THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

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:

BRIEF IN SUPPORT OF COVERAGE FOR CLAIMANT JAMES F. SCHERR

COMES NOW the Claimant James F. Scherr (hereinafter "Scherr"), by and through his attorney of record, and files this his Brief in Support of Coverage and would show the Honorable Court as follows:

I. Introduction

The deceptively simple question for the Court in this case is: what are "related" claims under the terms of the Home Insurance Company Policy No. LPL-F878124-1 (attached hereto as Exhibit A) issued to Scherr and his firm? *(Deposition of James F. Scherr*, pp. 33-35). While this seems to be a relatively straightforward issue, it is broken down into several sub-questions. Is "related to" ambiguous or is that phrase unambiguous? If unambiguous, does the common usage definition of "related to" provide coverage to Mr. Scherr and, if ambiguous, will the definition adopted by the Court afford coverage to the same parties. There are several instances for which coverage could be afforded:

1. payments made by Scherr in settlement of claims brought by his clients Ben Beard, David Bailey and Dan Petrosky; and

2. attorney's fees paid by Scherr to attorney Donald M. Hudgins to defend claims by non-client intervenors for which summary judgment was granted to Scherr and attorney's fees paid to the Baker & Botts law firm to hold the summary judgment on appeal. The final portion of the damage calculation would be attorney's fees paid to undersigned counsel for bringing this claim under Tx Civ. Prac. and Rem. Code §38.001 (West 2008). We will attempt to set forth the facts upon which these claims are brought and then address each of the issues thereafter.

II. Facts

Scherr, later assisted by Noel Gage (hereinafter "Gage"), brought a lawsuit on behalf of chiropractors Dr. W.C. LaRock, Dr. Joseph Superville and Coronado Chiropractic Clinic, individually and as representative of all Texas chiropractors against American General Fire & Casualty Company, The Home Insurance Company, Allstate Insurance Co., Kemper Group Insurance Companies, Lumbermen's Mutual Casualty Company, Crawford & Company, Crum & Foster, U.S. Insurance Group, U.S. Fire Insurance Co., Texas Employers Insurance Association, Texas Employers National Insurance Co., National Standard Insurance Co., Commercial Union Insurance Co., National Union Fire Insurance of Pittsburgh, Pennsylvania, Intracorp, Inc., Safeco Insurance Company of America, Hartford Fire Insurance Company, Liberty Mutual Insurance Company, North River Insurance Company, New Jersey, Dr. William W. Timberlake, and all other insurance companies who wrongfully cut chiropractor bills. See Plaintiff's Original Class Action Petition[1]

[1]Exhibits attached hereto are from a notebook maintained by counsel from Home Insurance Company which contain agreed exhibits between the parties.

(attached hereto as Exhibit B). Despite several attempts to certify the action as a class action, it was never certified (*Deposition of James F. Scherr*, p. 21, lines 21-25 to p. 22, lines 1-8). After the Original Class Action Petition was filed, chiropractic Drs. Beard, Bailey and Petrosky were joined as putative class representatives. Ultimately, Drs. Beard, Bailey and Petrosky terminated the services of Scherr and Gage (*Deposition of James F. Scherr*, p. 22, lines 9-23) and retained the services of Marjorie Georges (now Jobe) to represent them in the remainder of the action against the insurance companies. *(Deposition of James F. Scherr*, p. 27, lines 21-23) Ms. Georges settled that case on behalf of Beard, Bailey and Petrosky, and the Court specifically indicated by way of Judgment signed on January 21, 1994: "The Court further finds that this action shall not be considered as a class action under Tex. R. Civ. P. 42, since no class has been certified and no hearing has been held on class certification, and no prejudice would be caused to the putative class members by entry of a Judgment.": (attached hereto as Exhibit C). The proceeds of that settlement and some of the other interim settlements were paid into the Registry of the Court. Prior to Scherr being released by Beard, Bailey and Petrosky, monies from some of the settlements had been divided among the named Plaintiffs and attorneys' fees had been paid from the proceeds. Disputes arose over the prior distributions and the disposition of the monies held in trust. These disputes erupted into litigation.

