

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 03-E-0106

**In the Matter of the Liquidation of
The Home Insurance Company**

**APPENDIX OF EXHIBITS TO LIQUIDATOR'S OBJECTION TO
CLAIMANT JAMES F. SCHERR'S MOTION TO RECOMMIT**

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

By his attorneys,
MICHAEL A. DELANEY
ATTORNEY GENERAL

J. Christopher Marshall
NH Bar ID No. 1619
Civil Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3650

J. David Leslie
NH Bar ID No. 16859
Eric A. Smith
NH Bar ID No. 16952
Rackemann, Sawyer & Brewster, P.C.
160 Federal Street
Boston, MA 02110-1700
(617) 542-2300

February 2010

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-38
Proof of Claim Number: INSU275827-01
Policy or Contract Number:
Claimant Name: James F. Scherr
Insured or Reinsured Name:
Date of Loss:

Exhibits to Liquidator's Section 15 Submission

Document Exhibit No.
Home Policy No. LPLF8781241
Eighth Amended Original Petition of Dr. Beard et al. in Cause No. 94-03110 in
the 129th Judicial District of Texas2
Third Amended Plea in Intervention of Dr. Gillespie et al. in Cause No. 94-03110
in the 129th Judicial District of Texas3
Letter from Home to Mr. Scherr dated February 2, 19964
Notice of Determination5
Notice of Redetermination6
Proof of Claim of James F. Scherr7
Original Class Action Petition of Dr. LaRock et al.8

Renewal Certificate

Professional Liability Insurance Policy
Attach to your expiring declarations.

Policy Number:

LPL-F878124-1



is a claims made Policy. Please review the Policy carefully.

Policy is limited to liability for only those claims that are first made against the Insured during the policy period.

Insured by the stock company below and hereinafter called the company

THE HOME INSURANCE COMPANY OF INDIANA INDIANAPOLIS, INDIANA

Item 1. Named Insured and Address (Number, Street, Town or City, County, State, Zip Code)

JAMES F. SCHERR L.L.P. James F Scherr, P.C.
~~last H. Joops advised James F Scherr individually~~
109 N. OREGON, SUITE 800
EL PASO EL PASO TX 79901

~~last H. Joops advised James F Scherr individually~~
Discount Legal Services of
Scherr & Legato, P.C. see # 3

Producer Name

DANIELS-HEAD INSURANCE AGENCY INC.

Item 2. Policy Period

From (Day-Mon-Yr)

11-JUN-1993

To (Day-Mon-Yr)

11-JUN-1994

12:01 A.M. Standard Time at the address of the Named Insured as stated herein.

Item 3. Form of Named Insured's Business

Insured is PARTNERSHIP

Those Professionals Listed on the Application.

1.4. Limit of Liability

\$ 200,000

Aggregate \$ 600,000

1.5. Deductible

\$ 5,000

Claim \$

6. Premium

PREMIUM \$11,006.00

NO. OF PROFESSIONALS 3

7. Policy Changes and Endorsements (The endorsements noted below are part of this policy and either became effective at the inception of or during the preceding Policy Period(s), or will become effective at the inception of the Renewal Period.)

- 136581 05/86 LPL POLICY JACKET
- 137530 07/92 CANCEL/NONRENEW
- 137683 10/88 ARBITRATION ENDST
- 137973 07/91 REG ENDORSEMENT
- 140552 05/92 POLICYHOLDER NOTICE

RECEIVED
MAY 27 1993
P.L.U.M.

Box	Remarks	Countersigned at AUSTIN, TX	Issue Date 24-May-1993
		Authorized Representative	Countersign Date 11/23/93

FICI Ed. 10-90

6-11-93 DL

00375

COPY

CF165

Renewal Certificate

LPL-F878124-1

Professional Liability Insurance Policy
Attach to your expiring declarations.

Policy Number:



is a claims made Policy. Please review the Policy carefully.
Policy is limited to liability for only those claims that are first made against the Insured during the policy period.

Insured by the stock company below and hereinafter called the company

THE HOME INSURANCE COMPANY OF INDIANA INDIANAPOLIS, INDIANA

Item 1. Named Insured and Address (Number, Street, Town or City, County, State, Zip Code)
JAMES F. SCHERR L.L.P. James F Scherr, P.C.
~~161 H. Joseph Drive James F Scherr individually~~
 109 N. OREGON, SUITE 800
 EL PASO TX 79901
 EL PASO ✓
 Part of Regal individually +
 Discount legal services of
 Scherr & Legato, P.C. see # 3

Producer Name
DANIELS-HEAD INSURANCE AGENCY INC.

Item 2. Policy Period
 From (Day-Mon-Yr) **11-JUN-1993** To (Day-Mon-Yr) **11-JUN-1994**

12:01 A.M. Standard Time at the address of the Named Insured as stated herein.

Item 3. Form of Named Insured's Business
 Insured is **PARTNERSHIP**

And Those Professionals Listed on the Application.

Item 4. Limit of Liability
 Claim \$ **200,000**
 Aggregate \$ **600,000**

Item 5. Deductible
 Per Claim \$ **5,000**

Item 6. Premium
PREMIUM \$11,006.00

NO. OF PROFESSIONALS **3**

Item 7. Policy Changes and Endorsements (The endorsements noted below are part of this policy and either became effective at the inception of or during the preceding Policy Period(s), or will become effective at the inception of the Renewal Period.)
 H36581 05/86 LPL POLICY JACKET
 H37530 07/92 CANCEL/NONRENEW
 H37683 10/88 ARBITRATION ENDST
 H37973 07/91 REG ENDORSEMENT
 H40552 05/92 POLICYHOLDER NOTICE

RECEIVED
MAY 27 1993
PL.U.M.

Not file in This Box	Remarks	Countersigned at AUSTIN, TX	Issue Date 24-May-1993
		Authorized Representative 11/23/93	Countersign Date 5/15/93

8298F (CI Ed. 10-90)

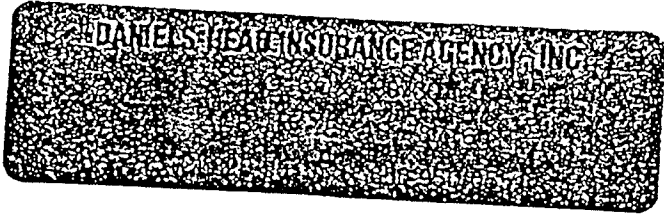
6-11-93

00375

COPY

CF166

Professional Liability Insurance Policy
Lawyers



THE HOME INSURANCE COMPANIES



H36581F Ed. 5-86

CF167

Provisions

(A stock insurance company, hereinafter called the Company)

in consideration of the undertaking of the Named Insured to pay, when due, the premium and the amounts as described herein and in the amounts stated in the Declarations, and in reliance upon the amounts in the application attached hereto and made a part hereof, and subject to the limits of liability stated in the Declarations, and subject to all of the terms of this insurance, the company agrees with the Named Insured as follows:

This is a Claims Made Policy — Please Read Carefully

Section A — Insured

The Insured: The word "Insured," whenever used in this policy, means:

- a) The Named Insured firm or persons named in the Declarations, or any lawyer or professional legal corporation who during the policy period becomes a partner, officer, director or employee of the firm;
- b) any lawyer or professional legal corporation who was a former partner, officer, director or employee of the firm or predecessor firm(s) solely while acting in a professional capacity on behalf of such firms;
- c) any lawyer or professional legal corporation who was a partner, officer, director or employee of the firm or predecessor firm(s) who has retired from the practice of law, but only for the professional services rendered prior to the date of retirement from the Insured firm;
- d) any non-lawyer who was, is now, or hereinafter becomes an employee of the firm or predecessor firm(s) solely while acting within the scope of such person's duties as an employee;
- e) as respects to the liability of each Insured as is otherwise covered herein, the heirs, executors, administrators, assigns and legal representatives of each Insured in the event of death, incapacity or bankruptcy;
- f) any lawyer acting as "of counsel," but only while performing services on behalf of the Insured, any employed lawyer or any other employee.

Firm Changes: Any material change among the partners or stockholders of the Named Insured during the policy period should be reported to the Company immediately, and the Company given the right to decline to continue coverage or to charge an additional premium therefor.

Section B — Coverage

I. Professional Liability and Claims Made Clause:
To pay on behalf of the Insured all sums in excess of the deductible amount stated in the Declarations 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.

It is a condition precedent to coverage under this policy that all claims be reported in compliance with the Section F CLAIMS I. NOTICE OF CLAIMS.

PROVIDED ALWAYS THAT such act, error or omission happens:

- (a) during the policy period; or,
- (b) prior to the policy period, provided that prior to the effective date of the first Lawyers Professional Liability Insurance Policy issued by this Company to the Named Insured or predecessor law firm and continuously renewed and maintained in effect to the inception of this policy period:
 - 1) The Insured did not give notice to any prior insurer of any such act or error, and
 - 2) the Named Insured, any partner, shareholder, employee, or where appropriate the Named Insured's management committee or any member thereof, had no reasonable basis to believe that the Insured had breached a professional duty or to foresee that a claim would be made against the Insured; and
 - 3) there is no prior policy or policies which provide insurance for such liability or claim, unless the available limits of liability of such prior policy or policies are insufficient to pay any liability or claim, in which event this

policy will be excess over any such prior coverage, subject to this policy's terms, limits of liability, exclusions and conditions.

When the Insured renders or fails to render services as an administrator, conservator, receiver, executor, guardian, trustee, or in any similar fiduciary capacity, the Insured's acts and omissions in such capacity shall be deemed for the purpose of this section to be the performance of professional services for others in the Insured's capacity as a lawyer, provided that this coverage shall not apply to any loss sustained by the Insured as the beneficiary or distributee of any trust or estate.

Services performed by the Insured in a lawyer-client relationship on behalf of one or more clients shall be deemed for the purpose of this section to be the performance of professional services for others in the Insured's capacity as a lawyer, although such services could be performed wholly or in part by non-lawyers.

It is a condition precedent to coverage under this policy that all claims be reported in compliance with the Section F CLAIMS I. NOTICE OF CLAIMS.

Claim, whenever used in this policy, means a demand received by the Insured for money or services, including the service of suit or institution of arbitration proceedings against the Insured.

Damages, whenever used in this policy, means a monetary judgement or settlement, including any such judgement or settlement for personal injury, and does not include fines or statutory penalties, or sanctions whether imposed by law or otherwise, nor the return of or restitution of legal fees, costs and expenses.

Predecessor Firms, whenever used in this policy, means any lawyer, law firm or professional legal corporation engaged in the practice of law to whose financial assets and liabilities the firm listed as Named Insured in the Declarations is the majority successor in interest.

Policy Period, whenever used in this policy, means the period from the inception date of this policy to the policy expiration date as set forth in the Declarations or its earlier termination date, if any.

II. Consent to Settle, Defense: With respect to the insurance afforded by this policy, the Company 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 Company shall not settle any claim without the consent of the Insured unless otherwise agreed between the Insured and the

Company. If the Insured shall refuse to consent to any settlement or compromise recommended by the Company and acceptable to the claimant and shall elect to contest the claim or proceeding, then the Company's liability under this policy shall not exceed and shall be limited to the amount for which the claim or proceedings could have been settled or compromised. It is further agreed that the Company may make such investigation of any claim as it deems expedient, but the Company shall not be obligated to pay any claim or judgement or to defend or to continue to defend any claim after the limits of the Company's liability have been exhausted. Thus, when the claims expenses equal the amount for which the case could have been settled or compromised, the Company shall have the right to withdraw from the further investigation and/or defense thereof by tendering control of such investigation or defense to the Insured, and the Insured agrees, as a condition of the issuance of this policy, to accept such tender.

III. Discovery Clause: 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 the Company 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 or the optional Reporting Period purchased hereunder. The Insured shall cooperate fully with the Company as provided in Section F CLAIMS I. and II. and any investigation conducted by the Company or its representatives shall be subject to the terms set forth in this policy.

IV. Options to Extend Claims Reporting Period: If the Named Insured does not renew this policy after complying with all the terms and conditions thereof, including the payment of all premiums and/or deductibles when due, or if the Company shall cancel or refuse to renew the policy for reasons other than the Named Insured's non-payment of premiums and/or deductibles or non-compliance with the terms and conditions of

policy, then the Named Insured upon payment of an additional premium as set forth herein shall have the option to extend the insurance afforded by this policy subject otherwise to its terms, limitations, exclusions and conditions, to apply to CLAIMS FIRST MADE AGAINST THE INSURED DURING (a) 12 MONTHS, (b) 24 MONTHS, or (c) 36 MONTHS, as elected by the Named Insured, following immediately upon the effective date of termination, but only by reason of any act, error or omission in professional services rendered before such effective termination date and otherwise covered by this insurance.

The extension of coverage for claims made subsequent to termination of the policy shall be as endorsed hereto, if purchased, and shall hereinafter be referred to as the OPTIONAL REPORTING PERIOD.

The premium for the optional Reporting Period elected by the Named Insured shall be (a) 100% for 12 MONTHS, (b) 150% for 24 MONTHS, or (c) 185% for 36 MONTHS, of the full annual premium for this policy.

This coverage will be renewable annually at the expiration of the optional Reporting Period at the election of the Insured upon payment of an additional premium determined by the Company in accordance with the rates in effect at each renewal date.

At the commencement of any optional Reporting Period, the entire premium therefor shall be deemed earned, and in the event the Insured terminates the optional Reporting Period before its term for any reason, the Company shall not be liable to return to the Insured any portion of the premium for the optional Reporting Period.

The fact that the period during which claims must be first made against the Insured under this policy is extended by virtue of the optional Reporting Period shall not in any way increase the limits of liability of this policy.

Option to Purchase Non-Practicing Reporting Period: If any Insured retires or otherwise ceases the private practice of law during the policy period, then upon payment of an additional premium as set forth herein, the Insured shall have the option to extend the insurance afforded by this policy to apply to CLAIMS FIRST MADE AGAINST THE INSURED AND REPORTED TO THE COMPANY DURING (a) 12 MONTHS, (b) 24 MONTHS, (c) 36 MONTHS or (d) an unlimited period immediately following the expiration date of this policy as set forth in the Declarations, but only by reason of any act, error or omission in professional services

rendered before the Insured's date of retirement or termination of private practice and otherwise covered by the insurance, PROVIDED there is no other insurance procured on or after the Insured's date of retirement or termination of practice which covers the Insured for such liability or claim. Such other insurance shall render this coverage inapplicable, even though the limits of liability of such other insurance may be inadequate to pay all losses and claim expenses and/or the deductible amount and deductible provisions of such other insurance may be different from those of this policy.

