THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

In the Matter of the Liquidation
of the Home Insurance Company

No. 03-E-0106

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

Claimant Scherr asks this court to recommit this matter and review the referee's order on the merits. Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator of the Home Insurance Company ("liquidator"), objects. The court has reviewed the referee's order. Therefore, to the extent that Scherr requests such review, his motion is GRANTED. Upon review, the court concludes that the referee properly applied controlling Texas law. Accordingly, Scherr's motion to recommit is DENIED.

As a preliminary matter, the court will address Scherr's request for oral argument on this motion. New Hampshire Superior Court Rule 58 provides:

> In civil or equity actions, unless a party requests oral argument or an evidentiary hearing on any motion filed by the party or any objection thereto by another party within ten (10) days after the filing of the motion, **setting forth by memorandum, brief statement or written offer of proof the reasons why the oral argument or evidentiary hearing will further assist the court in determining the pending issue(s)**, no oral argument or evidentiary hearing will be scheduled and the court may act on the motion on the basis of the pleadings and the record before it....

(Emphasis added). As Scherr recognizes in his motion, the issue before this court is "what are 'related' claims under the terms of the Home Insurance Company Policy No. LPL-F878124-1 ... issued to Scherr and his firm?" Scherr's Motion to Recommit at 2. Specifically, Scherr disputes the referee's finding that the term is not ambiguous. *Id.* This issue involves purely legal ques-

tions, which can be resolved by the court based on the language of the insurance policy, the pleadings, and the applicable law. *See Sherman v. Graciano*, 152 N.H. 119, 121 (2005) ("[T]he interpretation of a contract, including whether a contract term is ambiguous, is ultimately a question of law for this court to decide."). Moreover, Scherr failed to set forth reasons why oral argument would further assist the court in determining the pending issues. *See* Super. Ct. R. 58; *In re Erik M.*, 146 N.H. 508, 511 (2001) (juvenile did not meet requirements of Rule 58 because, when he requested a hearing, he did not set forth any reasons why a hearing would assist the trial court). Accordingly, Scherr's request for a hearing is DENIED.

Scherr is an attorney licensed to practice in Texas. The Home Insurance Company ("Home") issued Scherr a professional liability policy ("the policy"), in effect for the period of June 11, 1993 to June 11, 1994. Scherr's policy has a per claim limit of $200,000 and an aggregate limit of $600,000.

On July 28, 1988, Scherr filed suit on behalf of three chiropractors against a number of insurance companies alleging that the companies wrongfully cut chiropractor bills. Scherr's Motion to Recommit at 3. Several attempts to certify the action as a class action were unsuccessful. *Id.* After the original class action petition was filed, three more chiropractors joined as putative class representatives. *Id.* The putative class representatives eventually terminated Scherr and hired attorney Marjorie Georges to represent them. *Id.* at 3-4. Attorney Georges settled the case on their behalf. *Id.* Subsequently, the putative class representatives brought a malpractice action against Scherr and his firm, alleging breach of fiduciary duty, negligence, and fraud. *Id.* at 4–5. Specifically, they alleged that Scherr failed to represent their interests in the failed class action litigation and failed to distribute properly the settlement funds. *Id.* During the pendency of trial on the malpractice claim, the putative class representatives entered into a settlement agreement

with Scherr in the amount of $675,000. *Id.* at 9. Home contributed $203,639.20 to Scherr's defense and settlement payments. Liquidator's Objection at 3.

In October 1995, before settlement by the putative class representatives, six other chiropractors (the "intervenors") sought to intervene in the malpractice action. Scherr's Motion to Recommit at 6. Specifically, the intervenors alleged that Scherr and his firm were negligent in their failure to certify a class action suit and in their distribution of settlement funds from the putative class's settlement. *Id.* The intervenors brought allegations of negligence, breach of fiduciary duty, fraud, conspiracy, conversion, and violation of Texas Deceptive Trade Practices Act. *Id.* at 7. The intervenors claim was severed from the putative class's malpractice trial. Scherr sought coverage from Home. *Id.* at 8. Home advised Scherr that defense costs and loss payments in the putative class representatives malpractice action had exhausted the per claim limits of Scherr's policy and that Home would no longer participate in Scherr's defense. Liquidator's Motion at 3-4. Ultimately, the trial court granted summary judgment in favor of Scherr. Scherr's Motion at 10. The intervenors appealed and the Texas Court of Appeals for the Fourteenth District upheld the court's summary judgment ruling. *Id.*; *see also Gillespie v. Scherr*, 987 S.W.2d 129 (Ct. App. Tex. - 14th Dist. 1998). Scherr now seeks reimbursement from Home for the costs associated with his defense against the intervenors' claims.

Home denied Scherr's claim based on its assertion that the putative class representative litigation is "related" to the intervenors' litigation under the terms of the policy. The governing policy language provides:

> **Section E – Limits of Liability**
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> **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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> ...
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> **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.
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> (Emphasis in original).

