

**HUDGINS, HUDGINS & WARRICK**

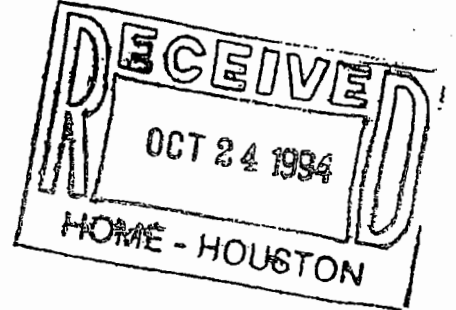
a professional corporation  
ATTORNEYS AT LAW  
24 GREENWAY PLAZA, SUITE 1007  
HOUSTON, TEXAS 77046  
(713)623-2550 FAX (713)623-2793

October 20, 1994

The Home Insurance Company  
P. O. Box 4357  
Houston, Texas 77210

Attn: Mr. Oscar Allen

RE: Claim No. : 640-L-600813-174  
Insured : James Scherr  
Claimant : Ben Beard, et al



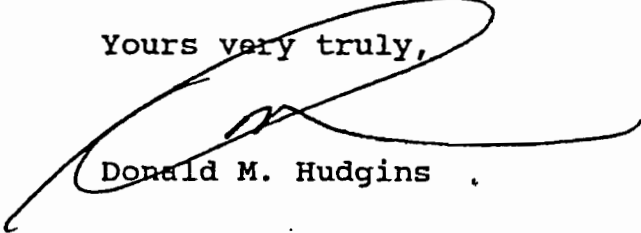
Dear Oscar:

This will acknowledge assignment of the referenced case and receipt of your file on this matter.

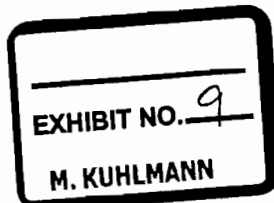
I attended the depositions of Noel Gage and James Scherr on October 13 and 14, 1994 in El Paso, Texas, and am in the process of getting the Motion to Substitute filed with the court.

We have received Plaintiffs' Third Amended Original Petition, a copy of which is enclosed for your file. I will keep you advised of developments as they occur.

Yours very truly,

  
Donald M. Hudgins

DMH/jb  
Enclosure



00097

THE HOME  
INSURANCE  
COMPANY



2925 BRIARPARK  
SUITE 800  
HOUSTON, TEXAS 77042  
713-787-7800

P.O. BOX 4357  
HOUSTON, TX 77210

November 1, 1994

**CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

James F. Scherr  
109 North Oregon, Suite 800  
El Paso, TX 79901

Insured:	James Scherr
Claimant:	Ben Beard, et al
Policy Limits:	\$200,000 Each Claim/\$600,000 Aggregate
Deductible:	\$5,000

Dear Mr. Scherr:

We have received plaintiff's third amended original petition regarding the above-captioned matter.

In order to protect your interests, we have agreed to retain the law firm of Hudgins, Hudgins & Warrick. A representative of the firm will contact you shortly, and we trust that you will provide the firm with your full cooperation in the defense of this litigation.

Your policy contains a deductible provision as set forth above. Accordingly, defense counsel has been instructed to bill you directly for expenses incurred in the defense of the subject claim until the deductible has been satisfied. Expenditures for defense expenses and costs act to reduce the per claim and aggregate limits of the policy.

A review of the third amended original petition in this matter reveals allegations of conversion and action to void contingency fee contracts. Additionally, the third amended petition seeks to recover exemplary damages. Therefore, we are accepting this claim under a reservation of rights. At this time, I refer you to the following provisions in your policy.

Section B - Coverage

Professional Liability and Claims Made Clause

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;

Damages, whenever used in this policy, means a monetary judgment or settlement, including any such judgment or settlement for personal injury, and does not include fines or

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statutory penalties, or sanctions whether imposed by law or otherwise, nor the return of or restitution of legal fees, costs and expenses.

Exclusions

Section C - Exclusions

I. This policy does not apply:

- (a) to any judgment or final adjudication based upon or arising out of any dishonest, deliberately fraudulent, criminal, maliciously or deliberately wrongful acts or omissions committed by the Insured;

The third amended original petition is seeking to recover exemplary damages in the sum of \$1,935,600. Please be advised that The Home Insurance Company is reserving its rights for any payment, judgment or award of this nature.

