THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

No. 03-E-0106

In the Matter of the Liquidation of The Home Insurance Company

LIQUIDATOR'S OBJECTION TO CLAIMANT OSIJO'S MOTION TO RECOMMIT

Roger A. Sevigny, Insurance Commissioner, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby objects to the motion to recommit filed by Claimant Adebowale O. Osijo, MBA ("Claimant") regarding the Referee's November 5, 2009 Order on the Merits ("Order") (attached hereto as Exhibit 1) . As reasons therefor, the Liquidator states:

The 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 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. The Referee correctly held that these decisions preclude Claimant from proceeding against Home, and the Liquidator's denial of Claimant's claim was accordingly proper. Claimant's motion does not present the full history of the litigation that bars his claim and on which the Referee and Liquidator relied. It is described below.[1]

[1] The Claimant's and the Liquidator's merits submissions to the Referee (including exhibits), the Claimant's motion for clarification, and the Liquidator's objection to that motion are included in the Appendix to Liquidator's Objection to Claimant Osijo's Motion to Recommit ("Appendix") filed herewith.

Background

Claimant seeks to recover for bodily injury he suffered allegedly because of the negligence of Home's insured 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 Liquidator's Exhibits ("Liq. Ex.") (included as Tab 3 in the Appendix), Exs. 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 Liq. Ex. D (policy) at pg. 4 (named insured endorsement). The Claimant's proof of claim ("POC", Liq. Ex. 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 Liq. Ex. 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 Liq. Ex. A (POC attachment, ¶¶ 1-2, 7); Liq. Ex. H (cancelled check). The Settlement Agreement signed by Claimant released Home's insured HRM. Liq. Ex. 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." Liq. Ex. 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. Liq. Ex. I (Alameda Superior Court's order dated October 10, 1991); Claimant's Exhibits (Appendix Tab 4), Ex. 1 (Transcript of September 5, 1991 hearing). 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 (Liq. Ex. 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. Liq. Ex. K. Those provisions included release and dismissal with prejudice of the defendants, including HRM. Liq. Ex. G, ¶ 1.

After lengthy litigation against various defendants,[2] Claimant sought to reopen the settlement by filing a Motion to Set Aside Enforcement Order and to Nullify Settlement Agreement in the HRM action on May 18, 2007. Liq. Ex. P. The Alameda County Superior Court denied the motion on June 21, 2007. Liq. Ex. 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 (Liq. Ex. 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

[2] Claimant brought suit against various other persons (including his attorney and Home) and litigated with them over various aspects of the settlement from 1992 through 2006. 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). Liq. Exs. L, M, N and O. This litigation is summarized in the later decision discussed below. See Liq. Ex. O at 2-5.

third party claim under the HRM policy in the Home liquidation. Liq. Ex. C (Notice of Determination).

After briefing and telephonic oral argument, the Referee found that Claimant had a full and fair opportunity to litigate the issues raised in his proof of claim in matters he filed in the California courts. The Referee concluded that Claimant's claims against Home are precluded by the res judicata and collateral estoppel effect of the California judgments. Order at 4-5. The Claimant then filed a motion for clarification (Appendix Tab 5), which the Referee denied in the November 17, 2009 Order on Claimant's Motion for Clarification (attached as Exhibit 2).

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.[3] The 1991 settlement of the HRM Action thus 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, as the Referee held, 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. Claimant's motion to recommit accordingly should be denied.

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

The 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

[3] 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 depend upon the existence of valid claims against the insureds of the insolvent insurer.

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 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)). As the Referee held (Order at 2-3), each of the elements for res judicata is present.[4]

First, the 1992 judgment of the Alameda County Superior Court (Liq. Ex. 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) (Liq. Ex. J), review denied, No. S028364 (Cal. Sept. 30, 1992).[5] The Claimant sought to reopen the judgment by motion in 2007, but the Alameda Court

[4] As the Referee concluded (Order at 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).

[5] 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; . . . .").

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) (Liq. Ex. 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.[6]

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 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

[6] 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. Liq. Ex. R at 9. The argument is thus barred by collateral estoppel. See pages 13-14 below.

"'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 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. Accordingly, the Court should sustain the Referee's decision sustaining the Liquidator's denial of 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 contends 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. However, as the Referee held (Order at 3-4), these challenges are precluded by the California decisions rejecting Claimant's 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.

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) (Liq. Ex. 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) (Liq. Ex. 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 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. Liq. Ex. 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 Liq. Ex. A (POC, proposed second amended complaint). The alleged invalidity of the settlement is a "primary right" addressed by the judgment. See Liq. Ex. 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. As the Referee held (Order at 3-4), 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.

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. Where Claimant vigorously pursued litigation regarding the enforceability of the settlement in the trial and appellate courts twice, the Referee properly concluded that Claimant had a full and fair opportunity to be heard. Order at 4, 5. 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.

