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

OBJECTION TO CLAIMANT JAMES F. SCHERR'S MOTION TO RECOMMIT AND REVIEW REFEREE'S ORDER ON THE MERITS

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby objects to the motion of claimant James F. Scherr ("Scherr" or "Claimant") to recommit and review the Referee's Order on the Merits filed February 4, 2010 ("Order"). A copy of the Order is attached as Exhibit A. For the reasons set forth below, the Court should deny the motion.

Introduction

In the Order, the Referee correctly sustained the Liquidator's determination denying Scherr's claim. Home's duties both to defend and indemnify have been exhausted by the payment of Home's per claim limit of coverage. Scherr purchased a professional liability policy from Home with a per claim limit of $200,000. The limit includes defense costs as well as indemnity. During the policy period, Scherr notified Home of a malpractice action made against him by a group of three chiropractors who had been named plaintiffs in a putative class action Scherr had filed against numerous insurance companies. A group of seventeen other chiropractors, members of the putative class, intervened in the malpractice action. Their intervention was severed. The malpractice action was ultimately settled, with Home paying defense costs and contributing to the settlement to the extent of its $200,000 per claim limit. Home declined to participate further in defense of the continuing severed action because it arose

from "related acts, errors, or omissions" to the malpractice action and thus "shall be treated as a single claim" subject to a single per claim limit under the express terms of the Home policy.

The Referee correctly held that under the applicable Texas law the term "related" is unambiguous and should be applied using its ordinary meaning of "having a logical or causal connection." Order at 4-6. The Referee further properly held that the claims of the two groups of plaintiffs are "related" under this standard because they arise out of the same acts, errors or omissions: the alleged improper handling of the class action and the alleged improper distribution of settlement funds. Id. at 6. That some of the claims were made by doctors who had an attorney/client relationship with Scherr and other claims were by doctors who ultimately were determined not to be clients does not change that fact that both groups of plaintiffs based their claims on the same acts, errors or omissions. Id. The claims are related and subject to a single limit. The Referee accordingly properly sustained the Liquidator's denial of Scherr's claim against Home.

Background

The Referee succinctly summarized the relevant facts at pages 1-3 of the Order. The Liquidator sets forth the following to provide greater detail and cites to supporting exhibits. The exhibits, which were filed with the Referee, are provided in the Liquidators' Appendix filed with this Objection (cited as "Liq. Ex."), or with Scherr's motion (cited as "Scherr Ex.").

1. Underlying facts. Home issued to Scherr a lawyer's professional liability policy (LPLF878124) with a $200,000 per claim limit and a $600,000 aggregate limit for the period June 11, 1993 to June 11, 1994. Liq. Ex. 1 (Home policy), Declarations page.

Scherr is an attorney licensed to practice law in the State of Texas. Liq. Ex. 7 (proof of claim) at Att. 1, ¶ I. On July 28, 1988, Scherr brought an action on behalf of a putative class of

all Texas chiropractors alleging that certain insurance companies had engaged in a civil conspiracy aimed at cutting chiropractic services and charges. Dr. Walter Rhodes, et al. v. Great American Insurance Company, et al., Case No. 88-7707 (the "Rhodes action"). Liq. Ex. 8 (Rhodes Petition) at ¶ XIII. After the suit was filed, doctors Beard, Bailey, and Petrosky (the "Beard plaintiffs"), were joined as putative class representatives. The Beard plaintiffs subsequently terminated Scherr's services and engaged attorney Marjorie Georges; Ms. Georges settled the claims on behalf of the Beard plaintiffs. See Scherr Ex. C. The Beard plaintiffs then brought suit against Scherr asserting claims arising out of his alleged improper handling of the Rhodes action and alleged improper actions regarding distribution of monies received in settlement in the Rhodes action (the "Beard malpractice action"). See Liq. Ex. 2 (Beard Eighth Petition).

The Beard malpractice action was scheduled for trial in October 1995. After the first portion of the jury verdict was rendered, see Scherr Ex. O (jury charge and special questions), the parties settled the Beard malpractice action. See Scherr Ex. P (Full and Final Release). Home contributed $203,639.20 towards Scherr's defense costs and settlement payments. Liq. Ex. 4 (Home letter) at 1; Liq. Ex. 7, Att, 1, ¶ III.

During the pendency of the Beard malpractice action, additional chiropractic doctors (the "Gillespie plaintiffs") intervened alleging that they too had been injured by Scherr's alleged actions in handling the Rhodes action and distributing monies received in settlement. See Liq. Ex. 3 (Gillespie Petition). The court severed the Gillespie plaintiffs' intervention to a separate trial, and Scherr sought coverage for it from Home. See Liq. Ex. 7, Att. 1, ¶ IV; Liq. Ex. 4 at 2. Home advised Scherr that defense costs and loss payments in respect of the Beard malpractice action had exhausted the per claim limits of the Policy and that Home would no longer

participate in Scherr's defense. Liq. Ex. 4 at 2. The court granted summary judgment for Scherr on the Gillespie plaintiffs' claims, and that summary judgment was upheld by the Texas Court of Appeals. Gillespie v. Scherr, 987 S.W.2d 129 (Tex App. – Houston [14th Dist.] 1998, pet. denied) (Scherr Ex. Z). Scherr paid additional defense costs for which he now seeks reimbursement under the Policy. See Liq. Ex. 7, Att. 2.

2. The Home Policy. The Policy provides professional liability coverage for "claims first made against the insured during the policy period and reported to the [Home] during the policy period caused by an act, error, or omission for which the Insured is legally responsible." Liq. Ex. 1 at "Policy Section B (Coverage)". The Policy per claim limits include defense expenses as set forth in Section E(I) of the Policy:

> **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. [Emphasis added]

The Declaration page states that the limit for "each claim" is $200,000 and the "aggregate" limit is $600,000. Liq. Ex. 1, Declarations page.