The extension of coverage elected by the Insured for claims made subsequent to the Insured's date of retirement or termination of private practice shall be endorsed hereto, if purchased, and shall hereinafter be referred to as the NON-PRACTICING REPORTING PERIOD.

The premium for the Non-Practicing Reporting Period elected by the Insured shall be (a) 100% for 12 MONTHS, (b) 150% for 24 MONTHS, (c) 185% for 36 MONTHS, or (d) 225% for an unlimited period of the full annual premium for this policy.

The deductible amount and deductible provisions of this policy will be waived with respect to claims first made against the Insured during the Non-Practicing Reporting Period purchased by the Insured.

The limits of liability stated in the Declarations and described in Section E LIMITS OF LIABILITY I. and II. shall not apply to the optional reporting period available herein. The limits of liability stated in the following schedule shall apply to claims first made against the Insured during the Non-Practicing Reporting Period, if purchased and shall apply as described in said schedule.

The limits of liability in effect at the inception of this policy as stated in the Declarations shall be used to compute the limits of liability provided during the Non-Practicing Reporting Period if purchased.

In the event of the death of an Insured or for those Insureds with three consecutive full years of coverage by the Company who become permanently, totally disabled preventing further practice of an Insured as defined by item (a) in Section A INSURED I. THE INSURED, such Insured shall be entitled, at no additional premium, to a Non-Practicing Reporting Period for all claims first made after the termination of the policy period arising out of any act, error or omission occurring prior to the termination of the policy period and otherwise covered by this policy. However, those

identified by items (b) thru (l) of Section A INSURED I. THE INSURED are specifically excluded from exercising this option.

"Totally and permanently disabled" means that the Insured has become so disabled as to be wholly prevented from rendering professional services for others in the capacity as a lawyer or notary public provided that such disability:

- A. has existed continuously for not less than 6 months; and
- B. is expected to be continuous and permanent.

"Totally and permanently disabled" shall not include any condition which:

- A. is a result of war or acts of war, whether or not declared;
- B. occurred during active service in the armed forces of any country; or
- C. results from:
 - 1. intentionally self-inflicted injuries;
 - 2. actual or attempted suicide, whether or not sane; or

- 3. the abuse or misuse of addictive chemical compounds or alcohol.

If the Insured exercises the Non-Practicing Reporting Period option:

(a) The liability of the Company for each claim FIRST MADE AGAINST THE INSURED DURING THE NON-PRACTICING REPORTING PERIOD purchased by the Insured shall not exceed the amount(s) stated in the applicable schedule for "each claim"; and

(b) Subject to the limits of liability for "each claim," the liability of the Company for all claims FIRST MADE AGAINST THE INSURED DURING THE POLICY PERIOD INCLUDING THE NON-PRACTICING REPORTING PERIOD shall not exceed the amount(s) stated in the schedule below as "policy aggregate."

If any "aggregate" or "policy aggregate" limit of liability becomes exhausted by payment of claims expenses, judgments and/or settlements, this policy, including the Non-Practicing Reporting Period, may be cancelled by the Company. The Company also shall not be obligated to defend or continue to defend any claim for which the applicable "aggregate" or "policy aggregate" has been exhausted by payment of claims expenses, judgments or settlements.

V (SCHEDULE)

- 1. \$100,000 each claim/\$300,000 aggregate, then Column I of the following schedule applies.
- 2. \$200,000 each claim/\$600,000 aggregate, then Column II of the following schedule applies.
- 3. Other than those indicated in I or II, then such limits as shown in the Declarations shall also apply during the total Non-Practicing Reporting Period purchased and the "aggregate" limit shall be deemed the "policy aggregate" as referred to in subparagraph (b) above.

Effective as of
and applicable to
**CLAIMS FIRST MADE
AGAINST THE INSURED DURING**

	I	II
A. Each Claim:	\$100,000	\$ 200,000
Policy Aggregate:	300,000	600,000
B. Each Claim:	110,000	220,000
Policy Aggregate:	350,000	600,000
C. Each Claim:	120,000	240,000
Policy Aggregate:	400,000	600,000
D. Each Claim:	130,000	260,000
Policy Aggregate:	500,000	600,000
Each Claim:	140,000	280,000
Policy Aggregate:	500,000	600,000

First 12 month period immediately following expiration, if a 12 month extension is purchased;

Second 12 month period immediately following expiration, if a 24 month extension is purchased (Also subject to A);

Third 12 month period immediately following expiration, if a 36 month extension is purchased (Also subject to A and B);

Fourth 12 month period immediately following expiration;

and thereafter, if the unlimited extension is purchased (Also subject to A, B and C).

1. **Exercising The Options:** As a condition precedent to the Insured's right to exercise these options, the full annual premium of this policy and any deductibles that are due must have been paid. For the Optional Reporting Period nor the Practicing Reporting Period shall be available when any Insured's license or right to practice his profession is revoked, suspended by or surrendered at the request of any regulatory authority.

The Insured's right to purchase any extension option must be exercised by notice in writing not later than thirty (30) days after the cancellation or termination date of this policy. Effective notice must indicate the total extension period desired **AND MUST INCLUDE PAYMENT OF PREMIUM OR SUCH EXTENSION PERIOD** as well as all deductibles due the Company.

If such notice, premium and deductible payment are not so given to the Company, the Insured shall not at a later date be able to exercise such rights.

Section C — Exclusions

This policy does not apply:

(a) to any judgement 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;

(b) to any claim made by or against any business enterprise not named in the Declarations which is owned by the Insured or in which the Insured is a partner or employee, or which is controlled, operated or managed by the Insured, either individually or in a fiduciary capacity, including the ownership, maintenance or use of any property in connection therewith, or to any claim made against the Insured solely because the Insured is a partner, officer, director, stockholder employee or employee of any firm or corporation not named in the Declarations;

(c) to liability arising out of the Insured's services and/or capacity as:

1) an officer, director, partner, trustee, or employee of a business enterprise or charitable organization or pension, welfare, profit sharing, mutual or investment fund or trust;

2) a public official, or an employee of a governmental body, subdivision, or agency;

3) a fiduciary under the Employee Retirement Income Security Act of 1974 and its amendments or any regulation or order issued pursuant thereto, except if an Insured is deemed to be a fiduciary solely by reason of legal advice rendered with respect to an employee benefit plan;

(d) to any liability for bodily injury, sickness, disease or death of any person, or injury to or destruction of any tangible property or loss of use resulting therefrom;

(e) to any claims arising out of notarized certification or acknowledgement of a signature without the physical appearance before such notary public as Insured hereunder of the person who is or claims to be the person signing said instrument;

(f) to any claim made by a present, former or prospective partner, officer, director, stockholder employee or employee of the Insured unless such claim arises out of the professional services of the Insured in a lawyer-client relationship except as otherwise excluded under Exclusion (h);

(g) to any claim based upon or arising out of discrimination by the Insured on the basis of race, creed, age, sex or marital status;

(h) to any claim based upon or arising out of the work performed by the Insured, with or without compensation, with respect to any corporation, fund, trust, association, partnership, limited partnership, business enterprise or other venture, be it charitable or otherwise, of any kind or nature in which any Insured has any pecuniary or beneficial interest, irrespective of whether or not an attorney-client relationship exists, unless such entity is named in the Declarations. For purposes of this policy, ownership or shares in a corporation shall not be considered a "pecuniary or beneficial interest" unless one Named Insured or members of the immediate family of the Named Insured own(s) 10% of the issued and outstanding shares of such corporation;

(i) to any claim for property damage arising out of Insured's act, error or omission while acting as attorney, officer, director, partner, trustee or employee of a business enterprise which is liable or may be held liable for the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon

land, the atmosphere or any water course or body of water.

II. Waiver of Exclusion and Breach of Conditions: Whenever coverage under any provision of this policy would be excluded, suspended or lost

(a) because of exclusion (a) relating to any judgment or final adjudication based upon or arising out of any dishonest, deliberately fraudulent, criminal, malicious or deliberately wrongful acts or omissions by any Insured, or

(b) because of noncompliance with Section F CLAIMS I. NOTICE OF CLAIMS relating to the giving of notice to the Company with respect to which any other Insured shall be in default solely because of the default or concealment of such default by one or more partners or employees responsible for the loss or damage otherwise insured hereunder,

the Company agrees that such insurance as would otherwise be afforded under this policy shall apply with respect to each and every Insured who did not personally commit or personally participate in committing one or more of the acts, errors or omissions described in any such exclusion or condition; provided that if the condition be one with which such Insured can comply, after receiving knowledge thereof, the Insured entitled to the benefit of the Waiver of Exclusions and Breach of Conditions shall comply with such condition promptly after obtaining knowledge of the failure of any other Insured or employee to comply therewith. However, related acts, errors or omissions shall be treated as a single claim, and suits brought by more than one person or organization shall not operate to increase the Company's limit of liability.

With respect to provision II. (a) above, the Company's obligation to pay in the event of such waiver shall be in excess of the deductible and in the excess of the full extent of any assets in the firm of any Insured who is not a beneficiary to the waiver.

Section D — Territory

The insurance afforded applies worldwide.

Section E — Limits of Liability

I. Limits of Liability — Each Claim: The liability of the Company for each claim FIRST MADE AGAINST THE INSURED AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD, including the Optional Reporting Period, if such is purchased, shall not exceed the amount stated in the Declaration for each claim, and shall include

all claim expenses. If the limits of liability are exhausted prior to settlement or judgment of any pending claim or suit, the Company shall have the right to withdraw from the further investigation or defense thereof by tendering control of such investigation or defense to the Insured, and the Insured agrees, as a condition to the issuance of this policy, to accept such tender.

II. Limits of Liability/Aggregate: Subject to Section E I. LIMITS OF LIABILITY — EACH CLAIM, the liability of the Company shall not exceed the amount stated in the Declarations as aggregate as a result of all claims FIRST MADE AGAINST THE INSURED AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD including the Optional Reporting Period, if such is purchased.

III. Deductible: The deductible amount stated in the Declarations shall be paid by the Named Insured and shall be applicable to all damages and claim expenses, for each and every claim, whether or not loss payment is made for claims first made during the policy period. The deductible shall be deemed to be applied first to the damages and/or claim expenses.

If the Optional Reporting Period is purchased, the deductible will be applicable in the full amount shown in the Declarations and shall be applicable to all damages and claim expenses, for each and every claim whether or not loss payment is made, for all claims first made during the Optional Reporting Period.

Such amounts shall upon written demand by the Company be paid by the Named Insured within thirty (30) days regardless of the number of claims first made during the policy period.

The determination of the Company as to the reasonableness of the claim expenses shall be conclusive on the Named Insured.

IV. Multiple Insureds, Claims and Claimants: The inclusion herein of more than one Insured or the making of claims or the bringing of suits by more than one person or organization shall not operate to increase the Company's limit of liability. Related acts, errors or omissions shall be treated as a single claim. All such claims, whenever made, shall be considered first made during the policy period or optional Reporting Period in which the earliest claim arising out of such act, error or omission was first made, and all such claims shall be subject to the same limits of liability.

V. Payment and Apportionment of Claim Expenses: All claim expenses shall first be

contracted from the limit of liability with the remainder, if any, being the amount available to pay as damages. If the limits of liability are exhausted prior to settlement or judgment of any pending claim or suit, the Company shall have the right to withdraw from the further investigation or defense thereof by tendering control of such investigation or defense to the Insured, and the Insured agrees, as a condition to the issuance of this policy, to accept such tender.

claim expenses, whenever used in this policy, means:

(a) fees charged by any lawyer designated by the Company;

(b) all other fees, costs and expenses resulting from the investigation, adjustment, defense and appeal of a claim, if incurred by the Company.

However, "claim expenses" does not include salary charges of regular employees or of the officials of the Company or any supervisory counsel retained by the Company.

Section F — Claims

Notice of Claims: As a condition precedent to the right to the protection afforded by this insurance, the Insured shall, as soon as practicable, give to the Company written notice of any claim made against the Insured.

In the event suit is brought against the Insured, the Insured shall immediately forward to the Company every demand notice, summons or other process received directly or by the Insured's representatives.

Assistance and Cooperation of the Insured: The Insured shall cooperate with the Company and upon the Company's request shall submit to examination and interrogation by a representative of the Company, under oath if required, and shall attend hearings, depositions and trials, and shall assist in effecting settlement, securing and giving evidence, obtaining the attendance of witnesses, and in the conduct of suits, as well as in the giving of a written statement or statements to the Company's representatives and meeting with such representatives for the purpose of investigation and/or defense, all without charge to the Insured. The Insured shall further cooperate with the Company and do whatever is necessary to secure and effect any rights of indemnity, contribution or apportionment which the Insured may have. The Insured shall exercise the Insured's right to either reject or demand the arbitration of any claim made against the Insured in accordance with the written instructions of the

Company. The Insured shall not, except at the Insured's own cost, make any payment, admit any liability, settle any claims, assume any obligation or incur any expense without the written consent of the Company.

III. Subrogation: In the event of any payment under this policy, the Company shall be subrogated to all the Insured's rights of recovery therefor against any person or organization, and the Insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Insured shall do nothing to prejudice such rights.

The Company shall not exercise any such rights against any persons, firms or corporations included in the definition of Insured. Notwithstanding the foregoing, however, the Company reserves the right to exercise any rights of subrogation against an Insured with respect to any claim brought about or contributed to by the intentional, dishonest, fraudulent, criminal or malicious act or omission of such Insured.

Any amount so recovered shall be apportioned as follows:

Any recovery shall first be used for the repayment of expenses incurred toward subrogation; second, to loss and/or claim expenses paid by the Company; third, to any loss and expense payment by the Insured in excess of any deductible(s); fourth, to any loss and expense payments by an excess carrier on behalf of the Insured; fifth, to any loss and expense payments by any primary carrier on behalf of the Insured; and last, to repayment of the Insured's deductible.

IV. Action Against the Company: No action shall lie against the Company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this policy, nor until the amount of the Insured's obligation to pay shall have been fully and finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the Claimant and the Company.

Nothing contained in this policy shall give any person or organization the right to join the Company as a co-defendant in any action against the Insured to determine the Insured's liability. Bankruptcy or insolvency of the Insured or of the Insured's estate shall not relieve the Company of any of its obligations hereunder.

V. False or Fraudulent Claims: If any Insured shall commit fraud in proffering any claim as regards

amount or otherwise, this insurance shall become void as to such Insured from the date such fraudulent claim is proffered.