Please be advised that the damages sought exceed your per claim or aggregate limit of liability. Accordingly, if you have relevant excess insurance, you should place that carrier on notice. Similarly, you have, at your own cost and expense, the right to retain counsel to represent your uninsured interest in this matter. Should you decide to do so, please have your counsel communicate directly with counsel retained on your behalf by the Company.

Furthermore, The Home reserves any and all other rights it may now have or subsequently acquire, including the right to deny coverage and withdraw from the defense of this matter. The Home shall assert such rights if and when circumstances warrant. The Home also reserves its right to reimbursement from you of any expenses paid in the defense of this action, if it is later determined that this claim is not covered under your policy.

Therefore, for the reasons set forth above, and for such other good and sufficient reasons as may hereafter appear, this Company is accepting this claim and is providing you with a defense, under a full reservation of all of its rights with respect to coverage.

Should you feel that any of the information upon which this reservation has been made is in error, or there is any further information you wish to bring to our attention which may impact our coverage determination, please forward same promptly and we will review our position at that time. Please do not hesitate to contact the undersigned directly should you determine that such a re-evaluation is in order.

We look forward to working with you toward a satisfactory conclusion to this matter.

Very truly yours,

  
Oscar Allen  
Claims Analyst  
Professional Liability Department

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Page 3  
November 1, 1994

OA:pbg-1

cc: Don Hudgins  
Hudgins, Hudgins & Warrick  
24 Greenway Plaza, Suite 1007  
Houston, TX 77046

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**HUDGINS, HUDGINS & WARRICK**

a professional corporation

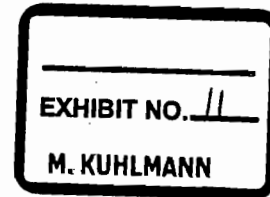
ATTORNEYS AT LAW

24 GREENWAY PLAZA, SUITE 1007

HOUSTON, TEXAS 77046

(713)623-2550 FAX (713)623-2793

February 28, 1995



Mr. Oscar Allen  
The Home Insurance Company  
P. O. Box 4357  
Houston, Texas 77210

RE: Claim No. : 640-L-600813-174  
Insured : James Scherr  
Policy No. : LPL-F878124  
Claimant : Beard, et al

Dear Oscar:

To date, the case has not settled by splitting the money previously recovered in settlement from the insurance companies. There is a total of \$370,000 in settlement proceeds which is now going to be in the registry of the court for the balance of the litigation and which will be placed in an interest bearing account.

While at first this may appear to be a dispute over the recovery of attorneys fees, Plaintiffs' complaints definitely go deeper than that. As you can see by the amount of attorneys fees, there has been a tremendous amount of activity in this case on both sides. Our insured, Jim Scherr, has hired Attorney Don Wilhelm to actively pursue the counterclaim which they have filed against the plaintiffs.

Additionally, as I previously advised, grievances have been filed by the plaintiffs against Mr. Scherr and his co-defendant, Mr. Gage. Those grievances mirror the complaints made in the petition. In line with your authority, I have been involved in the grievance response to the extent that it will have an effect on our case. Mr. Scherr, however, has hired Jim Darnell to represent him in the grievance action and he has authored Mr. Scherr's response. One thing that was done in the response by Darnell was to somewhat modify the amount of expenses that Scherr has been claiming, because of lack of supporting documentation. This is an item that had been complained of by the plaintiffs.

We now have a June 12, 1995 trial setting in this case and discovery is going forward at a very rapid rate. Pursuant to your authority, we have hired Gerald Treece as our expert and will split his fees 50/50 with the co-defendants. We have not yet received any reports from the plaintiffs' experts, but these are due shortly and their depositions will be taken after the reports are received.

*Ⓢ Trial setting!  
Note and return.  
EAT*

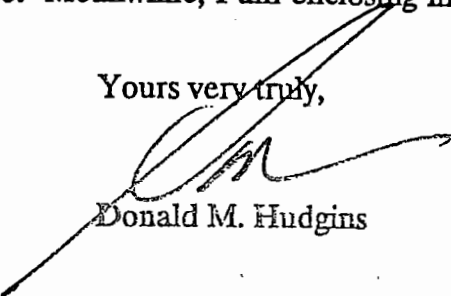
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Mr. Oscar Allen  
Beard v. Scherr  
February 28, 1995  
Page 2

Additionally, we are going forward with discovery in this case as we discussed, along the lines of the agreed to budget. The co-defendant, Gage, has designated a number of out-of-state witnesses and I will be submitting them to you in an amended LMP once the defendants agree on which ones are material.

