

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:**

**CLAIMANT JAMES F. SCHERR'S BRIEF AND REPLY
TO LIQUIDATOR'S SECTION 15 SUBMISSION**

COMES NOW the Claimant James F. Scherr (hereinafter "Scherr"), by and through his attorney of record, and files this Brief and Reply to Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company's ("Home") submission pursuant to Section 15 of the Revised and Restated Order Establishing Procedures Regarding Claims Filed with The Home Insurance Company in Liquidation and the Referee's Standing Order of March 17, 2009, and would show the Honorable Court as follows:

I. Introduction

The Liquidator's determination that Scherr's claim should be denied should be overturned. The policy does provide a per claim limit of \$200,000.00. As the Liquidator indicated, the real issue is whether the original suit against Scherr and the seventeen other chiropractors' claims 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. The Court simply must look to what was asked of the jury in the malpractice case and what that jury determined (Exhibit O to Amended Brief in Support of Coverage). Question No. One inquired whether Defendants breached the fiduciary duty between an attorney and client in representation of the Plaintiffs. Question No. Two asked if this breach of fiduciary duty between attorney and client was intentional. Question No. Three asked whether Defendants committed fraud against any of the Plaintiffs. Question No. Four was unanswered. Question No. Five 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 to which the jury responded in identical amounts. Each of these claims are claims a client might have against his or her attorney. These are not claims which a stranger to the litigation could realistically assert. It is clear from the ruling of the Court in *Gillespie, et al. v. Scherr, et al.* 987 S.W.2d 129 (Tex. App.-Hous.[14th Dist.]1998)(no pet.) that there was no attorney/client relationship between Scherr and the Gillespie Plaintiffs. As a result, the claims must be unrelated. Any claims from strangers to the attorney/client relationship logically cannot be the same as claims arising uniquely from that relationship.

II. Ambiguity

While Claimant clearly pointed out that the only Texas Court to address whether the term “related” as set forth in Section E, IV of the applicable Policy is ambiguous has determined that it is not, See *Columbia Casualty Company v. CP National, Inc.* 175 S.W. 3d 339 (Tex. App.- Hous. [1st Dist.]2004)(no pet.), that is not the end of the evaluation. There are fourteen Courts of Appeals in the State of Texas. Each Court is conclusive authority in the counties whose Courts are within their territory. *Vernon’s Ann. Tex. Const., Art.5, §6* (2007). In El Paso, the appropriate Court

would be the Eighth Court of Appeals. While a case from Houston would certainly be some authority, it is not conclusive as a case from the Eighth Court of Appeals of Texas or the Texas Supreme Court would be. One of the situations when the Texas Supreme Court may address an issue under its discretionary jurisdiction is when there are conflicting opinions from the Courts of Appeal. *V.T.C.A. Government Code*, §22.001(a)(2)(2004). Better reasoned authority has determined that “related” is ambiguous and have 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). The Court should simply determine whether there is a causal connection between the Gillespie Intervention Claims and those of the Malpractice Plaintiffs. There is not.

III. If “Related” is Ambiguous

Should the Court find that the term “related” is ambiguous under the terms of the Home Policy, Scherr would be required to show that the Gillespie and Malpractice Claims are not causally connected. The Beard, Bailey and Petrosky claims constitute a single related claim. The issues submitted to the jury (Exhibit O to Amended Brief in Support of Coverage) which the Plaintiffs alleged and the jury found were committed by Scherr and Gage. The Plaintiffs went to the jury with issues regarding fraud and breach of fiduciary duty. Each of these acts are issues which were and are issues of dispute between a lawyer and his or her clients. The Gillespie Intervention is, simply, different. While similar 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 applied. The Gillespie Intervenors were not clients of Jim Scherr and their damages could not have been caused by a breach of the attorney-

client relationship or a violation of a contingent fee agreement. There was no agreement and there was no relationship. At best, the Gillespie Intervenors could only complain that Scherr did not pursue their claims. Absent an attorney-client relationship, there could not be any causal connection between the Gillespie Intervenors' claims and the Malpractice Plaintiffs' claims. As the United States District Court for the District of Kansas indicated in *Chong*, where there are 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.", the claims are not causally related. 787 F.Supp. 183, 188 (D.Kan. 1992).

IV. If "Related" is Unambiguous

Should the Court determine that the term "related" is unambiguous, the ordinary meaning which Courts have most often adopted is that claims have a "logical or causal connection". *Merriam-Webster's New Collegiate Dictionary*, 11th Ed. (2003). See *Columbia Casualty Company V. CP National, Inc.*, 175 S.W.3d 348. As set forth hereinabove, the Malpractice Plaintiffs suffered damages as a result of violations of the attorney-client relationship and a contingent fee agreement, misapplication and miscalculation of attorneys' fees and costs and conversion of client funds. These breaches of the relationship/agreement could not have logically or causally caused damage to the Gillespie Intervenors. The Gillespie Intervenors were not clients and their damages, if any, arose simply because their bills had been reduced by insurance companies. Their complaint with Mr. Scherr was that he failed to certify the class to which they believed they belonged. Although the class was not certified while Scherr was counsel of record, the case settled after other counsel substituted for Scherr. New counsel did not pursue certification. That judgment did not purport to

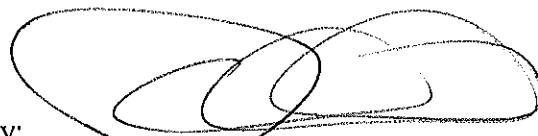
affect the claims of the putative class. Therefore, any claims which the Gillespie Intervenors might have had against the insurance companies (the logical cause for any claims) were not foreclosed.

V. Conclusion

Whether this Court determines that the claims are ambiguous or not, there is no causal or logical connection between the claims of the Malpractice Plaintiffs and the Gillespie Intervenors. The Liquidator's denial of coverage should be reversed.

Respectfully submitted,

JIM DARNELL, P.C.



Dated: October 2, 2009

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- AND -

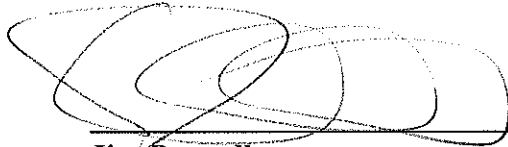
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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2009, a copy of the foregoing has been forwarded electronically, via courier, and/or via United States mail, postage prepaid, to the following parties:

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