BEFORE THE SUPERIOR COURT

MERRIMACK COUNTY, NEW HAMPSHIRE

IN RE THE LIQUIDATION OF HOME INSURANCE COMPANY

DISPUTED CLAIMS DOCKET

In Re Liquidator Number: 2008-HICIL-41

Proof of Claim Number: CLMN712396-01

Claimant: ***Harry L. Bowles***

CLAIMANT'S SUPPLEMENT TO CLAIMANT'S RESPONSE TO LIQUIDATOR'S RESPONSE TO CLAIMANT'S SECOND MOTION TO RECOMMIT AND FOR COURT ORDER VOIDING, NULLIFYING AND RESCINDING ALL ORDERS AND PROCEEDINGS REGARDING CLAIM NUMBER CLMN712396-01 FOR FRAUD

1. Comes Claimant Harry L. Bowles to supplement his response dated April 1, 2011 to the Liquidator's objection to Bowles' Second Motion to Recommit.

History

2. The basis for this Proof of Claim filed in February 2008 was a dispute that originated in the 151st District Court in Houston as a motion by Bowles per Rule 12, Texas Rules of Civil Procedure titled Attorney to Show Authority. In reply to the motion, the attorney employed by TPCIGA submitted to the Texas court a copy of Home Insurance Policy No. LPL-F871578, defense of which was said to authorize his appearance in August 2005, solely as defense counsel for BPS, one of the five named defendants in Cause No. 1995-43235. Despite Bowles' claim of insurance fraud by submission of a void policy, the Texas court summarily dismissed Bowles' motion. It thereby reaffirmed its June 2006 dismissal of Bowles' legal malpractice suit against

BPS and co-defendants George Bishop and David Sharp.

3. Subsequently Bowles filed litigation in the federal court in Austin against TPCIGA and Home Insurance Company in Liquidation claiming fraud, conspiracy and tortious interference in an official proceeding. Both defendants presented affidavits stating Home Insurance acted to provide a defense of the policy quickly after Bowles' legal malpractice suit was filed in August 1995. Bowles termed the affidavits false and perjurious. The federal court refused jurisdiction, declaring correct procedure would be for Bowles to file a Proof of Claim with the Liquidator and follow New Hampshire law as stipulated in the New Hampshire Insurance Code.

4. Bowles' Proof of Claim was submitted in February 2008 and was rejected by the Liquidator in October 2008 on the basis of the *res judicata* effect of the June 2006 ruling by 151st Court in Texas against Bowles that dismissed the legal malpractice action (Cause No. 1995-43235). The Liquidator has also cited the *res judicata* effect of the alleged "final judgment" rendered on February 12, 1996 in the underlying lawsuit, Cause No. 1991-43239. This was the dismissal that was obtained over Bowles' objection in the Rule 12 Motion to Show Authority.

5. Bowles claimed insurance fraud by TPCIGA's and HICIL's misrepresentation that BPS was legally provided with a defense of Home Policy No. LPL-F871578. Bowles initiated a disputed claim proceeding demanding that the rejection notice be nullified and changed to reflect that a defense of Policy No. LPL-F871678 was unauthorized under this Court's June 2003 Order of Liquidation and the New Hampshire Insurance Code. The Liquidator, through his law firm in Boston, agreed to litigate the issue. An alleged disinterested Referee was appointed by the Liquidator, and the Liquidator was forced to agree to Bowles' demand for an evidentiary hearing.

6. The Disputed Claim litigation in this Court was fraudulent for reason that the Liquidator and Referee Linda Gehris presumed to take judicial notice of affairs in Texas and to interpret

Texas law without jurisdiction to do so. With the Referee's approval the Liquidator claimed privity of interest in the actions in the 151st District Court in Texas knowing that he had no such privity. In fact, both the Liquidator and TPCIGA had adamantly refused to be joined as third-party defendants in Cause No. 1995-43235, which is proof that the employment by TPCIGA of a defense attorney for BPS was without basis in a valid insurance contract requiring their intervention.

7. Their refusal to be third-party defendants was obviously to avoid their culpability for the felony violation of Section 37.09 of the Texas Penal Code prohibiting the fabrication and use of false physical evidence to affect the outcome of an official proceeding.

New Hampshire Law of the Case

8. The referee's sole jurisdiction in this Proof of Claim proceeding was with regard to New Hampshire law concerning the right of TPCIGA and the Liquidator to intervene in the Texas litigation in August 2005 in defense of Home Policy No. LPL-F871578. Bowles cited this Court's June 13, 2003 Order of Liquidation and provisions of the New Hampshire Insurance Code as irrefutable proof that neither the Liquidator nor TPCIGA were legally authorized to intervene in the Texas litigation in August 2005. Neither the Liquidator's response nor the Referee's January 4, 2010 Order on the Merits (see attached **EXHIBIT A**) ever addressed this primary and overriding issue. This is uncontradicted prima facie evidence that this Court's approval of the Order on the Merits must be declared null, void and without legal effect.