Said lawsuit (hereinafter "malpractice case"), was filed October 13, 1995. Among the allegations against Messrs. Scherr and Gage were that they breached their fiduciary duty to their clients:

1. in failing to promptly and accurately account for settlement proceeds;
2. in failing to promptly deliver collected settlement proceeds;
3. in failing to provide Plaintiffs with an accurate account of claimed expenses;
4. in failing to provide Plaintiffs with accurate information concerning one or more settlement negotiations;

5. in favoring one client to the detriment of and against the interest of Plaintiffs;

6. in violating the contingency fee contract by taking more in attorneys' fees than allowed;

7. in placing the interests of Cause No. 88-7707 Co-Plaintiffs' Dr. LaRock and Dr. Superville ahead of the interests of Plaintiffs and other members of the class; and

8. in placing their own interests ahead of the interests of Plaintiffs and other members of the class.

The pleadings in the malpractice case continued through a series of amended Petitions (attached hereto as Exhibits E through I)which culminated in Plaintiffs' Eighth Amended Original Petition (attached hereto as Exhibit J) which was the live pleading when the matter proceeded to trial. The Plaintiffs in the malpractice case alleged items 1-8 from the Original Petition (attached hereto as Exhibit D) and also indicated that Scherr and Gage were negligent in, *inter alia*:

1. failing to keep Plaintiffs adequately informed of the process of the litigation;

2. preparing Plaintiffs inadequately for their respective depositions;

3. failing to exhaust their administrative remedies prior to commencement of the litigation; and

4. obtaining the participation of Ben Beard, David Bailey and Dan Petrosky upon the false pretext of what the class action would accomplish and that their principal clients, LaRock and Superville, would advance $100,000.00 of their initial costs.

In addition, Plaintiffs' Eighth Amended Original Petition claimed that Scherr and Gage committed actual and constructive fraud by "collecting more attorneys fees than those to which they were entitled under the terms of the contingency fee contract", "knowingly concealing their special relationship with class members LaRock and Superville to the detriment of the Plaintiffs", "knowingly mak[ing] false representations as to material facts to Plaintiffs with the intent of inducing Plaintiffs to enter the contingency fee contract and to participate in Cause No. 88-7707", that Mr. Scherr "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, $50,000.00,

$75,000.00 and $95,000.00 all received in separate settlements in Cause No. 88-7707 - expenses for which there is either no accounting or inadequate accounting."

As the malpractice case neared its October, 1995, trial date, doctors of chiropractic medicine Richard Gillespie, Stewart Stephenson, Ted Stephenson, Odion Ojo, Richard Ivy, Carlos Domino, individually and on behalf of their respective practices sought to intervene in the case (hereinafter "Gillespie Intervention"). The original Plea in Intervention (attached hereto as Exhibit K) alleged, *inter alia*, that Scherr and Gage and their respective firms were negligent in the following particulars:

1. in that they failed to certify, or even attempt to certify, a class action suit;

2. in their representation of the class;

3. in that they settled class causes of action without the consent of the class or without a denial of certification of the class;

4. in that they did not do adequate discovery;

5. in that they failed to maintain records required by the Texas Rules of Civil Procedure in a class action litigation;

6. in not properly distributing settlements proceeds among the class;

7. in their representation of the class in that they failed to acknowledge and respond to objections made by various class members to the settlements that were being negotiated;

8. in undertaking a representation of the class action when they did not have, or were unwilling to commit, adequate financial resources to maintain the class action;

9. in settling the suit for a fraction of its actual value for the benefit of certain class representatives;

10. in selection and retention of Drs. LaRock and Superville as class representatives; and

11. in using a purported class action as leverage for settlement for a chosen few.

In addition, Intervenors alleged breaches of fiduciary duty by Defendants in the original Plea in Intervention:

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

There were further allegations of actual and constructive fraud, conspiracy, violation of the Texas Deceptive Trade Practices Act, §17.46 (b)(2); §17.46(b)(5), §17.46(b)(7), §17.46(b)(12), §17.45(5) and conversion. Certain of the allegations were on behalf of putative class members, while others appeared to imply that the Gillespie Intervenors actually had an attorney-client relationship with attorneys Scherr and Gage, *see e.g.* Plea in Intervention, p. 5, Breach of Fiduciary Duty, Item 6, "in taking more fees than they were permitted to do under the fee contract". Clearly, the Gillespie Intervention was patterned after the suit filed by clients Beard, Bailey and Petrosky in the malpractice case.

The Gillespie Intervenors ultimately filed three more amended pleadings: 1) First Amended Plea in Intervention (attached hereto as Exhibit L) and 2) Second Amended Plea in Intervention (attached hereto as Exhibit M) with the ultimate pleading being the Third Amended Plea in

Intervention (attached hereto as Exhibit N). The Court severed the Gillespie Intervention and the malpractice case proceeded to trial.