Section G — Conditions

I. Application: By acceptance of this policy, the Insured agrees that the statements in the application are personal representations, that they shall be deemed material and that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between the Insured and the Company, or any of its agents, relating to this insurance.

II. Other Insurance: Subject to the limitation of coverage as set forth in Section B COVERAGE I. (b) for prior insurance, and Section B COVERAGE V. for insurance procured subsequent to termination of practice, this insurance shall be in excess of the amount of the applicable deductible of this policy and any other valid and collectible insurance available to the Insured whether such other insurance is stated to be primary, pro rata, contributory, excess, contingent or otherwise, unless such other insurance is written only as a specific excess insurance over the limits of liability provided in the policy.

III. Changes: Notice to any agent or knowledge possessed by any agent or other person acting on behalf of the Company shall not affect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of the policy, nor shall the terms of the policy be waived or changed, except by written endorsement issued to form a part of this policy.

IV. Assignment: Assignment of interest under this policy shall not bind the Company unless its consent is endorsed in writing hereon.

V. Cancellations: This policy may be cancelled by the Named Insured by surrender thereof to the

Company or by mailing to the Company written notice stating when thereafter such cancellation shall be effective. If cancelled by the Insured, the Company shall retain the customary short rate proportion of the premium.

This policy may be cancelled by the Company by mailing to the Named Insured in the Declarations written notice stating when, not less than thirty (30) days thereafter, such cancellation shall be effective. Such notice shall be conclusive on all Named Insureds.

However, if the Company cancels the policy because the Insured has failed to pay a premium or deductible when due, this policy may be cancelled by the Company by mailing a written notice of cancellation to the Insured stating when not less than ten (10) days thereafter such cancellation shall be effective. The mailing of notice as aforementioned shall be sufficient notice and the effective date of cancellation stated in any notices shall become the end of the policy period. Delivery of such written notice by the Named Insured or the Company shall be the equivalent to mailing.

If cancelled by the Company, earned premium shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected or as soon as practicable thereafter.

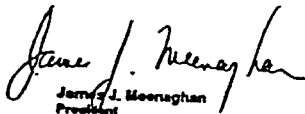
Definitions-Reference

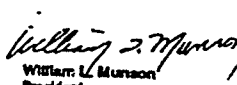
Certain words are specifically defined for the policy and the definitions are to be found in the sections set forth below:

(a) Claim, damages, policy period — see Section B COVERAGE I.


(b) Claim expenses — see Section E LIMITS OF LIABILITY V.


IN WITNESS WHEREOF, the Company has caused this policy to be executed and attested, but this policy shall not be valid unless countersigned by a duly authorized representative of the Company.


James J. Meenaghan
President
THE HOME INSURANCE COMPANY
OF WISCONSIN


William L. Munson
President
THE HOME INDEMNITY COMPANY


F.A. Mina
President
CITY INSURANCE COMPANY


Arthur Phillips
President
THE HOME INSURANCE COMPANY
OF INDIANA
THE HOME INSURANCE COMPANY
OF ILLINOIS


Roger M. Moak
Corporate Secretary
THE HOME INSURANCE COMPANY
THE HOME INDEMNITY COMPANY
CITY INSURANCE COMPANY
THE HOME INSURANCE COMPANY
OF INDIANA
THE HOME INSURANCE COMPANY
OF ILLINOIS
THE HOME INSURANCE COMPANY
OF WISCONSIN

**Nuclear Energy Liability
Exclusion Endorsement (BROAD FORM)**

This endorsement modifies the provisions of this policy.

It is agreed that:

This policy does not apply:

(A) Under any Liability Coverage, to bodily injury or property damage

1) with respect to which an Insured under this Policy is also an Insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an Insured under any such policy but for its termination upon exhaustion of its limit of liability; or

2) resulting from the hazardous properties of nuclear material and with respect to which (a) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (b) the Insured is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

Under any Medical Payments Coverage, or any Supplementary Payments provision relating to first aid, to expenses incurred with respect to bodily injury resulting from the hazardous properties of nuclear material and arising out of the operation of a nuclear facility by any person or organization.

(C) Under any Liability Coverage, to bodily injury or property damage resulting from the hazardous properties of nuclear material, if

1) the nuclear material (a) is at any nuclear facility owned by, or operated by or on behalf of an Insured or (b) has been discharged or dispersed therefrom;

2) the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an Insured; or

3) the bodily injury or property damage arises out of the furnishing by an Insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, but if

such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (3) applies only to property damage to such nuclear facility and any property thereat.

II. As used in this endorsement:

"hazardous properties" include radioactive, toxic or explosive properties;

"nuclear material" means source material, special nuclear material or by-product material;

"source material", "special nuclear material", and "by-product material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof;

"spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a nuclear reactor;

"waste" means any waste material (1) containing by-product material and (2) resulting from the operation by any person or organization of any nuclear facility included within the definition of nuclear facility under paragraph (a) or (b) thereof;

"nuclear facility" means

(a) any nuclear reactor,

(b) any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing spent fuel, or (3) handling, processing or packaging waste,

(c) any equipment or device used for the processing, fabricating or alloying of special nuclear material if at any time the total amount of such material in the custody of the Insured at the premises where such equipment or device is located consists of or contains more than twenty-five (25) grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235,

(d) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste,

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations;

"nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;

"property damage" includes all forms of radioactive contamination of property.

ENTERED *Adrian*
RECEIVED

CAUSE NO. 94-03110

BEN BEARD, DAVID BAILEY and
DAN PETROSKY,

Plaintiffs,

v.

JAMES FRANKLIN SCHERR, NOEL
GAGE and GAGE, BEACH & AGER,

Defendants.

AND

JAMES F. SCHERR

Counter-Plaintiff,

v.

BEN BEARD, DAVID BAILEY and
DAN PETROSKY

Counter-Defendants,

and

MARJORIE GEORGES and
JONES & GEORGES, P.C.

Third Party Defendants.

NOEL A. GAGE

Counter Plaintiff

vs.

BEN BEARD, DAVID BAILEY, AND
DAN PETROSKY

Counter Defendants

and

MARJORIE GEORGES, LUTHER JONES
AND JONES & GEORGES,

Third Party Defendants

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
129TH JUDICIAL DISTRICT

EXHIBIT
36
DELGADO-Byrdme.N.J

PLAINTIFFS' EIGHTH AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Ben Beard, David Bailey, and Dan Petrosky, Plaintiffs, and file this their

~~PLAINTIFF SEVENTH AMENDED PETITION (11/13/02)~~

Seventh Amended Original Petition against James Scherr, Noel Gage, and Gage, Beach and Ager, Defendants and Third Party Defendants Marjorie Georges, Luther Jones and Jones & Georges and file this their Answer to all Third Party Claims of James Franklin Scherr, Noel A. Gage and Gage Beach & Ager and in support thereof would respectfully present the following:

PARTIES

1. Ben Beard is an individual residing in Houston, Texas and David Bailey is an individual residing in College Station, Texas. Dan Petrosky is an individual residing in El Paso, Texas. Defendant James Scherr is an attorney who has previously been served in this case and has filed an answer. Noel Gage is an attorney who has previously been served and who has filed an answer and Gage, Beach & Ager is a partnership which also has been served and has filed an answer. Third Party Defendants Marjorie Georges, Luther Jones and Jones & Georges are all residents of El Paso County, Texas.

VENUE

2. Plaintiff's action against Defendants is properly maintainable in the county of suit for the following reasons: Negotiations that formed the basis of the contract between Ben Beard and Defendant Scherr occurred in Harris County, Texas. Therefore, venue is appropriate in Harris County.

FACTS

3. Defendants are attorneys licensed to practice law in the State of Texas. Defendant James Scherr entered into Contingency fee contracts to represent Plaintiffs in certain causes of action against numerous insurance companies enumerated in Cause No. 88-7707, *Dr. Walter Rhodes et al v. American General Fire and Casualty Company et al* in the 243rd Judicial

~~PLAINTIFFS SEVENTH AMENDED PETITION (11/23/02)~~

Page 1

District Court of El Paso County, Texas, hereinafter referred to as "Cause No. 88-7707".
 Defendant Scherr entered into an agreement with Defendant Gage, and his law firm Defendant Gage, Beach & Ager, to assist him in representing Plaintiffs. During the course of representing the Plaintiff, Defendants failed to properly account for monies collected by Defendants on behalf of the Plaintiffs and favored specific other clients at the expense of Plaintiffs. Further, it is believed by Plaintiffs that Defendants wrongfully appropriated, for the benefit of Defendants, certain funds collected on behalf of Plaintiffs. More specifically, and in response to special exceptions of defendant James Franklin Scherr, Plaintiffs allege the following facts: 1) in violation of the agreement of the plaintiffs in Cause No. 88-7707 that all funds recovered would be divided equally among the various Plaintiffs therein, Defendants paid over to William LaRock

Respectfully submitted,

Jones & Georges, P.C.
 303 Texas Avenue, Ste. 800
 El Paso, TX 79901
 (915)534-0040
 Fax: 534-0055

By: _____

Martie Georges

State Bar No. 21453075

Attorney for and Joseph Superville a share

~~PLAINTIFFS SEVENTH AMENDED PETITION (88-7707)~~

Page 3

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 PAGE 31

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greater than they were entitled to receive pursuant to said agreement; 2) in violation of his contingent fee contract with the Plaintiffs in Cause No. 88-7707, Defendants paid to themselves legal fees in the amount of \$42,667.75, a sum in excess of that authorized by the contingent fee contract executed between James Franklin Scherr and the Plaintiffs; 3) in violation of the contingent fee contract between James Franklin Scherr and the Plaintiffs herein, Defendants paid to themselves one hundred percent of all monies recovered in a settlement negotiated with one particular insurance company; 4) Defendants are currently wrongfully withholding disbursement of funds recovered in settlements in the amounts of \$75,000.00 and \$95,000.00, the pretext for which is a claim for expenses which defendants have failed to validate or document in spite of repeated requests that they provide proper documentation.

4. Defendants intentionally defrauded Plaintiffs by causing them to become plaintiffs in the Class Action lawsuit upon the false representation that its prosecution would lead to an end of the discriminatory practices of various insurance companies and further by failing to inform the Plaintiffs of their relationship with two Co-Plaintiff class representatives -- LaRock and Superville -- in Cause No. 88-7707.

BREACH OF FIDUCIARY DUTY

5. In addition to the negligence committed by Defendants in Cause No. 88-7707, Defendants jointly and severally breached their fiduciary duty to Plaintiffs in one or more of the following respects:

- (1) in failing to promptly and accurately account for settlement proceeds;
- (2) in failing to promptly deliver collected settlement proceeds;
- (3) in failing to provide Plaintiffs with an accurate account of claimed expenses;

~~PLAINTIFFS (MAY 19 1997) (MAY 19 1997) (MAY 19 1997)~~

- (4) in failing to provide Plaintiffs with accurate information concerning one or more settlement negotiations; and
- (5) in favoring one client to the detriment of and against the interests of Plaintiffs.
- (6) in violating the contingency fee contract by taking more in attorneys fees than allowed.
- (7) in placing the interests of Cause No. 88-7707 Co-Plaintiffs' Dr. LaRock and Dr. Superville ahead of the interests of Plaintiffs and other members of the class.
- (8) in placing the their own interests ahead of the interests of Plaintiffs and other members of the class.

In response to Defendant Gage, and Gage, Beach & Ager's Special Exceptions to this paragraph, Plaintiffs assert the following specific acts of conduct. Defendants Gage failed to inform Plaintiffs that he had a special relationship with LaRock and Superville. More specifically, Defendant Gage failed to inform the Plaintiffs that he served in a special corporate counsel relationship to Coronado Chiropractic Clinic, that he was engaged in extensive litigation involving Coronado Chiropractic including defense of a suit by the Attorney General of Texas alleging deceptive trade practices and fraud against LaRock and Superville, that he was representing the clinic in at least a dozen other causes of action both offensive and defensive; that he was counsel for LaRock and Superville in a cause of action against other members of the putative class; that his principal purpose in participating in the class action litigation was collection of unpaid charges claimed by Coronado Chiropractic; that he communicated on a regular basis with LaRock and Superville but not with other members of the class; or that he was the recipient of referrals of legal business from Coronado Chiropractic.

In further response to the special exceptions of Gage and Gage, Beach & Ager, Plaintiffs assert that Defendants principal motivation in pursuing the alleged class action lawsuit was collection of unpaid bills of their client LaRock and Superville to the end of enriching themselves at the expense of the uncertified class; and further that Defendants at no time prosecuted the class action for the purpose of achieving the goals which they promised Plaintiffs would be accomplished.

~~PLAINTIFFS' MOTION FOR APPOINTMENT OF RECEIVERS (88-2326)~~ Page 3

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As a consequence of the aforementioned breaches of their fiduciary duties, defendants, jointly and severally caused Plaintiffs to suffer actual damages and have unjustly enriched themselves.

In connection with the allegations of negligence contained in this paragraph, Plaintiffs specifically plead the following specific acts of negligence:

(1) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs and members of the putative class in that they assigned the principal responsibility for the management of the class to an attorney who admitted under oath that she had no experience in this type of litigation;

(2) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in that failing to keep them adequately informed of the progress of the litigation;

(3) Defendant Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in that they negotiated settlements that did not achieve the stated purposes of the litigation;

(4) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in that they did not adequately prepare them for their respective depositions;

(5) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in failing to exhaust their administrative remedies prior to commencement of the litigation;

(6) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in that they never conducted a hearing for the purposes of certification; and

(7) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in failing to maintain records required by the Texas Rules of Civil Procedure in class action litigation;

(8) Defendants Scherr and Gage were negligent breached their fiduciary duty to Plaintiffs in failing to inform the named members of the class of the legal consequences of the settlements they negotiated;

PLAINTIFFS' SEVENTH AMENDED PETITION (2002-11-14)

Page 8

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(9) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in failing to acknowledge and respond to objections made by various class members to the settlements that were being negotiated;

(10) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in undertaking a class action of the nature envisioned in Cause No. 88-7707 when they did not have adequate financial capacity to maintain the class action; and

(11) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in obtaining the participation of Ben Beard, David Bailey and Dan Petrosky upon the false pretext of what the class action would accomplish and that their principal clients LaRock and Superville would advance \$100,000.00 of the initial costs.

ACTUAL AND CONSTRUCTIVE FRAUD

6. Defendants committed fraud against the Plaintiffs by collecting more attorneys fees than those to which they were entitled under the terms of the contingency fee contract. Further Defendants fraudulently misrepresented their intentions in filing Cause No. 88-7707 as indicated in paragraph IV above. Defendants also fraudulently concealed their true relationship with two of the other class representatives.