The scope of a "claim" for limits purposes is set forth in Section E(IV):

> **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. [Emphasis added]

All allegations against the insured based on "[r]elated acts, errors or omissions" are therefore a single claim, subject to the $200,000 per claim limit which includes both defense and indemnity.

ARGUMENT

The Policy provides that all claims and suits arising out of related acts, errors, or omissions are to be treated as a single claim. The Referee correctly held that the Gillespie plaintiffs' continued action was based on acts, errors, and omissions that are related to those alleged by the Beard plaintiffs, so that the actions constitute a single claim under the Policy. Home paid its per claim limit in defense and settlement costs in the Beard malpractice action, relieving Home of any further defense obligation regarding the Gillespie plaintiffs' claims.

As the Referee held, under the applicable Texas law, the word "related" is not ambiguous. It requires only that there be a logical or causal connection between the acts, errors and omissions. The Policy language makes clear that claims arising from "related" acts, errors, or omissions are to be treated as a single claim even if they involve different claimants. Review of the Beard plaintiffs' and the Gillespie plaintiffs' petitions reveals that the two actions involve not just related but the same asserted acts, errors or omissions: improper handling of the Rhodes action by failing to disclose a prior relationship with two named plaintiffs (Drs. LaRock and Superville), negligently conducting the action, failing to properly account for settlements, and improperly withholding funds collected as expenses. The acts, errors or omissions underlying the petitions are "related," so the petitions are subject to a single limit.

I. UNDER TEXAS LAW, THE TERM "RELATED" IS UNAMBIGUOUS AND MEANS HAVING A "LOGICAL OR CAUSAL CONNECTION."

The Referee properly rejected Scherr's contention that the policy language is ambiguous and requires a causal connection. Order at 4-6. As the Referee noted, the Parties agree that Texas law applies to coverage questions in this matter. Order at 4.[1] Texas law governing the construction of insurance policies is well established:

> Insurance policies are contracts and therefore are controlled by rules of construction applicable to contracts generally. When construing a contract, including an insurance policy [the Texas courts'] primary focus is to ascertain the true intent of the parties as expressed in the written document. Whether a policy or contract is ambiguous is a question of law for the court to determine. A written contract that can be given a definite or certain legal meaning is not ambiguous. If the policy or contract contains no ambiguity, the words used are to be given their ordinary meaning. If, however, the language of the policy or contract is subject to two or more reasonable interpretations, the policy is ambiguous and the construction that would afford coverage to the insured must be adopted. A court should consider a contract, such as an insurance policy, as a whole, giving effect to each part; no single phrase, sentence, or section of the contract or policy should be isolated and considered apart from the other provisions.

Columbia Cas. Co. v. National Emer. Serv. Inc., 175 S.W.3d 339, 343 (Tex. App. – Houston [1st Dist.] 2004, pet. denied) (citations omitted). "[N]either conflicting expectations nor dialectics are sufficient to create ambiguity," and "not every difference in the interpretation of an insurance policy amounts to an ambiguity." Id. at 348 n.4, citing Forbau v. Aetna Life Ins. Co., 876 S.W.2d 132, 134 (Tex. 1994) ("Both the insured and the insurer are likely to take conflicting views of coverage, but neither conflicting expectations nor disputation is sufficient to create an ambiguity"), and Potomac Ins. Co. of Ill. v. Jayhawk Med. Acceptance Corp., 198 F.3d 548, 551 n.3 (5th Cir. 2000) ("[M]ere absence of a policy definition does not give rise to a finding of ambiguity").

[1] This dispute involves coverage under a professional liability policy issued to a Texas attorney in Texas (Liq. Ex. 1, Declarations page) with respect to claims asserted in Texas courts (Liq. Ex. 2 and 3) regarding conduct in handling a lawsuit brought in Texas (Liq. Ex. 8). In these circumstances, the State that bears the most significant relationship to the contract is Texas. See Ellis v. Royal Ins. Co., 129 N.H. 326, 330-32 (1987).

The pertinent language of the Home Policy provides that:

> 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.

Liq. Ex. 1 at Section E(IV). The first sentence of the section provides that the existence of multiple claimants or multiple actions ("claims . . . or suits by more than one person") does not expand Home's limits of liability. The second sentence provides that "related" "acts, errors or omissions" are to be treated as a single claim. This language is clear and unambiguous.

The ordinary meaning of the word "related" is "having a logical or causal connection." See Webster's Third New International Dictionary at 1916 (2002) (defining "relate" in pertinent part as "to show or establish a logical or causal connection between" and defining ""related" as "having relationship: connected by reason of an established or discoverable relation"). Scherr contends the word "related" is ambiguous and must be construed to have a narrower meaning requiring a "causal" connection. The Referee correctly rejected this position under applicable Texas law. Order at 4-6. The Referee relied on the reasoning of the Texas Court of Appeal in Columbia Casualty, 175 S.W.3d at 344, which addressed the meaning of the word "related" in the context of language very similar to the Home Policy.[2] The court held that the word "related" was not ambiguous and, "giving the term 'related' its ordinary and generally accepted meaning," it held that "'related' means having a logical or causal connection." Columbia Casualty, 175 S.W.3d at 348 (citing Merriam-Webster's Collegiate Dictionary 1050 (11th ed. 2003)). See North Am. Specialty Ins. Co. v. Royal Surplus Lines Ins. Co., 541 F.3d 552, 557 (5th Cir. 2008)

[2] The medical malpractice policy at issue in Columbia Casualty had a per claim limit for "all injury or damage arising out of, or in connection with, the same or related medical incident" and defined "medical incident" as "any act, error, or omission in the providing of or failure to provide professional services." 175 S.W.3d at 344.

(applying Texas law and following Columbia Casualty in defining "related" to mean "having a logical or causal connection").

