THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

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

In Re Liquidator Number: 2008-HICIL-38
Proof of Claim Number: INSU275827-01
Claimant Name: James F. Scherr

LIQUIDATOR'S SECTION 15 SUBMISSION

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), makes this submission in support of the Liquidator's determination of the claim of James F. Scherr ("Scherr" or "Claimant") pursuant to § 15 of the Revised and Restated Order Establishing Procedures Regarding Claims Filed with The Home Insurance Company in Liquidation ("Claims Procedures Order") and the Referee's Structuring Conference Order of March 17, 2009.

Introduction

The Liquidator's determination of Scherr's claim should be sustained because Home's duties both to defend and indemnify, pursuant to the Lawyer's Professional Liability policy issued to Claimant, 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 clear terms of the Home policy.

A. Issues to be Determined

1. Do the original malpractice action and the severed action arise from "related acts, errors, or omissions" such that they "shall be treated as a single claim" under the terms and conditions of the Home policy issued to Claimant?

B. Exhibits

1. Home Policy No. LPLF878124
2. Eighth Amended Original Petition of Dr. Beard *et al.* in Cause No. 94-03110 in the 129th Judicial District of Texas
3. Third Amended Plea in Intervention of Dr. Gillespie *et al.* in Cause No. 94-03110 in the 129th Judicial District of Texas
4. Letter from Home to Mr. Scherr dated February 2, 1996
5. Notice of Determination
6. Notice of Redetermination
7. Proof of Claim of James F. Scherr
8. Original Class Action Petition of Dr. LaRock *et al.*

C. Background

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. Exhibit 1 (Home policy), Declarations page.

Scherr is an attorney licensed to practice law in the State of Texas. Exhibit 7 (POC) 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"). Exhibit 8 (Rhodes Petition) at ¶ XIII.

Three of the former named plaintiffs in the Rhodes Action, doctors Beard, Bailey, and Petrosky (the "Beard Claimants"), brought suit against Scherr during the term of the Home professional liability insurance policy alleging claims arising out of his handling of the Rhodes Action and monies received in settlement. See Exhibit 2 (Beard Eighth Petition). During the policy period Scherr notified Home of the claim against him and Home acknowledged a duty to contribute to Scherr's defense. Home contributed $203,639.20 towards Scherr's defense costs and settlement payments. Exhibit 4 (Home letter) at 1; Exhibit 7, Att, 1, ¶ III. During the pendency of the Beard Claimants' action, additional chiropractic doctors (the "Gillespie Claimants") intervened alleging that they too had been injured by Scherr's actions in representing the putative class of Texas chiropractic doctors in the Rhodes Action and through the handling (or the alleged mishandling) of monies received in settlement. See Exhibit 3 (Gillespie Petition). The court severed the Gillespie Claimants' intervention to a separate trial, and Scherr sought coverage for it from Home. See Exhibit 7, Att. 1, ¶ IV; Exhibit 4 at 2. Home advised Scherr that defense costs and loss payments in respect of the Beard Claimants' action had exhausted the per claim limits of the Policy and that Home would no longer participate in Scherr's defense. Exhibit 4 at 2. Scherr has since paid additional defense costs for which he seeks reimbursement under the Policy. See Exhibit 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." Exhibit 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. Id.

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. Because the Gillespie Claimants' continued action is based on acts, errors, and omissions that are related to those alleged by the Beard Claimants, the actions constitute a single claim under the Policy. Home paid its per claim limit in defense and settlement costs in the Beard Claimants' action relieving Home of any further defense obligation regarding the Gillespie Claimants' action.

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 Claimants' and the Gillespie Claimants' petitions reveals that the two actions involve not just related but essentially 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 petitions are accordingly "related" and subject to a single limit.

I. UNDER TEXAS LAW AND THE HOME POLICY, COMPLAINTS ALLEGING LOGICALLY RELATED ACTS, ERRORS OR OMISSIONS ARE TO BE TREATED AS A SINGLE CLAIM SUBJECT TO A SINGLE LIMIT.

The Parties agree that Texas law applies to coverage questions in this matter. See Scherr Br. 10.[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. 2004) (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 (Exhibit 1, Declarations page) with respect to claims asserted in Texas courts (Exhibits 2 and 3) regarding conduct in handling a lawsuit brought in Texas (Exhibit 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 (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.

Exhibit 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.

1. The Term "Related" Is Unambiguous And Means Having A "Logical Or Causal Connection."

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, but this position is contrary to applicable Texas law. The Texas Court of Appeal addressed the meaning of the word "related" in the context of language very similar to the Home Policy in Columbia Casualty, 175 S.W.3d at 344.[2] As Scherr acknowledges (Scherr Br. 10), 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.

[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 or failure to provide professional services." 175 S.W.3d at 344.

Royal Surplus Lines Ins. Co., 541 F.3d 552, 557 (5th Cir. 2008) (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 an Arizona case to that effect relied on in Scherr's brief, Arizona Prop. & Cas. Ins. Guar. Fund v. Helme, 735 P.2d 451, 456 (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]

Thus, under Texas law, acts, errors, and omissions that have a logical or causal connection are "related," so that under the Policy claims arising from these acts are subject to a single limit. It is significant that 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

[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) "Multiple Insureds, Claims and Claimants" ("Related acts, errors or omissions shall be treated as a single claim.").

insured's activities, not the effect of those activities on the claimants. Accordingly, two complaints arising from related acts, errors or omissions are to be treated as a single claim, even if they involve different claimants or go so far as to allege different theories of liability or different damages arising from the underlying acts. The critical question in applying the per claim limits is whether the factual allegations present "related acts, errors or omissions." The dispositive issue in this matter is whether Scherr's alleged acts are logically or causally connected.[4]

