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: CLMN712396-01
Claimant Name: Harry L. Bowles

LIQUIDATOR'S SECTION 15 SUBMISSION

Roger A. Sevigny, Insurance Commissioner, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), submits this brief pursuant to Section 15 of the Restated and Revised Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company In Liquidation entered January 19, 2005 ("Claims Procedures Order") and in accordance with the Referee's Order dated September 18, 2009.

In this matter, Harry L. Bowles ("Claimant") has filed a Proof of Claim ("POC") asserting a third party claim for alleged professional malpractice on the part of Home's insured, the law firm of Bishop, Peterson & Sharp, P.C. ("BPS") and its shareholders/attorneys. In filings submitted in this disputed claim proceeding, Claimant also asserts a claim relating to the allegedly improper provision of a defense to BPS and its shareholders by Home and the Texas Property and Casualty Insurance Guaranty Association ("TPCIGA") in the malpractice action Claimant brought against them in the Texas state courts.

Claimant 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. Claimant is therefore precluded by the doctrine of res judicata from asserting them as a third party claim in Home's liquidation. Indeed, Claimant is barred by collateral estoppel

from challenging the res judicata effect of the judgments in the 1991 litigation because he litigated those issues in his 1995 malpractice action and suffered an adverse judgment. Finally, Claimant cannot recover from Home on his improper provision of a defense claims because Claimant fails to state any such claim against Home, and because, in any event, the claims made against Home's insureds are potentially covered and therefore triggered a duty to defend under the Home professional liability policy.

The Liquidator notes his disagreement with the vitriolic assertions that run through Claimant's submissions. This brief focuses on the substantive issues.

I. EXHIBITS

The Liquidator's exhibits are as follows:

A. Claimant's POC, dated February 4, 2008.
B. Home Insurance Company of Indiana policy LPL-F871578-1.
C. Letter from Bishop to Home, dated December 29, 1993 (with enclosures) and response letter from Home dated January 10, 1994.
D. *Motion to Withdraw* filed in the District Court of Harris County, Texas, Cause No. 1991-25939, dated April 8, 1994.
E. *Order* of the District Court of Harris County, Texas, Cause No. 1991-25939, dated April 11, 1994.
F. *Third Party Intervention* filed in the District Court of Harris County, Texas, Cause No. 1991-25939, dated April 18, 1994.
G. *Plaintiff's Petition in Intervention* filed in the District Court of Harris County, Texas, Cause No. 1991-25939, dated May 5, 1994.
H. *Order Granting Intervenors' Motion for Summary Judgment* of the District Court of Harris County, Texas, Cause No. 1991-25939, dated July 18, 1994.
I. *Order Granting Severance Requested by Bishop Peterson & Sharp, P.C. and George M. Bishop* of the District Court of Harris County, Texas, Cause No. 1991-25939, dated April 10, 1995
J. *Order* of the District Court of Harris County, Texas, Cause No. 1991-25939 dated April 26, 1996.
K. *Amended Order* of the District Court of Harris County, Texas, Cause No. 1995-43235 dated June 27, 2006.
L. *Order for Disbursement of Funds* of the District Court of Harris County, Texas, Cause No. 1991-25939 and 1991-25939-A, dated August 30, 1996.
M. *Order of Permanent Injunction* of the District Court of Harris County, Texas, Cause No. 1991-25939 date March 21, 2005.

N. *Order* of the District Court of Harris County, Texas, Cause No. 1995-43235 dated August 30, 2006.

O. *Order Granting Defendant Bishop, Peterson & Sharp, P.C.'s Motion to Sever* of the District Court of Harris County, Texas, Cause No. 1995-43235 dated August 30, 2006.

P. *Order* of the District Court for Harris County, Texas, Cause No. 1995-43235 dated April 12, 2007.

Q. *Defendant David E. Sharp's Motion for Summary Judgment* filed in the District Court of Harris County, Texas, Cause No. 1995-43235 dated June 19, 2009.

R. *Order Granting Defendant David E. Sharp's Motion for Summary Judgment* of the District Court of Harris County, Texas, Cause No. 1995-43235 dated July 21, 2009.

S. *Order Granting Motion for Severance* of the District Court of Harris County, Texas, Cause No. 1995-43235 dated September 29, 2009.

T. *Plaintiff's Sworn Motion per Rule 12, T.R.C.P. Challenging Authority of Attorney(s) Representing Defendant Sharp to Appear in Defense of a Purported Professional Malpractice Insurance Policy Under the Administration of the Texas Property and Casualty Insurance Guaranty Association* filed in the District Court of Harris County, Texas, Cause No. 1995-43235, dated October 1, 2009.

U. *Order* of the United States District Court for the Western District of Texas, Cause No. 07-cv-00740, dated January 2, 2008.

V. *Order of Dismissal* of the United States District Court for the Western District of Texas, Cause No. 08-cv-00808, dated April 22, 2009.

W. *Order* of the United States District Court for the Western District of Texas, Cause No. 08-cv-00808, dated April 2, 2009.

X. *Official Order of the Commissioner of Insurance of the State of Texas*, dated June 26, 2003.

Y. Liquidator's Second Report, dated August 14, 2003.

Z. Packing Slip dated June 20, 2003 (provided by TPCIGA).

II. THE INSURANCE POLICY

1. Home issued BPS a professional liability insurance policy, No. LPL-F871578-1, for the period January 24, 1993 to January 24, 1994 (the "Policy") (Exhibit B). The insureds under the policy included BPS and its shareholders/attorneys, George M. Bishop ("Bishop"), Charles K. Peterson ("Peterson") and David E. Sharp ("Sharp").

