**THE STATE OF NEW HAMPSHIRE**

**MERRIMACK, SS.** **SUPERIOR COURT**

**BEFORE THE COURT-APPOINTED REFEREE**
**IN RE THE LIQUIDATION OF THE HOME INSURANCE COMPANY**
**DISPUTED CLAIMS DOCKET**

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| **In Re Liquidator Number:** | **2009-HICIL-44** |
| **Proof of Claim Number:** | **CLMN711647** |
| **Policy or Contract Number:** | **GL1692617** |
| **Claimant Name:** | **Adebowale O. Osijo** |
| **Claimant Number:** | **CDV-2007-745** |
| **Date of Loss:** | **October 7, 1988** |

## LIQUIDATOR'S SECTION 15 SUBMISSION

Roger A. Sevigny, Insurance Commissioner, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), submits this brief pursuant to Section 15 of the Restated and Revised Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company In Liquidation entered January 19, 2005 ("Claims Procedures Order") and in accordance with the Structuring Conference Order issued July 7, 2009.

In this matter, Adebowale O. Osijo, MBA ("Claimant") seeks to recover damages for personal injury from a shooting in 1988. Claimant filed a lawsuit against Home's insured Housing Resources Management ("HRM") in 1989, and that action was settled in July 1991 with Home paying the $250,000 settlement sum. Claimant essentially seeks to reject the settlement and litigate the personal injury action as a third-party claim in the Home liquidation. However, the California courts have twice rejected Claimant's attempts to avoid the settlement, once by enforcing the settlement and later by denying Claimant's attempt to vacate that order. These decisions, and the appellate decisions affirming them, preclude Claimant from proceeding against Home. The enforceability of the settlement has already been exhaustively litigated by

the Claimant in the California courts. Claimant cannot raise new challenges to the settlement now, whether or not the specific basis for the challenge has been previously raised.

**A. Issue to be decided**

Whether decisions of the California courts preclude Claimant's third-party claim in the Home liquidation proceeding under the Home policy issued to HRM.

**B. Exhibits**

A. Proof of Claim No. CLMN711647 with Proposed Verified Second Amended Complaint in Equity

B. Letter dated November 30, 2008 from Claimant to Home

C. Liquidator's Notice of Determination dated March 25, 2009

D. Copy of Policy GL 1692617 issued to National Investment Development Corp

E. Second Amended Complaint dated June 22, 1989, Osijo v Housing Resources Management, Inc., Case No. 649881-6 filed in the Superior Court of California, County of Alameda

F. Answer to Second Amended Complaint dated June 28, 1989, Case No. 649881-6 filed in the Superior Court of California, County of Alameda

G. Settlement Agreement dated July 25, 1991

H. Copy of settlement draft number 51990219 issued by The Home Insurance Companies dated July 26, 1991 in the amount of $250,000

I. Order on Defendants' Motion for Enforcement of Settlement dated October 10, 1991, Case No. 649881-6, Superior Court of California, County of Alameda

J. Decision dated July 16, 1992, Court of Appeal, State of California, First Appellate District, Division Two, Osijo v. Housing Resources Management, Inc., No. A055045, Alameda Superior No. 649881-6

K. Judgment dated November 3, 1992, Superior Court of California, County of Alameda, Northern Division, Case No. 649881-6

L. Decision dated April 12, 1996, Court of Appeal, State of California, First Appellate District, Division Two, Osijo v. Ganong and Michell, No. A098661, Contra Costa Superior Court No. C92-05352

M. Decision dated February 2, 1998, Court of Appeal, State of California, First Appellate District, Division Five, Osijo v. Ganong and Michell, No. A077882, Contra Costa Superior Court No. C92-05352

N. Decision dated September 7, 2004, Court of Appeal, State of California, Fifth Appellate Division, Osijo v. The Home Insurance Company, F042329, Superior Court No. 02-CECG-00266

O. Decision dated December 12, 2006, Court of Appeal, State of California, Fifth Appellate District, Osijo v. Sevigny, No. F049063, Superior Court No. 04-CECG-02628

P. Plaintiff's Notice of Motion To Set Aside Enforcement Order and To Nullify Settlement Agreement dated May 18, 2007, Case No. 649881-6 filed in Superior Court, State of California, County of Alameda

Q. Order - Motion to Vacate/Set Aside Denied dated June 21, 2007, Case No. C-649881-6, Superior Court, State of California, County of Alameda