Attached hereto as Exhibit O is the Charge of the Court submitted to the Jury in the malpractice case. Question Number 1 inquired whether Defendants breached the fiduciary duty between an attorney and a client in the representation of the Plaintiffs. Question Number 2 asked if this breach of fiduciary duty between attorney and client was intentional. Question Number 3 asked whether Defendants committed fraud against any of the Plaintiffs. Question Number 4, which was unanswered, asked whether Defendants acted intentionally in committing fraud against Plaintiffs. Question Number 5 asked what sum of money Beard, Bailey and Petrosky were each entitled to recover from $306,500.00 paid by various insurance companies in settlement. The jury answered with identical amounts. Question Number 6 asked if Beard, Bailey and Petrosky committed fraud against Scherr and Gage, and Question Number 7 asked what damages the attorneys incurred. Question Number 8 asked whether Beard, Bailey and Petrosky waived further recovery in connection with the Texas Employers' Insurance Association/Travelers settlements. Question Number 9 inquired whether Beard, Bailey and Petrosky failed to comply with the contingency fee agreement. Question Number 10 asked whether James Scherr and Noel Gage performed compensable work for their clients Beard, Bailey and Petrosky (which was answered "yes"). Questions Numbered 11, 12 and 13 asked what sum of money would compensate Messrs. Scherr and Gage for their damages. As can be seen, the negligence allegations of the Eighth Amended Petition were dropped in favor of allegations of breaches of fiduciary duty, intentional torts and fraud. Texas law provides that where exemplary damages may be recovered (as would have been the case in the malpractice case) that a second exemplary damage hearing is conducted before the same jury. Prior to receipt of the final jury verdict, malpractice Plaintiffs and Defendants entered into a settlement

in the amount of $675,000.00. Attached are copies of the Full and Final Release (Exhibit P), Agreed Motion for Dismissal (Exhibit Q) and Agreed Order of Dismissal (Exhibit R). The Agreed Order of Dismissal, identified above, did not purport to dismiss any claims asserted in the Gillespie intervention. As part of the settlement, The Home Insurance Company paid $50,000.00 and Jim Scherr contributed $117,500.00. (See Full and Final Release, pp. 1-2, Exhibit P attached hereto).

The applicable part of the Policy (referred to hereinabove) provided 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."[2] The policy further states that "the liability of the Company for each claim...shall not exceed the amount stated in the Declaration for each claim, and shall include all claim expenses." *Id.* (Sub-Section I) and "the liability of the Company shall not exceed the amount stated in the Declarations as aggregate as a result of all claims..." *Id.*(Sub-Section II.) The policy limits for Mr. Scherr's policy were $200,000.00 for each claim and $600,000.00 aggregate. *(Deposition of James F. Scherr*, pp. 71, line 24 through p. 72 line 1).

In response to correspondence seeking additional coverage under the policy to increase the limits from $200,000.00 to $600,000.00 based on the participation of Beard, Bailey and Petrosky, Oscar Allen sent a letter of explanation on February 2, 1996 (attached hereto as Exhibit S) , indicating that the $200,000.00 limit was all that The Home Insurance Company intended to pay.

After invoking the doctrine of negligence in the first eight Petitions, Plaintiffs abandoned the theory upon submission of the case to the jury. After settlement, however, the malpractice Plaintiffs filed their Ninth Amended Original Petition (attached hereto as Exhibit T). It is Scherr's position

[2]The Home Insurance Company's Professional Liability Policy: Page 6, Section E, Sub-Section IV

that Plaintiffs' Ninth Amended Original Petition is of no consequence or effect as it was never a live pleading.

On October 20, 1995, while the jury was deliberating, The Home Insurance Company through Risk Enterprise Management Limited staked out its position with regard to coverage in correspondence from Oscar Allen to Jim Scherr.(attached hereto as Exhibit U). The company indicated that it would not pay any amount in excess of $200,000.00 as it viewed all allegations under the pending litigation to be "related".

After the conclusion of the malpractice case, Jim Scherr retained the firm of Hudgins, Hudgins & Warrick to defend him in the Intervention. Scherr, through his counsel, Don Hudgins, filed a Motion for Summary Judgment containing the Affidavits of: 1) Don Hudgins (attached hereto as Exhibit V) explaining that the verdict in the malpractice litigation never became the basis of the judgment because of the settlement and Order of Dismissal, and 2) Jim Scherr,(attached hereto as Exhibits W, X and Y) discussing the procedural history in the class action and malpractice litigation.