2. Section B of the Policy sets forth the relevant coverage provisions. The "Professional Liability and Claims Made Clause" provides that the Home agrees:

> 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. [Policy Section B(I)].

The Policy is thus a "claims made" policy.[1]

3. The Policy provides coverage for amounts "the Insured shall become legally obligated to pay as damages" and also provides for a defense. The "Consent to Settle, Defense" clause sets forth Home's duty to defend the Insured:

> [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. [Policy Section B(II)].

4. The Policy does not require, however, that third parties actually bring suit against the insured during the policy period for those claims to be covered. The "Discovery Clause" provides coverage for any suits brought against the insured that are based on circumstances that the insured notifies Home of during the policy period:

> If, during the policy or any optional Reporting Period purchased hereunder, the Insured first becomes aware than 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. [Policy Section B(III)].

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[1] "There are two basic types of liability insurance policies: claims-made and occurrence. A pure claims-made policy provides coverage for claims made during the policy period regardless of when the events out of which the claim arose occurred. In contrast, an occurrence policy provides coverage for all 'occurrences' which take place during a policy period, regardless of when the claim is made. ...Claims-made policies commonly require not only that the claim be made, but also that it be reported to the insurer, within the policy period." 7 L. Russ & T. Segalla, Couch on Insurance 3d § 102:20 at 102-45 to 102-46 (1997).

The duty to defend under the Policy therefore attaches not only to claims made during the policy period but also to claims subsequently made against the insured arising out of circumstances reported to Home during the policy period. Policy, Section B(I); Section B(II); Section B(III).

III. THE CLAIMANT'S PRIOR LITIGATION

The Liquidator provides the somewhat lengthy summary of the Claimant's prior litigation so that an overview is before the Referee. The exhibits on which the Liquidator particularly relies are the orders granting and severing BPS's claim for attorney's fees in the underlying litigation and granting and severing BPS' motion for summary judgment on res judicata grounds in Claimant's malpractice action. Exhibits H, I, K, O.

A. Claimant's 1991 Litigation, Including the Attorneys' Fee Claim

5. In 1991, Claimant brought suit against his former business partners in the District Court of Harris County, Texas captioned Bowles et al. v. Schwartz et al., Cause No. 1991-25939 (together with Cause No. 1991-25939-A, the "1991 Litigation"). POC at 3, ¶¶ 2-3 (Exhibit A). Bishop represented Bowles in Bowles v. Schwartz. POC at 3, ¶ 1.

6. By letter dated December 29, 1993, Bishop informed Home, on behalf of himself and BPS, that Claimant might file a claim for malpractice arising from the 1991 Litigation and enclosed correspondence from Claimant. *Letter* dated December 29, 1993 (with enclosures) (Exhibit C).

7. On April 8, 1994 Bishop moved to withdraw as Claimant's counsel of record. *Motion to Withdraw* dated April 8, 1994 (Exhibit D). The court granted Bishop's motion to withdraw on April 11, 1994. *Order* dated April 11, 1994 (Exhibit E).

8. On April 18, 1994 Bishop and BPS intervened in the 1991 Litigation seeking attorneys fees relating to Bishop's representation of Claimant in that action. *Third Party Intervention* dated April 18, 1994 (Exhibit F).

9. Claimant objected to Bishop and BPS' intervention and action for attorneys' fees. *Plaintiff's Petition in Intervention* dated May 5, 1994 (Exhibit G). In contesting the legal costs sought by Bishop and BPS, Claimant failed to file a counterclaim for legal malpractice. Id.

10. BPS and Bishop moved for summary judgment on their attorneys' fee claims on May 27, 1994, and the Court granted that motion on July 18, 1994. *Order Granting Intervenors' Motion for Summary Judgment* dated July 18, 1994 (Exhibit H).

11. BPS and Bishop then moved to sever their claim from the 1991 Litigation and for the entry of a final judgment. The motion was granted on April 10, 1995 and the severed action was denominated as Cause No. 1991-25939-A. *Order Granting Severance Requested by [BPS] and [Bishop]* dated April 10, 1995 (Exhibit I).

12. On May 15, 1995 the Court set aside the April 10, 1995 severance order. See *Order* dated April 26, 1996 (Exhibit J).

13. The Court granted final summary judgment in the 1991 Litigation on February 12, 1996. See *Amended Order* dated June 27, 2006 (Exhibit K) ("February 12, 1996: Final Summary Judgment signed in Cause No. 1991-25939 in the 334th District Court.").

14. On April 26, 1996, the Court reinstated the severance order regarding BPS and Bishop's claims for attorneys' fees by vacating the May 15, 1995 order that had set it aside. *Order* April 26, 1996 (Exhibit J).

15. On August 30, 1996 the District Court ordered the disbursement of funds in the 1991 Litigation to BPS "representing principal and interest due through July 26, 1996, on the

judgment signed by the Honorable Jack O'Neill on July 18, 1994" and to Bishop in respect of other claims. *Order for Disbursement of Funds* dated August 30, 1996 (Exhibit L).

16. On March 21, 2005 the District Court barred Claimant from making any further filings in the 1991 Litigation, citing his continuing efforts to litigate that matter "long after the final judgment has been entered." *Order of Permanent Injunction* dated March 21, 2005 (Exhibit M).

B. Claimant's 1995 Litigation against Home's Insureds

17. On August 31, 1995 Claimant filed a malpractice suit against BPS, Bishop, Peterson and Sharp alleging malpractice in representing him in the 1991 Litigation, captioned Bowles v. Bishop et al., Cause No. 95-043235, District Court of Harris County, Texas, 151st Judicial District (the "1995 Litigation").[2] See *Amended Order* dated June 27, 2006 (Exhibit K).