Once we have completed the depositions of the parties and experts, I will report to you on my evaluation of the case. Meanwhile, I am enclosing my interim statement for your consideration.

Yours very truly,



Donald M. Hudgins

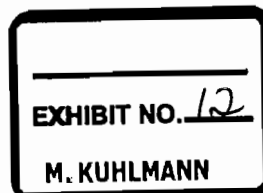
DMH/jb  
Enclosure

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**HUDGINS, HUDGINS & WARRICK**

a professional corporation  
ATTORNEYS AT LAW  
24 GREENWAY PLAZA, SUITE 1007  
HOUSTON, TEXAS 77046  
(713)623-2550 FAX (713)623-2793

May 25, 1995



VIA FACSIMILE # 787-7848

The Home Insurance Company  
P. O. Box 4357  
Houston, Texas 77210

Attn: Mr. Oscar Allen

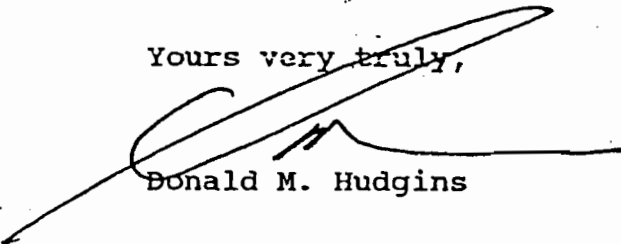
RE: Claim No. : 640-L-600813-174  
Insured : James F. Scherr  
Style : Beard v. Scherr

Dear Oscar:

Enclosed you will find our Suit Approaching Trial Report. I will advise you of the outcome of the hearing on our Motion for Summary Judgment. Our summary judgment is based on the statute of limitations on some of the claims; however, the plaintiffs have filed a response alleging the discovery rule which, in all probability, will require the Court to overrule the motion.

Once I have concluded Renee Wolfe's deposition, I will report to you further.

Yours very truly,

  
Donald M. Hudgins

DMH/jb  
Enclosure

RECEIVED

MAY 30 1995

COURT REPORTER

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Attorneys Suit Approaching Trial Report

Claim No. : 640-L-600813-174  
Insured : James F. Scherr  
Style of Case : Ben Beard, et al vs. James F. Scherr, et al

Date of Trial

The case is currently on the trial docket for the week of June 12, 1995. This is the second setting and although this is an early setting, because of the summer trial docket, we can expect the case to be reached for trial. All parties want to conclude the case, as does the court, so we are almost certain of the case being reached.

Additional Investigation and Discovery

The discovery of this case has proceeded non-stop. The defendant attorneys have a cross-action against the plaintiffs and their attorneys. All of the parties as well as the plaintiffs' attorneys have been deposed. The plaintiffs have designated three expert witnesses, two of which have been deposed. The remaining depositions yet to be taken are:

(1) Dr. Ben Beard's estranged wife. She is expected to shed light on the claims of Dr. Beard for his psychological injuries as well as his claims against the insured on the issues of malpractice.

(2) Plaintiffs' accounting expert. He is expected to testify about the insured's negligence and intentional acts concerning the expenses involved in the underlying class action case.

(3) Calvin McKenzie. He is the paralegal hired by the insured to work on the underlying class action case. Plaintiffs claim that he was also used by the insured on other matters in the insured's office and this was improperly billed to the class action case. In my discussions with him, he will rebut this allegation; however, he is now living out of state and refuses to come to trial, but has agreed to a deposition.

(4) Renee Wolfe, the ex-office manager for James Scherr. Her deposition is scheduled to be taken by the plaintiffs. She was Mr. Scherr's girlfriend for many years and is now suing him for sexual harassment and is expected to be an adverse witness.

There are several other witnesses who the co-defendants are planning on deposing. Additionally, none of the defendants' experts have been deposed. We are working with these experts, including our ethics expert and our malpractice expert, to secure reports once they have concluded their review of the voluminous documents in this case. Our experts' preliminary opinions are



very favorable to our insured and one feels that the essence of this case is simply a fee dispute.

