EXHIBIT B

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Joanna Lippman Salinas

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March 2, 2009

VIA CMRRR
Harry L. Bowles
306 Big Hollow Lane
Houston, Texas 77042

Re: Civil Action No. 1:08CV808SS; In the United States District Court, Western District of Texas, Austin Division
Harry L Bowles vs. Home Insurance Company in Liquidation (N.H.); and Texas Property & Casualty Insurance Guaranty Association
Our File No.HIR.9015

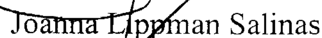
Dear Mr. Bowles:

Enclosed please find a copy of the Joint Discovery/Case Management Plan Under Federal Rule of Civil Procedure 26(f) and corresponding Scheduling Order in the above-referenced matter. These documents were electronically filed with the Court on this date.

Thank you for your attention to this matter.

Very truly yours,

FLETCHER, FARLEY,
SHIPMAN & SALINAS, L.L.P.



Joanna Lippman Salinas

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Cc: ***<u>VIA Electronic</u>***
Daniel Jordan
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Austin, TX, 78759-8435

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

HARRY L. BOWLES	)	
	)	
VS.	)	CIVIL ACTION NO. 1-08-CV-808-SS
	)	
HOME INSURANCE COMPANY IN LIQUIDATION AND TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION	)	

SCHEDULING ORDER

Pursuant to Rule 16, Federal Rules of Civil Procedure, the Court issues the following Scheduling Order:

1. A report on alternative dispute resolution in compliance with Local Rule CV-88 shall be filed by April 13, 2009.

2. The parties asserting claims for relief shall submit a written offer of settlement to opposing parties by May 1, 2009, and each opposing party shall respond, in writing, by May 15, 2009. All offers of settlement are to be private, not filed, and the Court is not to be advised of the same. The parties are further ORDERED to retain the written offers of settlement and responses as the Court will use these in assessing attorney's fees and court costs at the conclusion of trial.

3. The parties shall file all amended or supplemental pleadings and shall join additional parties by June 1, 2009.

4. All parties asserting claims for relief shall file their designation of potential witnesses, testifying experts and a list of proposed exhibits, and shall serve on all parties, but not file, a summary of any witness who will present any opinion in trial in an expert report by August 1, 2009. Any opinion or testimony not contained in the

summary will not be permitted at trial. Parties resisting claims for relief shall file their designation of potential witnesses, testifying experts and a list of proposed exhibits, and shall serve on all parties, but not file, a summary of any witness who will present any opinion in trial in an expert report by September 1, 2009. Any opinion or testimony not contained in the summary will not be permitted at trial. All designations of rebuttal experts shall be filed within **fifteen (15) days** of receipt of the report of the opposing expert. The Fed. R. Civ. P. 26 standard is not applicable to this paragraph; it does not make any difference whether or not the expert witness is a "retained expert," as any opinion or testimony of any expert not contained in the summary will not be permitted at trial.

5. An objection to the reliability of an expert's proposed testimony under Federal Rule of Evidence 702 shall be made by motion, specifically stating the basis for the objection and identifying the objectionable testimony, within **eleven (11) days** of receipt of the written report of the expert's proposed testimony, or within **eleven (11) days** of the expert's deposition, if a deposition is taken, whichever is later.

6. The parties shall complete all discovery on or before January 15, 2010. Counsel may by agreement continue discovery beyond the deadline, but there will be no intervention by the Court except in extraordinary circumstances, and no trial setting will be vacated because of information obtained in post-deadline discovery.

7. All dispositive motions shall be filed no later than February 5, 2010, and shall be limited to ten (10) pages. Responses shall be filed within eleven (11) days of the service of the motion and shall be limited to ten (10) pages. Any replies shall be filed

within eleven (11) days of the service of the response and shall be limited to five (5) pages, but the Court need not wait for the reply before ruling on the motion.

8. This case is set for docket call on ______________________, 2010 at _____ a.m, and trial in the month of____________, 2010. The parties should consult Local Rule CV-16(d) regarding matters to be filed in advance of trial.

SIGNED this the __________ day of __________________________, 2009.

____
UNITED STATES DISTRICT JUDGE

AGREED:

____
Harry L. Bowles, Plaintiff, pro se

/s/
Joanna Lippmann Salinas, Attorney for Defendant Home Insurance Co. in Liquidation

/s/
Daniel Jordan, Attorney for Defendant Texas Property and Casualty Insurance Guaranty Association

HIR.9015

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

HARRY L. BOWLES	§	
	§	
Plaintiff,	§	
	§	
VS.	§	
	§	**CIVIL ACTION NO. 1:08CV808SS**
HOME INSURANCE COMPANY IN LIQUIDATION (N.H.); AND TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION	§ § § § §	
	§	
Defendants.	§	

JOINT DISCOVERY/CASE MANAGEMENT PLAN
UNDER FEDERAL RULE OF CIVIL PROCEDURE 26(f)

1. Where and when the meeting of the parties required by Rule 26(f) was held, and the persons or counsel who attended for each party.

   The parties conferred via written correspondence, with a proposed plan and scheduling order submitted by counsel for Defendants to Plaintiff *pro se* on February 13, 2009.

   Harry L. Bowles appeared pro se. Daniel Jordan appeared for Defendant Texas Property & Casualty Insurance Guaranty Association ("TPCIGA"). Joanna Lippman Salinas appeared for The Home Insurance Company in Liquidation by its Liquidator Roger A. Sevigny, Commissioner of Insurance of The State of New Hampshire, solely in his capacity as the Liquidator of The Home Insurance Company (improperly named Home Insurance Company in Liquidation (N.H.)) ("HICIL").

2. The nature and basis of the claims and defenses.

   Plaintiff:

Defendant TPCIGA:

Plaintiff's Original Complaint contains allegations to the effect that TPCIGA improperly "intervened" in legal malpractice litigation brought by Plaintiff against Bishop, Peterson & Sharp ("BPS") and George M. Bishop, and filed a false affidavit in connection with that Underlying Litigation (*Harry L. Bowles v. George M. Bishop, et al*; Cause No. 1995-43235 in the 151st Judicial District Court of Harris County, Texas). BPS and Mr. Bishop were insureds under a professional liability policy issued by Home, with effective dates of January 23, 1993 to February 6, 1994.

TPCIGA has never "intervened" or otherwise made an appearance as a party in the Underlying Litigation. Instead, TPCIGA furnished a defense to BPS under the Home policy issued to BPS by retaining defense counsel from the firm of Marshall and McCracken to represent BPS. Plaintiff alleges that this conduct by TPCIGA was "officious intermeddling," based on Plaintiff's allegations that there was no coverage under the Home policy. Plaintiff claims that he sustained damages as the result of TPCIGA's conduct in retaining counsel to represent BPS, because the defense counsel retained by TPCIGA to defend BPS were successful in obtaining a summary judgment in favor of BPS in the Underlying Litigation. Plaintiff complains that the summary judgment granted by the Court in his malpractice litigation against BPS was improperly granted. According to Plaintiff, the improper ruling in favor of BPS in the Underlying Litigation was the result of bias on the part of the District Judge who presided over the Underlying Litigation. Plaintiff's Complaint does not allege that TPCIGA engaged in any conduct to create bias in favor of BPS. Instead, Plaintiff alleges that the Court in the Underlying Litigation was already biased because Defendant George Bishop's wife was a District Judge in Harris County, and because of Mr. Bishop's political activity within the Republican Party.

Plaintiff also complains that TPCIGA failed to furnish certain information to Plaintiff in connection with the Underlying Litigation or in connection with his claim under the Home policy, and that BPS' defense counsel filed a false affidavit signed by a TPCIGA employee in the Underlying Litigation.

TPCIGA responds to Plaintiff's allegations as follows. First, this court has no subject matter jurisdiction over Plaintiff's claims against TPCIGA in this case. Plaintiff's claims are based on his assertion that he sustained damages as the result of an improper summary judgment by the District Judge in his state court litigation against BPS. It is well-settled that Federal district courts do not have subject matter jurisdiction over claims based on the alleged incorrectness or impropriety of judgments entered by state district courts.