In holding that "related" was unambiguous, the Columbia Casualty court expressly declined to limit the word to "causal" connections and refused to follow the Arizona case to that effect relied on in Scherr's motion, Arizona Prop. & Cas. Ins. Guar. Fund v. Helme, 735 P.2d 451 (Ariz. 1987). Columbia Casualty, 175 S.W.3d at 347. The court noted that the policy "[did] not indicate that any particular definition, or a limited or restrictive definition... should be used to replace the plain, ordinary, and generally accepted meaning of 'related'" and concluded that "although a malpractice event may involve numerous independent grounds of negligence that constitute a series of acts, Texas law indicates that they can still be related and form a single malpractice claim." Id. at 347-48. The Columbia Casualty court approvingly cited the California Supreme Court's decision in Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co., 855 P.2d 1263 (Cal. 1993), where the California court "defined 'related claims' as those encompassing 'both logical and causal connections,' noting that 'restricting the word only to causal connections improperly limits the word to less than its general meaning.'" Columbia Casualty, 175 S.W.3d at 347 (quoting Bay Cities, 855 P.2d at 1274).[3] Accord, Gregory v. Home Ins. Co., 876 F.2d 602, 606 (7th Cir. 1989).

The Referee found the Columbia Casualty court's reasoning "more persuasive" (Order at 6) and declined to follow Helme and St. Paul Fire & Marine Ins. Co. v. Chong, 787 F. Supp. 183

[3] The attorney's professional liability policy in Bay Cities was very similar to the language of the Home policy. It provided that "[t]wo or more claims arising out of a single act, error or omission or a series of related acts, errors or omissions shall be treated as a single claim." 855 P.2d at 1265; compare Policy Section E(IV) ("Related acts, errors or omissions shall be treated as a single claim.").

(D. Kan. 1992), cited by Scherr.[4] The Referee accordingly did not need to reach the Liquidator's contention that these cases are inapplicable for the additional reason that interpretation of the Policy is a matter of Texas law. Absent a decision of the Texas Supreme Court, the best indication of Texas law is the decision of the Texas appellate court in a case that is essentially on point – Columbia Casualty. See also North Am. Specialty, 541 F.3d at 557 (following Columbia Casualty). Under Texas law, acts, errors, and omissions that have a logical or causal connection are "related," so that under the Policy claims arising from such acts are subject to a single limit.

II. THE ACTS, ERRORS OR OMISSIONS ALLEGED IN THE GILLESPIE PETITION ARE RELATED TO THOSE IN THE BEARD PETITION, THEREFORE ONLY A SINGLE LIMIT IS APPLICABLE.

The Policy defines a single claim by reference to "acts, errors or omissions." These categories relate to factual matters, not questions of law, and they concern the insured's activities, not the effect of those activities on the claimants. Thus, contrary to Scherr's contentions, two complaints arising from related acts, errors or omissions are to be treated as a single claim under the Policy, even if they involve different claimants or allege different theories of liability or different damages arising from the underlying acts. As the Referee agreed (Order at 6), the critical question in applying the per claim limits is whether the factual allegations

[4] Chong, 787 F. Supp. 183, has no bearing here. First, the case is distinguishable on its facts, because it involved a lawyer who represented the defendants in three separate criminal cases and gave separate (although similarly erroneous) advice to each. Here, both the Gillespie and Beard plaintiffs assert claims arising from Scherr's conduct of one case, the Rhodes action. Second, the Chong decision does not reflect Texas law. It followed the reasoning of Helme, which was rejected by the Texas court in Columbia Casualty, and the reasoning of the California Court of Appeals in Bay Cities Paving & Grading, Inc. v. Layers' Mut. Ins. Co., 233 Cal. App. 3d 1184 (1991), which was later reversed by the California Supreme Court in Bay Cities, 855 P.2d at 1275, the decision followed in Columbia Casualty. See Chong, 787 F. Supp. at 188 (citing Helme, which it references as "Hermes", and the lower court in Bay Cities). Cf. Columbia Casualty, 175 S.W.3d at 347-48 (following the California Supreme Court in Bay Cities and rejecting Helme). Scherr's motion also erroneously relies on the overruled intermediate appellate decision in Bay Cities. Scherr Motion at 12. McCraw v. Mensch, 461 F. Supp. 2d 872 (W.D. Wisc. 2006), also cited by Scherr, is also irrelevant. While the court stated that "related" is ambiguous under Illinois law, it held only that acts of alleged negligence ten years apart were not related. Id. at 878.

present "related acts, errors or omissions." The dispositive issue in this matter is whether Scherr's alleged acts are logically or causally connected.

In determining whether the Gillespie plaintiffs' and Beard plaintiffs' actions present related acts, errors or omissions, the Referee properly looked to the allegations made in the two actions. Scherr has contended that the ultimate resolution of the actions and the legal theories presented to the jury in the first action are relevant. However, under the clear language of the Home policy quoted above, suits by separate claimants do not increase Home's liability, and the question is whether those suits present "related acts, errors or omissions." The answer is properly determined based upon the operative pleadings that frame the actions and not through an attempt to deduce what particular acts, errors or omissions may ultimately be decisive.[5] This approach is consistent with the principle of Texas law that "the duty to defend is determined by the claims alleged in the petition and the coverage provided in the policy." Pine Oak Builders, Inc. v. Great Amer. Lloyds Ins. Co., 279 S.W.3d 650, 654 (Tex. 2009); see GuideOne Elite Ins. Co. v. Fielder Road Baptist Church, 197 S.W.3d 305, 308 (Tex. 2006) ("Facts outside the pleadings, even those easily ascertained, are ordinarily not material to the determination").

