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.
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> 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. The Claims Against Scherr

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:

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[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. <u>The Allegations against Scherr by the Beard and Gillespie Plaintiffs are Related.</u>

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