2. Any Duty To Defend Depends Solely On The Allegations Of The Complaint And The Language Of The Policy.

In determining whether the Gillespie and Beard actions present related acts, errors or omissions, the Referee need only look at the petitions in the two actions. Scherr has suggested 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]

---

[4] Scherr's reliance on St. Paul Fire & Marine Ins. Co. v. Chong, 787 F. Supp. 183 (D. Kan. 1992), is misplaced. See Scherr Br. 13-16. First, the case is distinguishable on its facts, because it involved a lawyer who represented three defendants in separate criminal cases and gave separate (although similarly erroneous) advice to each. Here, both the Gillespie and Beard Claimants assert claims arising from Scherr's conduct of one case, the Rhodes Action. Second, the Chong decision also does not reflect Texas law. It followed the reasoning of Helme, which was rejected by the Texas court in Columbia Casualty, as well as the reasoning of the California Court of Appeals in Bay Cities, which was later reversed by the California Supreme Court in 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); Columbia Casualty, 175 S.W.3d at 347 (following the California Supreme Court in Bay Cities and rejecting Helme).

[5] Indeed, the only non-pleading matter cited by Scherr, the Charge of the Court (Scherr Br. 7-8, 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. Scherr's proposed approach would require delay of a determination whether suits were "related" until

Under Texas law "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"). While this case involves the application of policy limits, the gravamen of Scherr's claim is that Home should have provided a defense against the Gillespie Claimants' action so that he is entitled to recover costs incurred in defending that action. In these circumstances, it is appropriate to look to the pleadings because, under Texas law, determinations of the duty to defend depend upon the allegations of the complaint, not subsequent developments. Scherr's claim should be determined based on the facts alleged in the operative pleadings of the Beard Claimants and Gillespie Claimants and the pertinent language of the Home policy.

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 allegations of the Beard and Gillespie petitions present logically connected acts, errors or omissions. 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 88-7707. 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

---

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.

[6] For convenience, the Liquidator cites to the Beard Claimants' "Plaintiffs' Eighth Amended Original Petition" and the Gillespie Claimants' "Third Amended Plan in Intervention," which Scherr cites as the final petitions. Scherr Br. at 4, 7, 9 (citing Scherr Ex. J, N). They are also Liquidator's Exhibits 2 and 3.

(Beard ¶¶ 4, 6-7; Gillespie pages 5, 7); and 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). 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 to this brief.

The acts, errors or omissions underlying the Beard Claimants' and the Gillespie Claimants' actions are essentially the same and are therefore "related." Indeed, Scherr acknowledges the striking similarity between the pleadings of the Beard Claimants and Gillespie Claimants. Scherr Br. 6-7. Both petitions allege failure to account for or misappropriation of settlement proceeds, the favoring of specific clients, failure to effectively pursue the class action, collection of fees in excess of those permitted by contingent fee agreement, misrepresenting the intent in filing the class action, and misappropriation of settlements as expenses. See Chart of Allegations. Even if the allegations were not viewed as essentially identical, however, the acts, errors and omissions at a minimum are "related": they took place in the prosecution of the same lawsuit and they involve alleged favoring of LaRock and Superville over other claimants and alleged failure to account for or misappropriations from the same settlements.[7] Under any reasonable interpretation of the term, the acts, errors or omissions underlying the Beard and Gillespie Claimants' actions are "related." They accordingly "shall be treated as a single claim."

[7] Scherr cites Admiral Ins. Co. v. Briggs, 264 F.Supp.2d 460 (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 Br. 15. 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 588 ("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 Claimants have not described "different alleged misstatements, omissions and promises"; they have both pointed to Scherr's alleged mishandling of the Rhodes Action, his misallocation and misappropriation of funds, his allegedly improper motives, and his favoring of Drs. LaRock and Superville. See the Chart of Allegations.

Scherr's attempts to distinguish the two actions rest on legal issues, not the underlying acts, errors and omissions that are the subject of the Policy. Scherr contends that he was not the Gillespie Claimants' attorney. Scherr Br. 12-13. While the Texas Court of Appeals affirmed the grant of summary judgment to Scherr on this ground, Gillespie v. Scherr, 987 S.W.2d 129 (Tex. App. 1998), that does not affect whether the underlying "acts, errors or omissions" were "related". It only provides a ground for denying liability for alleged harm from those acts, errors or omissions. That the Gillespie Claimants may ultimately have been determined not to be Scherr's clients does not mean that the acts, errors and omissions of which they complain are not related to those underlying the Beard Claimants' action. It just means that the Gillespie Claimants cannot successfully prosecute the claim. The two actions are still "related."

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

CONCLUSION

The Referee should sustain the Liquidator's determination denying Scherr's claim due to Home's payment of the applicable per claim limit under the Policy.

Respectfully submitted,

ROGER A. SEVIGNY, COMMISSIONER
OF INSURANCE OF THE STATE OF
NEW HAMPSHIRE, SOLELY AS
LIQUIDATOR OF THE HOME
INSURANCE COMPANY,
By his attorneys,
MICHAEL A. DELANEY
ATTORNEY GENERAL

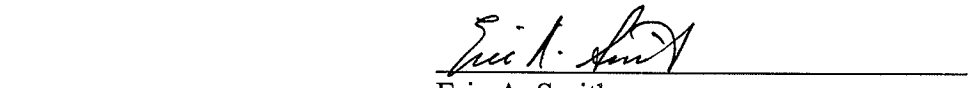
J. Christopher Marshall
NH Bar ID No. 1619
Civil Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3650

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

September 4, 2009

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Section 15 Submission, the Liquidator's Exhibits and the compendium of non-New Hampshire authorities were sent via e-mail on September 4, 2009 to counsel for Scherr.



Eric A. Smith

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 Chiroprators 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.