The Referee correctly held that the allegations against Scherr by the Beard and Gillespie plaintiffs are related. Order at 6. Most fundamentally, both petitions concern Scherr's handling of the putative class action Dr. Walter Rhodes, et al. v. Great American Ins. Co., et al., Cause 88-

[5] Indeed, the non-pleading matter cited by Scherr, the Charge of the Court (Scherr Motion at 8-9, 18; Scherr Ex. O), demonstrates the futility of such a quest. The Charge contains special questions to the jury, but they address only ultimate legal issues and damages, and do not identify the "acts, errors or omissions" that may have been presented to the jury. Further, Scherr's proposed approach would require delay of a determination whether suits were "related" until they were concluded, which would create uncertainty for both the insured and the insurer, and it is inconsistent with the Texas rule that determinations of a duty to defend rest on the pleadings.

7707. Both petitions[6] allege that Scherr filed the Rhodes action on behalf of a putative class of chiropractors against various insurance companies (Beard ¶ 3; Gillespie page 5); that Scherr failed to inform others of a preexisting relationship with named plaintiffs LaRock and Superville (Beard ¶¶ 4, 6-7; Gillespie pages 5, 7); that Scherr and other attorneys failed to properly account for certain settlements, inappropriately paid LaRock and Superville amounts from those settlements, and inappropriately paid themselves amounts as expenses out of those settlements (Beard ¶¶ 3, 6, 8, 11, 14; Gillespie pages 5, 6, 7, 8, 10); and that Scherr negligently handled the Rhodes action by, among other things, failing to certify or conduct a hearing for the purpose of certifying a class (Beard ¶ 5; Gillespie page 6). A side-by-side comparison of the pertinent allegations of the petitions, which highlights their many similarities, is set forth in the Chart of Allegations attached as Exhibit B to this objection (and also submitted to the Referee). The Referee correctly concluded that the both petitions alleged claims (1) arising out of Scherr's alleged improper handling of the class action, and his failure to have the class certified, and (2) relating to the distribution of money from the settlements. Order at 6.

The acts, errors or omissions underlying the Beard plaintiffs' and the Gillespie plaintiffs' actions are the same and are therefore "related." As the Referee concluded, "the claims themselves related to the same acts, errors or omissions allegedly made or not made by Scherr. Therefore, the claims have both a logical and causal connection." Order at 6.[7] Indeed, Scherr acknowledges the striking similarity between the pleadings of the Beard plaintiffs and Gillespie plaintiffs. Scherr Motion at 7 ("Clearly, the Gillespie Intervention was patterned after the suit

[6] For convenience, the Liquidator cites to the Beard plaintiffs' "Plaintiffs' Eighth Amended Original Petition" and the Gillespie plaintiffs' "Third Amended Plea in Intervention," which Scherr cites as the final petitions. Scherr Motion 5, 8 (citing Scherr Ex. J, N). They are also Liquidator's Exhibits 2 and 3.

[7] That fact that the allegations are causally connected means that a single per claim limit applies even if the term "related" were viewed as ambiguous as Scherr contends.

filed by clients Beard, Bailey and Petrosky in the malpractice case."). Even if the allegations were not identical, however, the acts, errors and omissions at a minimum are "related": they took place in the prosecution of the same lawsuit and they generally involve alleged favoring of LaRock and Superville over other claimants, alleged failure to account for or misappropriations from the same settlements, and negligence in prosecuting the class action.[8] Under any reasonable interpretation of the term, the acts, errors or omissions underlying the Beard and Gillespie plaintiffs' actions are "related." They accordingly "shall be treated as a single claim." See Gregory, 876 F.2d at 604-606 (class action fraud claims arising from tax opinion letter concerning a video production and cross-claim of error regarding status of the production as a security are "related" and subject to a single limit).

Finally, the Referee properly rejected Scherr's attempt to distinguish the two actions based on legal issues, not the underlying acts, errors and omissions that are the subject of the Policy. Order at 6. Scherr contends that he was not the Gillespie plaintiffs' attorney, and that the claims by his clients the Beard plaintiffs are therefore unrelated. Scherr Motion at 13-14, 17-18. It is true that the Texas Court of Appeals affirmed the grant of summary judgment against the Gillespie plaintiffs on the ground that they were not clients. Gillespie v. Scherr, 987 S.W.2d 129 (Scherr Ex. Z). However, that does not affect whether the underlying "acts, errors or omissions" were "related". It only provides a ground for denying liability to the Gillespie

[8] Scherr cites Admiral Ins. Co. v. Briggs, 264 F.Supp.2d 460, 463 (N.D. Tex. 2003), for the proposition that "different alleged misstatements, omissions and promises that occurred on different days to different individuals" give rise to unrelated claims. Scherr Motion at 17. The Briggs decision is not persuasive. It does not reflect Texas law as determined in the 2004 Columbia Casualty decision and recognized in the Fifth Circuit's 2008 North Am. Specialty decision, 541 F.3d at 558 ("a pattern of neglect and incompetence" in medical malpractice amounts to a "continuing pattern of neglect, not a series of discrete events"). In any event, the Beard and Gillespie plaintiffs have not described "different alleged misstatements, omissions and promises"; they have both pointed to Scherr's alleged mishandling of the Rhodes action, his alleged misallocation and misappropriation of funds, his allegedly improper motives, his favoring of Drs. LaRock and Superville and his failure to certify the class. See Exhibit B (Chart of Allegations).

plaintiffs for alleged harm from those acts, errors or omissions. Although the Gillespie plaintiffs may ultimately have been determined not to be Scherr's clients, this does not mean that the acts, errors and omissions of which they complain are not related to those underlying the Beard plaintiffs' action. It just means that the Gillespie plaintiffs cannot successfully prosecute the claim. The two actions are still "related." As the Referee held, regardless of whether the Beard plaintiffs were Scherr's clients and the Gillespie plaintiffs were not, "the claims themselves related to the same acts, errors or omissions allegedly made or not made by Scherr." Order at 6. Scherr's argument rests on the theory that claims can only be related if the claimants stand in the same legal relationship to the insured. But, as the Referee recognized, that is not the test under the Policy, which expressly specifies that it is "acts, errors or omissions" that must be "related."