9. Nobody!, and BPS in particular, could or has legally received insurance benefits under a Home Insurance policy after June 13, 2003 without filing a Proof of Claim with the Liquidator. This is because all Home policies were ordered cancelled by Item (e) in the Order of Liquidation and all ongoing proceedings against the Home, whether in New Hampshire or elsewhere, were

abated unless the Liquidator saw fit to intervene and obtained this Court's leave to do so. The Liquidator, TPCIGA and Referee Gehris were and are fully aware (and have admitted) that no insured party under Home Policy No. LPL-F871578 ever submitted a Proof of Claim with the Liquidator after June 13, 2003. This is irrefutable prima facie proof of insurance fraud. It is proof that the Liquidator, TPCIGA and Referee Gehris jointly and intentionally renounced the Order of Liquidation and the New Hampshire Insurance Code in favor of committing a felony crime in Texas against Bowles to benefit convicted felon George M. Bishop and his long-time co-conspirators in the underlying 1991 litigation. The unanswered question is: What was the quid pro quo for their action, and why have the various notified law enforcement agencies refused to prosecute this blatant public corruption?

Texas Law of the Case

9. The Referee's Order on the Merits presumes to set out and interpret Texas law as a basis for rejection of Bowles' Proof of Claim. This Court can accept neither Referee Gehris's jurisdictional authority to do so, nor the qualification of the Liquidator's legal counsel in Boston to practice law in this case as if the venue were in Texas.

Res Judicata Inapplicable in Cause No. 1995-43235 and in Cause No. 1991-43235 in Texas

10. The Liquidator and Referee Gehris acted in violation of Texas law in dismissing the Bowles' Proof of Claim on grounds of *res judicata*. The Referee's Order on the Merits references the finality of both the 1995 and the 1991 litigation in Texas as preclusive to Bowles' filing of a Proof of Claim with the Liquidator. All the 1991 and 1995 judgments in Texas against Bowles, including four or more permanent injunctions, were unconventional and summarily rendered without due process and without even one trial on the merits.

11. Texas law as stated by the Texas Supreme Court in *Lehmann v Har-Con Corp.*,39 S.W.3d

191 (Tex. 2001) is that:

> "when there has not been a conventional trial on the merits, an order or judgment is not final for purposes of appeal unless it actually disposes of every pending claim and party or unless it clearly and unequivocally states that it disposes of all claims and all parties. An order that adjudicates only the plaintiff's claims against the defendant does not adjudicate a counterclaim, cross-claim, or third-party claim, nor does and order like the latter dispose of the plaintiff's claims. An order that disposes of claims by only one of one of multiple plaintiffs or against one of multiple defendants does not adjudicate claims by or against other parties. An order does not dispose of all claims and all parties merely because it is entitled "final", or because the word "final" appears elsewhere in the order, or even because it awards costs. Nor does an order completely dispose of a case merely because it states that it is appealable, since even interlocutory orders may sometimes be appealable. Rather, there must be some clear indication that the trial court intended the order to completely dispose of the entire case. Language that the plaintiff take nothing by his claims in the case, or that the case is dismissed, shows finality if there are no other claims by other parties; but language that "plaintiff take nothing by his claims against "X" when there is more than one defendant or other parties in the case does not indicate finality."

11. A review of Referee Gehris's Order on the Merits shows that her conclusions are based entirely on the Liquidator's presumption that this Court had personal and subject matter jurisdiction to determine the finality of litigation of the two cases in Texas courts involving Bowles and George M. Bishop, Cause No. 1991-25939 and Cause No. 199543235. **Neither the Referee nor this Court has or had such jurisdiction. There is no appellate court in New Hampshire to which Bowles has an avenue of appeal.**

12. The fact is that neither the 1991 case nor the 1995 (legal malpractice) case in Texas were ever final for appeal purposes ~~of~~ for *res judicata* purposes under Texas law as stated in *Lehmann*. In the 1995 legal malpractice case, for instance, the 151st Court rendered a summary judgment that disposed of Bowles' claims against one defendant (BPS) without disposing Bowles claims against the other parties, namely the co-defendants sued individually: George M. Bishop & Associates, George M. Bishop, K. Charles Peterson and David E Sharp.

13. These individual law practices were never covered by Home Policy No. LPL-F871578.

However, the Liquidator and the Referee Gehris made the fraudulent argument that "**regardless of when BPS dissolved, and what Attorney Bishop did after the dissolution of the firm, he was an insured under the Home policy, as was BPS itself, and any other lawyers who worked for BPS during the policy period, for actions taken during the policy period and reported during the policy period, even if the claims related to those actions were made after termination of the policy.**"

13. Had Bowles been informed that BPS was dissolved in the summer of 1993, Bowles would have excluded BPS as a defendant because all the work about which Bowles complained was performed by sole practitioner George M. Bishop & Associates after October 25, 1993. George M. Bishop & Associates, according to the testimony of David E. Sharp, "continued representing Bowles after Bishop, Peterson and Sharp ceased practicing law together".

14. The Liquidator's and the Referee's bad faith is exposed by the statement that Home's insurance policy covered George M. Bishop & Associates after the dissolution of BPS. They are and were totally aware that George M. Bishop & Associates was never listed in the policy as an insured party.