R. Decision dated July 8, 2008, Court of Appeal, State of California, First Appellate District, Division Two, Osijo v. Housing Resources Management, Inc., No. A118833, Alameda County Superior Court No. C-649881-6

**Background**

This disputed claim proceeding arises from the Liquidator's determination of the Claimant's third-party claim in the Home liquidation. The Claimant seeks to recover for bodily injury he suffered allegedly because of the negligence of Home's insured Housing Resources Management, Inc. ("HRM"). The Claimant brought a personal injury action against HRM entitled Osijo v. Housing Resources Management, Inc., et al., No. C649881 (Superior Court of California, Alameda County) (the "HRM Action"). See Exhibits E and F (complaint and answer).

Claimant now seeks to assert a "third party" claim pursuant to RSA 402-C:40, I, against Home as insurer of the alleged tortfeasor. Home insured HRM under a policy issued to National Investment Development Corporation. See Exhibit D (policy) at pg. 4 (named insured

endorsement). The Claimant's proof of claim ("POC", Exhibit A), states that his claim is a third party claim (item 5) for personal injury (Item 10) and provides the conditional release of Home's insured HRM (Item 14) required of third-party claimants. The injuries at issue are those underlying the HRM Action. See Exhibit A (POC attachment (Proposed Second Amended Complaint in Equity) ¶ 1 and pg. 6).

The HRM Action was settled in July, 1991, and Home paid $250,000 under the HRM policy to the trust account of Claimant's then attorney. See Exhibit A (POC attachment, ¶¶ 1-2, 7); Exhibit H (cancelled check). The Settlement Agreement signed by Claimant released Home's insured HRM. Exhibit G.

Although the Claimant signed the settlement agreement at a mediation on July 25, 1991, he immediately became dissatisfied, and he has challenged the settlement repeatedly since 1991. As he states, he "has and had obdurately refused to accept the purported 'Voluntary Settlement Agreement,' as valid since July 25, 1991, and until eternity." Exhibit A (POC attachment, ¶ 4) (emphasis in original).

The Defendants in the HRM Action moved to enforce the settlement. The motion was heard on September 5, 1991, Claimant presented oral argument, but the court granted the motion for enforcement of the settlement. A copy of the Alameda Superior Court's order dated October 10, 1991 is attached as Exhibit I. Claimant appealed from the enforcement order, and the California Court of Appeal affirmed the enforcement order in a decision dated July 16, 1992. Osijo v. Housing Resources Management, Inc., No. A055045 (Exhibit J), review denied, No. S028364 (Cal. Sept. 30, 1992). The Alameda County Superior Court entered a final judgment "enforcing the settlement provisions set forth in the settlement agreement" on November 3,

1992. Exhibit K. Those provisions included release and dismissal with prejudice of the defendants, including HRM. Exhibit G, ¶ 1.

Subsequently, Claimant brought suit against various other persons (including his attorney and Home) and litigated with them over various aspects of the settlement. This litigation resulted in at least four decisions by the California Court of Appeal: Osijo v. Ganong and Michell, No. A098661 (Cal. Ct. App. April 12, 1996); Osijo v. Ganong and Michell, No. A077882 (Cal. Ct. App. February 2, 1998); Osijo v. The Home Insurance Company, F042329 (Cal Ct. App. September 7, 2004); and Osijo v. Sevigny, No. F049063 (Cal. Ct. App. December 12, 2006). Exhibits L, M, N and O. This litigation is summarized in the later decision discussed below. See Exhibit O at 2-5.

On May 18, 2007, Claimant again sought to reopen the settlement by filing a Motion to Set Aside Enforcement Order and to Nullify Settlement Agreement in the HRM action. Exhibit P. The Alameda County Superior Court denied the motion on June 21, 2007. Exhibit Z. Claimant appealed, and on July 8, 2008, the California Court of Appeal affirmed the denial of the motion. Osijo v. Housing Resources Management, Inc., No. A118833 (Exhibit R), review denied, No. S165837 (Cal. Sept. 17, 2008), cert. denied, 129 S. Ct. 1341 (U.S. Feb. 23, 2009).

As the California courts have enforced the settlement between Claimant and Home's insured HRM, the Liquidator determined in the Notice of Determination that Claimant has no third-party claim under the HRM policy in the Home liquidation. See Exhibit C (Notice of Determination).