7. During the time Plaintiff's were represented by Defendants in Cause No. 88-7707, Defendants knowingly concealed their special relationship with class members LaRock and Superville to the detriment of the Plaintiffs in this cause. Had Plaintiffs known of the special relationship they would not have engaged themselves as Plaintiffs in Cause 88-7707 nor would they have executed the contingency fee contract with Defendant James Franklin Scherr.

8. Defendants knowingly made false representations as to material facts to Plaintiffs with

~~PLAINTIFFS SEVENTH AMENDED PETITION (8/15/04)~~

the intent of inducing Plaintiffs to enter the contingency fee contract and to participate in Cause No. 88-7707. Defendants knowingly made the following representations:

1. That Defendants intended to represent the class of all Texas Chiropractors for the benefit of all Texas Chiropractors in Cause No. 88-7707, instead of the sole benefit of Dr. LaRock and Dr. Supervilla, two Co-Plaintiffs in 88-7707;

2. That any proceeds from Cause No. 88-7707 would be divided by the Court in Cause No. 88-7707 and would be divided equally amongst the Plaintiffs.

9. Plaintiffs would not have entered into the contingency fee contract with Defendants on Cause No. 88-7707 had they known the falsity of the above representations. Plaintiffs relied on the misrepresentations to their substantial injury and damage.

10. By reason of Plaintiffs reliance upon Defendants' representations, Plaintiffs have been damaged in an amount in excess of the minimum jurisdiction of the Court.

11. Defendants breached the above stated fiduciary duties owed to Plaintiffs as a result of the Attorney Client relationship and as such committed constructive fraud as well as actual fraud upon Plaintiffs. In Response to Special Exceptions of Gage and Gage, Beach & Ager, Plaintiffs herein assert specific acts of conduct.

Defendant Gage and Gage, Beach & Ager

(1) Defendants Gage and Gage, Beach & Ager acted fraudulently in failing to reveal to Plaintiffs herein their special relationship with LaRock and Supervilla;

(2) Defendants Gage and Gage, Beach & Ager acted fraudulently in claiming expenses that were not incurred or not authenticated;

PLAINTIFFS' REPORT & ALLEGED VERDICT (11/2/02)

Page 8

(3) Defendants Gage and Gage, Beach & Ager acted fraudulently in accepting fees in excess of those contracted for by James Franklin Scherr;

(4) Defendants Gage and Gage, Beach & Ager committed fraud by informing Plaintiffs that the settlements being negotiated were consistent with the stated purposes of the lawsuit;

(5) Defendants Gage and Gage, Beach & Ager committed fraud when they filed a claim on behalf of LaRock and Superville against two members of the putative class; and

(6) Defendant Gage and Gage, Beach & Ager committed fraud when they negotiated settlements in disregard of objections imposed by members of the class.

12. Plaintiffs have suffered actual damages as a result of these acts.

13. Defendants knew that the representations, cited specifically elsewhere in these pleadings - specifically in Paragraphs 5 and 11, were false when they made them and thus the representations were willful and malicious and constitute conduct for which the law allows exemplary damages. In this connection, Plaintiffs will show that they have incurred significant expenses, including attorneys fees in the investigation and prosecution of this action. Accordingly, Plaintiffs request the award of exemplary damages against defendants in an amount of not less than \$3,000,000.00.

CONVERSION

14. Defendant James Franklin Scherr has appropriated and/or is attempting to appropriate as expenses substantial sums of money collected on behalf of plaintiffs -- more specifically the sums of \$86,500.00, \$30,000.00, \$75,000.00 and \$95,000.00 all received in separate settlements in Cause No. 88-7707 -- expenses for which there is either no accounting or

~~CAUTION: EVERYTHING ABOVE THIS LINE IS UNRECORDED~~

inadequate accounting. Each Defendants has wrongfully converted all sums presently or previously claimed as expenses in Cause No. 88-7707, and accordingly, Plaintiffs seek a judgment of this Court denying defendants claims for expenses in Cause No. 88-7707.

ACTION TO VOID CONTRACT

15. Because of the various acts of misconduct and/or negligence previously stated herein, Plaintiffs seek a judgment of this court that the contingency fee contracts executed in connection with Cause No. 88-7707, be declared null and void ab initio and also be declared as against the public policy of this State, and that the lien of Defendants' Scherr and Gage against the \$200,000.00 in the registry of the Court be extinguished.

EXEMPLARY DAMAGES

16. Defendants' conduct as described above was intentional, egregious, wanton and malicious with a flagrant disregard for the rights of Plaintiffs. Therefore, Plaintiffs request that the Court assess punitive damages against Defendants.

PREJUDGMENT INTEREST

Plaintiffs would show that they are entitled to recover prejudgment interest in this cause and specifically plead for prejudgment interest recovery.

GENERAL DENIAL

Third Party Defendants Marjorie Georges, Luther Jones and Jones & Georges deny each and every third party claim asserted by Noel A. Gage or Gage, Beach & Ager, and demand strict proof thereof. Third Party Defendants Marjorie Georges and Jones & Georges deny each and every third party claim asserted by James Franklin Scherr.

~~PLAINTIFFS SEVERAL AMENDED PETITION (01/23/03)~~

AFFIRMATIVE DEFENSE

Third-Party Defendants Marjorie Georges, Luther Jones and Jones & Georges, and counter-defendant Ben Beard each were legally justified in engaging in the conduct Counter-Plaintiff James Franklin Scherr charges is the basis of their tortious interference with his contract for legal services with David Bailey and Dan Petrosky and/or civil conspiracy to deprive him of his fees, services, and expenses in that said conduct was legally justified.

Plaintiffs plead the *DISCOVERY RULE* in connection with defendants affirmative defense of *Statute of Limitations*. Plaintiffs assert that the limitations defense is meritless in that the statute does not begin to run until the attorney client relationship is terminated or until the litigation in which the attorney client relationship existed is terminated. *Hughes v. Mahoney and Higgins*, 821 S.W.2d 154, 157 (Tex. 1991). *Willis v. Maverick*, 760 S.W.2d 642 (Tex. 1988)

EQUITABLE ESTOPPEL

(Doanaco's 70.164)

DENIAL OF SWORN ACCOUNT

Plaintiffs specially deny each and every item in defendant James Franklin Scherr's sworn account, and demands strict proof of all items in the account. In denying this sworn account Defendants further plead that defendant James Franklin Scherr has forfeited all right to compensation based upon his contingency fee contract with Plaintiffs for the reason that James Franklin Scherr is guilty of fraud, breach of fiduciary duty and conversion of client funds, the factual basis for which can be found in Paragraphs 5 and 11 herein. Plaintiffs further deny Scherr's sworn account for the reason that said account is in nearly all respects fraudulent, defendant James Franklin Scherr having fabricated all or nearly all of the expenses contained

PLAINTIFFS REQUEST ADDITIONAL PAGES (2163174)

Page 11


therein, and for the further reason that any expenses lawfully incurred are the responsibility of all class members which defendant Scherr negligently attempted to represent. Plaintiffs further deny that all lawful offsets, credits and payments have been allowed and finally, demand strict proof of any legitimate expense and what pro rata share, if any, should be assigned to the Plaintiffs.

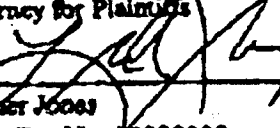
WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that Defendants be cited to appear and answer, and that, after trial, plaintiffs have judgment against Defendants for the maximum amount of \$2,303,900.00, that Counter Plaintiffs take nothing in their suit against Third Party Defendants and further.

1. Cancellation of Defendant James Franklin Scherr's attorney lien in the \$200,000.00 recovered by Martie Georges in Cause No. 82-7707;
2. Pre and post judgment interest as allowed by law;
3. Such further relief to which Plaintiffs may be entitled.

Respectfully submitted,

Jones & Georges
303 Texas Ave., Ste. 800
El Paso, TX 79901
(915)534-0040
FAX: 534-0055

By: 
Marjorie Wilcox Georges
State Bar No. 21453075
Attorney for Plaintiffs

BY: 
Luther Jones
State Bar No. 70928000
Attorney for Plaintiffs and Third
Party Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 1995 I delivered a copy of this document to all counsel by hand delivery.



Marie Georges

~~PLANTIFFS' SEVENTH AMENDED PETITION (01-1-144)~~

THIRD AMENDED PLEA IN INTERVENTION

TO THE HONORABLE COURT:

Comes now, Dr. Richard Gillespie, individually and as representative of San Marcos Chiropractic Center; Dr. Stewart Stephenson, individually and as representative of Injury Treatment Center, Chiropractic Arts Center and Accident & Industrial Injury Center, Inc.; Dr. Ted Stephenson, individually and as representative of Stephenson Chiropractic Center; Dr. Odion E. Ojo, individually and as representative of Astrodome Chiropractic and Sports Clinic, Inc.; Dr. Richard G. Ivy, individually and as representative of Ivy Chiropractic; Dr. Carlos Xavier Domino, individually and as representative of Gentle Care Chiropractic Clinic and Chiro-Sports-Med Clinics of Houston; Dr. Kathryn L. Kelth-Arden, individually and as representative of Mesa Hills Chiropractic and Back Care Clinic; Dr. David Niekamp, individually and as representative of Gulfgate Chiropractic Clinic, Inc.; Dr. Gene A. Chapman, individually and as representative of Chapman Chiropractic Clinic and Greenspoint Chiropractic; Dr. Kenneth N. Huete, individually and as representative of Doctors Chiropractic Health Center; Dr. A. Kent Rice, individually and as representative of Cy-Fair Steeplechase Chiropractic Clinic and Cy-Fair Chiropractic Associates, P.C.; George G. Junkin, D.C., individually and as representative of Northwest Chiropractic Center, Inc.; Tracy A. Sanders, D.C., individually and as representative of Sanders Chiropractic Clinic and Town & Country Chiropractic Clinic; Lowery S. Stancil, D.C., individually and as representative of The Chiropractic Health Center; Dr. George Aubert, individually and as representative of Tomball Chiropractic Center, Inc.; Dr. John P. Johnston, individually and as representative of John P. Johnston, Inc.; Dr. William Colgin, —

individually and as representative of Mr. William M. Colgin, D.C., P.C. and Dr. William Colgin d.b.a. Chiropractic Arts Center; Dr. Kurt Griesser, as well as others to be named later, and file, as Intervenors, this Third Amended Plea in Intervention and would show the Court as follows:

PARTIES

Intervenors are individual chiropractors and their businesses whose names, addresses, and principal place of businesses are as follows:

Intervenor, Dr. Richard Gillespie, 1520 Ranch Road 12, San Marcos, Texas 78666.

Intervenor, Dr. Stewart Stephenson, Injury Treatment Center, Chiropractic Arts Center and Accident & Industrial Injury Center, Inc., 2005 South Texas Avenue, Bryan, Texas 77802.

Intervenor, Dr. Ted Stephenson and Stephenson Chiropractic Center, 1313 Briarcrest Drive, Bryan, Texas 77802.

Intervenor, Odion E. Ojo, Astrodome Chiropractic and Sports Clinic, Inc., 2630 Westridge, Houston, Texas 77054.

Intervenor, Dr. Richard G. Ivy and Ivy Chiropractic, 124 North West Newton, Burleson, Texas 76028.

Intervenor, Dr. Carlos Xavier Domino, Gentle Care Chiropractic Clinic and Chiro-Sports-Med Clinics of Houston, 5271 Memorial Drive, Houston, Texas 77007.

Intervenor, Dr. Katherine L. Keith-Arden and Mesa Hills Chiropractic and Back Care Clinic, 6512 North Mesa St., El Paso, Texas 79912.

Intervenor, Dr. David Niekamp and Gulfgate Chiropractic Clinic, Inc., 3815 Reveille, Houston, Texas 77087.

Intervenor, Dr. Gene A. Chapman, Chapman Chiropractic Clinic and Greenspoint Chiropractic, 4747 Research Forest Drive, Suite 155, The Woodlands, Texas 77381.

Intervenor, Dr. Kenneth N. Huete and Doctors Chiropractic Health Center, 3431 West Holcombe Boulevard, Houston, Texas 77025.

Intervenor, Dr. Kent Rice, Cy-Fair Steelechase Chiropractic Clinic and Cy-Fair Chiropractic Associates, P.C., 11250 West Road, Building J, Houston, Texas 77065.

Intervenor, George G. Junkin, D.C. and Northwest Chiropractic Center, Inc., 11510 Northwest Freeway, Houston, Texas 77092.

Intervenor, Tracy A. Sanders, D.C., Sanders Chiropractic Clinic and Town & Country Chiropractic Clinic, 8333 Katy Freeway, Suite 100, Houston, Texas 77024.

Intervenor, Lowery S. Stancil, D.C. and The Chiropractic Health Center, 906 West Main, Tomball, Texas 77375.

Intervenor, Dr. George Aubert and Tomball Chiropractic Center, Inc., 27030 Tomball Parkway, Tomball, Texas 77375.

Intervenor, Dr. John P. Johnston and John P. Johnston, Inc., 1990 Post Oak Boulevard, Suite G, Houston, Texas 77056.

Intervenor, Dr. William Colgin, Mr. William M. Colgin, D.C, P.C. and Dr. William Colgin d.b.a. Chiropractic Arts Center, 905 Heatherway Street, Rosenberg, Texas 77471.

Intervenor, Dr. Kurt Griesser, 905 Heatherway Street, Rosenberg, Texas 77471.

BACKGROUND FACTS

Defendants are attorneys licensed to practice law in the State of Texas. Defendants filed suit purporting to represent Intervenor in a class action suit for certain causes of action against numerous insurance companies in Cause No. 88-7707, *Dr. Walter Rhodes, et al. v. American General Fire and Casualty, et al.*, in the 243rd Judicial District Court of El Paso County, Texas, hereinafter referred to as "Cause No. 88-7707."

On July 28, 1988, Defendants brought Cause No. 88-7707 on behalf of all Texas chiropractors alleging that certain insurance companies had engaged in a civil conspiracy aimed at cutting chiropractic services and charges. Defendants herein, alleged among other things that chiropractors suffered damages due to the insurance companies' non-payment and slow payment of chiropractors' bills; and, that the chiropractic profession was defamed and maligned by acts of certain insurance companies.

Suit was filed on behalf of all Texas chiropractors with Drs. La Rock and Superville named as class representatives.