In sum, the acts, errors or omissions alleged by the Beard and Gillespie plaintiffs are "related" within the meaning of the Policy and Texas law. Accordingly, they are to be treated as a single claim. Having paid "per claim" policy limits to Scherr in respect of the Beard plaintiffs' action, Home's obligations under the Policy have been exhausted and it has no obligations with respect to the Gillespie plaintiffs' action.

CONCLUSION

The Court should sustain the Referee's Order and deny Scherr's motion to recommit.

Respectfully submitted,

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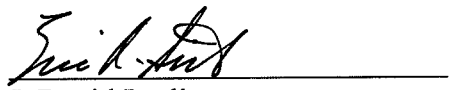

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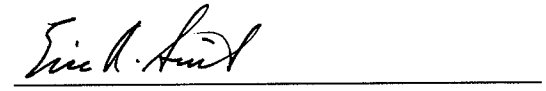
February 26, 2010

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Objection to Claimant James F. Scherr's Motion to Recommit was mailed, first class mail postage prepaid, to the persons on the attached service list on February 26, 2010. The Appendix of Liquidator's Exhibits was mailed only to counsel for Claimant Scherr; it will be posted and available on the Home liquidation website, www.hicilclerk.org.



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THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

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

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

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

In Re Liquidator Number:	**2008-HICIL-38**
Proof of Claim Number:	**INSU275827-01**
Claimant Name:	**James F. Scherr**
Claimant Number:	
Policy or Contract Number:	
Insured or Reinsured Name:	
Date of Loss:	

ORDER ON THE MERITS

This case arises from claims by James Scherr for reimbursement of costs he incurred related to the defense of claims against him. Scherr alleges Home has a duty to reimburse him for those costs pursuant to the terms of a Home lawyer's professional liability policy issued to Scherr. Scherr acknowledges that the per occurrence limit of the Home policy has been exhausted by other claims against him. He asserts that the defense costs for which he now seeks reimbursement are due to claims which are not related to the prior claims against him. Scherr asserts that the aggregate limit of liability of the Home policy has not been exhausted and that the per claim limit of liability does not apply to eliminate a duty to defend the claims for which he now seeks reimbursement.

Home alleges that the defense costs for which Scherr seeks reimbursement arise out of the same claim as one for which Home has already paid the per claim limit and Home has exhausted the per claim limit of the policy. Because the per claim limit of the Home policy has been exhausted, Home asserts it has no duty to reimburse Scherr for his additional defense costs.

RELEVANT FACTS

I. **The Home Policy**

Home issued a lawyer's professional liability policy to James F. Scherr and other related entities, policy number LPLF878124, which was in effect for the period June 11, 1993 to June 11, 1994 ("the Home policy"). The Declarations page of the Home policy states the per claim limit of $200,000 and the aggregate limit of $600,000.

The Home policy states that Home's duty is:

> 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.

Home Policy, Section B, page 1 of 9.

In Section E – Limit of Liability, the Home policy defines the per claim and aggregate limits, stating:

> 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.

Home Policy, Section E, page 6 of 9. The same section of the Home policy states:

> **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.

Home Policy, Section E, page 6 of 9.

II. <u>The Claims Against Scherr</u>

On July 28, 1988, Scherr filed a class action for the putative class of all Texas chiropractors alleging civil conspiracy by certain insurance companies related to cutting chiropractic services and charges. *Dr. Walter Rhodes, et al. v. Great American Insurance Company, et al.*, Case No. 88-7707, ("the Rhodes action"). After the suit was filed, Doctors Beard, Bailey and Petrosky ("the Beard plaintiffs") were joined as putative class representatives.

During the pendency of the Rhodes action, the Beard plaintiffs terminated the services of Scherr and hired Attorney Marjorie Georges to represent them. Georges settled the claims on behalf of the Beard plaintiffs. Eventually, the Beard plaintiffs brought suit against Scherr ("the Beard malpractice action") alleging numerous claims related to Scherr's alleged negligence in handling the class action and his alleged improper actions related to the distribution of settlement funds from the Rhodes action. The

Beard malpractice action was scheduled for trial in October 1995. The trial was bifurcated. After the first portion of the jury verdict was rendered, the parties settled the Beard malpractice action. Both Home and Scherr made payments pursuant to that settlement agreement. Home also contributed to Scherr's defense of the Beard malpractice action.

Before trial in the Beard malpractice action, other doctors, including Dr. Gillespie ("the Gillespie plaintiffs") intervened in the Beard Malpractice action. The Gillespie plaintiffs were doctors who had not been putative representatives of the class which Scherr had sought to be certified in the Rhodes action. The Gillespie plaintiffs alleged malpractice by Scherr in the Rhodes action including claims related to Scherr's failure to have the class certified and claims related to the distribution of settlement funds from the Rhodes action. The Court severed the claims by the Gillespie plaintiffs.

The Court granted summary judgment to Scherr as to the claims by the Gillespie plaintiffs. That summary judgment was upheld by the Court of Appeals. *Gillespie v. Scherr*, 987 S.W.2d 129 (Ct.App.Tx. 14th Dist. 1998). The Court of Appeals confirmed there was no attorney/client relationship or other contractual relationship between Scherr and the Gillespie plaintiffs and noted that there had never been certification of a class in the Rhodes action. Scherr paid attorneys fees related to defense of the claims by the Gillespie plaintiffs, and the ensuing appeals.

III. Notice to Home and Home's Position on Coverage

During the Home policy period, Scherr notified Home of the claims against him by the Beard plaintiffs. Home acknowledged a duty to defend and indemnify Scherr for those claims. Home contributed a total of $203,639.00 toward Scherr's defense costs and settlement payments.