15. Another example of fraud on the Court in the Referee's Order on the Merits is the Referee's finding that Cause No. 1991-25939 and Cause No. 1991-25939-A were subjected to final judgment in the Texas courts. This is a matter of continuing dispute in Texas and was a primary issue in Bowles' legal malpractice action against George M. Bishop & Associates. The Referee's summary judgment on this issue was rendered without regard for contradicting evidence in the case file in Texas such as is exemplified by a February 1996 letter from defendant George M. Bishop & Associates to opposing attorney Grant Cook (attached as **EXHIBIT B**). The letter undeniably states that Bishop recognized the non-finality of the

February 12, 1996 "Final Summary Judgment". Accordingly, The Referee's "finding" that Bowles malpractice lawsuit in Texas against Bishop & Associates was precluded by the *res judicata* effect of the February 12, 1996 "Final Summary Judgment" is prima facie false and fraudulent. This Court has no authority or jurisdiction to accept or approve the Referee's indescribably biased and unprofessional rendition that was obviously authored by the Liquidator's Boston law firm.

16. It is a fact that Cause No. 1991-25939-A was dismissed for want of prosecution (DWOP) in 1998. That squelches the Referee's finding of finality in that litigation.

Texas Law of the Case re Judgments Against Non-Covered Defendants

17. The Liquidator and Referee Gehris, in their zeal to protect TPCIGA and HICIL officials from the threat of criminal prosecution knowingly and intentionally refused to take notice of other Texas case law regarding the judgment obtained by TPCIGA in its defense of BPS. This case law was generated by TPCIGA itself in several cases in which TPCIGA refused to pay claims made against it.

18. The seminal case is one involving a claim for judgment damages by an uninsured motorist involved in an accident after the insurance company that had defended the motorist went into receivership. The insurance company had successfully defended the uninsured motorist who obtained a jury verdict in his favor. TPCIGA prevailed on the basis that a claim by an uninsured party cannot be a "covered claim" that TPCIGA is liable to pay. The case is *Lopez v. Property & Cas. Ins. Guar. Ass'n*, 990 S.W.2d 504 (Tex.App – Austin 1999). *Lopez* is also cited in a somewhat similar case styled *Texas Property and Cas. Ins. v. Johnson*, 4 S.W.3d328 (Tex.App. – Austin 1999). It is also cited in *Bobby Webb v. TPCIGA*, No. 03-03-00764-CV (Tex. App.- Austin Lexis 10020).

19. *Lopez* is again cited in a very recent appellee's brief filed in the Austin Court of Appeals by a law firm representing TPCIGA in a suit against TPCIGA. The case is *styled John H. Carney & Associates v. TPCIGA* (Tex.App.- Austin No. 03-10-00385-CV, Jan. 21, 2011)

20.. The special thing about these cases is that in each instance TPCIGA refused, or is refusing, to pay a claim made against TPCIGA by a party insured by a defunct insurance company to attempt to collect a judgment against the insurance company obtained prior to when the company went into receivership. This is the reverse of the Bowles case where TPCIGA and Home voluntarily provided coverage of Bowles' malpractice suit even though there had never been any litigation or settlement or judgment, or even a formal claim, involving Home Insurance and BPS or George M. Bishop & Associates prior to Home's June 2003 liquidation.

21. The referenced cases and the brief have the effect of amplifying the grossness of the civil and criminal insurance fraud, conspiracy and money laundering scheme perpetrated against Bowles and devised and orchestrated by convicted felon George M. Bishop. TPCIGA was on an attack mission to punish and destroy Bowles without regard for his legal rights and in disregard of both Texas and New Hampshire statutes.

22. According to the cited cases, Texas insurance law authorizes TPCIGA to review and construe the coverage status of claims and judgments and pay those claims that arise out of and are within the coverage of a policy. In *Lopez* it was determined that Lopez was not an insured within the terms and conditions of the policy. This is also the case here, as the Exclusions Clause of Home Policy No. LPL-F871578 clearly prohibits coverage of Bowles' lawsuit. Bowles was able to obtain absolute proof of this in 2009 when defendant David E. Sharp testified that George Bishop and Associates had assumed representation of Bowles after the BPS law firm was dissolved in early 1993.

23. It is obvious that the litigation of TPCIGA's authority to intervene in Bowles' malpractice case should have occurred before the 151st District Court in Texas. It would have. However, TPCIGA and HICIL (the Liquidator) refused to be joined as third-party defendants in the Cause No. 1995-43235. They apparently had no intention of being held accountable as coconspirators in the commission of a felony crime in violation of Texas Penal Code Section 37.09 - using a knowingly void insurance policy to affect the course and outcome of an official proceeding.

24. They have not been successful in escaping being held accountable. **It is this Court's duty and responsibility to recognize their willing participation in a scheme involving criminal insurance fraud for the purpose of laundering stolen money and covering up 19 years of official oppression against Bowles in the courts of Texas and New Hampshire.**

Conclusion

25. This Court must officially recognize and publicly acknowledge its lack of jurisdiction, and that of the Liquidator and Referee Gehris as well, to consider and make judgments on matters that are entirely unrelated to the issue of whether or not TPCIGA was authorized under the New Hampshire Insurance Code and this Court's June 13, 2003 Order of Liquidation to employ (in August 2005) an attorney to intervene in Cause No. 1995-43235 in Texas to defend Home Insurance Policy No. LPL-F871578.