Defendants had a prior referral relationship with, LaRock and Superville, the named representatives. After settlements on behalf of the class were made, settlement proceeds were either taken as attorneys' fees or distributed to LaRock and Superville. None of the unnamed class members received any of the settlement proceeds and, in some circumstances, Defendants retained one hundred percent of the settlement proceeds. In March of 1994, Defendants entered into an agreed final dismissal of the class action suit.

CAUSES OF ACTION

NEGLIGENCE

Defendants were jointly and severally negligent in proximately causing Intervenor's damages. Defendants negligence includes but is not limited to the following:

- (1) Defendants were negligent in that they failed to certify, or even attempt to certify, a class action suit.
- (2) Defendants were negligent in their representation of the class.
- (3) Defendants were negligent in that they settled class causes of action without the consent of the class or without a denial of certification of the class.
- (4) Defendants were negligent in that they did not conduct adequate discovery.
- (5) Defendants were negligent in that they failed to maintain records required by the Texas Rules of Civil Procedure in a class action litigation.
- (6) Defendants were negligent in not properly distributing settlement proceeds among the class.
- (7) Defendants were negligent in their representation of the class in that they failed to acknowledge and respond to objections made by various class members as to the settlements that were being negotiated.
- (8) Defendants were negligent in undertaking a representation of the class action when they did not have, or were unwilling to commit, adequate financial resources to maintain the class action.
- (9) Defendants were negligent in settling the suit for a fraction of its actual value for the benefit of certain class representatives.
- (10) Defendants were negligent in selection and retention of Drs. LaRock and Superville as class representatives.
- (11) Defendants were negligent in using a purported class action as leverage for settlement for a chosen few.

BREACH OF FIDUCIARY DUTY

In addition to the negligence committed by Defendants in Cause No. 88-7707, Defendants jointly and severally breached their fiduciary duties to Intervenorors including but not limited to the following respects:

- (1) in failing to promptly and accurately account for settlement proceeds;
- (2) in failing to promptly distribute settlement proceeds;
- (3) in failing to provide the class with an accurate account of claimed expenses;
- (4) failing to inform Intervenorors of settlement negotiations;
- (5) in favoring LaRock and Superville over all other class members;
- (6) in taking more fees than they were permitted to do under the fee contract;
- (7) in failing to conduct proper discovery;
- (8) in settling the suit in the manner in which it was settled;
- (9) by appointment of inadequate counsel;
- (10) in naming improper class representatives;

Defendant Gage failed to inform Intervenorors that he had a special relationship with LaRock and Superville. More specifically, Defendant Gage failed to inform the Intervenorors that he served in a special corporate counsel relationship to Coronado Chiropractic Clinic; that he was engaged in extensive litigation involving Coronado Chiropractic, including defense of a suit by the Attorney General of Texas alleging deceptive trade practices and fraud against LaRock and Superville; that he was representing the clinic in at least a dozen other causes of action, both offensive and defensive; that he was counsel for LaRock and Superville in a cause of action against other members of the putative class; that his

principal purpose in participating in the class action litigation was collection of unpaid fees claimed by Coronado Chiropractic; that he communicated on a regular basis with LaRock and Superville but not with other members of the class; or that he was the recipient of referrals of legal business from Coronado Chiropractic.

ACTUAL AND CONSTRUCTIVE FRAUD

Defendants represented to Intervenor that they intended to represent all chiropractors in the State of Texas in Cause No. 88-7707, when in actuality, the sole beneficiaries of this suit were to be Defendants and Drs. La Rock and Superville. Defendants also stated that any proceeds from Cause No. 88-7707 would be divided among the class. These representations were false; Defendants knew that the representations were false when they were made, or made them recklessly without any knowledge of their truth and as a positive assertion. These representations were made with the intention that the Intervenor would act upon them, and the Intervenor did in fact act upon them. Defendants committed fraud against Intervenor by collecting more fees than they were entitled under the term of the contingent fee contract and making all distributions to LaRock and Superville. Defendants fraudulently misrepresented their intentions in filing Cause No. 88-7707 as indicated above. Defendants also fraudulently concealed their true relationship with La Rock and Superville.

Defendants breached the above stated fiduciary duties owed to Intervenor and thereby committed constructive fraud, as well as actual fraud upon Intervenor. Defendants have proximately caused Intervenor actual damages as a result of these acts.

CONSPIRACY

In addition, Defendants participated in a conspiracy to defraud Intervenors. Intervenors' damages were a proximate result of this conspiracy. The acts of civil conspiracy are set out in the preceding paragraphs.

VIOLATION OF THE TEXAS DECEPTIVE TRADE PRACTICES ACT

Furthermore, at all times material hereto, Intervenors were "consumers" of goods and services as that term is defined in the DTPA. Intervenors allege that Defendants violated the following provisions of the DTPA:

1. Sec 17.46(b)(2), to wit: "causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services";
2. Sec. 17.46(b)(5), to wit: "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities which they do not have or that a person has sponsorship, approval, status affiliation, or connection which he does not";
3. Sec. 17.46(b)(7), to wit: "representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another"; and
4. Sec. 17.46(b)(12), to wit: "representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law."

In addition, Defendants committed unconscionable actions and courses of actions as defined by § 17.45(5) DTPA. Defendants' violation of the DTPA was a producing cause of Intervenors' damages.

Defendants' violation of the DTPA was a producing cause of Intervenor' damages. Intervenors are suing for additional damages, as Defendants' conduct was committed

knowingly. Intervenor's are therefore entitled to three times their actual damages that exceed \$1,000.00, as well as court costs and attorneys' fees.

CONVERSION

Defendant Scherr has appropriated and/or is attempting to appropriate as expenses substantial sums of money collected on behalf of Intervenor's - more specifically the sums of \$86,500.00, \$50,000.00, \$75,000.00 and \$95,000.00 all received in separate settlements in Cause No. 88-7707- - expenses for which there is no accounting or inadequate accounting. Defendants have wrongfully converted all sums they claim or claimed as expenses in Cause No. 88-7707 and accordingly, Intervenor's seek a judgment of this Court denying claims for expenses in Cause No. 88-7707 and payment of all such sums to Intervenor's.

ACTION TO VOID ATTORNEYS' FEES

As the Defendants violated their fiduciary duties to Intervenor's, Intervenor's seek a judgment of this Court that the payment of any attorneys' fees to Defendants in Cause No. 88-7707 is against the public policy of this State and that the all attorneys fees and/or expenses be returned to Intervenor's.

DAMAGES

Intervenor's are entitled to their actual damages including their share of the monies in the registry of the Court, punitive or exemplary damages, additional and treble damages under the Deceptive Trades Practices Act, costs of court and expense of litigation, repayment of all settlement proceeds distributed, and attorney's fees of thirty-three percent.

In addition to their contractual damages and extra-contractual damages, Intervenor
are entitled to recover from Defendants both prejudgment interest and post judgment
interest at the maximum rate allowed by law.

Intervenor plead for damages not to exceed five million dollars.

JURY DEMAND

Pursuant to Rule 216 of the Texas Civil Rules of Procedure Intervenor hereby
demand a jury.

NO ELECTION OF REMEDIES

The foregoing facts and theories are pled cumulatively and alternatively, with no
election or waiver of rights or remedies.

WHEREFORE, PREMISES CONSIDERED, Intervenor pray that after hearing
hereon, they be awarded the above-mentioned damages and any further relief, both at law
and in equity, to which they may show themselves to be entitled under the facts and
circumstances of this case.

Respectfully submitted,

ARCHER, WALDNER, & VICKERY, L.L.P.
2929 Allen Parkway, Suite 2410
Houston, Texas 77019
(713) 526-1100
Facsimile (713) 523-5939

By: Joe Archer
JOSEPH F. ARCHER- 01292000

ATTORNEYS FOR INTERVENOR

REMSM

*Risk Enterprise
Management
Limited*

2925 Briarpark, Suite 850, Houston, Texas 77042
Tel: (713) 787-7800 Fax: (713) 787-7851
Mailing Address:
P.O. Box 4357
Houston, Texas 77210

February 2, 1996

CERTIFIED MAIL/
RETURN RECEIPT REQUESTED

James F. Scherr
109 North Oregon
Suite 800
El Paso, TX 79901

RE: REM's Principal: The Home Insurance Company
Claim No.: 640-L-600813-174
Insured: James Scherr
Claimant: Ben Beard, et al.
Policy Limits: \$200,000 each claim; \$600,000 aggregate
Deductible: \$5,000

Dear Mr. Scherr:

I am writing in response to Attorney Jim Darnell's December 10, 1995, letter.

Additionally, this letter will also inform you of the company's position concerning coverage under the policy issued by The Home Insurance Company, Policy Number LPLF878124.

Your policy's limits of liability are \$200,000 per claim and \$600,000 in the aggregate. Your limits of liability are self-liquidating. Accordingly, as defense costs accrue, your available limits for continued defense and indemnity are correspondingly decreased.

On behalf of The Home Insurance Company, Risk Enterprise Management Limited (REM) has paid \$203,639.20 in defense costs and loss payment. Please refer to the following section in your policy:

E-Limits of Liability

I. Limits of liability - each claim

The liability of the company for each claim first made

February 2, 1996



against the insured and reported to the company during the policy period, and including the optional reporting period, if such is purchased, shall not exceed the amount stated in the declaration for each claim and shall include all claim expenses. If the limits of liability are exhausted prior to settlement or judgment of any pending claim or suit, the company shall have the right to withdraw from the further investigation or defense thereof by tendering control of such investigation or defense to the insured, and the insured agrees, as a condition to the issuance of this policy, to accept such tender.

On October 18, 1995, we received your letter of October 16, 1995, forwarding us the plea and intervention filed by Joe Archer for 17 chiropractors in the above-captioned matter. The court severed the plea and intervention to a separate trial. Please be advised that it is The Home Insurance Company's position that the plea and intervention suit does not represent a new claim because related acts, errors or omissions are treated as a single claim. Please refer to the following provision in your policy:

Section E-Limits of Liability

IV. Multiple Insureds, Claims, and Claimants

The inclusion herein of more than one insured or the making of claims or the bringing of suits by more than one person or organization shall not operate to increase the company's limit of liability. Related acts, errors or omissions shall be treated as single claim. All such claims, whenever made, shall be considered first made during the policy period or optional reporting, in which the earliest claim arising out of such act, error or omission was first made, and all such claims shall be subject to the same limits of liability.

In view of the fact that we have paid \$203,639.20, we believe that we have fulfilled our obligation under the policy pursuant to the aforementioned policy provisions. Therefore, we will not be participating in the further defense handling of this matter.

James F. Scherr

-3-

February 2, 1996

REMSM
Risk Enterprise
Management
Limited

If you have information that would indicate that our position is in any way incorrect, we encourage you to present such information for our consideration.

Very truly yours,

RISK ENTERPRISE MANAGEMENT LIMITED

Oscar Allen
Claim Manager

cc: Donald M. Hudgins
Hudgins, Hudgins & Warrick

James Darnell

HO1696kd.d1

THE HOME INSURANCE COMPANY IN LIQUIDATION

P.O. Box 1720
 Manchester, New Hampshire 03105-1720
 Tel: (800) 347-0014

Date: 11/20/2006

Class: II

James F. Scherr
 109 North Oregon
 Suite 1200
 El Paso, TX 79901

RE: NOTICE OF DETERMINATION
 Proof of Claim No.: INSU275827-01

Determination Summary

Gross Amount of Claim	: \$ 278,279.74
Amount Allowed by Liquidation	: \$ 0

Explanation: Home defended you against a suit brought by three of your former clients under a defense costs eroding professional liability policy. You represented the clients jointly in the underlying action. Additional former clients, members of the same group you jointly represented, sought to intervene in the suit against you after the initial plaintiffs and Home, on your behalf, and with your consent, agreed to settle for Home's remaining per claim policy limits. Home declined to defend the intervention since Home had already agreed to pay its remaining policy limits. You claim that the intervention is a separate claim, unrelated to the initial suit such that Home is required to apply a separate per claim limit to the intervention. Related claims are considered a single claim under the policy. The original plaintiffs' and the intervenors' claims are factually and causally related. Therefore, this Proof of Claim has been disallowed.

Dear Claimant :

The purpose of this letter is to provide you with a determination set forth above of claims you have presented to The Home Insurance Company in Liquidation ("The Home"), under the Proof(s) of Claim specified above. The Home expects to present notice of this determination to the Superior Court for Merrimack County, New Hampshire (the "Court") for approval in accordance with New Hampshire Revised Statute, RSA 402-C:45. Read this Notice of Determination carefully as it sets forth your rights and obligations in detail.

The Home has now made a Determination on the claims as set forth above in accordance with The Home Claim Procedures (the "Procedures")* approved by the Court. If the claim has been allowed, in whole or in part, it has been assigned a Class II priority as a "policy related claim" pursuant to the Order of Distribution set forth in RSA 402-C:44 and will be placed in line for payment as directed by the Court from the assets of The Home. The first \$50 of the amount allowed on each claim in this class shall be deducted from the amount distributed as specified in RSA 402-C:44.

You may have other claims against The Home for which you may receive other Notices of Determination. You will have a separate right to dispute each Notice of Determination. If your claim has been allowed in whole or in part, this Notice of Determination does not mean that your claim will immediately be paid, or that it will be paid in full or at all. Pursuant to order of the Court, The Home may make distributions of its assets as a percentage of all allowed claims in a particular priority class in The Home estate as approved by the Court. The amount of the final payment for allowed claims will be determined by the final ratio of assets to liabilities and the applicable priority. Please be advised that the final percentage of payment you receive from The Home, at the time The Home estate is finally closed, is the total payment amount that you will be entitled to for this claim.

The Liquidator does not expect there to be assets sufficient to make a distribution to creditors in classes below Class II.

Any and all distributions of assets may be affected and/or reduced by any payments you have received on this claim from any other sources not listed on the Notice of Distribution. Any such distributions by The Home are based on The Home's knowledge and/or understanding of the amounts you have received in settlement and/or reimbursement of this claim from all other sources at the time of the allowance or thereafter. Should The Home subsequently become aware of prior recoveries from other sources The Home has the right to reduce its future distribution payments to you to the extent of such other recoveries or to seek and obtain repayment from you with respect to any previous distributions that were made to you.

Further, if you seek or receive any future payment from any other source on this claim after you receive a distribution payment from The Home you must notify The Home at the address below and The Home has the right to recover from you the distribution payments in whole or in part, to the extent of any such other future recoveries.

As a condition to receipt of any distributions, The Home shall be entitled to any rights to subrogation you may have against any third party and you shall be deemed to have assigned to The Home such rights upon receipt of any distributions. You shall also be obliged to reimburse The Home for any legal fees or other costs associated with The Home recovering from you any distribution payments to which you are not entitled.