18. In January 2006, BPS moved for summary judgment. The Court then requested additional briefing regarding the question:

> "If the February 12, 1996 order signed by the 334th District Court is a 'final judgment' as to the [1991 Litigation], what effect, if any, does it have on [Claimant's] malpractice claim filed on August 31, 1995, in a different Civil District Court (the 151st), since this claim was not made as a compulsory counter-claim in the main lawsuit in the 334th District Court?" [*Amended Order* dated June 27, 2006 (Exhibit K)].

19. The Court granted the motion for summary judgment on June 27, 2006. *Amended Order* dated June 27, 2006 (Exhibit K). After setting forth the relevant chronology, the Court ruled that "Final Judgments have been entered in the underlying cases, (Cause No. 1991-25939 and Cause No. 1991-25939-A; and, therefore, [Claimant]'s cause of action for legal malpractice is barred by *res judicata*. . . . [B]ecause [Claimant]'s 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 in this court." Id. at 3.

[2] It appears that Peterson is now deceased. See Claimant's Proposed Findings, ¶ 4.

20. Following the grant of summary judgment against him and in BPS' favor, Claimant moved that the Court grant him a rehearing on the issue. See *Order* August 30, 2006 (Exhibit N). On August 30, 2006 the Court rejected Claimant's motion for a rehearing and, on BPS' motion, severed the claims against it from the remainder of the 1995 Litigation. Id.; *Order Granting Defendant Bishop, Peterson & Sharp, P.C.'s Motion to Sever* dated August 30, 2006 (Exhibit O).

21. Following BPS' successful motion for summary judgment, Bishop also filed a motion for summary judgment. See *Order* dated April 12, 2007 (Exhibit P). The Court granted the motion on April 12, 2007, reasoning that "because [Claimant]'s 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 in this court." Id.

22. On June 19, 2009, Sharp moved for summary judgment in the 1995 Litigation citing the statute of limitations, res judicata, the absence of any duty running from Sharp as a shareholder of BPS to Claimant, and waiver due to the fourteen year delay between filing of the 1995 Litigation and service on Sharp. *Defendant David E. Sharp's Motion for Summary Judgment* dated June 19, 2009 (Exhibit Q). Sharp's motion for summary judgment was granted on July 21, 2009. See *Order Granting Defendant David E. Sharp's Motion for Summary Judgment* dated July 21, 2009 (Exhibit R). Following his successful motion for summary judgment, Sharp moved to sever the claims against him and the motion was granted on September 29, 2009. See *Order Granting Motion for Severance* dated September 29, 2009 (Exhibit S).

23. Claimant challenged the authority of TPCIGA to provide Sharp with defense counsel in the course of the 1995 Litigation. See *Plaintiff's Sworn Motion per Rule 12, T.R.C.P.*

Challenging Authority of Attorney(s) Representing Defendant Sharp to Appear in Defense of a Purported Professional Malpractice Insurance Policy Under the Administration of the Texas Property and Casualty Insurance Guaranty Association dated October 1, 2009 (Exhibit T). On October 12, 2009 the Court rejected Claimant's argument that TPCIGA could not provide Sharp with a defense. See Claimant's Brief ¶ 8.

C. Claimant's Federal Litigation against Home and TPCIGA

24. Claimant has filed and dismissed two actions against Home and TPCIGA in the United States District Court for the Western District of Texas. See *Order* of the United States District Court for the Western District of Texas, Cause No. 07-cv-00740, dated January 2, 2008 (Exhibit U); *Order of Dismissal* of the United States District Court for the Western District of Texas, Cause No. 08-cv-00808, dated April 22, 2009 (Exhibit V). Personnel from the Home liquidation (Ronald F. Barta) and TPCIGA (Amber A. Walker) filed affidavits in those proceedings that Claimant has referenced in numerous pleadings. See, e.g. POC at 6; Claimant's Brief at 12; Claimant's Proposed Facts ¶¶ 40-44. The sole substantive order issued in those proceedings contained analysis of the improper provision of defense issues. See *Order* of the United States District Court for the Western District of Texas dated April 2, 2009 (Exhibit W).

D. The Liquidation Proceeding and Claimant's POC

25. On June 13, 2003 Home was declared insolvent and an Order of Liquidation was entered by this Court.

26. On June 26, 2003 the Commissioner of Insurance of the State of Texas officially designated Home as an impaired insurer under Texas Ins. Code 21.28-C based upon the Order of Liquidation entered in by this Court. See *Official Order of the Commissioner of Insurance of the State of Texas*, dated June 26, 2003 (Exhibit X).

27. Immediately upon Home's liquidation, the Liquidator transferred claim files that would likely be subject to guaranty association protection to the appropriate guaranty associations for handling. See Liquidator's Second Report, dated August 14, 2003 ¶ 5 (Exhibit Y). By the time of the Liquidator's Second Report, the Liquidator had shipped approximately 6,500 claim files to the appropriate guaranty associations for handling. Id. Among those files was Home's claim file on the 1995 Litigation, which was shipped to TPCIGA on June 20, 2003. See Packing Slip dated June 20, 2003 (Exhibit Z).

28. On February 7, 2008 the Liquidator received Claimant's POC dated February 4, 2008. POC at 1.

IV. ARGUMENT

In the September 18, 2009 order, the Referee directed briefing regarding both Claimant's malpractice claim against BPS and his improper provision of defense claim against Home, citing three specific questions:

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 Liquidator addresses the questions in reverse order because res judicata precludes Claimant's malpractice claim and Claimant's "improper defense" claim fails as a matter of law. The Referee accordingly need not reach the question of coverage under the Home Policy.