26. Bowles' Proof of Claim filed in February 2008 has not been settled, and it is this Court's duty to order that the Liquidator proceed to settle the Proof of Claim with admission that the intervention in Texas was absolutely unauthorized and in violation of New Hampshire law and the June 13, 2003 Order of Liquidation and that, furthermore, constituted a criminal violation of both New Hampshire and Texas Penal Codes regarding fabrication and use of false documents to determine the course and outcome of an official proceeding..

Request for Relief

27. Bowles requests this Court immediately renounce and denounce the intervention by TPCIGA in Bowles' legal malpractice action in Texas. Bowles requests the Court order the Liquidator to enter into negotiations with Bowles in good faith to settle the February 2008 Proof of Claim.

Respectfully submitted,

Harry L. Bowles, Claimant, Pro Se
306 Big Hollow Lane,
Houston, Texas 77042
Tel. 713-983-6779 Fax 713-983-6722

Attachments: Exhibit A, Exhibit B.

Certificate of Service

I, Harry L. Bowles, hereby certify that on this **29th Day of April, 2011** a true and correct copy of the foregoing was sent by U.S. Mail to the Liquidation Clerk, HICIL, Merrimack County Superior County, P.O. Box 2880, Concord New Hampshire, 03301; to Mr. Eric A. Smith, Rackemann, Sawyer and Brewster, 160 Federal Street, Boston, MA 02110-1700; to Mr. Marvin Kelly, Executive Director, TPCIGA, 9120 Burnet Road, Austin, TX 78758; and to J. Christopher Marshall, New Hampshire Dept of Justice, 33 Capitol Street, Concord, NH 03301-6397.

A copy was also sent to Mr. Dennis A Pompa, TFI Fraud Unit, Attention Jack Hall – Mail Code 109-3A, P.O. Box 149336, Austin, Texas 78714-9336

Harry L. Bowles

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

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

In Re Liquidator Number: 2008-HICIL-41
Proof of Claim Number: CLMN712396
Claimant Name: Harry L. Bowles
Policyholder Account: Class II

ORDER ON THE MERITS

This dispute arises out of a claim by Mr. Bowles against his counsel, Bishop, Peterson & Sharp, P.C. ("BPS"). Mr. Bowles has filed a Proof of Claim asserting a third party claim for alleged professional malpractice on the part of BPS and Attorney George Bishop. In addition, Mr. Bowles also asserts that Home and Texas Property and Casualty Insurance Guaranty Association ("TPCIGA") improperly provided a defense to BPS and its shareholders in the malpractice action Mr. Bowles brought against them in the Texas state courts. Mr. Bowles alleges first that the Home professional liability policy does not allow for defense of BPS or its attorneys. His argument is that he did not sue BPS until after the policy period, that Attorney Bishop was not an insured during the Home policy period and that the intentional acts exclusion bars coverage for BPS. Mr. Bowles argues that res judicata and collateral estoppel do not apply to his claims against Home and he is entitled to recovery both in the Texas courts and in this dispute.

The Liquidator asserts that Mr. Bowles is not entitled to recover on his malpractice claims because they were compulsory counterclaims that he did not assert in the underlying 1991 litigation in the Texas state courts. Therefore, the Liquidator argues Mr. Bowles is precluded by res judicata from asserting these claims as a third party in the Home liquidation. In addition, the Liquidator argues that collateral estoppel also bars Mr. Bowles from challenging the res judicata effect of the judgments in the 1991 litigation because Mr. Bowles litigated those issues in his 1995 malpractice action and suffered an adverse judgment. Finally, the Liquidator asserts Mr. Bowles cannot recover from Home on his improper provisions of a defense claim because he fails to state any such claim against Home, and, in addition, the claims made against the Home's insureds are potentially covered and therefore triggered a duty to defend under the Home professional liability policy.

RELEVANT FACTS

The Home Policy

Home issued to BPS a professional liability insurance policy LPL-F871578-1 (hereinafter "the Policy") which was in effect for the period January 24, 1993 to January 24, 1994. The insureds under the policy included BPS and its shareholders George M. Bishop and David E. Sharp.

EXHIBIT A

The Home policy stated that Home agreed:

> To pay on behalf of the Insured all sums...which the Insured shall become legally obligated to pay as damages as a result of claims first made against the Insured during the policy period and reported to the company during the policy period caused by any act, error or omission for which the Insured is legally responsible, and arising out of the rendering or failure to render professional services for others in the Insured's capacity as a lawyer or notary public.

The policy also provides for a defense. The pertinent clause states that Home:

> ...shall defend any claim against the Insured including the appeal thereof seeking damages to which this insurance applies even if any of the allegations of the suit are groundless, false or fraudulent.