Additionally, there is no diversity of citizenship jurisdiction between Plaintiff and TPCIGA. TPCIGA as an unincorporated association is a citizen of each state in which its member insureds are citizens, including Texas, the state in which Plaintiff is also a citizen.

No federal question jurisdiction exists in this case because Plaintiff's Complaint fails to state a claim under a federal law. A third-party liability claimant has no federal claim or cause of action against another person's liability insurer, or against an entity such as TPCIGA, for making an incorrect determination of its own contractual obligation to furnish defense counsel to represent a defendant. Nor does any federal claim arise in favor of a third-party liability claimant if defense counsel retained on behalf of a defendant in litigation are successful in defending the litigation, resulting in a judgment resolving the issues of liability against the liability claimant and in favor of the defendant in the liability litigation.

With respect to Plaintiff's ostensible effort to assert claims under 42 U.S.C. §1983, Plaintiff's Complaint fails to raise a federal question because it fails to allege any facts involving state action by TPCIGA. TPCIGA is not a state actor, and Plaintiff does not even allege that TPCIGA engaged in any direct communication with a state actor with respect to the Underlying Litigation. Certainly there are no allegations that TPCIGA entered into an agreement with a state actor with the specific intention of wrongfully depriving Plaintiff of his constitutional rights, which is what the applicable case law would require to state a claim. Since Plaintiff's Complaint fails to state a claim against TPCIGA on which relief could be granted, it also fails to state a claim that raises a federal question for purposes of subject matter jurisdiction.

TPCIGA has numerous substantive grounds on which it has no liability to Plaintiff. First, under the Guaranty Act, TPCIGA has no liability to Plaintiff under Texas law other than for failure to pay a "covered claim." Plaintiff asserts that there was no coverage under the Home policy, so his liability claims could not constitute a "covered claim" payable by TPCIGA under the Guaranty Act.

Plaintiff lacks standing to assert a claim against TPCIGA for its conduct in determining that it owed a defense to BPS. Under the applicable Texas law, Plaintiff could only have standing to bring a direct claim against TPCIGA if he had obtained a judgment against BPS or another insured under the Home policy, and the judgment was for a cause of action within the coverage of the policy. This is certainly not true with respect to the Underlying Litigation, since the summary judgments granted in the Underlying Litigation were in favor of the defendants, not Plaintiff.

TPCIGA owed Plaintiff no duty with respect to its conduct in furnishing a defense to BPS in the Underlying Litigation, or with respect to its control of the defense of BPS under the Home policy. Under Texas law, the only legal duty owed by a liability insurer is owed to its insured, and is limited to its duty under the *Stowers* doctrine to reasonably settle claims within the coverage of the policy within the policy limits. Plaintiff's Complaint does not allege facts which could give rise to a claim under the Stowers doctrine, and even if such facts were alleged, the Guaranty Act expressly precludes TPCIGA from liability in connection with a *Stowers* claim.

Plaintiff's Complaint also purports to assert claims against TPCIGA for perjury and for failing to comply with Plaintiff's discovery requests in the Underlying Litigation. However, no independent cause of action exists with respect to such claims. Similarly, Plaintiff alleges that TPCIGA engaged in conduct which violated various criminal statutes, but none of the statutes in question create a private cause of action for their violation.

Plaintiff's claims are frivolous and lack any merit whatsoever. TPCIGA correctly determined that it owed a defense to BPS. Therefore, TPCIGA was statutorily obligated to furnish a defense to BPS, and TPCIGA carried out its statutory obligations by doing so. Contrary to Plaintiff's allegations, BPS furnished Home with written notice of a claim by Plaintiff against BPS prior to the expiration of the Home policy in question. The claim file furnished by Home to TPCIGA contains communications from Plaintiff involving Plaintiff's complaints by Plaintiff about the quality of BPS's legal representation, and Plaintiff demanded fee reductions in connection with his complaints. BPS was advised of Plaintiff's potential legal malpractice claims in correspondence to Mr. Bishop in December 1993. Plaintiff's written demands for fee reductions qualify as a claim within the meaning of the policy. BPS notified Home of these claims in correspondence dated December 29, 1993—more than a month before the expiration of the policy. Even if Plaintiff's correspondence had not contained a demand for fee reductions, coverage under the Home policy would still have been triggered under the policy's discovery clause provisions, which permit an insured to trigger coverage by notifying Home within the policy period of events which might subsequently give rise to a claim. BPS reasonably believed that Plaintiff would bring legal malpractice claims against it, and indeed, Plaintiff did so within a few months of his initial threats. Based on the available documentation from the Home claim file, BPS clearly satisfied the requirements of the Home policy with respect to triggering the claims-made coverage available under the Home policy. Accordingly, had TPCIGA denied a defense to BPS, as Plaintiff insists it should have done, TPCIGA would have breached its statutory obligations to BPS.

Further, TPCIGA denies that the trial court acted improperly in the Underlying Litigation by granting summary judgment in favor of BPS. To the contrary, it is undisputed that BPS filed a claim against Plaintiff for recovery of its attorneys' fees in Cause No. 1991-43235. The trial court in the Underlying Litigation correctly ruled that any malpractice claims Plaintiff wished to assert against BPS were mandatory counterclaims. Therefore, the Court in the Underlying Litigation acted correctly in determining that the judgment in Cause No. 1991-43235, which did not furnish any relief to Plaintiff in connection with any legal malpractice claims against BPS, meant that Plaintiff's claims against BPS in the Underlying Litigation were barred by *res judicata*.

If the trial court in the Underlying Litigation entered an incorrect judgment in favor of BPS, as Plaintiff alleges, Plaintiff's remedy was to seek reversal of the judgment by filing a timely appeal in a state appellate court of competent jurisdiction. Plaintiff failed to do so, and has thereby waived any claims that the summary judgment in favor of BPS was improperly granted. Alternatively, any damages to Plaintiff arising from the entry of an

improper judgment in the Underlying Litigation were not caused by TPCIGA, but were caused by Plaintiff's failure to bring a timely appeal.

With respect to Plaintiff's liability claim against Mr. Bishop, the information presently available to TPCIGA indicates the summary judgment entered in Mr. Bishop's favor in the Underlying Litigation has not yet become final. As a result, Plaintiff's remedy for relief from the summary judgment in favor of Mr. Bishop in the Underlying Litigation is to request reconsideration of the summary judgment, and if that is not successful, to timely bring an appeal when the summary judgment in favor of Mr. Bishop becomes final and appealable.

In addition, Plaintiff's claims in this litigation are also the subject of pending litigation in the Home Insurance Company receivership proceedings in New Hampshire. As a result, some or all of Plaintiff's claims in this case are presently pending in at least three different courts: 1) the Court presiding over the Underlying Litigation; 2) the Court presiding over the Liquidation of Home Insurance Company, and 3) this Court. It is clearly improper for Plaintiff to bring the same claims in multiple courts.

Defendant HICIL:

All references to acts or events prior to the Order of Liquidation refer to The Home Insurance Company and all references to acts or events post the Order of Liquidation refer to The Home Insurance Company in Liquidation.

On June 11, 2003, The Home Insurance Company ("Home") was declared insolvent and an Order of Liquidation was entered by the Superior Court for the State of New Hampshire, Merrimack County, said order having been vacated and superseded by Order of Liquidation dated June 13, 2003. Home is a New Hampshire corporation with its statutory offices in Manchester, New Hampshire and its principal office in New York. Home is a New Hampshire insurance company subject to regulation by the New Hampshire Insurance Department.

Home issued a Professional Liability Policy to Bishop Peterson & Sharp, P.C. (the "Insured Law Firm"). The Professional Liability Policy is a claims made and reported policy. Under the policy, a "claim" was defined as a "demand received by the insured for money or services, including the service of a suit...." Prior to the expiration of the Professional Liability Policy reporting period, Bowles forwarded letters to the Insured Law Firm expressing dissatisfaction with its work and demanding fee reductions. The Insured Law Firm then notified Home regarding same within the policy period. For purposes of the Professional Liability Policy and pursuant to its Discovery Clause, a claim was timely reported alleging acts or omissions that potentially invoked coverage under the Professional Liability Policy. Since the Professional Liability Policy is a third-party liability policy providing the Insured Law Firm with defense and indemnity benefits where coverage is otherwise afforded, this was all that was necessary to potentially invoke coverage under the policy at issue.