In or about October 1995, Scherr also informed Home of the claims by the Gillespie plaintiffs and requested defense and indemnification for those claims. Home denied any duties related to the claims by the Gillespie plaintiffs stating that the payments made with respect to the Beard plaintiffs had exhausted the per claim limits of the Home policy and the aggregate limit did not apply. Scherr paid additional defense costs related to the claims by the Gillespie plaintiffs and seeks reimbursement for those amounts from Home. [1]

LEGAL ANALYSIS

Scherr argues that he is entitled to reimbursement for the claims by the Gillespie plaintiffs because their claims are not related to those of the Beard claimants. Because they are not related, Scherr argues that a separate per claim limit applies to the claims by the Gillespie plaintiffs and he is entitled to the separate per claim limit. Scherr asserts that the aggregate limit of liability applies regardless of whether the term "related" in the Home policy is ambiguous, because the claims by the Gillespie plaintiffs are not "related" to the claims by the Beard plaintiffs.

The Liquidator asserts that the per claim limit of liability applies and there is no further duty to reimburse Scherr for defense costs for the claims by the Gillespie plaintiffs. The Liquidator argues that the term "related" is not ambiguous and the claims by the Gillespie plaintiffs are related to the claims by the Beard plaintiffs.

The language of the Home policy which is the basis for argument in this dispute is:

[1] Scherr has withdrawn his claim that the aggregate limit applied to the claims by the Beard plaintiffs.

> **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 limit of liability. Related acts, errors or omissions shall be treated as a single claim.

I. Applicable Law

The parties agree that the law of Texas applies to the interpretation of the Home policy. The parties also agree that the issue before the Referee is narrow – whether the claims by the Beard plaintiffs and the claims by the Gillespie plaintiffs are "related" based on the terms of the policy. To answer this question, the Referee must determine whether the term "related" as used in the Home policy is ambiguous.

In *Columbia Cas. Co. v. National Emer. Ser. Inc.*, 175 S.W.3d 339 (Tex.App. 2004) the Texas Appellate Court for Houston explained Texas law governing construction of insurance policies, stating

> Whether a policy or contract is ambiguous is a question of law for the court to determine. A written contract that can be given a definite or certain legal meaning is not ambiguous. If the policy or contract contains no ambiguity, the words used are to be given their ordinary meaning. If, however, the language of the policy or contract is subject to two or more reasonable interpretations, the policy is ambiguous and the construction that would afford coverage to the insured must be adopted. A court should consider a contract, such as an insurance policy, as a whole, giving effect to each part; no single phrase, sentence, or section of the contract or policy should be isolated and considered apart from the other provisions.

Id. at 343, citations omitted. It is this rule which the Referee applies. The Referee must first determine whether "related" as used in the sentence "related acts, errors or omissions shall be treated as a single claim" is ambiguous. If it is not ambiguous, it is given its plain and ordinary meaning. If the term is ambiguous, then the construction that would afford coverage for Scherr must be adopted.

II. The Term "Related" is not Ambiguous.

Scherr argues that the term "related" is ambiguous and related claims are only those with a causal connection. Scherr acknowledges that if the term is ambiguous, Scherr has the burden to demonstrate the claims are not causally connected. Scherr argues he meets that burden by comparing the claims by the Beard plaintiffs and the Gillespie plaintiffs.

Scherr relies primarily on *St. Paul Fire and Marine Insurance Company v. Chong*, 787F.Supp.183 (D.Kan. 1992). In *Chong,* three Korean men were charged with kidnapping arising out of the same alleged facts. One attorney represented each of the three Korean defendants. The attorney gave poor advice and eventually each of the three clients sued him separately for malpractice. The Court found that the attorney's actions and omissions were similar as to each of the three clients, but not identical. The policy had a limit of liability for a single wrongful act or a series of related wrongful acts. The Court found that the undefined phrase "series of related wrongful acts" was ambiguous and construed the policy in favor of the insured attorney. The Court then found there were discreet losses to each client and that there was not a series of wrongful acts.

Scherr notes that in this case, the Gillespie plaintiffs did not proceed on the same allegations as those of the Beard plaintiffs; the Gillespie plaintiffs could not do so since they were not clients of Scherr's. Therefore, Scherr argues there were separate and distinct legal theories and alleged acts or omissions in this case, as there were in *Chong*.

Scherr also relies on *Arizona Property & Casualty Ins. Guar. Fund v. Helme*, 735 P.2d 451 (Az. 1987). In *Helme*, there were claims of medical malpractice against several doctors and other medical personnel related to the death of an auto accident victim. Dr. Eisenbeiss and his professional corporation, along with the doctors employed by the corporation, including Dr. Helme, were insureds under a medical malpractice policy with a per occurrence limit. The insurer became insolvent and the Arizona Guaranty Fund stepped in. Eventually the Fund paid the per occurrence limit. The Court then considered whether the failure of two doctors could be considered one occurrence because they constitute a series of related incidents. The Court first determined that the number of acts was the key. The Court then determined that there was a "single 'occurrence' if the acts are causally *related to each other* as well as to the final result." *Id.* at 458. The Court found that the allegations that each of the doctors failed to review x-rays on different days and for different reasons. The Court found that it was not error for the trial court to conclude there were two occurrences.