## ARGUMENT

Claimant's claim was properly denied because Home's insured HRM has no liability to Claimant where the HRM Action was settled in 1991. Any Home obligation to Claimant depends upon HRM's liability to Claimant.[1] The 1991 settlement of the HRM Action accordingly eliminated any third party claim the Claimant might later assert against Home. Claimant seeks to avoid this result by arguing that the settlement is invalid. However, he has already attempted to have the settlement set aside in the California courts, and the preclusive effect of the California decisions enforcing the settlement and denying Claimant's motion to vacate the settlement prevents Claimant from challenging the settlement in this proceeding.

### I. THE THIRD PARTY CLAIM IS PRECLUDED BY THE RES JUDICATA EFFECT OF THE JUDGMENT IN THE HRM ACTION.

The disputed issue in this matter is whether the Claimant can disregard the fully performed settlement and reopen his claim against HRM as a claim against Home. The doctrine of res judicata prevents this. The judgment enforcing the settlement agreement resolved the HRM Action, and Claimant cannot now reassert his claim against HRM in the Home liquidation.

"'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." Mycogen Corp. v. Monsanto Co., 51 P.3d 297, 301 (Cal. 2002). "Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action." Id. at 301-02. "The California Supreme Court has defined the doctrine of claim preclusion as

[1] The Claimant has asserted a "third party claim" in the Home liquidation as permitted by RSA 402-C:40, I, which allows persons with claims against an insured to file a claim directly in the liquidation. Such third-party claims of course depend upon the existence of valid claims against the insureds of the insolvent insurer.

follows: 'a final judgment, rendered upon the merits by a court having jurisdiction of the cause, is conclusive of the rights of the parties and those in privity with them, and is a complete bar to new suit between them on the same cause of action.'" Burdette v. Carrier Corp., 71 Cal. Rptr. 3d 185, 195 (Cal. Ct. App. 2008) (quoting Godard v. Security Title Ins. & Guar. Co., 92 P.2d 804 (Cal. 1939)). Each of the elements for res judicata is present in this matter.[2]

First, the 1992 judgment of the Alameda County Superior Court (Exhibit K) enforcing the settlement is final. The judgment was preceded by Claimant's appeal of the enforcement order to the California Court of Appeal, which affirmed the order, and to the California Supreme Court, which denied review. Osijo v. Housing Resources Management, Inc., No. A055045 (Cal. Ct. App. First Dist. Jul. 16, 1992) (Exhibit J), review denied, No. S028364 (Cal. Sept. 30, 1992).[3] The Claimant sought to reopen the judgment by motion in 2007, but the Alameda Court Superior Court denied the motion. The California Court of Appeal affirmed in an extensive decision, and the California Supreme Court and the United States Supreme Court denied review. Osijo v. Housing Resources Management, Inc., No. A118833 (Cal. Ct. App. First Dist. Jul. 8, 2008) (Exhibit R), review denied, No. S165837 (Cal. Sept. 17, 2008), cert. denied, 129 S. Ct. 1341 (U.S. Feb. 23, 2009). Accordingly the 1991 judgment is final.[4]

Second, the judgment is on the merits. It resolved the Claimant's tort claim against HRM by enforcing the settlement between Claimant and HRM. The substance of the HRM Action was thus determined. There need not be a trial for a judgment to be on the merits. See Consumer

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[2] The law of California governs the preclusive effect of the California judgments in New Hampshire. See In re Estate of Rubert, 139 N.H. 273, 275 (1994).

[3] The appellate decisions in these matters are unpublished. However, the Liquidator properly may rely on them for purposes of establishing preclusion. See Cal. Rules of Court, Rule 8.1115(b) (formerly Rule 977) ("An unpublished opinion may be cited or relied on: (1) When the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; . . . .").

[4] Claimant contends that the judgment is void as beyond the subject matter jurisdiction of the California court. However, he advanced that contention in his motion to vacate and it was rejected by the California Court of Appeal. Exhibit R at 9. The argument is thus barred by collateral estoppel. See pages 13-16 below.

Advocacy Group, Inc. v. Exxon Mobil Corp., 86 Cal.Rptr.3d 39, 54 (Cal. Ct. App. 2008) ("A judgment entered by consent or stipulation is as conclusive a bar as a judgment rendered after trial.") (punctuation omitted) (quoting 4 Witkin, CAL. PROCEDURE (2d ed. 1971) Judgment § 170 at 3312).