The policy provides coverage for any suits brought against the insured that are based on circumstances about which the insured notifies Home during the policy period. The policy specifically states:

> If, during the policy or any optional Reporting Period purchased hereunder, the Insured first becomes aware that an Insured has committed a specific act, error or omission in professional services for which coverage is otherwise provided hereunder, and if the Insured shall during the policy period or the optional Reporting Period purchased hereunder give notice to [Home} of:
>
> (a) The specific act, error or omission; and
> (b) The injury or damage which has or may result from such act, error or omission; and
> (c) The circumstances by which the Insured first becomes aware of such act, error or omission
>
> then any claim that may subsequently be made against the Insured arising out of such act, error or omission shall be deemed for the purposes of this insurance to have been made during the policy period.

In December 1993, Home informed BPS that the Policy would be cancelled due to "recent claims activity and past claim frequency." That policy cancellation was effective February 6, 1994.

Notification to Home by BPS

Prior to the cancellation of the policy, by letter dated December 29, 1993, Attorney Bishop informed Home, on his own behalf and that of BPS, that Mr. Bowles might file a claim against him or the firm based on the allegations of fraud and deceit. By letter dated January 10, 1994, Home Insurance informed Attorney Bishop that Home acknowledged receipt of the notice of a potential claim.

The Prior Litigation in the Texas State Courts

The 1991 Litigation In 1991, Mr. Bowles brought suit against his former business partners in the District Court of Harris County, Texas, entitled Bowles et al v. Schwartz et al., Cause No. 1991-25939 (later together with Cause 1991-25939-A). Mr. Bowles hired the law firm BPS and specifically Attorney Bishop to represent him in this litigation. Apparently, during the course of the 1991 litigation, BPS dissolved. Attorney Bishop continued to represent Mr. Bowles. Also during the course of the 1991 litigation, by letter dated December 22, 1993, Mr. Bowles accused Attorney Bishop of conspiracy and fraud.

On April 8, 1994, Attorney Bishop moved to withdraw as counsel of record for Mr. Bowles. The court granted that motion to withdraw on April 11, 1994. On April 18, 1994, Attorney Bishop and BPS intervened in the 1991 litigation seeking attorneys' fees relating to Attorney Bishop's representation of Mr. Bowles in this action. Mr. Bowles objected to the motion.

On May 27, 1994, Attorney Bishop and BPS moved for summary judgment on their claims for attorney's fees. The motion was granted on July 18, 1994. Attorney Bishop and BPS then moved to sever their claim from the original 1991 litigation and for entry of final judgment. The Court granted the motion on April 10, 1995 and the severed action was designated Cause 1991-25939-A. On May 15, 1995, the Court set aside the April 10, 1995 severance order. By order dated February 12, 1996, the Court granted final summary judgment in the 1991 litigation. On April 26, 1996, the Court reinstated the severance order for the claims for attorney's fees by Attorney Bishop and BPS by vacating the May 15, 1995 order. On August 30, 1996, the District Court ordered the disbursement of funds in the 1991 litigation to BPS and Attorney Bishop, with specific instructions on the disbursement. On March 21, 2005, the District Court barred Mr. Bowles from making any further filings in the 1991 litigation.

The 1995 Action On August 31, 1995, Mr. Bowles filed a malpractice suit against BPS, Attorney Bishop, Attorney Peterson, and Attorney Sharp, alleging malpractice in representing him in the 1991 litigation. This action was filed in the District Court of Harris County Texas 151st Judicial District and captioned Bowles v. Bishop, et al., Cause 95-043235.

In January 2006, BPS moved for summary judgment. The Court requested additional briefing on the issue of whether the February 12, 1996 order in the 1991 litigation was a final judgment as to that litigation, and what, if any, effect that order had on Mr. Bowles' malpractice claim filed on August 31, 1995, since the claims in the 1995 action were not made as compulsory counterclaims in the main lawsuit. The Court granted BPS' motion for summary judgment by order on June 27, 2006. The Court ruled that final judgments had been entered in the underlying cases, Causes 1991-25939 and 1991-35939-A and therefore, the Court held that Mr. Bowles' cause of action for legal malpractice was barred by res judicata. The Court specifically stated that because Mr. Bowles' cause of action for legal malpractice was a compulsory counterclaim that he failed to assert, he was barred by res judicata from asserting that claim in the 1995 action.

Mr. Bowles moved for rehearing on the issues. On August 30, 2006, the Court rejected the motion for rehearing and severed the claims against BPS from the remainder of the 1995 litigation.

Attorney Bishop filed a motion for summary judgment. The Court granted that motion on April 12, 2007, again ruling that because Mr. Bowles' cause of action for legal malpractice was a compulsory counterclaim that he failed to assert, he is now barred by res judicata from asserting it.

Attorney Sharp moved for summary judgment in the 1995 litigation on June 19, 2009 based on the statute of limitations, res judicata, the absence of any duty running from Attorney Sharp as a shareholder of BPS to Mr. Bowles, and waiver due to the fourteen year delay between filing of the 1995 litigation and service on Attorney Sharp. On July 21, 2009, Attorney Sharp's motion was granted. Attorney Sharp then moved to sever the claims against him and the Court granted that motion on September 29, 2009.