With respect to the malpractice claim, the Liquidator's disallowance of Claimant's POC should be upheld because Claimant is barred from asserting malpractice claims against Home's insureds due to the res judicata effect of the judgment in the 1991 Litigation. Claimant failed to assert malpractice claims, which were compulsory counterclaims to BPS' claim for attorneys'

fees in that case. Accordingly, the claims are barred and may not be used as the basis for a third party claim in the Home liquidation. Indeed, Claimant is collaterally estopped from challenging the res judicata effect of the judgment in the 1991 Litigation because he previously litigated and lost that issue in the 1995 Litigation.

With respect to the "inappropriate defense" issues, Claimant is not entitled to any recovery. First, Claimant cannot assert any such claim, as the provision of a defense under an insurance policy is a matter between the parties to the policy, not with a claimant against the insured who is a stranger to the policy contract. There is no duty running from Home to claimants against Home insureds that would require Home not to provide a defense. In any event, the 1995 Litigation was a potentially covered claim under the Policy so Home's insureds were entitled to a defense.

I. CLAIMANT'S THIRD PARTY CLAIM WAS PROPERLY DENIED BECAUSE CLAIMANT HAS NO VIABLE CLAIM AGAINST HOME'S INSURED.

For a claimant to assert a third party claim against Home under RSA 402-C:40, he must have a valid claim against a Home insured that is covered by Home's policy. In this case, Claimant's malpractice claim against BPS is precluded by the judgment in the insured's favor on the attorney's fees claim.

A. Claimant's Malpractice Claims Against BPS And Its Attorneys Are Barred By Res Judicata Because Claimant Did Not Assert Them As Counterclaims In The 1991 Litigation.

Claimant has no third party claim against Home under RSA 402-C:40 because his malpractice claims against Home's insureds are barred by the res judicata effect of the judgments in the 1991 Litigation. The Claimant was required to assert his claims as compulsory counterclaims to BPS' claim for attorneys' fees, and his failure to do so precludes him from asserting them now. The res judicata effect of the Texas judgments is determined by Texas law.

See In re Estate of Rubert, 139 N.H. 273, 275 (1994) ("The final judgment of a court of competent jurisdiction is entitled to the same faith and credit as to the parties before it as it has in the state of issuance.").

Under Texas law, "[a] claim of attorney malpractice has been held a compulsory counterclaim to a claim for attorneys' fees" such 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, 138 (Tex. App. 1998, no writ), citing CLS Assoc., Ltd. v. A B, 762 S.W.2d 221, 224 (Tex. App. 1988, no writ).[3] Because no counterclaim for malpractice was filed in response to BPS' and Bishop's claim for attorneys' fees in the 1991 Litigation, Claimant is barred by res judicata from asserting the malpractice claims in the Home liquidation.[4]

Texas courts have laid out three basic elements of res judicata. The doctrine requires the following elements:

> "(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."

[3] This is a specific application of the general rule in Texas that "[r]es 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, 652 (Tex. 1996). "Texas follows the transactional approach to res judicata." State and County Mut. Fire Ins. Co. v. Miller, 52 S.W.3d 693, 696 (Tex. 2001), citing Barr v. Resolution Trust Corp., 837 S.W.2d 627, 630-31 (Tex. 1992). "This approach mandates 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." Id. Further, Texas Rule of Civil Procedure 97(a), requires that: "A pleading shall state as a counterclaim any claim within the jurisdiction of the Court, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction...." See Goggin, 969 S.W.2d at 138 (malpractice claims arise from the same subject matter as claims for attorneys fees and are therefore compulsory counterclaims under Tex. R. Civ. P. 97(a)); CLS, 762 S.W.2d at 224 (same).

[4] The history of the 1991 Litigation is set forth at paragraphs 5-16 above and in the Liquidator's exhibits. It was also more succinctly summarized by the Texas court in its 2006 and 2007 orders in the 1995 Litigation. Exhibits K, O and P.

Amstadt, 919 S.W.2d at 652, citing Texas Water Rights Comm'n v. Crow Iron Works, 582 S.W.2d 768, 771-72 (Tex. 1979).[5] Claimant's malpractice claims are barred by res judicata because (1) there is a final judgment – the severed order granting summary judgment on BPS' claim for attorneys' fees, (2) BPS and Claimant were both parties to the judgment, and (3) Claimant could have (indeed was required to) raise his malpractice claims in opposing the claim for attorneys' fees.

Claimant's third party claims in the liquidation are based on the legal services provided to him by Bishop and BPS in the 1991 Litigation. POC (Exhibit A) at pg. 3, ¶¶ 1-2 ("This claim is based on breach of contract and legal malpractice... that occurred... while Bishop undertook to provide Bowles with legal services [in]... *Bowles et al. v. Schwarz et al.*, Cause No. 1991-25939 in the Harris County District courts."). When BPS withdrew from representation in the 1991 Litigation (Exhibits D & E) and intervened seeking attorneys fees (Exhibit F), Claimant's malpractice allegations were compulsory counterclaims. Tex. R. Civ. P. 97(a); Goggin, 969 S.W.2d at 138 (also involving a withdrawal and then intervention for attorneys' fees). Claimant responded by disputing the attorneys' fees, but he did not allege malpractice. See *Plaintiff's Petition in Intervention* dated May 5, 1994 (Exhibit G). The claim for attorneys' fees was decided in favor of BPS and Bishop on summary judgment (see Exhibit H), and was severed (Exhibit I). The severance order made the summary judgment a final, appealable order. See Pilgrim Enters., Inc. v. Maryland Cas. Co., 24 S.W.3d 488, 491 (Tex. App. 2000) ("A partial summary judgment becomes final and appealable when the trial court signs an order severing into a separate case the parties and claims addressed."); Guidry v. National Freight, Inc., 944

[5] "The policies behind the doctrine reflect the need to bring all litigation to an end, prevent vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double recovery." Barr, 837 S.W.2d at 629.