*A copy of the January 19, 2005 Restated and Revised Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company in Liquidation may be obtained from the website of the Office of the Liquidation Clerk for The Home Insurance Company in Liquidation and US International Reinsurance Company in Liquidation, www.hicilclerk.org

The following instructions apply to this Notice of Determination:

Claim Allowed

1. If this claim has been allowed in whole or in part and you agree with the determination, sign and date the enclosed Acknowledgment of Receipt of the Notice of Determination and mail the completed Acknowledgment to The Home.

Claim Disallowed

2. A. If all or part of your claim has been disallowed or you wish to dispute the determination or creditor classification for any reason, you may file a Request for Review with the Liquidator. The Request for Review is the first of two steps in the process of disputing a claim determination. The Request for Review must be received by The Home within thirty (30) days from the date of this Notice of Determination.

REQUEST FOR REVIEW FILING REQUIREMENTS:

- (a) Sign and return the attached Acknowledgment of Receipt form.
- (b) On a separate page, state specifically the reasons(s) you believe that the determination is in error and how it should be modified. Please note the Proof of Claim number on that page and sign the page.
- (c) Mail the Request for Review to:
The Home Insurance Company in Liquidation
P.O. Box 1720
Manchester, NH 03105-1720

You should keep a copy of this Notice of Determination, Acknowledgment of Receipt and Request for Review, then mail the Original Request for Review to us by U.S. Certified Mail.

- (d) The Request for Review must be received by The Home within thirty (30) days from the date of this Notice of Determination. The Request for Review must be in writing.
- (e) The Liquidator will inform you of the outcome of the review and issue to you a Notice of Redetermination.

IF A REQUEST FOR REVIEW IS NOT FILED WITH THE HOME WITHIN THE THIRTY (30) DAY PERIOD, YOU MAY NONETHELESS DIRECTLY FILE AN OBJECTION WITH THE COURT WITHIN SIXTY (60) DAYS FROM THE MAILING OF THIS NOTICE. You do not have to file the Request for Review as a prerequisite to dispute the Notice of Determination. Please see Section 2B (below) for the Objections to Denial of Claims.

B. If your claim is disallowed in whole or in part, you may file an Objection with the Court at

Office of the Clerk, Merrimack County Superior Court
163 N. Main Street, P.O. Box 2880
Concord, New Hampshire 03301-2880
Attention: The Home Docket No. 03-E-0106

within sixty (60) days from the mailing of the Notice of Determination and bypass the Request for Review procedures as noted in Section 2A (above). If the Request for Review is timely filed, as outlined in Section 2A, the Liquidator will inform you of the outcome of the review and issue to you a Notice of Redetermination. If the redetermination is to disallow the claim, you may still file an Objection with the Court. You have sixty (60) days from the mailing of the Notice of Redetermination to file your Objection. Please also sign and return the Acknowledgment of Receipt form and mail a copy of the Objection to the Liquidator.

IF YOU DO NOT FILE AN OBJECTION WITH THE COURT WITHIN EITHER SIXTY (60) DAYS FROM THE MAILING OF THIS NOTICE OF DETERMINATION OR SIXTY (60) DAYS FROM THE MAILING OF ANY NOTICE OF REDETERMINATION, YOU MAY NOT FURTHER OBJECT TO THE DETERMINATION.

A timely filed Objection will be treated as a Disputed Claim and will be referred to the Liquidation Clerk's Office for adjudication by a Referee in accordance with the Procedures.

3. You must notify The Home of any changes in your mailing address. This will ensure your participation in future distributions, as applicable. For purposes of keeping The Home informed of your current address, please notify us at the address given on the letterhead above.

Sincerely yours,

Peter Bengelsdorf, Special Deputy Liquidator
For Roger A. Sevigny, Liquidator
of The Home Insurance Company in Liquidation

If you wish to speak to someone regarding this Notice of Determination, please contact:

Ron Barta
Senior Manager
Home Insurance Company in Liquidation
Phone : 212-530-4054

CC: Jim Darnell P. C., 310 North Mesa St., Suite 212, El Paso, TX 79901

THE HOME INSURANCE COMPANY IN LIQUIDATION

P.O. Box 1720

Manchester, New Hampshire 03105-1720

Tel: (800) 347-0014

POC #: INSU275827-01

Amount Allowed: \$ 0

James F. Scherr
109 North Oregon
Suite 1200
El Paso, TX 79901

ACKNOWLEDGMENT OF RECEIPT

I hereby acknowledge receipt of the Notice of Determination as a Class II Creditor claim and confirm that I understand the content thereof. I further acknowledge and confirm that I understand the Instructions regarding the Notice of Determination of my Claim against The Home Insurance Company in Liquidation and in that regard advise as follows:

(Check off all applicable items.)

I agree to the determination.

I reject the determination and want to file a Request for Review (specific reasons must be included along with return of the signed Acknowledgment).

I reject the determination and intend to file a separate Objection with the Court, without filing a Request for Review.

I have not assigned any part of this claim.

I have not made any other recoveries with respect to this claim.

I have not sought and do not intend to seek any other recoveries with respect to this claim.

I have made recovery from others with respect to this claim (full details must be included with this Acknowledgement).

I have sought or intend to seek recovery from others with respect to this claim (full details must be included with this Acknowledgement).

I request that The Home mail further correspondence to:

_____ Same name as above.
New name _____

_____ Same address as above
New address _____

This Acknowledgment of Receipt must be completed, signed and returned to The Home in order to be eligible for distributions from The Home estate as directed by the Court.

Signature: _____

Printed Name: _____

Title: _____

Date: _____

THE HOME INSURANCE COMPANY IN LIQUIDATION

P.O. Box 1720
Manchester, New Hampshire 03105-1720
Tel: (800) 347-0014

RECEIVED

DEC 18 2006

HICIL

POC #: INSU275827-01

Amount Allowed: \$ 0

James F. Scherr
109 North Oregon
Suite 1200
El Paso, TX 79901

ACKNOWLEDGMENT OF RECEIPT

I hereby acknowledge receipt of the Notice of Determination as a Class II Creditor claim and confirm that I understand the content thereof. I further acknowledge and confirm that I understand the Instructions regarding the Notice of Determination of my Claim against The Home Insurance Company in Liquidation and in that regard advise as follows:

(Check off all applicable items.)

I agree to the determination.

I reject the determination and want to file a Request for Review (specific reasons must be included along with return of the signed Acknowledgment).

I reject the determination and intend to file a separate Objection with the Court, without filing a Request for Review.

I have not assigned any part of this claim.

I have not made any other recoveries with respect to this claim.

I have not sought and do not intend to seek any other recoveries with respect to this claim.

I have made recovery from others with respect to this claim (full details must be included with this Acknowledgment).

I have sought or intend to seek recovery from others with respect to this claim (full details must be included with this Acknowledgment).

THE HOME INSURANCE COMPANY IN LIQUIDATION

P.O. Box 1720
 Manchester, New Hampshire 03105-1720
 Tel: (800) 347-0014

Date : 5/15/2008

Class II

James F. Scherr C/O Jim Darnell P. C.
 310 N. Mesa St.
 Suite 212
 El Paso, TX 79901

RE: NOTICE OF REDETERMINATION
 Proof of Claim No.: INSU275827-01

Redetermination Summary

Gross Amount of Claim	: \$ 278,279.74
Amount Allowed by Liquidation	: \$ 0

Explanation: Home provided you a defense to a suit against you under a defense costs eroding professional liability policy. Three of your former clients, who you represented in the underlying action, which you had filed as a purported class action, were the initial plaintiffs. The class was not certified. Additional plaintiffs who were members of the proposed class sought to intervene in the suit against you after the initial plaintiffs and Home, on your behalf, had agreed to a settlement for Home's remaining policy limits. Home declined to defend and settle the intervention because Home had already agreed to pay its remaining per claim policy limit. You claimed that the intervention is a separate claim, unrelated to the initial suit, and that Home was required to apply a separate per claim limit to the intervention. Related claims are considered a single claim under the policy. In your Request for Review, you allege that the interveners were not your clients and that therefore, their claims were not related. The original plaintiffs' and the interveners claims are factually and causally related regardless of whether or not the interveners were your clients, as they have alleged. Therefore, this Proof of Claim was properly disallowed and has not been upset.

Dear Claimant:

The purpose of this letter is to respond to your Request for Review and provide you with a Redetermination set forth above of claims you have presented to The Home Insurance Company in Liquidation ("The Home"), under the Proof(s) of Claim specified above. The Home expects to present notice of this redetermination to the Superior Court for Merrimack County, New Hampshire (the "Court") for approval in accordance with New

Hampshire Revised Statute, RSA 402-C: 45. Read this Notice of Redetermination carefully as it sets forth your rights and obligations in detail.

The Home has reviewed your request for review and made a Redetermination on the claims as set forth above in accordance with The Home Claim Procedures (the "Procedures")* approved by the Court. If the claim has been allowed, in whole or in part, it has been assigned a Class II priority as a "policy related claim" pursuant to the Order of Distribution set forth in RSA 402-C:44 and will be placed in line for distribution as directed by the Court from the assets of The Home. The first \$50 of the amount allowed on each claim in this class shall be deducted from the amount distributed as specified in RSA 402-C:44.

You may have other claims against The Home for which you may receive other Notices of Determination or Redetermination. You will have a separate right to dispute each Notice of Determination or Redetermination. If your claim has been allowed in whole or in part, this Notice of Redetermination does not mean that your claim will immediately be paid, or that it will be paid in full or at all. Pursuant to order of the Court, The Home may make distributions of its assets as a percentage of all allowed claims in a particular priority class in The Home estate as approved by the Court. The amount of the final payment for allowed claims will be determined by the final ratio of assets to liabilities and the applicable priority. Please be advised that the final percentage of payment you receive from The Home, at the time The Home estate is finally closed, is the total payment amount that you will be entitled to for this claim.

The Liquidator does not expect there to be assets sufficient to make a distribution to creditors in classes below Class II.

Any and all distributions of assets may be affected and/or reduced by any payments you have received on this claim from any other sources not listed on the Notice of Distribution. Any such distributions by The Home are based on The Home's knowledge and/or understanding of the amounts you have received in settlement and/or reimbursement of this claim from all other sources at the time of the allowance or thereafter. Should The Home subsequently become aware of prior recoveries from other sources The Home has the right to reduce its future distribution payments to you to the extent of such other recoveries or to seek and obtain repayment from you with respect to any previous distributions that were made to you.

Further, if you seek or receive any future payment from any other source on this claim after you receive a distribution payment from The Home you must notify The Home at the address below and The Home has the right to recover from you the distribution payments in whole or in part, to the extent of any such other future recoveries.

* A copy of the January 19, 2005 Restated and Revised Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company in Liquidation may be obtained from the website of the Office of the Liquidation Clerk for The Home Insurance Company in Liquidation and US International Reinsurance Company in Liquidation, www.hicilclerk.org.

As a condition to receipt of any distributions, The Home shall be entitled to any rights to subrogation you may have against any third party and you shall be deemed to have assigned to The Home such rights upon receipt of any distributions. You shall also be obliged to reimburse The Home for any legal fees or other costs associated with The Home recovering from you any distribution payments to which you are not entitled.

The following instructions apply to this Notice of Redetermination:

Claim Allowed

1. If this claim has been allowed in whole or in part and you agree with the re-determination, sign and date the enclosed Acknowledgment of Receipt of the Notice of Redetermination and mail the completed Acknowledgment to The Home.

Claim Disallowed

2. If the Redetermination is to disallow your claim in whole or in part, you may still file an Objection with the Court at

Office of the Clerk, Merrimack County Superior Court
163 N. Main Street, P.O. Box 2880
Concord, New Hampshire 03301-2880
Attention: The Home Docket No. 03-E-0106

within sixty (60) days from the mailing of the Notice of Redetermination. **You have sixty (60) days from the mailing of the Notice of Redetermination to file your Objection.** Please also sign and return the Acknowledgment of Receipt form and mail a copy of the Objection to the Liquidator while maintaining copies of all documents for your reference.

IF YOU DO NOT FILE AN OBJECTION WITH THE COURT WITHIN SIXTY (60) DAYS FROM THE MAILING OF THIS NOTICE OF REDETERMINATION, YOU MAY NOT FURTHER OBJECT TO THE DETERMINATION.

A timely filed Objection will be treated as a Disputed Claim and will be referred to the Liquidation Clerk's Office for adjudication by a Referee in accordance with the Procedures.

3. You must notify The Home of any changes in your mailing address. This will ensure your participation in future distributions, as applicable. For purposes of keeping The Home informed of your current address, please notify us at the address given on the letterhead above.

Sincerely yours,

Peter Bengelsdorf, Special Deputy Liquidator
For Roger A. Sevigny, Liquidator
of The Home Insurance Company in Liquidation

Should you wish to speak with someone regarding this Notice of Redetermination, please contact:

Ron Barta
Senior Manager
Home Insurance Company in Liquidation
Phone : 212-530-4054

cc: Jim Darnell P. C., 310 North Mesa St., Suite 212, El Paso, TX 79901

THE HOME INSURANCE COMPANY IN LIQUIDATION
P.O. Box 1720
Manchester, New Hampshire 03105-1720
Tel: (800) 347-0014

POC #: INSU275827-01

Amount Allowed: \$ 0

James F. Scherr C/O Jim Darnell P. C.
310 N. Mesa St.
Suite 212
El Paso, TX 79901

ACKNOWLEDGMENT OF RECEIPT

I hereby acknowledge receipt of the Notice of Redetermination as a Class II Creditor claim and confirm that I understand the content thereof. I further acknowledge and confirm that I understand the Instructions regarding the Notice of Redetermination of my Claim against The Home Insurance Company in Liquidation and in that regard advise as follows:

(Check off all applicable items.)

I agree to the Redetermination.

I have not assigned any part of this claim.

I have not made any other recoveries with respect to this claim.

I have not sought and do not intend to seek any other recoveries with respect to this claim.

I have made recovery from others with respect to this claim (full details must be included with this Acknowledgement).

I have sought or intend to seek recovery from others with respect to this claim (full details must be included with this Acknowledgement).

I request that The Home mail further correspondence to:

_____ Same name as above.
New name _____

_____ Same address as above
New address _____

This Acknowledgment of Receipt must be completed, signed and returned to The Home in order to be eligible for distributions from The Home estate as directed by the Court.