#### Recap of Negotiations

There is currently \$370,000 escrowed with the clerk of the court in an interest bearing account. The case was mediated at which time the defendants agreed to accept \$125,000 out of the \$370,000. The plaintiffs' mediation demand was for the entire amount. Since that time, we have attempted on various occasions to negotiate the case; however, the plaintiffs filed grievances against the defendants with the State Bar, which has solidified the defendants' resolve not to give up any claims they have against the \$370,000. The defendants are claiming one-third of the \$370,000 as attorneys fees, as well as expenses in the amount of \$92,000, out of the plaintiffs' two-thirds. Plaintiffs' most recent demand was an oral demand of \$400,000 from the defendants.

#### Appraisal of Litigants

(a) Plaintiffs' attorney is Martie Georges of Jones & Georges and is assisted by her partner, Luther Jones. Ms. Georges is a competent, capable attorney who appears to have taken the case personally as have the insured, Jim Scherr, and his co-defendant, Noel Gage. From the amount of paper she has generated in the case, it appears to me that she works on nothing else. She also represented the plaintiffs in the State Bar grievance hearing. I feel that she is so personally and emotionally involved, she has had a difficult time properly evaluating the case and advising her clients.

Mr. Scherr, our insured, makes an excellent witness, although his record keeping in his office and his method of keeping track of expenses leave a lot to be desired. I feel that he will have good jury appeal.

Our co-defendant, Noel Gage, is an intelligent and very aggressive attorney. He has sometimes allowed his emotions to overcome his judgement and he can be abrasive. Potentially, he should be a good witness, but it does concern me if he gets out of control.

#### Opinion of Liability

I do not consider this to be a case of liability and would estimate our chances of securing a defense verdict at 85%. One of the plaintiffs, Dr. Ben Beard, is claiming a breach of confidentiality by the two defendants (mostly by the co-defendant) and is claiming mental and emotional distress and damages from same. This claim, in my opinion, is both exaggerated and not attributable to any actions of the insured. There is a slight chance of our motion for summary judgment being granted on some of the claims (motion pending).

Estimate of Charges to Date

Attorneys fees - \$39,000

Expenses - \$7,000

Estimate of Charges to a Conclusion

Attorneys fees - \$14,000

Expenses (experts) - \$10,000 - \$12,000

Recommended Procedure

Complete the depositions as scheduled. Attend hearings on Motion for Summary Judgment and assorted other motions, which are scheduled for May 26 and June 12, 1995. Complete preparation for trial of case and try case.

Member of Firm to Try the Case

Donald M. Hudgins

BEN BEARD, DAVID BAILEY and  
DAN PETROSKY,

Plaintiffs,

v.

JAMES FRANKLIN SCHERR, NOEL  
GAGE and GAGE, BEACH & AGER,

Defendants,

AND

JAMES F. SCHERR

Counter-Plaintiff,

v.

BEN BEARD, DAVID BAILEY and  
DAN PETROSKY

Counter-Defendants,

AND

JAMES F. SCHERR

Third-Party Plaintiff,

v.

MARJORIE GEORGES and  
JONES & GEORGES, P.C.

Third Party Defendants,

NOEL A. GAGE

Counter Plaintiff

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IN THE DISTRICT COURT OF  
HARRIS COUNTY, TEXAS  
129TH JUDICIAL DISTRICT

EXHIBIT NO. 13  
M. KUHLMANN

vs.

BEN BEARD, DAVID BAILEY, AND  
AN PETROSKY

Counter Defendants

§  
§  
§  
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§  
§

**PLAINTIFFS' FIFTH AMENDED ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Ben Beard, David Bailey, and Dan Petrosky, Plaintiffs, and file this their Fifth Amended Original Petition against James Scherr, Noel Gage, and Gage, Beach and Ager, Defendants and in support thereof would respectfully present the following:

**PARTIES**

1. Ben Beard is an individual residing in Houston, Texas and David Bailey is an individual residing in Bryan, Texas. Dan Petrosky is an individual residing in El Paso, Texas. Defendant James Scherr is an attorney who has previously been served in this case and has filed an answer. Noel Gage is an attorney who has previously been served and who has filed an answer and Gage, Beach & Ager is a partnership which also has been served and has filed an answer.

**VENUE**

2. Plaintiffs' action against Defendants is properly maintainable in the county of suit for the following reasons: Negotiations that formed the basis of the contract between Ben Beard and Defendant Scherr occurred in Harris County, Texas. Therefore, venue is appropriate in Harris County.