Home was designated as an impaired insurer by the Texas Commissioner of Insurance on June 26, 2003. Pursuant to the provisions of Subchapter G of the Texas Property and Casualty Insurance Guaranty Act (the "Act"), Home forwarded its entire claim file to the Texas Property and Casualty Guaranty Association (" TPCIGA") because the pending lawsuit potentially constituted a covered claim under the Act. Pursuant to the Act, TPCIGA undertook to discharge its statutory duty to defend the Insured Law Firm. Having forwarded the claim file to TPCIGA as it was required to do under the Act, Home has had no further direct involvement with the lawsuit by Bowles against the Insured Law Firm. By virtue of paragraph (n) of the Order of Liquidation, "all persons are hereby permanently enjoined and restrained from...any act to collect, assess, or recover a claim against The Home, other than the filing of a proof of claim with the Liquidator...." Bowles never filed a proof of claim regarding this matter.

HICIL asserts that this Court does not have jurisdiction because complete diversity does not exist between the parties, there is no federal question jurisdiction because Plaintiff has not alleged, and cannot allege, a violation of a federal law, statute, or constitutional provision on which this Court can exercise jurisdiction, and there is no other statutory basis for jurisdiction.

HICIL also asserts that the Order of Liquidation enjoins commencing any actions against Home except through the liquidation process and the Order of Liquidation is entitled to full faith and credit and comity. Further, this Court should dismiss under the doctrine of abstention.

HICIL also asserts that this case should be dismissed because Plaintiff has no viable claims against it. Plaintiff's pleadings fail to properly state a claim against it, and HICIL is entitled to judgment on the pleadings. Potential coverage was invoked under the policy of insurance issued by Home and Home undertook to provide a defense to its insured as required by the policy. Even if a defense had not been owed, the decision to afford a defense would simply constitute a voluntary payment. Complying with the duty to defend under a liability policy presents no basis for a third party claimant against HICIL. HICIL disputes that there are any viable causes of actions asserted against it.

3. The possibilities for a prompt settlement or resolution of the case.

None at this time. The parties disagree as to whether this Court has jurisdiction over this matter, whether Plaintiff's pleading properly state a claim, and also disagree as to liability, causation, and damages. Plaintiff has indicated that he is seeking damages in an amount in excess of $10,000,000, in addition to an injunction.

4. Whether each party has made or arranged for the disclosures required by Rule 26(a)(1).

The parties have not made their initial disclosures as of the time of this report. The parties will exchange their Rule 26(a)(1) disclosures on or before April 20, 2009.

5. Any issues relating to preserving discoverable information.

All parties, and their agents and representatives, shall preserve all information in their respective computer systems, removable electronic media, and other locations relating to Plaintiff's representation by, or complaints or allegations against Bishop Peterson and Sharp, P.C., and any of the lawyers associated therewith, and complaints or allegations against HICIL or TPCIGA. This includes electronic information contained in e-mails and other electronic or non-electronic communications, word processing documents, spreadsheets, databases, calendars, telephone logs, contact information, internet usage files, and network access information. This also extends to non-electronic files, including letters, memos, drafts, and handwritten notes.

Save and except any information, files, or materials, whether electronic or non-electronic, previously destroyed in the ordinary course of business, all such materials from November 6, 1992 to present shall be subject to this preservation agreement.

6. Proposed discovery plan.

(A) What changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made.

No changes needed. See answer to Number 4 regarding when disclosures will be made.

(B) The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues.

The parties agree that no discovery should be necessary prior to the Court ruling on the various Rule 12 motions filed by the Defendants. The parties believe that if discovery becomes necessary, it can be completed within six (6) months after a ruling on the Rule 12 motions.

Discovery should be completed on or before January 15, 2010.

(C) Any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.

Parties agree that all electronic, mechanical, or electric records or representations of any kind, such as tapes, cassettes, discs, e-mails, or recordings shall be produced in their original electronic or magnetic form, without alteration, and in written form. Parties further agree that e-mails shall be produced in native format.

(D) Any issues relating to claims of privilege or of protection as trial-preparation material, including—if the parties agree on a procedure to assert such claims after production—whether to ask the court to include their agreement in an order.

In the event of production of privileged material, the parties will comply with the procedures set forth in Rule 26(b)(2)(B).

(E) What changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed.

None known at this time.

(F) Any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

None known at this time.

____
Harry L. Bowles, Pro Se Plaintiff

/s/ Joanna Lippman Salinas
Joanna Lippman Salinas
Attorney for Defendant
Home Insurance Company in Liquidation

/s/ Daniel Jordan
Daniel Jordan
Attorney for Defendant
Texas Property & Casualty Insurance Guaranty Association

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

HARRY L. BOWLES)
)
VS.) CIVIL ACTION NO. 1-08-CV-808-SS
)
HOME INSURANCE COMPANY IN)
LIQUIDATION AND TEXAS PROPERTY)
AND CASUALTY INSURANCE)
GUARANTY ASSOCIATION)

DEFENDANT'S TEXAS PROPERTY AND CASUALTY INSURANCE
GUARANTY ASSOCIATION'S MOTION TO DISMISS FOR
LACK OF SUBJECT MATTER JURISDICTION

TO THE HONORABLE SAM SPARKS, UNITED STATES DISTRICT JUDGE:

NOW COMES the Texas Property and Casualty Insurance Guaranty Association (the "TPCIGA"), and files this its Motion to Dismiss the Complaint of Harry L. Bowles ("Bowles" or "Plaintiff") for Lack of Subject Matter Jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), and in support thereof would respectfully show the Court as follows:

1. Plaintiff's Complaint must be dismissed for lack of subject matter jurisdiction, since it is an impermissible collateral attack on the validity of a state court judgment, a matter over which federal district courts lack subject matter jurisdiction under the *Rooker/Feldman* doctrine.

The *Rooker/Feldman* doctrine provides that federal district courts lack subject matter jurisdiction to consider collateral attacks on the judgments of state courts, or claims inextricably intertwined with reviewing the validity of such judgments. *Reed v. Terrell*, 752 F.2d 472 (5th Cir.), cert. denied 474 U.S. 946, 106 S.Ct. 333, 88 L.Ed.2d 317 (1985); *Liedtke v. State Bar of Texas*, 18 F.3d 315 (5th Cir. 1994); *Hale v. Harney*, 786 F.2d. 688 (5th Cir. 1996). This principle of law is well-settled in this Circuit, so that when the plaintiff in *Jordaan v. Hall*, 275 F.Supp.2d

778 (N.D. Tex. 2003) complained that his constitutional rights were violated by the provisions of a divorce decree he contended to be an unconstitutional prior restraint which violated the free speech provisions of the First Amendment, the Court imposed sanctions on the attorney under Fed. R. Civ. P. 11.

Plaintiff's claims against TPCIGA in this case are based on Plaintiff's assertion that TPCIGA exceeded its statutory authority by retaining defense counsel to defend Home insured Bishop, Peterson & Sharp, P.C. ("BPS") in *Harry L. Bowles v. George M. Bishop, et al.*; Cause No. 1995-43235 in the 151st Judicial District Court of Harris County, Texas (the "Underlying Litigation"), and that TPCIGA submitted a false affidavit in connection with proceedings in that litigation. According to Plaintiff, this conduct by TPCIGA, and alleged bias on the part of the trial judge in favor of George Bishop, one of the defendants in the Underlying Litigation, resulted in the improper entry of take nothing summary judgments in favor of BPS and later in favor of Bishop. See Plaintiff's Complaint, ¶¶18-40.[1] Plaintiff does not allege that TPCIGA did anything to cause the trial judge to be biased in Bishop's favor; instead, Plaintiff alleges that the trial court's bias in favor of Bishop arose from his political activity on behalf of the Republican Party, and by virtue of his marriage to a Harris County District Judge. See Plaintiff's Complaint, ¶¶19-21.