Claimant seeks to avoid res judicata by focusing on Attorney Michell-Langsam's alleged actions in cashing the settlement check on July 30, 1991. However, the judgment enforcing the

settlement precludes new challenges. Moreover, as the Referee held, "the Court orders enforcing the settlement gave Attorney Michell-Langsam permission to complete the settlement. In fact, the orders required her to undertake actions to complete the settlement, regardless of whether Mr. Osijo agreed or cooperated by signing the settlement check and executing a release. Attorney Michell-Langsam was ordered by the Court to undertake the actions necessary to complete the claim." Order at 3. See Liq. Exs. I, K. Where the enforcement order authorized completion of the settlement, it authorized the cashing of the settlement check. The res judicata effect and collateral estoppel effect of the enforcement order and the later denial of the motion to vacate that order, both of which were appealed, bar further attacks on the implementation of the settlement now.

Claimant contends that there should have been a motion for permission to cash the check. As the Referee held in denying Claimant's motion for clarification, the presence or absence of such a motion is not relevant. Order on Claimant's Motion for Clarification (Exhibit 2). Res judicata prevents Claimant from presenting such new arguments at this point. In any event, the enforcement order authorizes implementation of the settlement, necessarily including cashing the settlement check. There is no requirement that counsel be made a party to litigation before being required to follow court orders, and Claimant himself was heard in opposition to the motion to enforce the settlement. Claimant Ex. 1 (Transcript of September 5, 1991 hearing).

Finally, Claimant's suggestions that the settlement funds are not accounted for is not accurate. As explained by the California Court of Appeal in the 2008 decision: "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., Liq. Ex. R at 3 (citations omitted). Indeed, Claimant has acknowledged receiving payment. Liq. Ex. A (POC, Item 8 (POC asks whether Home "has made any payments towards the amount of the claim," and Claimant responded "Yes, $122500")). As the California Court of Appeal stated, "[t]he parties have fully performed under the terms of the settlement agreement." Liq. Ex. R at 13.

B. Claimant's Attempts To Challenge The Settlement Based On Alleged Malfeasance Of His Attorney And Asserted Lack Of Jurisdiction Are Also Precluded By Collateral Estoppel.

The Court should also uphold the Referee's conclusion that Claimant's attack on the settlement is also barred by collateral estoppel. Order at 3. 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. 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. He also contends that the Alameda Superior Court lacked jurisdiction to enforce the settlement, but that argument was rejected by the Court of Appeal in the 2008 decision.

"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.[7] They did. First, in the 1992 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, Liq. Ex. J at 4. The court thus held that the settlement was authorized by Claimant's signing the settlement. The authority issue was clearly presented to and decided by the court in enforcing the settlement.

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 Claimant had knowingly settled his claim against HRM by asserting that his attorney "settled" the case. However, "issues" may not be subdivided and split apart in this manner. The authority issue was resolved adversely to Claimant. He may not now raise it again in a varied guise.[8]

Second, the question of whether the Alameda County Superior Court had subject matter jurisdiction was already raised and decided against Claimant. Claimant contends that the

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

[8] 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, Liq. Ex. L.

California courts lacked jurisdiction to enforce the settlement because there was no "express authorization on the record" of the settlement, citing Levy v. Superior Court, 10 Cal.4th 578 (1995); Davidson v. Superior Court, 70 Cal. App. 4th 514 (1999); and Blanton v. Women Care, Inc., 38 Cal.3d 396 (1985). However, in its 2008 decision 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., Liq. Ex. R. The court disagreed with Claimant's contention and held that Levy and Davidson did not require a contrary result. Id. at 6-13. The jurisdiction issue was 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. (Even if the issue were not precluded, the Claimant himself signed the settlement agreement (Liq. Ex. G at 3), thus providing clear authorization for the settlement which was enforced. Claimant concedes he signed the settlement. Claimant's Motion to Recommit at 7, ¶ 14.).

These decisions have collateral estoppel effect. Indeed, the California Court of Appeal itself anticipated the preclusive effect of its rulings in the liquidation proceeding. In the Sevigny decision, 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." Liq. Ex. O at 13. Claimant cannot circumvent the rulings by the California courts by slightly varying his arguments against the settlement.

C. Application Of Preclusion Is Consistent With Due Process.

Finally, the Referee correctly held that application of collateral estoppel does not deprive Claimant of due process. Order at 4. 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 in the California courts. There is no "unfairness" that would warrant not applying collateral estoppel or res judicata in this matter. Since the record of prior litigation is before the Court, there is no need for an evidentiary hearing.

[9] In Roos, the California Supreme Court observed that: "[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). See 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 (Liq. Ex. L) noted at page 3 that "the settling defendants paid $250,000 to Osijo and his counsel Michell."

CONCLUSION

For the foregoing reasons, the Court should deny Claimant's motion to recommit.

Respectfully submitted,

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

By his attorneys,

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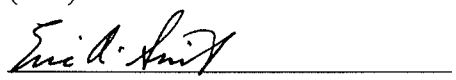

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November 25, 2009

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Objection to Claimant Osijo's Motion to Recommit was mailed, first class mail postage prepaid, to those on the attached Service List and to the Claimant on November 25, 2009. The voluminous Appendix was also mailed to Claimant, but not to those on the service list.

Eric A. Smith

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

In the Matter of the Liquidation of
The Home Insurance Company
Docket No. 03-E-0106

In the Matter of the Liquidation of
US International Reinsurance Company
Docket No. 03-E-0112

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