The Liquidator asserts that the term "related" as used in the Home policy is not ambiguous. First, the Liquidator argues that the Referee must look to the Scherr's alleged acts, errors or omissions to determine whether they are related. If the acts, errors or omissions alleged by the Beard plaintiffs are related to the acts, errors or omissions alleged by the Gillespie plaintiffs, the Liquidator asserts they are considered to be a single act, and a single claim, and the per occurrence limit applies to the allegations of both the Beard and Gillespie plaintiffs. The Liquidator relies on *Columbia Casualty*. In that case, the widow of a deceased patient sued various medical care providers. Columbia Casualty had issued a policy which provided coverage to at least two of the defendant doctors. The issue before the Court was whether the per loss event limit or the aggregate limit applied to Columbia Casualty's duty to indemnify the doctors. Each of the doctors separately and on different days reviewed the patient's x-rays and reached an inaccurate conclusion. The policy provided for a limit of liability per loss event and in the aggregate. The policy stated that the limit of liability stated for 'each claim' is the limit of the Company's liability for all injury or damage arising out of, or in connection with, the same or related medical incident. The policy also stated that the "Per Loss Event" limit applies to all Insureds for all Damages to all persons for injuries to one patient. The Court determined that the claims were for injuries to one patient, even though the actions were by two doctors. Therefore, the limit of liability per loss event applied.

In its discussion, the Court considered whether the claims were due to related medical incidents. The Court noted the *Helme* decision, and recognized that the *Helme* Court required a causal connection between one physician's negligence and the second physician's negligence in order to find related medical incidents. Finding that there was no policy language requiring any specific definition of "related", the Court gave the term its ordinary and generally accepted meaning, and concluded that "related" means having a logical or causal connection. The Court found such a connection between the alleged errors or omissions of the two doctors because the claims involved the same patient, at the same facility, during the same period of time, with regard to the same x-ray. The Court held that the per medical incident limit applied.

Scherr acknowledges that under the reasoning of *Columbia Casualty*, the term "related" would not be ambiguous. However, Scherr notes that the case was not decided by the Texas Supreme Court or the Texas Seventh Court of Appeals where the claims against Scherr were pending. Rather it was decided by

the Texas Eighth Court of Appeals, and therefore is not binding authority in this matter. Therefore, Scherr argues that there is better reasoned authority outside Texas on which the Referee should rely.

The Referee agrees with the Liquidator that the policy language makes clear that the analysis to be undertaken is whether Scherr's alleged acts, errors or omissions are related. If so, they shall be treated as a single claim.

The Referee finds that the term "related" is not ambiguous. The Referee finds the reasoning of the Texas Eighth Court of Appeals in *Columbia Casualty* to be more persuasive. The Referee also notes that the Fifth Circuit Court of Appeals has recognized the decision in *Columbia Casualty* and has relied on the holding that the term related means having a logical or causal connection. *See North American Specialty Ins. Co. v. Royal Surplus Lines Ins. Co.*, 541 F. 3d 552 (5th Cir. 2008).

III. The Allegations against Scherr by the Beard and Gillespie Plaintiffs are Related.

Given its ordinary meaning, "related" means "having a logical or causal connection." Therefore, the Referee must determine whether Scherr's alleged acts, errors or omissions, as set forth by the Beard plaintiffs and the Gillespie plaintiffs are related. The Referee finds that they are. The claims against Scherr arise out of his alleged improper handling of the class action, and his failure to have the class certified. These claims were made by chiropractors who would have been part of the class. That they were made by some doctors who had an attorney/client relationship with Scherr and some who did not does not change the fact that all of the doctors, both the Beard plaintiffs and the Gillespie plaintiffs, alleged the same acts, errors or omissions by Scherr.

The second set of claims are those related to the distribution of money from the settlements. While the Gillespie plaintiffs could not make claims about the distribution of money identical to those of the Beard plaintiffs because of the lack of attorney client relationship between the Gillespie plaintiffs and Scherr, the claims nevertheless arise out of the same acts, errors or omissions – the distribution of the same settlement funds. Therefore Scherr's acts, errors or omissions as alleged by both groups of plaintiffs are related as that term is used in the Home policy.

The claims by the Beard plaintiffs arise out of Scherr's acts, errors or omissions related to the Rhodes action. So do the claims of the Gillespie plaintiffs. The two groups of plaintiffs did not have the same relationship with Scherr. However, the claims themselves related to the same acts, errors or omissions allegedly made or not made by Scherr. Therefore, the claims have both a logical and causal connection.

The Referee does not find the reasoning of *Chong* or *Mensch* persuasive in light of the specific facts in this dispute. Rather the reasoning of the Texas Court of Appeals in *Columbia Casualty* demonstrates the term related is not ambiguous and that the claims of the Gillespie claimants are related to the alleged acts, errors or omissions of Scherr, as were the claims of the Beard claimants. *See also Gregory v. Home Ins. Co., Inc.* 876 F.2d 602 (7th Cir. 1988)(claims arising from an attorney's alleged error in an opinion letter concerning tax consequences of buying video tapes pursuant to video tape offering, as well as his error concerning video tape promotion as a security, were related and therefore considered a single claim under the attorney's liability policy).

For the reasons set forth above the Referee sustained the Liquidator's determination denying Scherr's claim.

So ordered.