Plaintiff's claims for damages and injunctive relief against TPCIGA rely entirely on Plaintiff's contention that he was damaged by allegedly incorrect rulings in the Underlying Litigation: "Further, Bowles has suffered damage caused by the 151st Court's rendition of a false summary judgment in Cause No. 1995-43235 that has adversely affected the ongoing litigation

[1] In fact, if one accepts as true Plaintiff's allegations in ¶¶19-22 of his Complaint, the trial court in the Underlying Litigation would have rendered a judgment against Plaintiff solely on the basis of pre-existing political bias in favor of Bishop, so that according to Plaintiff, the result would have been the same even if TPCIGA had not retained counsel to represent BPS, and regardless of the specific content of any motion, pleading or affidavit filed with the Court on behalf of BPS.

in the underlying case, Cause No. 1991-25939. Bowles alleges that "the original purpose of Defendants' intervention was to obtain a judgment that would have the dual effect of depriving Bowles of access to justice in both Cause No. 1995-43235 and Cause No. 1991-25939." Plaintiff's Complaint, ¶68. Plaintiff fails to allege any other facts by which he did or could have suffered any cognizable harm as the result of TPCIGA's conduct.

As a result, all of Plaintiff's claims against TPCIGA are based on Plaintiff's contention that the District Court in the Underlying Litigation *rendered improper judgments*, and that the judgments have caused adverse effects to Plaintiff in that litigation as well as in other state court litigation. Since the damages and injunctive relief sought by Plaintiff all relate to rulings made by the Court in state court proceedings, all of Plaintiff's claims are predicated on the notion that the District Judge of the 151st Judicial District of Harris County made judicial decisions that were so egregious that they involved violations of Plaintiff's constitutional right to due process. As a result, any determination of the merits of Plaintiff's claims would necessarily require this Court to make a substantive determination about the propriety of the decisions of one or more state court judges in connection with litigation in which Plaintiff was or is a party. Under the *Rooker/Feldman* doctrine, this Court cannot assume subject matter jurisdiction over a claim involving a determination of the propriety or validity of state court judgments or the other rulings which occurred in the context of state court litigation. Plaintiff's remedy for correcting legal errors by a District Court was to timely bring an appeal, which he failed to do in the case of the summary judgment rendered against Plaintiff and in favor of BPS. Based on Plaintiff's Complaint, the summary judgment involving Plaintiff's claims against Bishop has not become final, so that an appeal could be brought by Plaintiff when the judgment in favor of Bish0p becomes appealable. In any event, under the *Rooker/Feldman* doctrine, this Court has no

jurisdiction to act as a court of appeals with respect to the judgments of state courts. Accordingly, this case must be dismissed for lack of subject matter jurisdiction.

2. Plaintiff and TPCIGA are residents of Texas, so there is no diversity of citizenship jurisdiction over Plaintiff's claims under 28 U.S.C. §1332.

Plaintiff's Complaint alleges that TPCIGA is a "quasi-state agency." However, TPCIGA's enabling statute expressly creates TPCIGA as a private, nonprofit, unincorporated association of member insurers: "The Texas Property and Casualty Insurance Guaranty Association is a nonprofit, unincorporated legal entity composed of all member insurers who must be members of the association as a condition of their authority to transact insurance in this state." Tex. Ins. Code art. 21.28-C, §6.

Because TPCIGA is an unincorporated association it is a citizen of every state where its insurer members are citizens. *Temple Drilling Co. v. Louisiana Insurance Guaranty Association*, 946 F.2d 390, 393 (5th Cir. 1991); *Rhulen Agency, Inc. v. Alabama Insurance Guaranty Association*, 896 F.2d 674, 677 (2nd Cir. 1990).[2] There are many property and casualty insurers with certificates of authority to engage in insurance business in Texas are also domiciled in Texas, and are accordingly residents of Texas.[3] Therefore, TPCIGA is a citizen of Texas for diversity of citizenship purposes, and there is no diversity of citizenship between Plaintiff and TPCIGA.

3. Plaintiff's Complaint does not raise a federal question.

[2] This Court granted TPCIGA's Motion to Dismiss for Lack of Subject Matter Jurisdiction for the same reasons set forth in this Motion in *Pfizer Inc. v. Texas Property and Casualty Insurance Guaranty Association*, No. A-99-CV-143-SS (W.D. Tex. 1999), *affm'd without published opinion* 209 F.3d 720, *cert. denied* 531 U.S. 917, 121 S.Ct. 275, 148 L.Ed.2d 200.

[3] For instance, Texas Mutual Insurance Company, is a workers' compensation insurer created by statute as a Texas domiciled mutual insurance company. Tex. Ins. Code §2054.003. Texas Mutual Insurance Company is a member insurer of TPCIGA. Tex. Ins. Code §462.008.

Plaintiff's Complaint asserts that federal question jurisdiction exists under 28 U.S.C. §1331 and under 28 U.S.C. §1343(a)(3) and (a)(4). Federal question jurisdiction exists over "civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C.A. § 1331 (West 2006). Federal question jurisdiction arises from a well-pleaded complaint. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). Thus, Plaintiff's Complaint must set forth a violation of a federal law, statute, or Constitutional provision on which the Court can exercise jurisdiction.

Despite this requirement, Plaintiff's Complaint fails to identify any federal statute or Constitutional provision which could have afforded Plaintiff the right to assert his claims against BPS in the Underlying Litigation without BPS's representation by an attorney whose services were paid for by a third party. There is no such federal statutory or Constitutional right.

Additionally, Plaintiff's Complaint fails to raise a federal question because he fails to allege any facts that would comprise state action. TPCIGA is a private association of insurers. Tex. Ins. Code art. 21.28-C, §6. Despite the fact that TPCIGA is created by state law, the Fifth Circuit has held that a similar association of insurers created by Texas statute was not a part of the state, because its finances were separate from those of the state. *Texas Catastrophe Property Insurance Association v. Morales*, 975 F.2d 1178 (5th Cir. 1992), cert. denied 507 U.S. 1018, 113 S.Ct. 1815, 123 L.Ed.2d 446 (1993). Like TPCIGA, the "Catpool" has involuntary member insurers and is funded by assessments against its member insurers in almost exactly the same manner as the TPCIGA (the primary difference is that the Catpool also collects premiums). Tex. Ins. Code art. 21.49, §19. In holding that the "Catpool" was not a part of the State of Texas, the Court noted that: "If losses exceed premiums, the member companies are assessed, not the public treasury. The fact that losses are subsidized in part through the allowance of tax credits does not

eliminate the risk to the private entities' capital. When CATPOOL wins, the bank accounts of its members may be augmented, not the public treasury." *Id.* at 1182.

Similarly, although the TPCIGA never makes a profit, its member insurers have a clear financial interest in limiting its losses. In the event that the TPCIGA collects assessments in a particular line of insurance in excess of the amount needed to handle and pay covered claims, it is to refund the excess funds to its members in proportion to each member's contribution to the prior assessments. Tex. Ins. Code art. 21.28-C, §20(c). TPCIGA has made such assessment refunds in the past.

Since TPCIGA is a private party, it could only engage in conduct "under color of state law" by participating in a conspiracy with governmental officials to deprive Plaintiff of specific rights under the Constitution or federal law. *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185(1980); *Tower v. Glover*, 467 U.S. 914, 104 S.Ct. 2820, 81 L.Ed.2d 758 (1984). Plaintiff's Complaint does not contain any specific allegations that TPCIGA engaged in a conspiracy with any governmental officials. Instead, Plaintiff' Complaint contains a conclusory allegation that "Bowles invokes the jurisdiction of the federal court over the defendants in this case as parties who engaged in joint actions under color of law in conspiracy with a state actor, either a state district judge or judges, or in conspiracy with an agent or agency of the state." Plaintiff's Complaint, ¶8.