Third, the parties to the HRM Action and the third party claim in the Home liquidation are the same or in privity. "In order for res judicata to apply, the party against whom the defense is asserted must have been a party or was in privity with a party to the prior adjudication." Consumer Advocacy Group, 86 Cal.Rptr.3d at 51. Claimant is party to both matters. Since the validity of Claimants' third party claim against Home depends upon Claimant's claim against HRM, Home may assert any defenses HRM would have, such as the judgment enforcing the settlement.

Fourth, the cause of action asserted in the HRM Action and in the Claimant's third party claim are the same. "To define a cause of action, California follows the primary right theory." Consumer Advocacy Group, 86 Cal.Rptr.3d at 48. The primary right theory looks to the "'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty." Mycogen Corp., 51 P.3d at 306. Under the primary right theory, "the 'cause of action' is based upon the harm suffered, as opposed to the particular theory asserted by the litigant" and "[e]ven when there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." Slater v. Blackwood, 543 P.2d 593, 594-95 (Cal. 1975). Thus, the right to be free from personal injury is a 'primary right' and "there is but one cause of action for one personal injury which is incurred by reason of one wrongful act." Id. (quotation omitted). Here, the HRM Action was based on Claimant's "primary right" to be free of personal injury in the 1988 shooting incident,

Home's insured's alleged duty to prevent injury and the alleged breach of that duty, which resulted in one cause of action for his injuries. The third party claim is based on the same primary right, so the cause of action in the HRM Action and the present POC are the same. Compare Exhibit E (the second amended complaint in the HRM action) and Exhibit A (the POC).

The requirements for res judicata are satisfied. The judgment in the HRM Action is a final judgment on the merits that resolves the same cause of action between the same parties as is asserted in the third party claim. The Liquidator thus properly denied Claimant's third party claim.

## II. CLAIMANT'S CHALLENGE TO THE SETTLEMENT IS PRECLUDED BY THE RES JUDICATA AND COLLATERAL ESTOPPEL EFFECT OF THE JUDGMENT IN THE HRM ACTION.

Claimant appears to contend that he should be able to set aside the settlement because of his attorney's misconduct, in particular her alleged unauthorized action in cashing the settlement check on July 30, 1991. See Claimant Br. at 3, 12-16, 18; Exhibit A (POC attachment at 1 (Proposed Second Amended Complaint in Equity, First Cause of Action seeking to "Nullify Settlement Agreement & Set Aside Enforcement Order Based on Wholly Unauthorized Acts of Attorney")). These challenges are precluded by the California decisions rejecting his earlier challenges to the settlement. Even if Claimant's third party claim itself were not precluded by the judgment as set forth above, the judgment precludes him from attacking the settlement, whether based on new or previously advanced arguments. Under the California decisions, the settlement is valid and thus prevents assertion of a claim against Home based on HRM's alleged liability.

As an initial matter, the Liquidator notes that Claimant's argument presents an irrelevant point. Whether or not Claimant's counsel had authority to cash the settlement check on July 30, 1991, the settlement was in fact subsequently enforced by the California courts. Since the settlement was enforced, the question of authority at the time when counsel allegedly cashed the check does not matter. The settlement proceeds were properly received by counsel and subject to distribution under the agreement between Claimant and counsel. Claimant has also received his portion of the settlement.[5]

### A. Res Judicata Bars New Attacks On The 1991 Settlement.

As described in Part I, there are two decisions in the HRM Action itself that enforce the settlement and refuse to vacate the enforcement order. First, the Alameda County Superior Court enforced the settlement – over Claimant's objections – and that decision was affirmed by the California Court of Appeal. Osijo v. Housing Resources Management, Inc., No. A055045 (Cal. Ct. App. First Dist. Jul. 16, 1992) (Exhibit J), review denied, No. S028364 (Cal. Sept. 30, 1992). Second, Claimant filed a motion to set aside the enforcement order and nullify the settlement agreement, which the Alameda County Superior Court denied; the Court of Appeal affirmed on July 8, 2008, and both the California Supreme Court and the United States Supreme Court denied review. Osijo v. Housing Resources Management, Inc., No. A118833 (Cal. Ct. App. First Dist. Jul. 8, 2008) (Exhibit R), review denied, No. S165837 (Cal. Sept. 17, 2008), cert. denied, 129 S. Ct. 1341 (U.S. Feb. 23, 2009). The Court of Appeal noted that "[t]he parties have fully