2/3/2010
Dated

Melinda S. Gehris, Referee

Exhibit B

Chart of Allegations

Comparison of the Allegations Contained in the Claimants' Operative Petitions

Beard Claimants' Eighth Amended Original Petition dated October 13, 1995	**Gillespie Claimants' Third Amended Plea in Intervention [undated]**
"[Scherr and other counsel] are attorneys license to practice law in the State of Texas. Defendant James Scherr entered into Contingency fee contracts to represent [Beard Claimants] in certain causes of action against numerous insurance companies enumerated in Cause No. 88-7707." ¶ 3.	"[Scherr and other counsel] are attorneys licensed to practice law in the State of Texas. Defendants filed suit purporting to represent [Gillespie Claimants] in a class action suit for certain causes of action against numerous insurance companies in Cause No. 88-7707." Gillespie Complaint at pg. 5
"[Scherr and other counsel] failed to properly account for monies collected by [themselves] on behalf of Plaintiffs and favored specific other clients at the expense of Plaintiffs... [Scherr and other counsel] wrongfully appropriated for the benefit of [themselves] certain funds collected on behalf of plaintiffs...[1)...][1] greater than they were entitled to receive pursuant to said agreement; 2) in violation of his contingent fee contract with [Beard Claimants], 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 [Beard Claimants]; 3) in violation of the contingent fee contract between James Franklin Scherr and the [Beard Claimants], Defendants paid themselves one hundred percent of all monies received in settlement negotiated with one particular insurance company; 4) Defendants are currently wrongfully withholding disbursements of funds recovered in settlements in the amounts of $75,000 and 395,000, the pretext for which is a claim for expenses which defendants have failed to validate or document." ¶ 3.	"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, [Scherr] retained one hundred percent of the settlement proceeds." Gillespie Complaint at pg. 5. See also pgs. 6 and 7 quoted below
"[Scherr]... (1) [failed] to promptly and accurately account for settlement proceeds; (2) [failed] to promptly deliver collected settlement proceeds; (3) [failed] to provide [Beard Claimants] with an	Scherr: "(1)... fail[ed] to promptly and accurately account for settlement proceeds; (2)... fail[ed] to promptly distribute settlement proceeds; (3)... fail[ed] to provide the class with an accurate account of claimed expenses;

[1] Paragraph 3 of the Beard Claimants' Eighth Amended Original Petition runs from page 3 to page 4 of that document. Due to an apparent copying error on page 3, only the portion of the paragraph contained on page 4 may be quoted.

accurate account of claimed expenses; (4) [failed] to provide [Beard Claimants] with accurate information concerning one or more settlement negotiations; and (5) [favored] one client to the detriment of and against the interests of [Beard Claimants]. (6) [violated] the contingent fee contract by taking more in attorneys fees than allowed. (7) [placed] the interests of... Dr. LaRock and Dr. Superville ahead of the interests of [Beard Claimants] and other members of the class. (8) [placed] [his] own interests ahead of the interests of Plaintiffs and other members of the class." ¶ 5.	(4)... fail[ed] to inform [Gillespie Claimants] of settlement negotiations; (5)... favor[ed] LaRock and Superville over all other class members; (6)... [took] more fees than [he] was permitted to do under the contract; (7)... fail[ed] to conduct proper discovery; (8)... settl[ed] the suit in the manner in which it was settled; (9)... appoint[ed] inadequate counsel; (10)... nam[ed] improper class representatives" Gillespie Complaint at pg. 7.
Plaintiffs plead the following specific acts of negligence: (1) [Scherr]... assigned the principle 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) [Scherr]... fail[ed] to keep them adequately informed of the progress of the litigation; (3) [Scherr]... negotiated settlements that did not achieve the stated purpose of the litigation; (4) [Scherr]... did not adequately prepare them for their respective depositions; (5) [Scherr]... fail[ed] to exhaust their administrative remedies prior to commencement of the litigation; (6) [Shcerr]... never conducted a hearing for the purpose of certification; (7) [Scherr]... fail[ed] to maintain records required by the Texas Rules of Civil Procedure in class action litigation; (8) [Scherr]... fail[ed] to inform the named members of the class of the legal consequences of the settlements they negotiated; (9) [Scherr]... fail[ed] to acknowledge and respond to objections made by various class members to the settlements that were being negotiated; (10) [Scherr]... undert[ook] a class action of the nature envisioned in Cause No. 88-7707 when [he] did not have adequate financial capacity to maintain the class action; (11) [Scherr]... obtain[ed] the participation of [the Beard Claimants] upon the false pretext of what the class action would accomplish and that their principle clients LaRock and Superville would advance $100,000 of the initial costs." ¶ 5.	"[Scherr]... (1)... failed to certify, or even attempt to certify, a class action suit. (2)... [was] negligent in [his] representation of the class. (3)... settled class causes of action without the consent of the class or without a denial of certification of the class. (4)... did not conduct adequate discovery. (5)... failed to maintain records required by the Texas Rules of Civil Procedure in a class action litigation. (6)... [did not] properly distribut[e] settlement proceeds among the class. (7)... failed to acknowledge and respond to objections made by various class members as to the settlements that were being negotiated. (8)... undert[ook] 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)... settl[ed] the suit for a fraction of its actual value for the benefit of certain class representatives. (10)... select[ed] and ret[ained] Drs. LaRock and Superville as class representatives. (11)... us[ed] a purported class action as leverage for settlement for a chosen few." Gillespie Complaint at pg. 6.

"[Scherr]... collect[ed] more attorneys fees than those to which [he] was entitled under the terms of the contingency fee contract." ¶ 6.	"[Scherr]... collect[ed] more fees than [he was] entitled under the term of the contingent fee contract." Gillespie Complaint at pg. 8.
"[Scherr] fraudulently misrepresented [his] intentions in filing Cause No 88-7707 [and] fraudulently concealed [his] true relationship with two of the other class representatives." ¶ 6.	"[Scherr] fraudulently misrepresented [his] intentions in filing Cause No. 88-7707 [and] fraudulently concealed [his] true relationship with LaRock and Superville." Gillespie Complaint at pg. 8.
"[Scherr] knowingly made the following representations: 1. That [he] intended to represent the class of all Texas Chiropractors for the benefit of all Texas Chiropractors in Casue No. 88-7707, instead of the sole benefit of Dr. LaRock and Dr. Superville, 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." ¶ 8.	"[Scherr] represented to [Gillespie Claimants] that [he] intended to represent all chiropractors of the State of Texas in Cause No. 88-7707, when in actuality, the sole beneficiaries of this suit were to be [Scherr and his partners] and Drs. LaRock and Superville. [Scherr] also stated that any proceeds from Cause No. 88-7707 were to be divided among the class." Gillespie Complaint at pg. 8.
"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, $50,000, $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 inadequate accounting". ¶ 14.	"Scherr has appropriated and/or is attempting to appropriate as expenses substantial sums of money collected on behalf of [Gillespie Claimants] – 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." Gillespie Complaint at pg. 10.