S.W.2d 807, 812 (Tex. App. 1997). Claimant is therefore precluded from bringing malpractice claims regarding the 1991 Litigation. Goggin, 969 S.W.2d at 138.

Claimant's various filings appear to present three counterarguments. None has merit. First, Claimant suggests that there is some ambiguity regarding finality because the order severing the summary judgment on attorneys' fees was vacated, a final judgment was entered in the entire 1991 Litigation, and then the summary judgment was severed again. However, it does not matter whether the claim for attorneys' fees was resolved by the final judgment in the main action (Cause No. 1991-25939) or by the reinstated severed summary judgment (Cause No. 1991-25939-A). In either case, the judgment is final and has preclusive effect. The Texas Court recognized this in the *Amended Order* dated June 27, 2006 in the 1995 Litigation (Exhibit K).

Second, Claimant points out that the 1995 Litigation, Cause No. 19950-43235, was filed before final judgment was issued in the 1991 Litigation. See Claimant's Brief ¶ 45 (referring to proceedings between Bishop and Schwartz over distribution of funds). This is irrelevant. Even if the 1991 Litigation was still unresolved and lacked preclusive effect at the time the 1995 Litigation was filed, it had preclusive effect on the later action once final judgment entered. See Restatement (Second) of Judgments § 14 (1982) ("For purposes of res judicata, the effective date of a final judgment is the date of its rendition, without regard to the date of the commencement of the action in which it is rendered or the action in which it is to be given effect."). See also Ellis v. Amex Life Ins. Co., 211 F.3d 935, 937-38 (5th Cir. 2000) (discussing federal cases predicting that Texas will follow the Restatement § 14 rule). In Texas, judgments are final and have immediate preclusive effect, even if an appeal is taken. Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1, 6 (Tex. 1986) (adopting Restatement (Second) of Judgments § 13). The 1991 Litigation ended in a final judgment during the pendency of the 1995 action. See Order of

Permanent Injunction at 1 (Bowles "continues to engage in vexatious and harassing litigation in this case long after final judgment has been entered") (Exhibit M). Once judgment entered, it had preclusive effect on the 1995 Litigation.

Finally, Claimant's 1995 action involved claims against all the shareholders of BPS, although his POC focuses only on Bishop. To the extent Claimant's claim in the liquidation may be premised upon liability of Sharp and Peterson, it is also barred by the res judicata effect of the final judgment on attorneys' fees in the 1991 Litigation. The claim for attorneys' fees was asserted by both BPS and Bishop, so the final severed judgment in their favor (Exhibits H, I & J) bars malpractice claims against them. It also bars claims against Peterson and Sharp because they are in privity with BPS and Bishop. Claimant concedes that the alleged malpractice (if such it was) was committed only by Bishop. POC at 6, Claimant's Explanation of Late Filing ¶ 1 ("Only Mr. Bishop was the provider of services rendered to Bowles for which Bowles now files a claim for damages cause by Bishop's professional misconduct."). Peterson and Sharp could only be liable as alleged principals responsible for the conduct of their agent Bishop.[6] However, in situations of vicarious liability, a judgment for one of the persons in the vicarious relationship bars an action against the other. Soto v. Phillips, 836 S.W.2d 266, 269 (Tex. App. 1992, writ denied); see Restatement (Second) of Judgments § 51(1). The judgment for BPS and Bishop thus precludes a malpractice claim against Peterson and Sharp. Indeed, this was one of the grounds advanced by Sharp in the motion for summary judgment in the 1995 Litigation (Exhibit Q) that was recently granted by the Texas Court. Exhibit R.[7]

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[6] In Texas, the doctrine of vicarious liability, or respondeat superior, may make a principal liable for the conduct of this employee or agent. Baptist Mem'l Hosp. Sys. v. Sampson, 969 S.W.2d 945, 947 (Tex. 1998). Such liability is based on the principal's right to control the agent's actions to further the principal's objectives. See Wingfoot Enters. v. Alvarado, 111 S.W.3d 134, 146 (Tex. 2003).

[7] It should be noted that the Texas Court has granted summary judgment to BPS, Bishop and Sharp in the 1995 Litigation (Exhibits K, P & R), and the Court severed the claims against BPS and Sharp so these judgments are final

Claimant's potential claims against Peterson and Sharp also fail as a matter of law. As Claimant concedes, Peterson and Sharp provided no professional services to Claimant. POC at 6 ¶ 1. They are merely shareholders of a professional corporation. Under Texas law, shareholders of a professional corporation have limited liability and are not responsible vicariously for the acts of officers or employees of the corporation. Tex. Rev. Civ. Stat. art. 1528e, § 5 ("A shareholder of a professional corporation, as such, shall have no duty to supervise the manner or means whereby the officers or employees of the corporation perform their respective duties."); Tex. Rev. Civ. Stat. Ann. art. 1528e, § 16 (no shareholder liability for professional errors, omissions, negligence, incompetence, or malfeasance of officers, employees or agents of the corporation).