Mr. Bowles challenged the authority of TPCIGA to provide Attorney Sharp with a defense in the course of the 1995 litigation. The Court rejected Mr. Bowles' argument that TPCIGA could not provide Attorney Sharp with a defense on October 12, 2009.

The Federal Litigation Mr. Bowles has also filed and dismissed two actions against Home and TPCIGA in the United States District Court for the Western District of Texas, numbered 07-cv-00740 and 08-cv-00808. Ronald Barta of Home and Amber Walker of TPCIGA filed affidavits in those proceedings. Those affidavits have been referenced by Mr. Bowles in this litigation.

The Liquidation Proceeding Home was declared insolvent and on June 13, 2003, an Order of Liquidation was entered by the Merrimack County Superior Court. On June 26, 2003, the Commissioner of Insurance of the State of Texas officially designated Home as an impaired insurer under Texas Insurance Code based upon the Order of Liquidation. Immediately, the Liquidator transferred claim files that would likely be subject to guaranty association protection to the appropriate guaranty associations for handling. By the time the Liquidator filed its second report dated August 14, 2003, Home's claims file on the 1995 Litigation, referenced above, was shipped to TPCIGA.

The Liquidator received Mr. Bowles' Proof of Claim in the Liquidation on February 7, 2008.

LEGAL ANALYSIS

Now before the Referee are the following issues:

A. Whether the disallowance of Mr. Bowles' claim by the Liquidator was proper based on the language of the Home policy issued to Bishop, Peterson and Sharp, P.C.;
B. Whether Mr. Bowles is entitled to recovery on his claim that Home improperly provided a defense to Bishop, Peterson and Sharp, P.C.; and
C. Whether the principle of res judicata bars any claim by Mr. Bowles.

The Referee addresses the first two issues together.

I. The disallowance of Mr. Bowles' claim by the Liquidator was proper based on the language of the Home professional malpractice policy and Mr. Bowles is not entitled to recover from Home.

Mr. Bowles alleges that Home should not have provided a defense to BPS in his claims against the firm and its attorneys for three reasons. First, Mr. Bowles argues he did not sue BPS until after the policy period. Second, Mr. Bowles argues that Attorney Bishop was not an insured during the policy period. Third, Mr. Bowles asserts that the intentional acts exclusion bars coverage for BPS.

The Home policy is a claims-made policy. It provides coverage for claims made during the policy period regardless of when the events out of which the claim arose occurred. In this case, as with most claims-made policies, the policy required not only that the claim be made, but also that it be reported to the insurer within the policy period. See 7 L. Russ & T. Segalla, Couch on Insurance 3d §102:20 at 102-45 to 102-46 (1997). It is common for insureds, when faced with the termination of a claims made policy, to inform the insurer of any and all facts or allegations which could potentially result in a claim in the future. In fact, the policy requires such notification by the insured.

The discovery clause of the Home policy is clear: where the insured first becomes aware of a potential claim and gives notice to Home during the policy period, any claim subsequently made against the insured arising out of the alleged acts reported to Home is deemed to have been reported during the policy period. Those are the circumstance here. Attorney Bishop reported a potential claim to Home by letter in December 1993. His report was based on allegations made by Mr. Bowles related to actions taken by Attorney Bishop during the Home policy period. In 1995, after the policy terminated, Mr. Bowles filed suit against BPS and its shareholders. The basis for the allegations were acts which took place during the policy period and were reported to Home during the policy period and therefore Home was required to defend the claim.

Between the time when Attorney Bishop put Home on notice of a potential claim and the time Mr. Bowles filed suit against BPS the Liquidation began. The Liquidator sent files of potential claims to various Guaranty Associations after the liquidation. In doing so, the Liquidator was complying with statutes and the Liquidation Order. Pursuant to statute, TPCIGA was required to act on Home's behalf once Home was placed in liquidation. Therefore, when the claims were filed by Mr. Bowles against BPS, it was TPCIGA which was required to, and did, provide a defense to BPS and its shareholders.[1]

Mr. Bowles also argues that Attorney Bishop was not an insured under the policy for the purpose of the 1995 litigation because BPS was dissolved in the summer of 1993 and Attorney Bishop thereafter provided services to Mr. Bowles as representative of a different legal entity or law firm. Mr. Bowles apparently contends that the dissolution of the firm, and continued work as an attorney by Attorney Bishop, means that there was no coverage for Attorney Bishop under the Home policy. Regardless of when BPS dissolved, and what Attorney Bishop did after the dissolution of the firm, he was an insured under the Home policy, as was BPS itself, and any other lawyers who worked for BPS during the policy period, for actions taken during the policy

[1] In his Brief dated October 27, 2009, Mr. Bowles asserts that there was no defense owed because the policy does not define "potential covered claims." Mr. Bowles reviews again the language used by Ron Barta and Amber Walker in affidavits filed in the Texas suits referenced above. Mr. Bowles ignores the plain language of the policy, specifically the insuring agreement and discovery clause.

period and reported during the policy period, even if the claims related to those actions were made after termination of the policy. See infra.