Scherr asserts that the policy language is ambiguous. The referee disagreed. The instant motion to recommit followed.

Scherr disputes the referee's ruling that "the term [related] is not ambiguous and means 'having a logical or causal connection.'" Scherr's Motion to Recommit at 11. Scherr appears to argue that the referee should not have relied on *Columbia Casualty Company v. CP National, Incorporated*, 175 S.W.3d 339 (Tex. App. – 1st Dist. 2004) because it was not from the Eighth Court of Appeals of Texas. Scherr instead urges the court to adopt the holdings of courts in other states. *See e.g., St. Paul Fire & Marine Ins. Co. v. Chong*, 787 F. Supp. 183, 187 (D. Kan. 1992); *Arizona Prop. & Cas. Ins. Guar. Fund v. Helme*, 735 P.2d 451, 456-57 (Ariz. 1987). The liquidator objects and asserts that the referee correctly applied *Columbia Casualty*, "which addressed the meaning of the word 'related' in the context of language very similar to the Home Policy." Liquidator's Objection at 7.

The court recognizes that, nationally, there is a split as to how jurisdictions analyze the term "related" in insurance policies. *See Continental Cas. Co. v. Wendt*, 205 F.3d 1258, 1262

(10th Cir. 2000) (recognizing courts are not in agreement as to the ambiguity of the term "related wrongful act," finding the term unambiguous, and applying the plain meaning of the word "relate" which is "to show or establish a logical or causal connection"); *see also Gregory v. Home Ins. Co.*, 876 F.2d 602, 606 (7th Cir. 1989) (applying the common understanding of the word "related" and holding that it covers a broad range of connections, both causal and logical); *but see Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128-29 (2d Cir. 2001) (court agreed with other courts around the country that the term "relating to" is equivalent to the phrases "in connection with" and "associated with").

Here, the parties agree that the law of Texas applies to the interpretation of Scherr's policy. *See* Referee's Order on the Merits at 4. The referee correctly relied on *Columbia Casualty* as the authority of Texas law on this issue. Scherr correctly contends that a Texas court of appeals is not bound by the decision of another court of appeals. *Delamora v. State*, 128 S.W.3d 344, 359 (Tex. App. - Austin 2004). "[H]owever, considerations of comity argue a court of appeals should give considerable significance to a result reached by another court of appeals and reject it only for sound reason." 40 TEX. PRAC., CRIMINAL PRACTICE AND PROCEDURE § 0.113 SIGNIFICANCE OF THE DECIDING COURT (Westlaw 2009).

The *Columbia Casualty* court recognized that interpretation of the term "related to" was a matter of first impression in Texas and looked at authority from other jurisdictions. 175 S.W.3d at 347. Ultimately, the court concluded that the term "related" was unambiguous and the plain, ordinary, and generally accepted meaning of "related" should be used in interpreting the insurance policy. *Id.* at 347-48. The court held that "related" means "having a logical or causal connection." *Id.* at 348. The Texas Supreme Court has neither affirmed nor overruled this analysis.

Columbia Casualty has, however, been recognized by the Fifth Circuit and the United States District Court of the Southern District of Texas. *See N. Am. Specialty Ins. Co. v. Royal Surplus Lines Ins. Co.*, 541 F.3d 552, 557 (5th Cir. 2008); *Commercial Underwriters Ins. Co. v. Royal Surplus Lines Ins. Co.*, 345 F.Supp.2d 652, 667 (S.D. Tex 2004). This demonstrates that the Fifth Circuit and the district court believe *Columbia Casualty* was correctly decided in accordance with Texas law. *See Marketic v. U.S. Bank Nat'l Ass'n*, 436 F.Supp.2d 842, 850 (N.D. Tex. 2006) ("Where a state's highest court has not yet spoken on an issue, the Fifth Circuit has directed its district courts to look at the state's appellate courts for guidance unless the court is convinced that the highest court of the state would not adopt the appellate court's reasoning.").

The court concludes that *Columbia Casualty* is appropriate Texas authority. The remaining issue is whether the referee correctly applied *Columbia Casualty* to the facts of this case.

After review, the court also agrees with the referee's finding that putative class's claims are related to the intervenors' claims. They both brought claims arising out of Scherr's failed class action litigation and the subsequent distribution of settlement monies. Although one litigant prevailed and the other did not, this does not remove the relatedness of the claims. *See also Gillespie*, 987 S.W.2d at 131 (recognizing that the Intervenors and the putative class representatives brought similar claims against Scherr).

Upon review of the record, the court concludes that the referee's order is a proper application of controlling Texas law. Accordingly, Scherr's motion to recommit is DENIED.

So ORDERED.

Date: June 22, 2010

LARRY M. SMUKLER
PRESIDING JUSTICE