B. Claimant Cannot Relitigate The Preclusive Effect Of The Judgments In The 1991 Litigation As Those Issues Were Decided In Judgments In The 1995 Litigation.

The judgment in the 1995 Litigation precludes Claimant, as a matter of collateral estoppel, from relitigating the preclusive effect of the 1991 Litigation. In the 1995 Litigation, the Texas Court determined that "Final Judgments have been entered in the [1991 Litigation]" and that "[Claimant]'s cause of action for legal malpractice is therefore barred by *res judicata*."[8] *Amended Order* dated June 27, 2006 (Exhibit K). That order rejected Claimant's arguments that the 1991 Litigation was not final and that it did not have preclusive effect as to his malpractice claims. Having litigated this issue to final judgment (see Exhibit O) and lost, Claimant is barred from continuing to challenge the preclusive effect of the 1991 Litigation on his malpractice claims.

(Exhibits O, S). These judgments thus are a separate ground for precluding the malpractice claims against BPS and Sharp. The judgment in favor of Bishop is not final, but, while it may not have preclusive effect, it is persuasive regarding the preclusive effect of the judgment in Bishop's favor in the 1991 Litigation.

[8] Claimant has argued that the court erred in so deciding. See Claimant's Brief ¶ 45-47. Collateral attack on that decision in the liquidation, however, is not the appropriate avenue through which to seek review of the 1995 Litigation. Claimant could have, but did not, appeal to the Texas appellate courts.

"The doctrine of collateral estoppel or issue preclusion is designed to promote judicial efficiency, protect parties from multiple lawsuits, and prevent inconsistent judgments by precluding the relitigation of issues." Sysco Food Serv. v. Trapnell, 890 S.W.2d 796, 801 (Tex. 1994), citing Lytle v. Household Mfg., Inc., 494 U.S. 545, 553 (1990). "A party seeking to assert the bar of collateral estoppel must establish that (1) the facts 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., citing Allen v. McCurry, 449 U.S. 90, 94-95 (1980). "Strict mutuality of parties is no longer required. To satisfy the requirements of due process, 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. (citation and punctuation omitted) (emphasis in original).

Here, the Liquidator asserts the doctrine against Claimant who was a party to the 1995 Litigation. The first element of collateral estoppel is met because the matter Claimant seeks to litigate, the preclusive effect of the 1991 Litigation, is precisely the issue litigated in the 1995 Litigation. See *Amended Order* June 27, 2006 (Exhibit K) (requesting briefing on the finality of the 1991 Litigation and the effects of that litigation on Claimant's malpractice allegations).[9] The second element of collateral estoppel is also met because the Texas Court ruled that "Final Judgments have been entered in the [1991 Litigation]" and that "[Claimant]'s cause of action for legal malpractice is therefore barred by *res judicata*." Id. To reach this judgment it is essential that the District Court have found that the subject matter of the 1991 Litigation involved

[9] Claimant contends that the proceedings between Bishop and Schwartz over distribution of funds were not disclosed to the Texas Court and that this somehow vitiates the June 27, 2006 Amended Order. Claimant's Brief ¶¶ 45-46. This is not correct, as that order specifically refers to the November 1, 1995 and August 30, 1996 filings which Claimant asserts were among those omitted. Compare Claimant's Brief ¶¶ 40, 44 with Exhibit K at 2. Furthermore, Claimant concedes these materials were before the Texas Court when it granted summary judgment to Bishop, thus showing that they were not of consequences. Claimant's Brief ¶ 47.

Claimant's malpractice claims, that those claims were also the subject matter of the 1995 Litigation, and that the 1991 Litigation had finally determined Claimant's malpractice claims on the merits. See Texas Water Rights Comm'n, 582 S.W.2d at 771-72 (describing the elements that a court must find before applying the doctrine of res judicata). The final element of collateral estoppel is met because Claimant was clearly adverse to BPS and the shareholders of BPS because he had brought the action against them seeking damages.

In sum, Claimant has previously litigated the preclusive impact of the 1991 Litigation on any malpractice claims he might assert arising out of that proceeding. Claimant lost on that issue and is therefore precluded from pursuing the matter in the liquidation.

II. CLAIMANT FAILS TO STATE A CLAIM REGARDING THE DEFENSE AFFORDED TO BPS AND ITS SHAREHOLDERS, AND IN ANY EVENT HIS CLAIM HAS NO MERIT.

Claimant has asserted that Home, acting through TPCIGA, has improperly provided BPS and its shareholders with a defense in the actions brought against them by Claimant. Claimant's Proposed Findings, ¶ 67 ("[Claimant] is entitled to recover on his claim that Home, by and through TPCIGA, improperly provided defense counsel to BPS in [the 1995 Litigation]."); see Claimant's Brief ¶ 28 (seeking "damages caused by this tortious interference and tortious abuse of process"). Claimant cannot recover from Home because Home owes him no duty and thus has caused him no legally cognizable harm. Claimant can assert no claim against TPCIGA here because TPCIGA operates independently from the Home liquidation. In any event, the provision of a defense to BPS and its shareholders is proper under the terms of the Policy. Texas law applies to the interpretation of the policy. See Ellis v. Royal Ins. Co., 129 N.H. 326, 330-31 (1987) (in general, the law of the jurisdiction in which the risk is located should govern).