[5] As explained by the California Court of Appeal: "A $250,000 settlement check from Home was deposited into the client trust account of plaintiff's counsel. Under the terms of the settlement, the settling defendants paid $250,000 to Osijo and his counsel. Michell-Langsam, however, took for herself 45 percent of the settlement proceeds, or $112,500, not the 40 percent or $100,000 authorized by the written agreement for any settlement. In the succeeding years, plaintiff filed a series of lawsuits . . . [i]n the first of these, plaintiff recovered $12,5000 against Michell-Langsam for withholding as fees more of the settlement proceeds than her retainer agreement permitted." Osijo v. Housing Resources Management, Inc., Exhibit R at 3 (citations omitted). As the court stated at 13, "[t]he parties have fully performed under the terms of the settlement agreement." Id. Claimant has also acknowledged the payment in this proceeding. Exhibit A (POC, Item 8 (POC asks whether Home "has made any payments towards the amount of the claim," and Claimant responded "Yes, $122500")).

performed under the terms of the settlement agreement," and it concluded that "[i]t would be unjust and inequitable to allow appellant [the Claimant] to unwind more than a decade of decisions in the circumstances presented by this case." Id. at 13.

The judgment satisfies the requirements for res judicata as described in Part I. It is a final judgment, and the party against which it is to be enforced – the Claimant – was a party to both the HRM Action and this proceeding. The judgment is also clearly a judgment "on the merits" of the settlement as it provides that the settlement shall be enforced. Exhibit K.

Finally, the judgment is on the same cause of action or "primary right" as Claimant's present attempt to undo the settlement through the proof of claim. See Exhibit A (POC, proposed second amended complaint). The alleged invalidity of the settlement is a "primary right" addressed by the judgment. See Exhibit K. The judgment enforced the very settlement that Claimant now seeks to nullify.

The Claimant seeks to present as new his argument that the settlement is invalid due to his counsel's allegedly unauthorized cashing of the settlement check on July 30, 1991. Assuming that were the case (which it is not since the settlement was enforced), the argument is still barred. Res judicata applies even where arguments that are the subject of the present challenge were not previously raised. "Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief." Mycogen, 51 P.3d at 302 (quotation omitted). Thus, whatever grounds Claimant may have for contending that the settlement should not be enforced had to be raised in opposition to the motion to enforce. Here, of course, claimant not only attacked (and lost) the validity of the settlement at that time, but he also made a second attack on the settlement in his

motion to vacate. He is thus twice barred and may not raise further arguments, even if they are new. At some point, litigation must cease.

The California Court of Appeal recognized this point in Osijo v. Sevigny, Exhibit O at 5-12, when it affirmed a judgment in favor of the Burnham Brown firm. Claimant had already sued Burnham Brown contending that the HRM Action settlement was obtained improperly through fraud by his counsel and opposing counsel, and the court held that judgment for Burnham Brown on that claim precluded Claimant from challenging the settlement based on conflict of interest, even though that legal theory had not been previously raised. Id.

Application of res judicata here would promote the purposes underlying the doctrine – finality and respite from ceaseless litigation. "Public policy and the interest of litigants alike require that there be an end to litigation." Nein v. HostPro, Inc., 95 Cal. Rptr. 3d 34, 44 (Cal. Ct. App. 2009) (quoting Panos v. Great W. Packing Co., 134 P.2d 242 (Cal. 1943)). As the California Supreme Court has stated: "A predictable doctrine of res judicata benefits both the parties and the courts because it seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration." Mycogen Corp., 51 P.3d at 302. "The consistent application of the traditional principal that final judgments, even erroneous ones, are a bar to further proceedings based on the same cause of action is necessary to the well-ordered functioning of the judicial process. It should not be impaired for the benefit of particular plaintiffs, regardless of the sympathy their plight might arouse in an individual case." Slater, 543 P.3d at 596. Granting exceptions to the application of res judicata "would call 'into question the finality of any judgment and thus is bound to cause infinitely more injustice in the long run than it can conceivably avert in this case.'" Id. (quoting Greenfield v. Mather, 194 P.2d 1, 9 (Traynor J., dissenting)).