Signature: _____

Printed Name: _____

Title: _____

Date: _____

PROOF CLAIM
The Home Insurance Company,

Merrimack County Superior Court, State of New Hampshire 03-B-0106

Read Carefully Before Completing This Form

Please print or type

FOR LIQUIDATOR RECEIVED
DATE PROOF OF CLAIM RECEIVED JUN 14 2004

HICIL

INS# 27587

|||||

The Deadline for Filing this Form is June 13, 2004.

You should file this Proof of Claim form if you have an actual or potential claim against The Home Insurance Company of any of its former subsidiaries* ("The Home") even if the amount of the claim is presently uncertain. To have your claim considered by the Liquidator, this Proof of Claim must be postmarked no later than June 13, 2004. Failure to timely return this completed form will likely result in the DENIAL OF YOUR CLAIM. You are advised to retain a copy of this completed form for your records.

- 1. Claimant's Name: James F. Scherr
- 2. Claimant's Address: 109 N. Oregon, Suite 1200
El Paso, Texas 79901
- 3. Claimant's Telephone Number: (915) 544-0100
Fax Number: (915) 532-1759
Email address: slslaw@sbcglobal.net
- 4. Claimant's Social Security Number, ~~XXXXXXXXXXXX~~ [REDACTED]
- 5. Claim is submitted by (check one):
 - a) Policyholder or former policyholder
 - b) Third Party Claimant making a claim against a person insured by The Home
 - c) Employee or former employee
 - d) Broker or Agent
 - e) General Creditor, Reinsurer, or Reinsured
 - f) State or Local Government Entity
 - g) Other; describe: _____

If your name, address, e-mail address, or telephone number set forth above are incorrect, or if they change, you must notify the Liquidator so she can advise you of new information.

Describe in detail the nature of your claim. You may attach a separate page if desired. Attach relevant documentation in support of your claim, such as copies of outstanding invoices, contracts, or other supporting documentation.

See attached Plaintiff's First Amended Petition
marked as Attachment 1.

6. Indicate the total dollar amount of your claim. If the amount of your claim is unknown, write the word "unknown", BUT be sure to attach sufficient documentation to allow for determination of the claim amount.

See attached Summary Sheet*
\$ _____ (if amount is unknown, write the word "unknown").
marked as Attachment 2 *Plus attorneys' fees to complete litigation

7. If you have any security backing up your claim, describe the nature and amount of such security. Attach relevant documentation.

N/A

8. If The Home has made any payments towards the amount of the claim, describe the amount of such payments and the dates paid:

N/A

9. Is there any setoff, counterclaim, or other defense which should be deducted by The Home from your claim?

NO

10. Do you claim a priority for your claim? If so, why:

NO

11. Print the name, address and telephone number of the person who has completed this form.

Name: Jim Darnell
Address: 310 N. Mesa, Suite 212
El Paso, Texas 79901
Phone Number: (915) 532-2442
Email address: jdarnell@jdarnell.com

* The Home Indemnity Company, The Home Insurance Company of Indiana, City Insurance Company, Home Lloyds Insurance Company of Texas, The Home Insurance Company of Illinois, and The Home Insurance Company of Wisconsin.

12. If represented by legal counsel, please supply the following information:

a. Name of attorney: Jim Darnell

b. Name of law firm: Jim Darnell, P.C.

c. Address of law firm: 310 N. Mesa, Suite 212
El Paso, Texas 79901

d. Attorney's telephone: (915) 532-2442

e. Attorney's fax number: (915) 532-4549

f. Attorney's email address: jdarnell@jdarnell.com

13. If using a judgment against The Home as the basis for this claim:

a. Amount of judgment N/A

b. Date of judgment _____

c. Name of case _____

d. Name and location of court _____

e. Court docket or index number (if any) _____

14. If you are completing this Proof of Claim as a Third Party Claimant against an insured of The Home, you must conditionally release your claim against the insured by signing the following, as required by N.H. Rev. Stat. Ann. § 402-C:40 1:

I, _____ (insert claimant's name), in consideration of the right to bring a claim against The Home, on behalf of myself, my officers, directors, employees, successors, heirs, assigns, administrators, executors, and personal representatives hereby release and discharge _____ (insert name of defendant(s) insured by The Home), and his/her/its officers, directors, employees, successors, heirs, assigns, administrators, executors, and personal representatives, from liability on the cause(es) of action that forms the basis for my claim against The Home in the amount of the limit of the applicable policy provided by The Home; provided, however, that this release shall be void if the insurance coverage provided by The Home is avoided by the Liquidator.

 Claimant's signature Date

15. All claimants must complete the following:

I, James F. Scherr (insert individual claimant's name or name of person completing this form for a legal entity) subscribe and affirm as true, under the penalty of perjury as follows: that I have read the foregoing proof of claim and know the contents thereof, that this claim in the amount of See attached Summary Sheet * Attachment 2 against The Home is justly owed, except as stated in item 9 above, and that the matters set forth in this Proof of Claim are true to the best of my knowledge and belief. I also certify that no part of this claim has been sold or assigned to a third party.

Any person who knowingly files a statement of claim containing any false or misleading information is subject to criminal and civil penalties.

 Claimant's signature Date 6/9/04

*Plus attorneys' fees
 16. Send this completed Proof of Claim Form, postmarked by June 13, 2004, to:

The Home Insurance Company in Liquidation
 P.O. Box 1720
 Manchester, New Hampshire 03105-1720

You should complete and send this form if you believe you have an actual or potential claim against The Home even if the amount of the claim is presently uncertain.

Attachment 1

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS FILED
205TH JUDICIAL DISTRICT

GILBERT SANCHEZ
2007 JUN 1 PM 2 36
EL PASO COUNTY, TEXAS
BY _____
Cause No. 98-377 DEPUTY

JAMES F. SCHERR, §
Plaintiff, §
v. §
THE HOME INSURANCE COMPANY, §
Defendant. §

COPY

PLAINTIFF'S FIRST AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Plaintiff, JAMES F. SCHERR, by and through the undersigned attorney, and files his First Amended Petition complaining of Defendant THE HOME INSURANCE COMPANY, and in support thereof would show the Court as follows:

I.

Plaintiff is an attorney licensed to practice law in Texas with his principal place of business located at 1 Texas Tower, 6th Floor, El Paso, Texas, 79901. Defendant THE HOME INSURANCE COMPANY is an insurance company authorized to do business in the State of Texas upon which service has already been obtained.

II.

JURISDICTION

Jurisdiction and venue is proper in this Court because the events underlying the claims of the Plaintiff took place in El Paso

County, Texas, and the damages claimed herein greatly exceed the minimum jurisdictional limits of this Court.

III.

FACTS

On January 21, 1994, Plaintiff was sued by former clients Messrs. Beard, Bailey and Petrosky, in Harris County, Texas, alleging that, because of a pre-existing business relationship, Plaintiff favored another client over Messrs. Beard, Bailey and Petrosky in a lawsuit filed in El Paso County, Texas. At the time of the filing of the case, Plaintiff had coverage under a professional liability insurance policy issued by Defendant. The policy provided for \$200,000.00 coverage for damages and costs of defense per "claim," and \$600,000.00 in the "aggregate." Defendant paid for Plaintiff's defense of that case until defense costs reached approximately \$150,000.00. Defendant and Plaintiff then settled the case with Messrs. Beard, Bailey and Petrosky for payment by Defendant of \$50,000.00, payment by JAMES F. SCHERR of \$117,500.00 from his own funds, and release of monies held in the Court's trust account to Messrs. Beard, Bailey and Petrosky.

IV.

During the pendency of Beard, et al., case (the "Beard Litigation"), Messrs. Gillespie, Stephenson, Ojo, Ivy, Domino and others sought to intervene in the action filed by Beard, et al. The Court severed the intervention to a separate action (hereinafter the "Intervention"). A copy of said Plea in

Intervention and First Amended Plea in Intervention are attached hereto as Exhibit "A".

V.

On or about February 2, 1996, Defendant notified Plaintiff in writing that Defendant was denying defense of said Intervention based on the fact that it believed that the Intervention constituted the same "claim" as the original action brought by Messrs. Beard, Bailey and Petrosky.

VI.

Due to Defendant's refusal to provide coverage on the Intervention, Plaintiff was forced to hire the law firm of Hudgins, Hudgins & Warrick, Houston, Texas, to provide legal representation in said Intervention. At the time of the filing of this Petition, Plaintiff has incurred legal costs in excess of the jurisdictional minimums of this Court.

VII.

Breach of Contract

A.

After being paid the bargained for premium from Plaintiff, Defendant paid its portion of defense costs and settlement in the Beard Litigation. The limits of the policy called for a \$200,000.00 liability limit per claim.

B.

Defendant breached the contract by refusing to pay for the defense of the separate lawsuit brought by Gillespie, et al. The

Gillespie intervention is a distinct claim from the Beard litigation. Moreover, Gillespie, et al. attempted unsuccessfully to intervene in the Beard, et al. action. Therefore, the \$600,000.00 aggregate liability limit in the contract again applies and the Defendant is liable for the costs of defense of the Gillespie intervention.

C.

As a result of Defendant's breach of the insurance contract at issue, Plaintiff has suffered damages well in excess of the jurisdictional limits of this Court, as well as the costs, including attorney's fees, incurred in the Intervention filed by Gillespie, et al. Furthermore, Plaintiff seeks attorney's fees necessary to prosecute this case. In the event of an appeal to the Court of Appeals or Texas Supreme Court, Plaintiff would be entitled to additional attorney's fees.

VIII.

Declaratory Judgment

A.

Pursuant to the Uniform Declaratory Judgments Act, Texas Civil Practice and Remedies Code, § 37.001, et seq., Plaintiff requests the Court for a construction of the insurance contract and a declaration that Defendant had a duty to defend Plaintiff in the Gillespie intervention.

B.

The cost of defending Plaintiff in the Gillespie intervention in the 129th District Court, Harris County, Texas, as described above, would be a sum within the jurisdictional limits of this Court.

C.

Plaintiff has retained the firm of Jim Darnell, P.C., to represent Plaintiff in this action and has agreed to pay the firm a reasonable and necessary attorney's fee. Pursuant to § 37.001, et seq., Texas Civil Practice and Remedies Code, Plaintiff seeks an award of attorney's fees necessary to prosecute this case.

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that Defendant be cited to appear and answer, and that on final trial, Plaintiff have:

1. Judgment against Defendant for a sum in excess of the minimum jurisdictional limits of the Court;
2. Prejudgment interest as provided by law;
3. Attorney's fees;
4. Post-judgment interest as provided by law from the date of the judgment until paid;
5. Costs of suit;
6. A declaration that Defendant had a duty to defend Plaintiff in the Gillespie intervention; and

7. Such other and further relief to which Defendant may be justly entitled.

Respectfully submitted,

JIM DARNELL, P.C.
310 N. Mesa, Suite 212
El Paso, Texas 79901
Phone: (915) 532-2442
Fax: (915) 532-4549

By: 

Jim Darnell

State Bar No. 05391250

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was sent via facsimile (915) 544-8544 and U.S. mail to Carlos Rincon, Attorney for Defendant, 221 N. Kansas, Suite 2000, El Paso, Texas 79901, on this 1 day of June, 2004.


Jim Darnell

ATTACHMENT 2

SUMMARY SHEET

for

James F. Scherr

Paid to:	Amount
Jones & Georges	\$117,500.00
Hudgins & Hudgins	\$ 46,341.21
Baker & Botts	\$ 17,500.00
Donald G. Wilhelm	\$ 24,182.05
Jeffrey B. Pownell	\$ 21,786.98
Jim Darnell	\$ 50,969.50
Total:	\$278,279.74*

*Plus attorneys' fees to complete litigation

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS
68 JUDICIAL DISTRICT

Filed 7-25 A.D. 1988
at 1:10 o'clock P M
EDIE RUBALCABA, Clerk, Dist. Courts
El Paso County, Texas

#62

DR. W.C. LAROCK, DR. JOSEPH SUPERVILLE)
and CORONADO CHIROPRACTIC CLINIC)
Individually and as REPRESENTATIVE OF)
ALL TEXAS CHIROPRACTICISTS,)

Plaintiffs,)

vs.)

AMERICAN GENERAL FIRE & CASUALTY)
COMPANY, THE HOME INSURANCE COMPANY,)
ALLSTATE INSURANCE CO., KEMPER GROUP)
INSURANCE COMPANIES, LUMBERMEN'S)
MUTUAL CASUALTY COMPANY, CRAWFORD &)
COMPANY, CRUM & FOSTER, U.S.)
INSURANCE GROUP, U.S. FIRE INSURANCE)
CO., TEXAS EMPLOYERS INSURANCE)
ASSOCIATION, TEXAS EMPLOYERS NATIONAL)
INSURANCE CO., NATIONAL STANDARD)
INSURANCE CO., COMMERCIAL UNION)
INSURANCE CO., NATIONAL UNION FIRE)
INSURANCE OF PITTSBURGH, PENNSYLVANIA,)
INTRACORP, INC, SAFECO INSURANCE)
COMPANY OF AMERICA, HARTFORD FIRE)
INSURANCE COMPANY, LIBERTY MUTUAL)
INSURANCE COMPANY, NORTH RIVER)
INSURANCE COMPANY, NEW JERSEY,)
DR. WILLIAM W. TIMBERLAKE, and ALL)
OTHER INSURANCE COMPANIES WHO)
WRONGLY CUT CHIROPRACTOR BILLS,)

Defendants.)

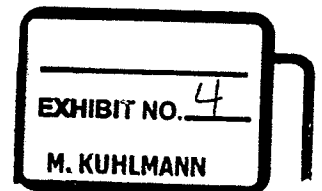
SMH
BY DEPUTY

NO. 88-07707

PLAINTIFF'S ORIGINAL CLASS ACTION PETITION

COMES NOW DR. W.C. LAROCK, DR. JOSEPH SUPERVILLE and CORONADO CHIROPRACTIC CLINIC, Plaintiffs, individually and on behalf of all other Texas Chiropractors, and bring this class action against THE HOME INSURANCE COMPANY, ALLSTATE INSURANCE CO., KEMPER GROUP INSURANCE COMPANIES, LUMBERMEN'S MUTUAL CASUALTY COMPANY, CRAWFORD & COMPANY, CRUM & FOSTER, U.S. INSURANCE GROUP, U.S. FIRE

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INSURANCE COMPANY, TEXAS EMPLOYERS INSURANCE ASSOCIATION, TEXAS EMPLOYERS NATIONAL INSURANCE CO., NATIONAL STANDARD INSURANCE CO., COMMERCIAL UNION INSURANCE CO., AMERICAN GENERAL FIRE AND CASUALTY COMPANY, NATIONAL UNION FIRE INSURANCE OF PITTSBURGH, PENNSYLVANIA, INTRACORP, INC., SAFECO INSURANCE COMPANY OF AMERICA, HARTFORD FIRE INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, NORTH RIVER INSURANCE COMPANY, NEW JERSEY, DR. WILLIAM W. TIMBERLAKE, and ALL OTHER INSURANCE COMPANIES WHO WRONGFULLY CUT CHIROPRACTOR BILLS, and show the following:

I.