A. Claimant fails to state a claim against Home relating to the improper provision of a defense.

Claimant has no claim against Home for alleged improper provision of a defense because he is not in privity with Home and Home owes him no duty regarding defense of its insured. Claimant is a stranger to the Policy contract between Home and BPS. No provisions of the Policy provide a claimant against Home's insureds with rights under the Policy. See Policy Section F(IV) ("Nothing contained in this policy shall give any person or organization the right to join [Home] as a co-defendant in any action against the Insured to determine the Insured's liability.") (Exhibit B).[10] The absence of any duty to a claimant is especially clear in this case, which involves a challenge to the duty to defend, not the duty to indemnify. "An insurer owes the duty to defend to the insured, not to a third party, even when the policy also covers a third party's claim against that insured." Rx.com Inc. v. Hartford Fire Ins. Co., 364 F.Supp.2d 609, 617 (D. Tex. 2005). Claimant plainly is not a beneficiary of the duty to defend. Where the contractual duty was intended to benefit the insured, but not the claimant, the claimant has no legally recognized interest that would allow it to challenge the provision of a defense. A claimant simply has no interest in how a defendant funds its defense.

In sum, there is no privity between Home and Claimant and no duty running from Home to the Claimant that would allow him to contest Home's provision of a defense. Claimant has cited no authority for his assertion that a plaintiff is injured when a defendant is provided with counsel, and such a rule would give plaintiffs improper leverage by enabling them to seek to deprive the insured of its defense. The federal district court in Texas recognized the absence of

[10] Texas law also explicitly prohibits direct actions by a third party claimant against an insurer regarding the third party plaintiff's disputes with an insured. See Tex. R. Civ. P. 38(c) ("This rule [governing third-party practice] shall not be applied, in tort cases, so as to permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract liable to the person injured or damaged."); Tex. R. Civ. P. 51(b)(same); Angus Chem. Co. v. IMC Fertilizer, Inc., 939 S.W.2d 138, 138 (Tex. 1997) ("In Texas, the general rule (with exceptions not relevant here) is that an injured party cannot sue the tortfeasor's insurer directly until the tortfeasor's liability has been finally determined by agreement or judgment.").

any duty in the ruling that led Claimant to withdraw his federal case against Home and TPCIGA. See *Order* dated April 2, 2009 at 7 ("Bowles has yet . . . to explain why Defendants' provision of a defense to the Insured Law Firm presents any basis for a claim by Bowles – a third party claimant – against them, of what duty Defendants have or had to Bowles."), 10 (Claimant "has not even alleged how he could possibly be in privity with [Home and TPCIGA], such that they owed him a duty of any kind.") (Exhibit W).

The Liquidator notes that Claimant consistently confuses the roles of the Liquidator, Home and TPCIGA. Prior to its liquidation in June 2003, Home provided BPS and Bishop with a defense (which is not an "intervention" in the case as a party).[11] The defense of BPS' shareholders after Home was placed in liquidation was provided by TPCIGA. As a matter of law, Home is not responsible for any decisions regarding that defense because it was independently conducted by TPCIGA pursuant to TPCIGA's statutory obligations. (The Liquidator agrees with TPCIGA's decision to provide a defense for the same reasons Home provided a defense pre-liquidation as described in the following section.)

Once Home was placed in liquidation, the Order of Liquidation ¶¶ (r) - (u) and New Hampshire statutes limited payments from the estate to administration costs, which prevented Home from paying claims or providing a defense under its policies except as distributions on determined claims, which may not be made for years. See RSA 402-C:44 (priorities of distribution); RSA 402-C:46 ("[T]he liquidator shall pay dividends in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims."). Recognizing

[11] The Liquidator notes that if Claimant could assert a claim for improper provision of a defense, and if Home's provision of a defense were somehow wrongful (both of which the Liquidator denies), Claimant's claim would be a pre-liquidation tort claim within Priority Class V, not a claim within the coverage of the Home policy within Priority Class II. See RSA 402-C:44. The Liquidator does not expect the assets of Home to permit any distribution below Priority Class II. In the Matter of Liquidation of Home Ins. Co., 158 N.H. 396, 397 (2009).

the harm that such delayed payments and lack of defenses would cause, state legislatures have created guaranty associations to step in and pay claims and defend actions under insolvent insurers' policies, subject to statutory limitations. See, e.g., RSA 404-B:2; New Hampshire Ins. Guar. Ass'n v. Pitco Frialator, Inc., 142 N.H. 573, 577 (1998). Texas created TPCIGA to "discharge an impaired insurer's policy obligations, including the duty to defend insureds under a liability insurance policy, to the extent that the policy obligation is a covered claim under this chapter." Tex. Ins. Code § 462.306(a). Indeed, the statutes provide for a stay of cases against insureds where an insolvent insurer such as Home had an obligation to defend to allow guaranty associations to take over the defense. See RSA 404-B:18; Tex. Ins. Code § 462.309(a); Order of Liquidation ¶ (y). The guaranty associations in turn have a claim in the insolvent insurer's estate for any defense or indemnity amounts they pay. See RSA 402-C:44, II.

Home is an impaired insurer in Texas. See *Official Order of the Commissioner of Insurance of the State of Texas*, dated June 26, 2003 (Exhibit X). Upon Home's liquidation, the Liquidator transferred the BPS claims file to TPCIGA.[12] TPCIGA then defended the 1995 Litigation pursuant to its independent statutory obligation under Tex. Ins. Code § 462.306(a). As a matter of law Home is not liable for errors, if any, in TPCIGA's determination to provide a defense. [13]

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[12] The Liquidator is required by statute to provide records to TPCIGA. See Texas Ins. Code, § 462.112 ("The receiver or statutory successor of an impaired insurer covered by this chapter shall give the board [of TPCIGA]...: (1) access to the insurer's records as necessary for the board to perform the board's functions under this chapter relating to covered claims.") Claimant therefore has no basis to complain of the Liquidator's shipment of the claim file to TPCIGA following the declaration of insolvency. See Packing Slip dated June 20, 2003 (Exhibit Z).