Mr. Bowles' third claim is that the 1995 litigation and his claims against BPS are excluded from coverage because his allegations are that BPS engaged in false and fraudulent professional misconduct when acting as Mr. Bowles' legal counsel.

The terms of the policy make clear that Home had a duty to defend Attorney Bishop and BPS for those claims for false and fraudulent misconduct. First, even if Mr. Bowles made some allegations in the 1995 litigation that would not have been covered by the Home policy, where a complaint potentially includes at least one covered claim, the insurer is required to defend the entire suit. See Zurich America Ins. Co. v. Nokia, 268 S.W.3d 487, 490 (Tex.2008) and 14 Couch on Insurance, §200:1. Second, the terms of the policy are clear and unambiguous. The policy states that it does not apply to any judgment or final adjudication based upon or arising out of any dishonest, deliberately fraudulent, criminal, maliciously or deliberately wrongful acts or omissions committed by the insured. (Emphasis added). The language of the exclusion makes clear that it does not operate until after a judgment or final adjudication in which there is a finding by the court that the potentially covered actions were undertaken dishonestly or were deliberately wrongful acts. In this case, there was no final adjudication or finding of such dishonest or deliberately wrongful acts. Therefore Home could not have relied upon the policy exclusion to deprive BPS of a defense for the 1995 litigation.

A defense was properly provided to BPS for the claims against it by Mr. Bowles. Therefore, the Liquidator properly disallowed Mr. Bowles' claim based on the terms of the policy. Mr. Bowles is not entitled to recover from Home or the Liquidator.

II. Res judicata Applies to Mr. Bowles' Claims in the Liquidation.

Mr. Bowles argues that res judicata does not apply to his claims because the decisions of the Texas Courts were based on fraud. Mr. Bowles also asserts that the order for summary judgment for BPS was not a final judgment on the merits and can't be the basis for a claim of res judicata.

The Liquidator argues that Mr. Bowles is barred from asserting malpractice claims against Home's insureds because of the res judicata effect of the judgment in the 1991 litigation. The Liquidator argues that malpractice claims are compulsory counterclaims to BPS' claims for attorney's fees and because Mr. Bowles did not make those claims in the 1991 litigation, they cannot provide a basis for a claim in the Home liquidation. Moreover, the Liquidator argues that Mr. Bowles is collaterally estopped from challenging the res judicata effect of the judgment of the 1991 litigation because he previously litigated and lost that issue in the 1995 litigation.

Texas law applies to determine the res judicata effect of a Texas judgment in this proceeding. *In Re Estate of Rupert*, 139 N.H. 273, 275 (1994). Texas law requires that a defendant bring as a counterclaim any claim arising out of the transaction or occurrence that is the subject matter of the opposing party's suit. *State and County Mut. Fire Ins. Co. v. Miller*, 52 S.W.3d 693 (Tex. 2001). Under Texas law, a claim of attorney malpractice is a compulsory counterclaim to a claim for attorneys' fees so that if a client chooses not to counterclaim for these actions, all

claims are barred by res judicata. *Goggin v. Grimes*, 969 S.W.2d 135 (Ct.App.Tex. 14th Dist. 1998). Therefore, when BPS intervened in the 1991 litigation seeking attorneys' fees, Mr. Bowles' claims for malpractice became compulsory counterclaims. He was required to bring them in the 1991 litigation. While Mr. Bowles disputed the attorneys' fees, he did not allege malpractice. Therefore, he failed to assert his compulsory counterclaims. The Texas Court agreed in the 1995 litigation, reaching the same conclusion. *Order of the District Court for Harris County, Texas, Cause No. 1995-43235 dated April 12, 2007.*

Having determined that Mr. Bowles' claims for malpractice were compulsory counterclaims, the Referee turns to whether res judicata applies in this dispute. Under Texas law, res judicata precludes relitigation of claims that have been finally adjudicated, or that arise out of the same subject matter and that could have been litigated in the prior action. *Amstadt v. Kochie*, 919 S.W.2d 644 (Tex. 1996). Texas law contemplates three elements of res judicata: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of the parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action. Id. at 652, citations omitted.

As to the first element, there is a final judgment on the merits in the 1991 litigation. The claim for attorneys' fees was decided in favor of BPS and was severed. That judgment became final and appealable when the trial court signed the order severing into a separate case the claims for attorneys' fees between BPS and Mr. Bowles. *See Pilgrim Enters, Inc. v. Maryland Cas. Co.*, 24 S.W.3d 488 (Ct. App.Tex. 1st Dist. 2000). Turning to the second elements, Mr. Bowles was a party to the litigation in the Texas state courts and he is the party here; the parties are the same. Third, in this action Mr. Bowles raises the claim of malpractice in his POC, therefore, the claims in this proceeding are the same claims Mr. Bowles could have raised, and was required to raise, in the 1991 litigation. Res judicata applies to preclude Mr. Bowles from proceeding on a claim against the Liquidator.