Despite Claimant's assertions, these purposes apply here. Claimant has had two opportunities to directly challenge the settlement – in opposing enforcement of the settlement in 1991 and in moving to nullify it in 2007. In each case, he appealed and received extensive consideration by the Court of Appeal. Having vigorously pursued litigation regarding the enforceability of the settlement in the trial and appellate courts twice, Claimant cannot reasonably contend that he has not had a full and fair opportunity to oppose enforcement of the settlement. Accordingly, there is no injustice in application of the res judicata doctrine to preclude renewed litigation in the Home liquidation proceeding. Any "public interest" exception to res judicata is "an extremely narrow one... it is the exception not the rule, and is only to be applied in exceptional circumstances." Consumer Advocacy Group, 86 Cal.Rptr.3d at 55 (quoting Arcadia Unified School Dist. v. State Dep't of Educ., 825 P.2d 438 (Cal. 1992)). There are no grounds to invoke it here. Having litigated over the settlement twice (in addition to the other related litigations), Claimant is not entitled to a third try.

### B. Claimant's Attempts To Present Slightly Varied Challenges To The Settlement Based On Alleged Malfeasance Of His Attorney Are Also Precluded By Collateral Estoppel.

Claimant's attack on the settlement is also barred by collateral estoppel. Claimant contends that he has not had a full and fair opportunity to litigate the issue of his attorney's authority to settle the HRM Action by cashing the settlement check on July 30, 1991. See Claimant Br. at 3, 12-16, 18. However, this is merely an attempt to recharacterize the issue that was decided – the enforceability of the settlement – so as to avoid the preclusive effect of the various judgments adverse to Claimant.

"Issue preclusion by collateral estoppel prevents relitigation of issues argued and decided in prior proceedings." Nein, 95 Cal. Rptr. 3d at 44. California courts apply the doctrine only if several threshold requirements are fulfilled:

> First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, the issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

Hernandez v. Pomona, 207 P.3d 506, 513 (Cal. 2009). "In addition to these factors... the courts consider whether the party against whom the earlier decision is asserted had a 'full and fair' opportunity to litigate the issue." Nein, 95 Cal. Rptr. 3d at 44.

The question here is whether the earlier decisions involved identical litigated issues to those now being raised by Claimant.[6] They did. First, and most prominently, in the appeal from the granting of the motion to enforce, the Court of Appeal held that the judgment "was in accord with the terms of the written settlement agreement, which was knowingly entered into and signed by appellant [Claimant]; and entry of judgment was, therefore, proper despite the fact that appellant afterward had second thoughts about the deal." Osijo v. Housing Resource Management, Exhibit J at 4. The court thus held that the settlement was authorized by Claimant's signing the settlement. The authority issue was thus clearly presented to and necessarily decided by the court in enforcing the settlement. (If the settlement had not been authorized, then it would not have been enforced.)

Claimant's present argument that his attorney somehow "settled" the case without authority by cashing the check on July 30, 1991 is merely an attempt to present a new spin on the authority issue already presented to the court. It seeks to disregard the court's conclusion that

[6] The various rulings discussed below are all final, and Claimant was a party to all of them.

Claimant had knowingly settled his claim against HRM by asserting that his attorney "settled" the case.[7] However, "issues" may not be subdivided and split apart in this manner. The authority issue of concern was resolved adversely to Claimant. He may not now raise it again in a varied guise.

Second, the question of whether the Alameda County Superior Court had subject matter jurisdiction was already raised and decided against Claimant. In Claimant's appeal of the motion to vacate, the California Court of Appeal rejected the argument that the judgment enforcing the settlement agreement was void for lack of subject matter jurisdiction. Osijo v. Housing Resource Management, Inc., Exhibit R at 9-13. The issue was clearly necessary to the decision because if the lower court had lacked jurisdiction, the Court of Appeal would have vacated the judgment. Accordingly, Claimant may not raise that issue in the Home liquidation proceeding.

Other lesser points that may arise are also precluded. The Claimant also brought a number of actions outside the HRM action against his attorneys, Home and others. These subsequent attacks concerning the settlement itself have also been rejected. For instance, in Osijo v. Ganong and Michell, No. A068661 (Cal. Ct. App. First Dist. April 12, 1996) (Exhibit L at 8-9), review denied, No. S053782 (Cal. June 26, 1996), the California Court of Appeal affirmed judgment against Claimant on his claims that his attorney, Michell, had an undisclosed conflict of interest in representing him. In Osijo v. Home Ins. Co., Nos. F042329, F043325 (Cal. Ct. App. Fifth Dist. Sept. 7, 2004) (Exhibit N at 11-14), the court affirmed judgments against Claimant and for his attorney Michell and other law firms on claims of fraud, including fraud in asserting that the settlement was legally binding. Finally, in Osijo v. Sevigny, No. F049063 (Cal. Ct. App. Fifth Dist. Dec. 12, 2006) (Exhibit O at 9), the court affirmed judgment against

[7] Where Claimant settled the case, his attorney's cashing the check is irrelevant to the enforcement of the settlement by the defendant HRM, although it may give rise to issues between Claimant and the attorney. Claimant litigated the appropriate allocation of the settlement payment with his attorney in Osijo v. Ganong and Michell, Exhibit L.