On December 30, 1998, the trial court granted summary judgment on behalf of Mr. Scherr (*Deposition of Donald M. Hudgins*, p. 87, line 22 through p. 88, line 10). Intervenors appealed to the Fourteenth Court of Appeals of Texas, which entered an opinion affirming the summary judgment (attached hereto as Exhibit Z). Thereafter, Baker & Botts defended the judgment before the Texas Supreme Court and was successful.

During the course of representation in the Gillespie intervention, Hudgins, Hudgins & Warrick was paid $46,341.21 (attached hereto as Exhibit AA), while Baker & Botts was paid $17,500.00 (attached hereto as Exhibit BB). In addition, Donald G. Wilhelm was paid $24,182.05

(attached hereto as Exhibit CC) and Jeffrey B. Pownell was paid $21,786.98 (attached hereto as Exhibit DD).

III. Ambiguity

The first issue which the Court must address is whether the term "related" as set forth in Section E, IV, of the applicable Policy (attached hereto as Exhibit A) is ambiguous. There are relatively few cases around the country interpreting the term "related" in the professional liability policy context. There appears to be only one Texas case which addresses the issue, *Columbia Casualty Company v. CP National, Inc.*, 175 S.W.3d 339 (TX App. - Houston [1st Dist.] 2004) (no pet.). The Court found that the term is not ambiguous and means "having a logical or causal connection" *Id.* at 348.

Other courts have found the term "related" to be ambiguous and defined related claims as only those having a causal connection. *McCraw v. Mensch*, 461 F.Supp.2d 872, 878 (WD Wis. 2006). See also *St. Paul Fire and Marine Insurance Company v. Chong*, 787 F.Supp.183, 187 (D. Kan. 1992). Several of the courts have looked to *Black's Law Dictionary*, 6th Edition and *Merriam-Webster's New Collegiate Dictionary,* 11th Ed. (2003) to determine whether there is an ambiguity. *St. Paul Fire and Marine Insurance Company v. Chong*, (D. Kan. 1992), 787 F.Supp.183 at 187.[3]; *Arizona Property & Casualty Ins. Guar. Fund v. Helme*, 153 Ariz. 129, 735 P.2d 451, 456-57 (1987); *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.*, 233 Cal. App.3d 1184, 285 Cal.Rptr. 174 (1991).

The definitions of "related" contained in *Merriam-Webster's New Collegiate Dictionary,* 11th Ed. (2003) are:

[3]"In its reply memorandum, St. Paul recites definitions of the term "related" as found in Black's Law Dictionary and Webster's Ninth New Collegiate Dictionary. A review of these definitions indicates that the term covers an incredibly broad, and certainly subjective, range of connections." Chong at 187.

Transitive Verb

1. To give account of: tell

2. To show or establish logical or casual connection between

Intransitive Verb

1. To apply or take effect retroactively

2. To have relationship or connection

3. To have or establish a relationship

4. To respond

The definitions of "related" contained in *Black's Law Dictionary*, 6th Edition (1990), are:

> To stand in relation; To have bearing or concern; To pertain; refer; To bring into association with or connection with; with "to."

Following the reasoning of *Chong* and *Helme*, Scherr believes that the term "related" should be considered ambiguous and the Court should determine whether there is a causal connection between the Gillespie Intervention claims and those of the malpractice Plaintiffs.

IV. If "Related" is Ambiguous

If the Court should find that the term "related" is ambiguous under the terms of the Home Policy, it would be Scherr's burden to show that the Gillespie and malpractice claims are not causally connected.

A. Beard, Bailey and Petrosky

From a careful reading of the cases, it is clear that the Beard, Bailey and Petrosky claims constitute a single related claim. The issues submitted to the jury (attached hereto as Exhibit O) constitute an identical series of events which the Plaintiffs alleged and the jury found were committed by Scherr and Gage. Further, in the only area in which the jury found damages, each of

the Plaintiffs was found to have suffered the identical monetary damage. Accordingly, Scherr withdraws his claim for $600,000.00 limits on the Beard, Bailey and Petrosky matter.