It is well-settled that conclusory allegations of conspiracy unaccompanied by specific facts are insufficient to state a claim for relief under 42 U.S.C. §1983. *Young v. Biggers*, 938. F.2d 565 (5th Cir. 1991); *Arsenaux v. Roberts*, 726 F.2d 1022 (5th Cir. 1982); *Hale v. Harney*, 786 F.2d 688 (5th Cir. 1986). Instead, a complaint fails to state a cause of action against a private citizen under 42 U.S.C. §1983 unless it contains factual allegations that (1) there was an

agreement between the private party and the state actor to commit an illegal act, and (2) the object of the conspiracy was to deprive the Plaintiff of their constitutional rights. *Priester v. Lowndes County*, 354 F.3d 414 (5th Cir. 2004).

Plaintiff's Complaint does not allege that TPCIGA engaged in any direct communication with any state actor, let alone that TPCIGA entered into any sort of agreement with a state actor to deprive Plaintiff of his constitutional rights. Therefore, the allegations of Plaintiff's Complaint are not sufficient to support federal question jurisdiction. *Sarmiento v. Texas Board of Veterinary Medical Examiners*, 939 F.2d 1242 (5th Cir. 1991).

A number of cases indicate that a Motion to Dismiss under Rule 12(b)(6) is the preferred procedure by which federal courts should consider cases in which the jurisdictional facts and the merits of the Complaint intertwine. *See*, e.g.; *Daigle v. Opelousas Health Care, Inc.*, 774 F.2d 1344 (5th Cir. 1985). However, as was the case in *Sarmiento, supra.*, Plaintiff's Complaint is also subject to dismissal for want of jurisdiction, since it falls within the narrow exception for cases "where the alleged claim under the Constitution of federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction, or where such a claim is wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). The courts in *Hines v. Cenla Community Action Committee, Inc.*, 474 F.2d 1052 (5th Cir. 1973), *Greco v. Orange Memorial Hospital Corporation*, 374. F.Supp. 227 (E.D. Tex. 1974), as well as in *Sarmiento*, followed this approach rather than proceeding to determine the case on its merits. Therefore, this motion to dismiss under Rule 12(b)(1) is being made in the alternative to TPCIGA's motion to dismiss under Rule 12(b)(6).

WHEREFORE, in the alternative to granting TPCIGA' motion to dismiss under Rule 12(b)(6), TPCIGA requests that the Court enter an order dismissing this case for lack of subject

matter jurisdiction.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT
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INSURANCE GUARANTY ASSOCIATION

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the foregoing Motion to Dismiss for Lack of Subject Matter Jurisdiction has been delivered to pro se Plaintiff Mr. Harry L. Bowles, 306 Big Hollow Lane, Houston, Texas 77042, by certified mail, and to Mr. Craig L. Reese, Fletcher, Farley, Shipman and Salinas, LLP, 8750 N. Central Expy., 16th Floor, Dallas Texas 75231, by ECF filing, in accordance with the Federal Rules of Civil Procedure, on this 12th day of January, 2009.

/s/
Daniel Jordan

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

HARRY L. BOWLES	)	
	)	
VS.	)	CIVIL ACTION NO. 1-07-CV-740-SS
	)	
HOME INSURANCE COMPANY IN LIQUIDATION AND TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION	)	

ORDER

Pending before the Court is the Defendant's Texas Property and Casualty Insurance Guaranty Association's Motion to Dismiss for Lack of Subject Matter Jurisdiction. Having considered the Motion, the pleadings on file, and the arguments presented, the Court finds that it does not have subject matter jurisdiction over the claims asserted by Plaintiff, and it is accordingly

ORDERED that this case be, and hereby is, DISMISSED without prejudice.

SIGNED this _______ day of __________________, 2007.

SAM SPARKS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

HARRY L. BOWLES	)	
	)	
VS.	)	CIVIL ACTION NO. 1-08-CV-808-SS
	)	
HOME INSURANCE COMPANY IN LIQUIDATION AND TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION	)	

DEFENDANT'S TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

TO THE HONORABLE SAM SPARKS, UNITED STATES DISTRICT JUDGE:

NOW COMES the Texas Property and Casualty Insurance Guaranty Association (the "TPCIGA"), and files this its Motion to Dismiss the Complaint of Harry L. Bowles ("Bowles" or "Plaintiff") for Failure to State a Claim pursuant to Fed. R. Civ. P. 12(b)(6), and in support thereof would respectfully show the Court as follows:

1. Plaintiff's Complaint fails to state a claim under federal law.

TPCIGA seeks dismissal of Plaintiff's Complaint under Rule 12(b)(6) for the same reasons discussed in its Motion to Dismiss under Rule 12(b)(1) relating to Plaintiff's failure to raise a federal question. Therefore, TPCIGA incorporates by reference its discussion of those grounds in this motion.

As discussed in Motion to Dismiss under Rule 12(b)(1), dismissal of Plaintiff's Complaint under Rule 12(b)(6) is likely the more appropriate procedure by which to address Plaintiff's failure to state a colorable claim under federal law.

2. Plaintiff's Complaint fails to state any claims on which relief could be granted under Texas law.

A) Under the Guaranty Act, TPCIGA did not owe any duty to Plaintiff other than to pay a "covered claim" if Plaintiff had obtained a judgment on a liability claim within the coverage of the Home policy.

TPCIGA has a statutory obligation to provide a defense to insureds under policies issued by an impaired insurer, but in doing so, TPCIGA is not an insurer and it does not engage in the business of insurance. Tex. Ins. Code art. 21.28-C, §8(b). Instead, TPCIGA is a distinct and unique entity created by statute, and under its enabling statute, TPCIGA has only one duty to a third-party liability claimant: to pay the claimant the full amount of a "covered claim." Tex. Ins. Code art. 21.28-C, §§5(8), 8(a).

In this case, Plaintiff's Complaint clearly does not state a claim for recovery of a "covered claim" from TPCIGA. A "covered claim" must at minimum be within the coverage of the policy issued by the impaired insurer, and no duty to indemnify under the Home liability policy could possibly be triggered unless a judgment for damages against BPS or Bishop was entered in the basis of a cause of action within the coverage of the Home policy. Plaintiff's Complaint does not assert that Plaintiff's liability claims were covered under the Home policy. To the contrary, Plaintiff's Complaint contains numerous allegations to the effect that his liability claims against BPS and Bishop were not covered under the Home policy, and all of Plaintiff's claims against TPCIGA rely on that contention. See Plaintiff's Complaint, ¶¶15-17, 32, 34, 40, 45, 47, 55, and 59. Plaintiff further admits that a final take nothing judgment was entered with respect to his liability claims against BPS, and that an interlocutory take nothing summary judgment has been entered with respect to his claims against Bishop. Accordingly, the factual admissions contained in Plaintiff's Complaint preclude recovery of a "covered claim" from TPCIGA. Tex. Ins. Code art. 21.28-C, §5(8).

B) Plaintiff's Complaint fails to assert any claim on which relief can be granted against TPCIGA relating to its handling of Plaintiff's liability claim against BPS.

Under Texas law, it is clear that a third party liability claimant such as Plaintiff has no standing to bring a direct cause of action against TPCIGA, or for that matter against a solvent liability insurer, until the issue of the insured's liability has been resolved by way of settlement or a judgment of liability against the insured. *Webb v. Texas Property and Casualty Insurance Guaranty Association*, 2005 WL 3234580 (Tex. App.—Austin 2005, no pet.)(not designated for publication); *Owens v. Allstate Insurance Company*, 996 S.W.2d 207 (Tex. App.—Dallas 1998, pet. denied).[1] Instead, Plaintiff's Complaint not only fails to allege the existence of a settlement or judgment that would resolve the issue of BPS's liability in his favor, it expressly alleges facts which negate the possibility that Plaintiff has standing to assert a direct claim against TPCIGA in connection with any liability claim under the Home policy.