The named Plaintiffs reside in El Paso County, Texas. Plaintiffs sue not only for themselves, but also on behalf of all Texas Chiropractors who have been denied payment for services rendered to patients covered by workers compensation insurance and other forms of insurance for payment of health care bills. Plaintiffs would show that: 1) the class is so numerous that joinder of all members is impracticable; 2) there are questions of law or fact common to the class; 3) the claims of Plaintiffs are typical of the claims of the class; 4) Plaintiffs, as the representative party, will fairly and adequately protect the interests of the class. Further, Plaintiffs would show that this class action is maintainable pursuant to T.R.C.P. 42 (b) for the reason that the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, and the common questions of law or fact concerning the refusal to pay for chiropractic services by Defendants predominate over any questions affecting only individual members and the class action is superior to

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other methods available for the fair and efficient adjudication of the controversy.

Defendant THE HOME INSURANCE COMPANY is a corporation doing business in the State of Texas and may be served by serving its agent, JAMES STITT, 1225 Greenville Ave. Suite 1001, Dallas, Texas 75234.

Defendant ALLSTATE INSURANCE CO. is an Illinois corporation doing business in Texas and may be served with process by serving its registered agent GARY E. BRIGGS, 222 W. Las Colinas Blvd., Suite 1500, Irving, Texas 75039-5403.

Defendant KEMPER GROUP INSURANCE COMPANIES is a group of insurance companies doing business in the State of Texas and may be served with process by serving its registered agent.

Defendant LUMBERMEN'S MUTUAL CASUALTY COMPANY is an insurance company doing business in the State of Texas and may be served with process by serving its registered agent, DAVID E. LEE, 1800 E. Gate Drive, Garland, Texas 75041-5513.

Defendant CRAWFORD & COMPANY LANDMARK LIFE INS. CO., is a corporation doing business in the State of Texas and may be served with process by serving its registered agent O.C. JARVIS or any other authorized officer or agent at 211 W. Commerce, P. O. Box 40, Brownwood, Texas 76804-0040.

Defendant CRUM & FOSTER is an insurance company doing business in the State of Texas and may be served with process by serving its registered agent.

Defendant U.S. INSURANCE GROUP is an insurance company doing business in the State of Texas and may be served with process by serving its registered agent.

Defendant U.S. FIRE INSURANCE CO., is an insurance company doing business in the State of Texas and may be served with process by serving its registered agent, KENNETH B. MOODY, at 4040 N. Central Expressway, Dallas, Texas 75204.

Defendant TEXAS EMPLOYERS INSURANCE ASSOCIATION is an insurance company doing business in the State of Texas and may be served with process by serving its registered agent TOM R. COFFIELD, JR., or any other authorized officer or agent at 1301 Young Street, Dallas, Texas 75221.

Defendant TEXAS EMPLOYERS NATIONAL INSURANCE CO., is an insurance company doing business in the State of Texas and may be served with process by serving its registered agent.

Defendant LIBERTY MUTUAL INSURANCE CO. is an insurance company doing business in El Paso County, Texas and may be served with process by serving its registered agent ALBERT L. BREELAND, or any other authorized officer or agent at 2110 Walnut Hill Lane, Suite 160, Irving, Texas 75038.

Defendant NATIONAL STANDARD INSURANCE CO. is an insurance company doing business in the State of Texas and may be served by serving its registered agent, COMMISSIONER OF INSURANCE, 1110 San Jacinto, Austin, Texas 78701-1998.

Defendant COMMERCIAL UNION INSURANCE CO. is an insurance company doing business in the State of Texas and may be served by serving its registered agent JAMES ROYAL, 9330 Ameberton Parkway, Dallas, Texas 75243.

Defendant AMERICAN GENERAL FIRE AND CASUALTY COMPANY is an insurance company doing business in the State of Texas and may be served with process by serving its registered agent WILLIAM ALEXANDER, II, 2919 Allen Parkway, Houston, Texas 77001.

Defendant NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA is an insurance company doing business in the State of Texas and may be served with process by serving its registered agent WILLIAM P. KANE, JR., 2001 Bryon Tower, Dallas, Texas 75201.

Defendant SAFECO INSURANCE CO. OF AMERICA is an insurance company doing business in the State of Texas and may be served with process by serving its registered agent DAVID B. DURHAM, 2701 N. Central Expressway, Richardson, Texas 75080.

Defendant HARTFORD FIRE INSURANCE COMPANY, is an insurance company doing business in the State of Texas and may be served with process by serving its registered agent GLEN E. DAMSTRA, JR., 5001 LBJ Freeway, Dallas, Texas 75221.

Defendant NORTH RIVER INSURANCE COMPANY, NEW JERSEY is an insurance company doing business in the State of Texas and may be served with process by serving its registered agent KENNETH B. MOODY, 40.0 N. Central Expressway, Dallas, Texas 75204.

Defendant INTRACORP, INC. is a Texas corporation doing business in Texas and may be served with process by serving its registered agent RICHARD VICTOR TAWTEL, 5100 Westheimer, Suite 275, Houston, Texas 77056.

Defendant WILLIAM W. TIMBERLAKE is a doctor of chiropractic doing business in the State of Texas and may be served with process at 3016 Jim Miller Rd. Dallas, Texas 75227.

II.

Plaintiffs are doctors of chiropractic and were at all times pertinent to this case, licensed by the Texas Board of Chiropractic Examiners to practice chiropractic. Plaintiffs provided necessary chiropractic care to a number of patients who were injured or while insured by Defendants under policies of insurance, automobile insurance, health insurance, worker's compensation insurance and other insurance.

It was the choice of these patients to secure the services and to contract with Plaintiffs for treatment of their injuries. These patients had a right to choose chiropractic treatment for their injuries and Defendants were required to provide for payment of the reasonable and necessary chiropractic fees in the respective local areas for treatment of their injuries.

III.

Plaintiffs would show that Defendants have engaged in a civil conspiracy aimed at cutting chiropractic services and charges. Defendants have engaged in a continuing course of conduct to cut chiropractic bills, disparage the care and treatment by chiropractors, interfere with the business relationship between Plaintiffs and their patients, restrain trade between Plaintiffs and their patients and engage in bad faith. Plaintiffs have suffered actual damages, loss of patients and future treatment, non-payment of bills, staff time to document and respond to the actions of Defendants, suffered damage to their business reputation and credit, mental anguish and legal fees and other damages for which Defendants are liable, together with punitive damages and prejudgment interest.

IV.

Plaintiffs would show that Defendants have engaged in unfair practices in the business of insurance (as defined by Article 21.21 et seq. of the Texas Insurance Code) and deceptive trade practices (as defined by Article 17.46 of the Texas Business and Commerce Code).

Plaintiffs would show that Defendants have engaged in one or more of the following acts:

1. Denying a claim without a reasonable basis for such denial.
2. Delaying payment of a claim without a reasonable basis for such delay.

3. Failing to promptly determine whether there was any reasonable basis for a denial or delay of a claim.
4. Withholding benefits by paying less than due.
5. Failure to pay Plaintiffs bills.
6. Refusing to pay claims without conducting a reasonable investigation based upon all available information. State Board of Insurance Amendment of unfair competition and unfair practices of insurers rules, Docket No. 41454 (8/10/82).
7. Discriminating against doctors of chiropractic. (Article 21.52 of the Texas Insurance Code).
8. Refusal to pay chiropractic services within 30 days or to controvert the services as required by Board Rules 41.160, 41.165 and 41.175 of the Texas Industrial Accident Board and Article 8306 §7 of the Texas Civil Statutes.
9. Refusing to accept the opinion of a chiropractor in adjusting or settling a claim by requiring another doctor's opinion.
10. Discriminating against doctors of chiropractic (Article 21.52 of the Texas Insurance Code).
11. Refusing to settle with claimants who received chiropractic care on the basis the fees of chiropractors are excessive and unreasonable without a timely and reasonable investigation concerning the claim. (Article 21.52 of the Texas Insurance Code)
12. Adjusting chiropractic bills and treatment in a different manner than those of other health care providers. (Article 21.52 of the Texas Insurance Code).
13. Arbitrarily refusing payment of chiropractic bills and then justifying refusal by subsequently retaining a doctor who has never seen the patient, the x-rays or the entire history of the patient to justify not paying the bill.
14. Refusing payment of chiropractic bills without any objective, grade or standard.
15. Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies (Article 21.21-2 §2(b)).
16. Failing to adopt and implement reasonable standards for prompt investigations of claims arising under its policies (Article 21.21-2 §2(c)).
17. Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear.
18. Compelling claimants covered by the policy of insurance to institute suits to recover amounts due under Defendants policies by offering substantially less than the amounts ultimately recovered in suits brought by them. (Article 21.21-2 §2(e)).
19. Refusing to settle workers compensation claims with future medical benefits provided by chiropractors.
20. Attempting to switch patients from treatment by a chiropractor to other types of doctors.

21. Disparaging the services of chiropractors by false or misleading representation of fact. (Deceptive Trade Practices Act 17.46 (a)(8)).
22. Breach of express warranty. (Texas Deceptive Trade Practices Act 17.50(a)(2)).
23. Breach of implied warranty. (Texas Deceptive Trade Practices Act 17.50(a)(2)).
24. Engaging in unconscionable action (Texas Deceptive Trade Practices Act 17.50(a)(3)).

The conduct of Defendants was a producing cause of Plaintiff's actual damages listed below. Plaintiff would further show the conduct of Defendants as described in this petition was committed knowingly. Pursuant to §17.505, giving 30 days written notice is rendered impractical by reason of the necessity of filing suit to prevent expiration of the statute of limitations. Further, Plaintiffs have given notice of the individual claims.

Defendants are liable to Plaintiffs and the others in the class for damages, prejudgment interest, reasonable attorney's fees and treble damages.

V.

Alternatively, and without waiving the foregoing, the conduct of Defendants constituted a willful, intentional, unwarranted, wrongful and unjustified interference by Defendants in the business of Plaintiffs and others in the class with their patients, as well as with prospective patients. As a proximate result of Defendants conduct, Plaintiffs and others in the class have been damaged as set forth herein.

VI.

Alternatively, and without waiving the foregoing, Plaintiffs and others in the class in good faith rendered services to their patients. Although Defendants had an obligation to act in good faith in respect to the handling of their

claims, Defendants breached that duty and acted in bad faith, which proximately caused damages to Plaintiffs.

VII.

Plaintiffs would show that Defendants have engaged in a continuing course of conduct as alleged above. After notice and hearing, a temporary injunction and thereafter a permanent injunction should be issued against Defendants to prohibit their bad faith conduct against chiropractors. Plaintiffs have no adequate remedy at law. After hearing and during the pendency of this suit, Plaintiffs request that the Court enjoin Defendants as follows:

1. Cutting, reducing, eliminating or refusing to pay chiropractic bills. In the event such Defendant contests any such bill, such Defendant shall deposit all monies in dispute into the registry of the Court, together with its written justification for the contest and the evidence to justify reduction.
2. Diverting patients of Plaintiffs or attempting to change treatment plans or health care providers.
3. Refusing, unreasonably limiting, diverting, switching or making an issue of future medical care with chiropractors in negotiation or settlement of workers' compensation claims.
4. Interfering with the doctor-patient relationship in any way.
5. Delaying payment of chiropractor bills.
6. Contacting patients of Plaintiffs concerning treatment or bills or any matter relating to chiropractors.
7. Making any derogatory remarks (orally or in writing) concerning chiropractors' treatment or bills.
8. Politiking, advertising, lobbying, donating money or solicitating political support to change the system or sway public opinion during the pendency of this suit.
9. Such other and further orders as the Court may deem necessary.

Upon final trial hereof, Plaintiffs pray this temporary injunction be made permanent.

VIII.

Alternatively, and without waiving the foregoing, Plaintiffs would show that Defendant INTRACORP, INC. and Defendant Dr. TIMBERLAKE were negligent and grossly negligent which negligence is a proximate cause of Plaintiffs damages.

IX.

Alternatively and without waiving the foregoing, Defendants are in violation of Article 8306 §7 for non-payment of medical services rendered by Plaintiffs and others in the class. As such, Plaintiffs are entitled to recover damages, interest thereon at the rate of twelve percent (12%) of the amount unpaid, and reasonable attorney's fees.

X.

Alternatively, and without waiving the foregoing, Plaintiffs would show that Defendants violated Article 3.62 of the Texas Insurance Code. Plaintiffs are entitled to damages, statutory penalty, interest and reasonable attorneys fees.

XI.

Plaintiffs and members of the class have suffered damages in excess of the minimum jurisdictional limits of this Court.

XII.

Plaintiffs would show that Defendants acted willfully and maliciously in the handling of these claims, and that the conduct of Defendants as aforesaid was of such character as to make Defendants liable for exemplary or punitive damages.

XIII.

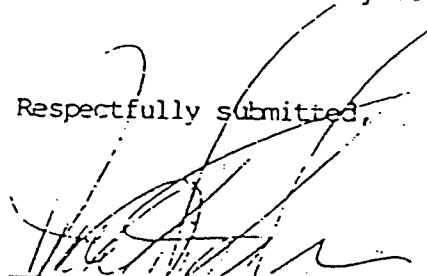
It was necessary to secure the services of JAMES F. SCHERR, a licensed Texas attorney, to prepare and prosecute this suit to protect the rights of Plaintiff

and members of the class. Judgment should be rendered in favor of this attorney and against Defendants for reasonable attorney's fees.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that Defendants be cited to appear and answer and that upon final trial Plaintiffs have:

- A. Judgment against Defendants in a sum in excess of the minimum jurisdictional limits of this court;
- B. Treble damages;
- C. Exemplary or punitive damages;
- D. Temporary and permanent injunctive relief;
- E. Prejudgment interest on the amount awarded as damages at the legal rate to the date of judgment;
- F. Post judgment interest thereafter at the legal rate until paid;
- G. Attorney's fees;
- H. Costs of this suit;
- I. Expert witness costs.
- J. Such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted,



JAMES F. SCHERR,
Attorney for Plaintiffs
425 Myrtle
El Paso, Texas 79901
(915) 544-0100
Texas Bar No. 17745400

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