B. Gillespie Intervention

The Gillespie Intervention is a horse of a different color, however. Placing the malpractice charge (Exhibit O) and the Gillespie Third Amended Plea in Intervention (Exhibit N) and opinion from the Houston Court of Appeals (Exhibit Z) side by each reveals a startling difference in the allegations. The malpractice Plaintiffs went to the jury with issues regarding fraud and breach of fiduciary duty. These alleged breaches arose from failure to account properly for expenses and attorney's fees from insurance settlements in violation of the terms of the contingent fee contracts. These issues thus arose in the course of representation of the malpractice Plaintiffs by Scherr and Gage.

While some of the same allegations may have been made by the Gillespie Intervenors, the Court of Appeals found that there was no attorney-client relationship between Scherr and any of the Intervenors. Therefore, none of the attorney-client issues could apply. Specifically, the Gillespie Intervenors were not clients of Jim Scherr, as the court found, *Gillespie, et al. v. Scherr, et al.*, 987 S.W. 2d 130 (Tex. App.) (no pet.). (Exhibit Z). Since the Gillespie Intervenors were not clients, they could not suffer the same damages as the malpractice Plaintiffs nor have been damaged by improper allocation of fees and expenses in violation of a contingent fee agreement. The settlement of the underlying class action (attached hereto as Exhibit C), as well as the Agreed Judgment concluding the malpractice case (attached hereto as Exhibit P) both left the claims of the putative class members/Gillespie Intervenors intact.

The damages incurred by the malpractice Plaintiffs were submitted to a jury, quantified to an extent and resolved by a settlement agreement. Whatever damages the Gillespie Intervenors

suffered could not have arisen from their attorneys' actions as the Texas Courts found that Scherr was not their attorney. The original class action lawsuit sought damages incurred by Texas chiropractors as a result of insurance companies writing coverage in the State of Texas unreasonably and unconscionably cutting chiropractors' bills. (see class action petition attached hereto as Exhibit B) To the extent that these allegations were true, and the Gillespie Intervenors suffered these damages, neither settlement sought to address those damages. The malpractice Plaintiffs complained of improper handling of monies gained in settlement of their claims against insurance companies while, at best, the Gillespie Intervenors could only complaint that Scherr did not pursue their claims. The Court of Appeals ruled that there was no attorney-client relationship and, since the class action was never certified, Scherr was neither authorized nor capable of pursuing the claims of the Gillespie Intervenors. As a result, whatever damage may have been suffered by the Intervenors arose solely from the actions of the insurance companies.

An examination of the *Chong* case may be instructive. The United States District Court for the District of Kansas, in *St. Paul Fire & Marine Inc. Co. v. Chong,* 787 F. Supp. 183, 187 (D. Kan. 1992) determined that the insurance company was liable for multiple claims when three different clients filed malpractice claims against their attorney. The three clients, Korean nationals who could not speak English, were arrested together, the factual allegations and complaining witnesses against each were the same. A single attorney undertook representation of each client and persuaded each of them to plead guilty. The attorney apparently failed to explain the consequences of pleading guilty and the differences in the word "plea" between Korean and English. While the attorney thought that each defendant would receive probation, each was sentenced to prison and the attorney erroneously informed them that they could not appeal. Deportation proceedings were begun immediately against each of the Koreans. The insurance company claimed that the three claims were

related and constituted a single claim while the attorney defendants claimed that they were entitled to separate per claim limits. 787 F.Supp. at 186 (U.S. - Kan, 1992). The Court ruled that there were multiple omissions and actions "in separate and distinct professional services [the attorney] provided, or should have provided" "which resulted in discreet losses to each of the three defendants." *Id.* at 188.

Applying that reasoning herein, it would be clear that there would be unrelated claims in the instant case. The three Korean Nationals identified in *Chong* seem to be more similar to Beard, Bailey and Petrosky who each had claims against Mr. Scherr, than the Gillespie Intervenors. Each of the malpractice Plaintiffs suffered identical damage as a result of identical actions by Scherr. The issue of whether the class action should have been certified or pursued was not submitted to the jury. Realistically, the only claims that the Gillespie Intervenors could have would be those relating to the underlying class action. These legal actions, to pursue or not to pursue the class certification are completely separate and apart from any decision by Scherr to overcharge or improperly calculate fees and expenses, withhold payment to his clients, or live up to the terms of the contingent fee agreement. As in *Chong*, there were different actions or omissions, if any, which could have caused damage to the malpractice Plaintiffs and the Gillespie Intervenors.