Additionally, under Texas law, even a solvent liability insurer owes no common law or statutory duty to a third-party liability claimant. The only common law tort duty owed by a liability insurer under Texas law is owed to its *insured*, and it is the duty imposed under the *Stowers* doctrine to reasonably settle claims within the limits of the liability policy. *Maryland Insurance Co. v. Head Industrial Coatings and Services, Inc.*, 938 S.W.2d 27 (Tex. 1996). Plaintiff's Complaint fails to allege any facts which could even possibly relate to a *Stowers* claim. Moreover, unlike a solvent liability insurer, TPCIGA does not owe any duty to the insureds of an insolvent insurer under *Stowers*, as such claims are expressly excluded as a "covered claim" payable by TPCIGA. Tex. Ins. Code art. 21.28-C, §5(8).

[1] There is an extensive discussion of the differences between federal and Texas law on the justiciability of coverage issues involving third party liability claims in *Westport Insurance Corp. v. Atchley, Russell, Waldrop & Hlavinka, LLP*, 267 F.Supp.2d 601 (E.D. Tex. 2003). The Court's discussion in *Westport* explains why TPCIGA has raised Plaintiff's lack of standing to assert a claim as a substantive bar to recovery under Texas law rather than as grounds for the lack of subject matter jurisdiction.

Subsequent to the decision in *Head*, the Texas Legislature enacted provisions in Tex. Ins. Code art. 21.21, §16, that prohibited insurers from engaging in certain unfair claim settlement practices. These statutory provisions created additional grounds on which a liability insurer may be liable to its insured for prohibited claim handling practices.[2] However, Plaintiff's Complaint does not allege any violation of these provisions. In any event, because TPCIGA is not an insurer and does not engage in the business of insurance by handling claims under the Guaranty Act, it is not subject to claims for unfair claim settlement practices under these statutory provisions. Tex. Ins. Code art. 21.28-C, §8(b); Tex. Ins. Code §§542.002, 542.003.

C) Plaintiff's Complaint fails to assert any causes of action under Texas law on which relief could be granted.

Plaintiff's Complaint alleges that TPCIGA acted improperly by furnishing a defense to BPS when no duty to defend existed under the Home policy. Plaintiff also alleges that TPCIGA or its retained defense counsel failed to comply with Plaintiff's discovery requests in the Underlying Litigation, submitted a false affidavit in connection with a hearing held in the Underlying Litigation, and belatedly furnished Plaintiff with various notices TPCIGA is directed to furnish to liability claimants under its Plan of Operation. See Plaintiff's Complaint, ¶¶35-42, 44-46, 51, 57-59, 62-63, 65. However, none of these allegations state a claim under Texas law on which relief can be granted.

First, it is well-settled that in the absence of a specific statute creating such a cause of action, an unsuccessful litigant who lost his case on the basis of alleged perjury cannot maintain a civil action against the person who allegedly committed the perjury. *Kale v. Palmer*, 791 S.W.2d 628 (Tex. App.—Beaumont 1990, writ denied); *Horlock v. Horlock*, 614 S.W.2d 478 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); *Chandler v. Gillis*, 589 S.W.2d

[2] These provisions are now codified as Chapter 542 of the Texas Insurance Code.

552 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.); *Morris v. Taylor*, 353 S.W.2d 956 (Tex. Civ. App.—Austin 1962, writ ref'd. n.r.e.).

Additionally, under Texas law, spoliation of evidence does not give rise to a cause of action separate from the lawsuit in which such conduct occurred. *Trevino v. Ortega*, 969 S.W.2d 950 (Tex. 1998). Similarly, a litigant's failure to comply with discovery requests does not give rise to a private cause of action. *Douglas v. Anson Financial, Inc.*, 2006 WL 820402 (Tex. App.—Fort Worth 2006, pet. denied)(not designated for publication); *cert. denied* 127 S.Ct. 1817, 167 L.Ed.2d 327, 75 USLW 3497.[3]

It is generally the case that alleged violations of criminal statutes do not give rise to a private cause of action for such violations, unless a statute expressly creates a private cause of action. For instance, in *Reeder v. Daniel*, 61 S.W.3d 359 (Tex. 2001), the Texas Supreme Court held that violations of Tex. Alco. Bev. Code §106.06, a statute imposing potential criminal penalties for furnishing alcohol to a minor, did not give rise to a civil cause of action for violation of the statute. Similarly, in *Baca v. Sanchez*, 172 S.W.3d 93 (Tex. App.—El Paso 2005, no pet.), the Court held that a petition asserting a civil cause of action for violation of three different sections of the Texas Elections Code did not state a cause of action, since those statutes did not create a private right of action for violation of those provisions. *See also Ondemir v. Bexar County Clerk*, 2001 WL 1136074 (Tex. App.—San Antonio 2001, pet. denied)(not designated for publication)(claim for alleged obstruction of justice in violation of Texas Penal Code was not a civil cause of action).

[3] Plaintiff incorrectly describes TPCIGA's conduct in retaining defense counsel to represent BPS in the Underlying Litigation as constituting its intervention as a party in the litigation. However, TPCIGA was not a party to the Underlying Litigation, and was not a party to whom Plaintiff directed any discovery requests in the Underlying Litigation.

Therefore, no cause of action exists under Texas law for any of the conduct Plaintiff alleges that TPCIGA committed in connection with its handling and defense of Plaintiff's liability claim against BPS and/or Bishop.[4]

WHEREFORE, TPCIGA requests that the Court enter an order dismissing this case for failure to state a claim on which relief can be granted.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT
TEXAS PROPERTY AND CASUALTY
INSURANCE GUARANTY ASSOCIATION

[4] TPCIGA did not furnish a defense to Bishop in the Underlying Litigation because Bishop expressly declined it.

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the foregoing Motion to Dismiss for Failure to State a Claim has been delivered to pro se Plaintiff Mr. Harry L. Bowles, 306 Big Hollow Lane, Houston, Texas 77042, by certified mail, and to Mr. Craig L. Reese, Fletcher, Farley, Shipman and Salinas, LLP, 8750 N. Central Expy., 16th Floor, Dallas Texas 75231, by ECF filing, in accordance with the Federal Rules of Civil Procedure, on this 12th day of January, 2009.

/s/
Daniel Jordan

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

HARRY L. BOWLES	)	
	)	
VS.	)	CIVIL ACTION NO. 1-08-CV-808-SS
	)	
HOME INSURANCE COMPANY IN LIQUIDATION AND TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION	)	

ORDER

Pending before the Court is the Defendant's Texas Property and Casualty Insurance Guaranty Association's Motion to Dismiss for Failure to State a Claim. Having considered the Motion, the pleadings on file, and the arguments presented, the Court finds that Plaintiff's Complaint fails to state a claim on which relief could be granted, so that this case must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), and it is accordingly

ORDERED that this case be, and hereby is, DISMISSED with prejudice.

SIGNED this _______ day of ________________, 2009.

____
SAM SPARKS
UNITED STATES DISTRICT JUDGE

HIR.9015

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

HARRY L. BOWLES	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. 1:08CV808SS
	§	
HOME INSURANCE COMPANY IN LIQUIDATION (N.H.); AND TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION	§	
	§	
Defendants.	§	

DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM OR, ALTERNATIVELY, MOTION FOR JUDGMENT ON THE PLEADINGS AND BRIEF IN SUPPORT

The Home Insurance Company in Liquidation by its Liquidator Roger A. Sevigny, Commissioner of Insurance of The State of New Hampshire, solely in his capacity as the Liquidator of The Home Insurance Company (improperly named Home Insurance Company in Liquidation (N.H.)) ("HICIL"), a Defendant herein, pursuant to FED. R. CIV. P. 12(b)(6)[1] and 12(c), files this its Motion to Dismiss for Failure to State A Claim or, Alternatively, Motion for Judgment on the Pleadings and Brief in Support ("Motion to Dismiss"), and in support thereof presents the following arguments and authorities:[2]

[1] HICIL has sought dismissal under Rule 12(b)(1) for many of the same reasons set forth herein. Should this Court decide to rule on the merits, *see Krim v. PCOrder. Com, Inc.*, 402 F.3d 489, 494 n.15 (5th Cir. 2005), HICIL hereby adopts and incorporates the arguments and authorities set forth in its Rule 12(b)(1) Motion as if fully set forth herein.