Claimant and for Burnham Brown on claims that the settlement was obtained improperly through fraud and conflicts of interest.[8]

These decisions have collateral estoppel effect. Indeed, the California Court of Appeal itself anticipated the preclusive effect of its rulings in the Sevigny decision, where the court expressly noted that "[i]ssue preclusion bars relitigation of the conflict of interest claim here [against the Liquidator] just as it bars relitigation of that claim against Burnham Brown." Exhibit O at 13. Claimant cannot circumvent these rulings by slightly varying his argument against the settlement to say that his attorney was not authorized to cash the settlement check.

Nor does application of collateral estoppel deprive Claimant of due process. See Roos v. Red, 30 Cal. Rptr. 3d 446, 452 (Cal. Ct. App. 2005).[9] Claimant clearly had a full and fair opportunity to present his claim. He had the opportunity and incentive to oppose the motion to enforce, and he did so. He not only opposed it and appealed it in 1991, he sought to reopen the issue and challenge the court's jurisdiction and appealed that issue in 2007. He was aware that counsel had cashed the settlement check when he received the initial part of the settlement funds. Even if this was not before the hearing on September 5, 1991, it was certainly long before he filed the motion to vacate in 2007.[10] Thus, Claimant has had ample opportunity to raise the issue

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[8] Claimant's claims against Home in the Home and Sevigny cases were dismissed based on the Order of Liquidation. Indeed, Claimant filed his POC in the Home liquidation after the Court of Appeals decision in Sevigny ended his pursuit of Home in California. However, the Home and Sevigny decisions (and others) rejected Claimant's varied arguments about the settlement in addressing other defendants. Those merits rulings also preclude Claimant's claims against Home.

[9] "[T]he courts have recognized that certain circumstances exist that so undermine the confidence in the validity of the prior proceeding that the application of collateral estoppel would be 'unfair' to the defendant as a matter of law. Such 'unfair' circumstances include a situation where the defendant had no incentive to vigorously litigate the issue in the prior action, particularly if the second action is not foreseeable. Another such circumstances occurs when the judgment in the prior action is inconsistent with previous judgments for the defendant on the matter. Finally, application of collateral estoppel is unfair where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result." Roos, 30 Cal. Rptr. 3d at 452 (quoting Kremer v. Chemical Const. Corp., 456 U.S. 461, 481 (1982); Parklane Hosiery, 439 U.S. at 330; SEC v. Monarch Funding Corp., 192 F.3d 295, 304 (2d. Cir. 1999)).

[10] For instance, the 1996 decision in Osijo v. Ganong and Michell (Exhibit L) noted at page 3 that "the settling defendants paid $250,000 to Osijo and his counsel Michell." See also note 5 above.

in the California courts. There is no "unfairness" that would warrant not applying collateral estoppel in this matter.

## CONCLUSION

For the foregoing reasons, the Referee should sustain the Liquidator's determination.

Respectfully submitted,

ROGER A. SEVIGNY, COMMISSIONER
OF INSURANCE OF THE STATE OF
NEW HAMPSHIRE, SOLELY AS
LIQUIDATOR OF THE HOME
INSURANCE COMPANY,
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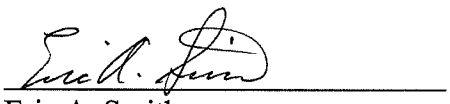

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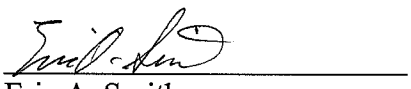
September 8, 2009

Certificate of Service

I hereby certify that a copy of the foregoing Section 15 Submission, the Liquidator's Exhibits and a Compendium of Non-New Hampshire Authorities Cited was emailed to the Claimant on September 8, 2009.



Eric A. Smith