The Gillespie Intervenors brought claims pursuant to the Texas Deceptive Trade Practices Act which were not alleged by the malpractice Plaintiffs in their Eighth Amended Petition (Exhibit J). Each of these allegations must necessarily arise from the Intervenors' belief that the underlying class action would be certified and pursued on their behalf. Again, these are separate and distinct from the allegations that went to the jury on behalf of the Beard malpractice Plaintiffs. See *Admiral Insurance Co., Inc. v. Christian Briggs, et al.*, 264 F.Supp.2d 460 (N.D. TX 2003). While the *Briggs* policy defined related wrongful acts as acts "logically or causally connected by reason of any

common fact, circumstance, situation, transaction, casualty, event or decision", the Court held that the three lawsuits for which the insured sought coverage contained "different alleged misstatements, omissions and promises that occurred on different days to different individuals." *Id.* at 463. Such was also the case here.

V. If "Related" is Unambiguous

Courts that have determined that the term "related" is unambiguous have most often looked at the definitions contained in Webster's Collegiate Dictionary. See *Columbia Casualty Company v. CP National, Inc.*, 175 S.W.3d at 348. The courts have determined that the unambiguous definition of "related" is that separate claims have a logical or causal connection. While the courts don't seem to address the logical prong, they do address causal connection. *See* cases cited in Part IV hereinabove. As stated, there is no causal connection between the damages suffered by the Beard Plaintiffs and those logically and realistically alleged by the Gillespie Intervenors. The malpractice Plaintiffs suffered damages as a result of violations of an attorney-client contingent fee agreement, misapplication and miscalculation of attorneys' fees and costs and conversion of client funds. None of these damages could logically be suffered by the Gillespie Intervenors who were not clients. Their damages, if any, arose simply because their bills had been cut by insurance companies. Their complaint with Mr. Scherr, therefore, is that he failed to certify the class. As set forth hereinabove, the class was not certified while Scherr was counsel of record and the case was settled after new counsel entered the case. The judgment therein did not purport to affect the claims of the putative class. Therefore, the Gillespie Intervenors' claims against the insurance companies, if there were any such claims, were not foreclosed.

VI. Conclusion

Whether this court should determine that the applicable language of the Home Insurance Policy is ambiguous or unambiguous, coverage should extend to Mr. Scherr for the unrelated claims of the Gillespie Intervenors. While the single $200,000.00 per claim was reached, the aggregate $600,000.00 limit was neither tendered nor paid. As a result, it was, and should remain, available to pay the attorneys' fees of Hudgins, Hudgins & Warrick, as well as the fees of Baker & Botts, Donald G. Wilhelm and Jeffrey B. Pownell, in defending the Intervenors' claims in the Trial Court, Appellate Court, and Before the Texas Supreme Court.

AS SUCH, Claimant seeks $46,341.21 (Hudgins, Hudgins, & Warrick), $17,500.00 (Baker & Botts), $24,182.05 (Donald G. Wilhelm) and $21,786.98 (Jeffrey B. Pownell) plus interest as provided by law, and attorneys' fees and expenses in the amount of $73,123.78. Should there be any question about the damages portion of this claim, Scherr will certainly further submit supporting documentation to the Court and opposing Counsel. It has been Counsel's understanding that the briefing presently ordered was solely on the issue of liability.

Respectfully submitted,

JIM DARNELL, P.C.

Dated: July 22, 2009

By: _____

Jim Darnell
310 N. Mesa Street, Suite 212
El Paso, Texas 79901

- AND -

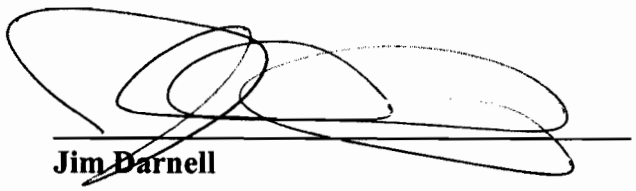
Edmond J. Ford
FORD & WEAVER, P.A.
10 Pleasant Street, Suite 400
Portsmouth, New Hampshire 03801

Attorneys for James F. Scherr

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2009, a copy of the foregoing has been forwarded electronically, via courier, and/or via United States mail, postage prepaid, to the following parties:

Eric A. Smith
Rackermann, Sawyer & Brewster P.C.
160 Federal Street
Boston, Massachusetts 02110-1700
Fax: (617) 542-7437



Jim Darnell

3454.doc