Mr. Bowles raises several other arguments contending he is entitled to proceed against the Liquidator. First, he claims there was not a final order in the 1991 litigation because the order severing the summary judgment on attorneys' fees was vacated, a final judgment was entered, and then the summary judgment was severed again. The Texas Court specifically recognized that the claim for attorneys' fees was resolved and the judgment was final. *Amended Order of the District Court of Harris County, Texas, Cause No. 1995-43235 dated June 27, 2006.*

Mr. Bowles also argues that he filed the 1995 litigation before there was a final judgment in the 1991 litigation. Regardless of the timing of the filing of the 1995 litigation, once final judgment was entered in the 1991 litigation, it had preclusive effect. *Ellis v. Amex Life Ins. Co.*, 211 F. 3d 935 (5thCir. 2000) and Restatement (Second) of Judgments §14 (1982).

Finally, as to the actions of Attorney Bishop and BPS, Attorney Sharp and Attorney Peterson were shareholders in the firm and therefore in privity with both BPS and Bishop. Therefore, the final judgment in the 1991 litigation also bars claims against Attorneys Peterson and Sharp under the doctrine of res judicata as adopted by the Texas courts.

The Liquidator also asserts that the judgment in the 1991 litigation precludes Mr. Bowles from relitigating the preclusive effect of the 1991 litigation. In the 1995 litigation the Texas Court

determined that final judgment had been entered in the 1991 litigation and that the cause of action for malpractice was barred by res judicata.

In *Sysco Food Service v. Trapnell*, 890 S.W.2d 796 (Tex. 1994), the Court said that a party seeking to assert the bar of collateral estoppel must establish that: (1) the fact sought to be litigated in the second action were fully and fairly litigated in the first action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action. *Id.* at 801, citations omitted. In this case, the Liquidator is asserting collateral estoppel against Mr. Bowles. The issue being litigated in this proceeding is that which Mr. Bowles litigated in the 1995 litigation, the preclusive effect of the 1991 litigation. In addition, the Texas Court ruled in the 1991 litigation that there was a final order in the 1991 litigation and therefore Mr. Bowles' claims for legal malpractice were barred by res judicata. This determination required the Court to have found that the subject matter of both the 1991 and 1995 litigation included Mr. Bowles' malpractice claims and that there had been a final determination in the 1991 litigation. Finally, Mr. Bowles was clearly an adversary if BPS and Attorney Bishop in the prior litigation. It is irrelevant that the Liquidator is not the same as the parties in the prior litigation, it is "only necessary that the party against whom the doctrine is asserted was a party or in privity with a party in the first action." *Id.*

III. Other Pending Motions And Pleadings

Mr. Bowles has filed Proposed Findings of Fact and Rulings of Law in this dispute. The Referee does not address them individually. To the extent they are relevant to this dispute and they are granted, the proposed findings of fact and rulings of law are incorporated into this Order.

Mr. Bowles has also filed two motions for summary judgment. The allegations and claims in those motions are addressed in this Order and those motions are denied.

CONCLUSION

For the reasons set forth above, the Referee finds that the Liquidator properly disallowed Mr. Bowles' claim based on the language of the Home policy issued to Bishop, Peterson and Sharp, P.C. In addition, Mr. Bowles is not entitled to recovery on his claim that Home improperly provided a defense to Bishop, Peterson and Sharp, P.C. Defense of BPS was proper. In addition, the principles of res judicata and collateral estoppel bar any claim by Mr. Bowles against BPS and the Liquidator.

Because the Liquidator properly disallowed Mr. Bowles' claims, there is no need for additional briefing on any other issues in this dispute. Any issues not decided by the Referee are moot.

So ordered.

Jan 4, 2010
Date

Referee, Melinda S. Gehris

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TEXAS BOARD OF LEGAL SPECIALIZATION"

February 28, 1996

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RE: No. 91-025939; Harry L. Bowles and Quality Seal Company v. Charles N. Schwarz, Jr., et al.; In the 334th District Court of Harris County, Texas

Dear Grant:

I received your "Final Summary Judgment" which apparently Judge Lloyd signed on February 12, 1996. It is clear to me that this is not a final summary judgment in that many issues before the Court have not yet been resolved, including my own intervention.

It is our intention to appeal this judgment, although I do not believe it is appealable, even though it purports to be a "final judgment for purposes of appeal."

Please review the enclosed Motion to Modify, Correct or Reform the Judgment and let me know if you can agree to any reformation of the judgment which would make it final for purposes of appeal. If you will not agree, I will request a hearing before Judge Lloyd and request that he make this a final order. If not, we can appeal and have the Court of Appeals tell us whether or not it is, in fact, a "final summary judgment." The purpose of the appeal would be to determine whether it is a final summary judgment and, if not, to ask Judge Lloyd to enter whatever orders are necessary in order to make this judgment final so that we can have all of the orders in this case reviewed by the appellate court.

Please let me know at your convenience if you would agree to any revisions in this "Final Summary Judgment" so that it can be appealed.

By copy of this letter, I am letting Mr. Bowles know my opinion concerning this judgment and that we intend to appeal the same whether or not he does. I am requesting that Mr. Bowles recuse himself on at least the portion of the case involving the fees due to Bishop Peterson & Sharp, P.C. after his election to the Supreme Court once this case reaches that Court.

EXHIBIT B