[2] Pursuant to W.D. LOC. R. CV-7(b), a summary of the facts relied upon in support of this Motion are set out under Tab A in HICIL's Appendix of Evidence filed herewith and incorporated herein. All references to acts or events prior to the Order of Liquidation refer to The Home Insurance Company and all references to acts or events post the Order of Liquidation refer to HICIL.

I. ARGUMENTS AND AUTHORITIES

A. The standards governing Rule 12(b)(6) motions to dismiss.

A pleading may fail to state a claim upon which relief may be granted for two reasons. *Walker v. South Cent. Bell Tel. Co.*, 904 F.2d 275, 277 (5th Cir. 1990). First, the substantive law may not afford relief on the basis of the facts alleged. *Id.* Second, the plaintiff's pleadings may be so badly framed that they are not entitled to a trial on the merits. *Id.* A motion to dismiss under Rule 12(b)(6) tests the formal sufficiency of the claims for relief. *See Nevarez v. United States*, 957 F. Supp. 884, 889 (W.D. Tex. 1997). The Court should dismiss under Rule 12(b)(6) when the plaintiff's complaint does not state factual allegations that suggest a right to relief that is plausible and above mere speculation. *See Bell Atlantic Corp v. Twombly*, __ U.S. __, 127 S.Ct. 1955, 1965 (2007).

B. The standards governing a Rule 12(c) motion for judgment on the pleadings.

Rule 12(c) is designed to dispose of those cases where the material facts are not in dispute and judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noted facts.[3] *Villagran v. Central Ford, Inc.*, 524 F. Supp. 2d 866, 871 (S.D. Tex. 2007). The standards for deciding the motion for judgment on the pleadings are the same as a motion to dismiss under Rule 12(b)(6). *Simonelli v. Fitzgerald*, 2007 WL 1889610, at *2 (W.D. Tex. 2007).

C. Bowles has no viable claims.

Bowles has alleged a number of causes of action against HICIL including fraud, conspiracy, officious intermeddling, tortious interference, perjury, obstruction of justice,

[3] HICIL hereby requests this Court take judicial notice under FED. R. EVID. 201 of the Order of Liquidation and the New Hampshire Insurers Rehabilitation and Liquidation Act, *see* N.H. REV. STAT. ANN. ch. 402-C (2008), both of which are included in the Appendix.

violations of TEX. PENAL CODE ANN. § 37.09 (Vernon Supp. 2008), and causing damage to his property rights and right of access to the courts.[4] The basis for all these claims is his belief that Home wrongfully provided a defense to its insured under a liability policy. Bowles takes that position that he had a right to sue his former lawyers without any defense being afforded them by their insurer.[5]

Home issued a Professional Liability Policy to the Insured Law Firm. Bowles forwarded letters to the Insured Law Firm expressing dissatisfaction with its work and demanding fee reductions during the term of the policy and the insured reported same to Home. For purposes of the Professional Liability Policy and pursuant to its Discovery Clause, that was all that was necessary to implicate potential coverage under the policy. Claims made and reported coverage covers occurrences which may give rise to a claim that come to the attention of the insured and is made known to the insurer during the policy period. *Yancey v. Floyd West & Co.*, 755 S.W.2d 914, 918 (Tex. App.—Fort Worth 1988, writ denied). In order to invoke coverage under a claims made policy, a claim must be made against the insured during the policy period and the insured must notify the carrier during that same period. *National Union Fire Ins. Co. v. Willis*, 139 F. Supp. 2d 827, 832 (S.D. Tex. 2001), *aff'd*, 296 F.3d 336 (5th Cir. 2002). When suit was finally filed against the Insured Law Firm, Home undertook to provide its insured a defense as required by the policy. A failure to do so would have constituted a breach of contract. Of course, even if a defense had not been owed, the decision to afford a defense would simply constitute a voluntary payment. Complying with the duty to defend under a liability policy

[4] Apparently Bowles is alleging a right of access violation under the 1st Amendment and a due process violation under the 14th Amendment.

[5] The balance of his complaints deal with the way the state district court handled the lawsuit he filed. Those complaints do not constitute a cause of action that can be asserted in this Court. *See Jordaan v. Hall*, 275 F. Supp. 2d 778, 788 (N.D. Tex. 2003).

presents no basis for a claim by a third party claimant (Bowles) against HICIL. *See Allstate Ins. Co. v. Watson*, 876 S.W.2d 145, 150 (Tex. 1994).

Bowles has asserted a number of causes of action that are not recognized in Texas or under federal common law. *Martin v. Morgan Drive Away, Inc.*, 665 F.2d 598, 605 n.5 (5th Cir.), *cert. dism'd*, 458 U.S. 1122 (1982) (officious intermeddling); *Trevino v. Ortega*, 969 S.W.2d 950, 953 (Tex. 1998) (perjury and spoliation); *Ondemir v. Bexar County Clerk*, 2001 WL 1136074, at *2 (Tex. App.—San Antonio 2001, pet. denied) (not designated for publication) (obstruction of justice is not a civil claim); *Kale v. Palmer*, 791 S.W.2d 628, 632 (Tex. App. Beaumont 1990, writ denied) (perjury is not a civil cause of action); *McCloskey v. San Antonio Traction Co.*, 192 S.W. 1116, 1118 (Tex. Civ. App.—San Antonio 1917, writ ref'd) (officious intermeddling); *see also Reeder v. Daniel*, 61 S.W.3d 359, 362 (Tex. 2001) (fact that Legislature enacts a criminal statute does not mean that Court can necessarily recognize a civil claim predicated upon that statute).[6]

Bowles has no right of access or due process claim. Although a cause of action is a property right protected by the 14th Amendment and access to courts is a protected interest under the 1st and 14th Amendments, *see Logan v Zimmerman Brush Co.*, 455 U.S. 422, 428-30 (1982); *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 857 (5th Cir. 2000), *cert. denied*, 532 U.S. 905 (2001), a plaintiff has no property interest in any particular form of remedy but simply has a right to seek redress. *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933).

The right of access simply means a right to institute suit. *LaBarbera v. Angel*, 95 F. Supp. 2d 656, 665 (E.D. Tex. 2000). A plaintiff has no right to a particular remedy or a right to proceed without his claims being contested. *Id.* (right of access does not mean right to win); *see*

[6] There is therefore no civil claim based on Section 37.09.

also Holmes v. Hardy, 852 F.2d 151, 153 (5th Cir.), *cert. denied*, 488 U.S. 931 (1988) (party did not have a constitutional right to status as indigent without a contested judicial determination).

Bowles has not and cannot show that he was unable to pursue his claims against the Insured Law Firm. *See Joyce v. Mavromatis*, 783 F.2d 56, 56 (6th Cir. 1986) (plaintiff had right to file suit and offer proof so he was never denied access); *Andrade v. Chojnacki*, 65 F. Supp. 2d 431, 454 (W.D. Tex. 1999) (since plaintiffs were not hindered from gaining physical access to the courts, no 1st Amendment right of access claim existed). In fact, Bowles filed numerous claims. The fact that the defendants in the state court actions were afforded a defense in no way precluded Bowles from pursuing his claims. *See Rogan v. City of Boston*, 267 F.3d 24, 28 (1st Cir. 2001). The fact that it might have caused him to lose is not the basis for a claim. Additionally, no cause of action for violation of any alleged constitutional right exists against HICIL, a private citizen. *See Morgan v. Barry*, 785 F. Supp. 187, 191 n.8 (D. D.C. 1992).[7]

Finally, no cause of action exists for any alleged conspiracy under Section 1985. Bowles is not a federal officer and there is no allegation that he is a member of any protected class or that HICIL acted with some racial or otherwise class-based, invidiously discriminatory animus. *Bittakis v. City of El Paso*, 480 F. Supp. 2d 895, 920 (W.D. Tex. 2007); *Salmon v. Miller*, 951 F. Supp. 103, 106 (E.D. Tex. 1996). Additionally, any claims of conspiracy are conclusory at best. In fact, Bowles never even alleges that HICIL conspired with anyone in the state court action. *See McKay v. Dallas ISD*, 2007 WL 2668007, at *9 (N.D. Tex. 2007); *Perry v. Gold & Laine, P.C.*, 371 F. Supp. 2d 622, 626 (D. N.J. 2005) (conclusory and unsupported allegations that defendants conspired to fix cases fell short of actions giving rise to 1985 claim).