[13] Claimant's asserted distinction between "potentially covered claims" and "covered claims" is meaningless in the context of the duty to defend. Claimant's Brief ¶ 13. The duty to defend would be a nullity if it only attached after a final determination that the claim is "covered" rather than merely "potentially covered." See Zurich Amer. Ins. Co. v. Nokia, 268 S.W.3d 487, 490 (Tex. 2008) ("An insurer must defend its insured if a plaintiff's factual allegations potentially support a covered claim, while the facts actually established in the underlying suit determine whether the insurer must indemnify its insured."). That is why insurers commonly provide a defense while reserving rights as to coverage (i.e. indemnity).

B. Claimant's Assertions Regarding Coverage Under The Policy Are Erroneous.

Claimant appears to base his claim that it was improper for Home to provide a defense to BPS on assertions that (a) Claimant did not sue BPS until after the policy period, (Claimant's Brief ¶¶ 14-16), (b) Bishop was not an insured during the policy period (Claimant's Proposed Facts, ¶¶ 7, 16, 22, 23), and (c) the intentional acts exclusion bars coverage for BPS. See Claimant's Brief, ¶ 26; Claimant's Proposed Facts, ¶¶ 21 and 65. Even assuming that Claimant had a protected interest that permitted him to raise these arguments, they are incorrect.

First, the fact that Claimant only filed suit against BPS in 1995, after the policy period had ended, does not mean there was no potential coverage and no duty to defend under the Policy. While the Policy is a "claims made" policy rather than an "occurrence" policy, it contains a discovery clause. Under the discovery clause:

> If, during the policy [period]... 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...and if the Insured shall during the policy period... give notice to [Home]... 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.

Policy Section B(III). Bishop provided Home with by letter dated on December 29, 1993 (well before the policy period ended) regarding Claimant's complaints and the possibility that Claimant might assert a malpractice claim. See Exhibit C. Accordingly, when Claimant filed suit against BPS and its shareholders, the action (the 1995 Litigation) was properly "deemed... to have been made during the policy period" and therefore subject to defense under the Policy.

Second, Claimant is incorrect in arguing that Bishop was not an insured under the Policy for purposes of the 1995 Litigation. Claimant asserts that because BPS dissolved "in the summer of 1993" and because Bishop subsequently provided legal services as an individual or on behalf

of "George M. Bishop & Associates", coverage is unavailable. Claimant's Proposed Findings ¶¶ 6-9. Claimant implicitly asserts that dissolution of the firm and failure to notify Home automatically "nullif[ies]" the policy and also erases coverage prior to dissolution. Id. at ¶ 14, 15, 16. This ignores the language of Section A(II) of the Policy, which merely states that such changes "should be reported to [Home] immediately" and that, upon such report Home shall be "given the right to decline to continue coverage or to charge an additional premium therefor." This language grants Home the ability, in its discretion, to decline coverage or charge additional premium. However, the Policy does not require Home to take any action whatsoever, let alone mandate termination, upon a change in the structure or ownership of BPS. Policy Section A(II). A right to "decline to continue coverage" suggests that the default in the event of no action is the continuation of coverage. The Policy was not, therefore, "nullified" by dissolution of BPS.[14]

Finally, Claimant's assertion that the 1995 Litigation was excluded from coverage due to his allegations of "BPS' false and fraudulent professional misconduct as Bowles' legal counsel" (Claimant's Proposed Findings ¶ 39), misreads the policy and ignores a fundamental purpose of professional liability insurance. By its terms, the exclusion on which Claimant relies, Section C(I)(a), does not operate until after a "judgment or final adjudication" in which it is found that the potentially covered actions were undertaken dishonestly or were deliberately wrongful acts. There has been no such judgment here. The requirement of a final adjudication before coverage is excluded reflects a fundamental purpose of professional liability insurance – to provide a defense against malpractice claims. If the insured could be deprived of a defense based on the mere allegations of those bringing suit, the value of liability insurance would be substantially

[14] It would not matter even if certain of Claimant's allegations concerned periods or services not covered under the Policy because "[i]f a complaint potentially includes a covered claim, the insurer must defend the entire suit." Zurich Am. Ins. Co., 268 S.W.3d at 491 citing 14 Couch on Insurance § 200:1 ("Typically, even if only one claim in a complaint containing multiple claims could be covered, the insurer must defend the entire action and the insurer must demonstrate that all the claims of the suit fall outside the policy's coverage to avoid defending the insured.").

reduced. For this reason, it is the general rule – as specified in the express Policy language – that "the dishonest acts exclusion is operative only after the insured's dishonesty or fraud has been established through adjudication." 9A Couch on Insurance 3d § 131:21 at 131-27 (1997).

The provision of a defense to BPS and it shareholders was therefore appropriate and, even if Home were involved, it would not work any legally cognizable harm on Claimant.

CONCLUSION

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

Respectfully submitted,

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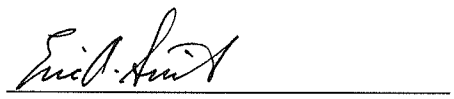

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November 5, 2009

Certificate of Service

I hereby certify that a copy of the foregoing Section 15 Submission, the Liquidator's Exhibits and a Compendium of Non-New Hampshire Authorities Cited was emailed and sent by first class mail to the Claimant on November 5, 2009.

Eric A. Smith