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[7] This necessarily ends any analysis of any 5th Amendment claim, even if Bowles was alleging actions by the federal government, which up to this point, he has not. No 6th Amendment claim exists because it only applies to criminal actions.

Bowles has not even attempted to comply with the liberal pleading requirements under FED. R. CIV. P. 8(e). Therefore, dismissal is appropriate under Rule 12(b)(6). Even were this Court to determine that the pleadings were adequate, HICIL is entitled to judgment on the pleadings because Bowles has no viable causes of action.

D. The doctrines of full faith and credit and comity require dismissal or judgment for HICIL.[8]

The Order of Liquidation unambiguously enjoins commencing any actions against HICIL except through the liquidation process. That Order of Liquidation was made pursuant to the liberally construed statutory scheme established for enhanced efficiency, economy of liquidation, and the equitable apportionment of any unavoidable loss. *Gonya v. Commissioner*, 899 A.2D 278, 280 (N.H. 2006). Pursuant to the statutory scheme, the liquidator is vested with title to and charged with administering Home's assets and persons asserting claims against HICIL must file proofs of claim in the liquidation. *In re Liquidation of Home Ins. Co.*, 913 A.2d 712, 715 (N.H. 2006).

The concept of full faith and credit is a central one to our system of jurisprudence. *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 703 (1982). The United States Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1. By enacting the Full Faith and Credit Act, *see* 28 U.S.C. § 1738, Congress statutorily codified this constitutional guarantee and extended the reach of this

[8] HICIL recognizes that it has previously made these same arguments in its Motion to Dismiss for Lack of Subject Matter Jurisdiction. Federal courts have not been consistent in their treatment of these doctrines with respect to the appropriate avenue to assert same. *See, e.g., Crowder v. American Eagle Airlines, Inc.*, 118 Fed. Appx. 833 (5th Cir. 2004) (dismissing under 12(b)(6)); *Clark v. Fitzgibbons*, 105 F.3d 1049 (5th Cir. 1997) (dismissing under 12(b)(1)); *Janak v. Allstate Ins. Co.*, 319 F. Supp. 215 (W.D. Wisc. 1970) (judgment under Rule 56). Out of an abundance of caution, HICIL asserts these grounds under all motions. The Fifth Circuit has suggested that where issues of fact are central both to subject matter jurisdiction and a claim on the merits, the district court should proceed to rule on the merits. *Krim v. PCOrder.Com, Inc.*, 402 F.3d 489, 494 n.15 (5th Cir. 2005).

doctrine to all courts within the United States, including federal courts. This constitutional mandate is fulfilled when the judgment of a state court has the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced. *Underwriters Nat'l Assurance Co.*, 455 U.S. at 704.

Courts regularly afford full faith and credit to orders from courts of other states with respect to insurance company rehabilitation and liquidation proceedings. In *Underwriters Nat'l Assurance Co., supra*, the United States Supreme Court held that full faith and credit must be extended to an order by the Indiana Rehabilitation Court enjoining the commencement or prosecution of any suit against the carrier. In so holding, the Court rejected the contention that giving full faith and credit to the order would violate the State's right to assert control over the assets of a foreign insurance company to be used for the benefit of its policyholders. 455 U.S. at 715.

In *Bard v. Charles R. Myers Ins. Agency, Inc.*, 839 S.W.2d 791 (Tex. 1992), an order from a Vermont receivership court contained an injunction prohibiting the prosecution of any action against the carrier. The Texas Supreme Court granted full faith and credit and dismissed a counterclaim by the insurance agency alleging conspiracy against the carrier. *Id.* at 797. The court noted that both the liquidation order and Texas public policy required that the claim be asserted in the receivership proceeding in Vermont. *Id.*[9]

[9] Other courts, including the Fifth Circuit, have consistently reached the same conclusion. *See, e.g., Clark v. Fitzgibbons*, 105 F.3d 1049, 1053 (5th Cir. 1997); *Anshutz v. J. Ray McDermott Co.*, 642 F.2d 94, 95 (5th Cir. Unit A 1981); *Janak v. Allstate Ins. Co.*, 319 F. Supp. 215, 218 (W.D. Wisc. 1970); *Louisiana ex rel. Guste v. Alio Corp.*, 595 So. 2d 797, 801 (La. Ct. App. 1992); *Integrity Ins. Co. v. Martin*, 769 P.2d 69, 70 (Nev. 1989).

There is no question that the New Hampshire Court had jurisdiction to enter the Order of Liquidation and that said order is valid under the New Hampshire Insurers Rehabilitation and Liquidation Act. The injunction against suits against HICIL is entitled to full faith and credit. [10]

The doctrine of comity refers to the recognition that one court affords to the decision of another, not as a matter of obligation but out of deference and respect. *Lee v. Miller County, Ark.*, 800 F.2d 1372, 1375 (5th Cir. 1986). Comity involves considerations of both convenience and expediency, as well as deference to the courts of a sister state. *Interfirst Bank-Houston, N.A. v. Quintana Petroleum Corp.*, 699 S.W.2d 864, 877 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). It is generally appropriate to apply this doctrine where another court has exercised jurisdiction over a matter and where the states agree about the public policy at issue. *In re State Farm Mut. Auto. Ins. Co.*, 192 S.W.3d 897, 901 (Tex. App.—Tyler 2006, orig. proceeding).

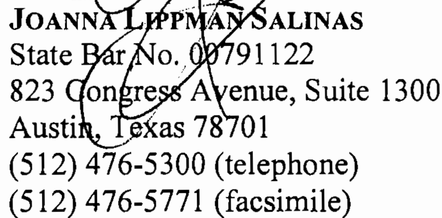
Both New Hampshire and Texas have adopted statutory schemes that serve the same interest in judicial economy unique to liquidations by joining all of the insolvent carrier's claimants in a single receivership, ensuring equal treatment of all insureds, claimants, and creditors. N.H. REV. STAT. ANN. § 402-C:1 (2008): *Gonya*, 899 A.2d at 280; *Bard*, 839 S.W.2d at 797. Because the Order of Liquidation issued by the New Hampshire court is in harmony with both states' regulatory scheme, the Order of Liquidation should be enforced as a matter of comity and full faith and credit and this case dismissed or, alternatively, judgment should be rendered in favor of HICIL.

[10] The Texas Legislature has in fact mandated that full faith and credit be afforded. *See* TEX. INS. CODE ANN. § 443.402(a) (Vernon Pamph. 2008).

WHEREFORE, PREMISES CONSIDERED, HICIL prays that Bowles's Complaint be dismissed in its entirety for failure to state a claim, or alternatively that judgment be entered in favor of HICIL as to all of Bowles's causes of action, and for such other and further relief to which it may be entitled.

Respectfully submitted,

FLETCHER, FARLEY, SHIPMAN & SALINAS, L.L.P.



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CERTIFICATE OF SERVICE

THIS WILL CERTIFY that a true and correct copy of this Appendix in Support of the Motion to Dismiss has been served on all attorneys of record in this cause by ECF filing and on the pro se Plaintiff by certified mail, return receipt requested, in accordance with the Federal Rules of Civil Procedure on this 12th day of January, 2009.

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HIR.9015

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

HARRY L. BOWLES	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. 1:08CV808SS
	§	
HOME INSURANCE COMPANY IN LIQUIDATION (N.H.); AND TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION	§	
	§	
Defendants.	§	

APPENDIX IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM, OR, ALTERNATIVELY, MOTION FOR JUDGMENT ON THE PLEADINGS

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CERTIFICATE OF SERVICE

THIS WILL CERTIFY that a true and correct copy of this Appendix in Support of the Motion to Dismiss/Motion for Judgment has been served on all attorneys of record in this cause by ECF filing and on the pro se Plaintiff by certified mail, return receipt requested, in accordance with the Federal Rules of Civil Procedure on this 12th day of January, 2009.

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