**FACTS**

3. Defendants are attorneys licensed to practice law in the State of Texas. Defendant James

Scherr entered into Contingency fee contracts to represent Plaintiffs in certain causes of action against numerous insurance companies enumerated in Cause No. 88-7707, *Dr. Walter Rhodes et al v. American General Fire and Casualty Company et al* in the 243rd Judicial District Court of El Paso County, Texas, hereinafter referred to as "Cause No. 88-7707". Defendant Scherr entered into an agreement with Defendant Gage, Defendant Gage, Beach & Ager, to assist him in representing Plaintiffs. During the course of representing the plaintiffs, Defendants failed to properly account for monies collected by Defendants on behalf of the Plaintiffs and favored specific other clients at the expense of Plaintiffs. Further, it is believed by Plaintiffs that Defendants wrongfully appropriated for the benefit of Defendants, certain funds collected on behalf of Plaintiffs. More specifically, and in response to special exceptions of defendant James Franklin Scherr, plaintiffs allege the following facts: 1) in violation of the agreement of the plaintiffs in Cause No. 88-7707 that all funds recovered would be divided equally among the various plaintiffs therein, defendants paid over to William LaRock and Joseph Superville a share greater than they were entitled to receive pursuant to said agreement; 2) in violation of his contingent fee contract with the Plaintiffs in Cause No. 88-7707 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 Plaintiffs; 3) in violation of the contingent fee contract between James Franklin Scherr and the Plaintiffs hereinafter Defendants paid to themselves one hundred percent of all monies recovered in a settlement negotiated with one particular insurance company; 4) defendants are currently wrongfully withholding disbursement of funds recovered in settlements in the amount of \$75,000.00 and in the amount of \$95,000.00 the pretext for which is a claim for expenses which defendants have failed to validate in spite of repeated requests that they provide proper documentation.

4. Defendants intentionally defrauded Plaintiffs by causing them to become plaintiffs in the Class Action lawsuit upon the false representation that its prosecution would lead to an end of the discriminatory practices of various insurance companies and further by failing to inform the Plaintiffs of their relationship with two Co-Plaintiffs -- LaRock and Superville -- in Cause No. 88-7707.

#### BREACH OF FIDUCIARY DUTY

5. In addition to the negligence committed by Defendants in Cause No. 88-7707, Defendants jointly and severally breached their fiduciary duty to Plaintiffs in one or more of the following respects:

- (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; and
- (5) in favoring one client to the detriment of and against the interests 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.
- (8) in placing the their own interests ahead of the interests of Plaintiffs and other members of the class.

As a consequence of the aforementioned breaches of their fiduciary duties, defendants, jointly and severally caused Plaintiffs to suffer actual damages and have unjustly enriched themselves.

## ACTUAL AND CONSTRUCTIVE FRAUD

6. Defendants committed fraud against the Plaintiffs by collecting more attorneys fees than those to which they were entitled under the terms of the contingency fee contract. Further Defendants fraudulently misrepresented their intentions in filing Cause No. 88-7707 as indicated in paragraph IV above. Defendants also fraudulently concealed their true relationship with two of the other class representatives.

7. During the time Plaintiff's were represented by Defendants in Cause No. 88-7707, Defendants knowingly concealed their special relationship with class members LaRock and Superville to the detriment of the Plaintiffs in this cause. Had Plaintiffs known of the special relationship they would not have engaged themselves as Plaintiffs in Cause 88-7707 nor would they have executed the contingency fee contract with Defendant James Franklin Scherr.

8. Defendants knowingly made 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. Defendants knowingly made the following representations:

1. That Defendants intended to represent the class of all Texas Chiropractors for the benefit of all Texas Chiropractors in Cause 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.

9. Plaintiffs would not have entered into the contingency fee contract with Defendants on Cause No. 88-7707 had they known the falsity of the above representations. Plaintiffs relied on the

misrepresentations to their substantial injury and damage.

10. By reason of Plaintiffs reliance upon Defendants' representations, Plaintiffs have been damaged in an amount in excess of the minimum jurisdiction of the Court.

11. Defendants breached the above stated fiduciary duties owed to Plaintiffs as a result of the Attorney Client relationship and as such committed constructive fraud as well as actual fraud upon Plaintiffs.

12. Plaintiffs have suffered actual damages as a result of these acts.

13. Defendants knew that the representations were false when they made them and thus the representations were willful and malicious and constitute conduct for which the law allows exemplary damages. In this connection, Plaintiffs will show that they have incurred significant expenses, including attorneys fees in the investigation and prosecution of this action. Accordingly, Plaintiffs request the award of exemplary damages against defendants.

#### CONVERSION

14. Defendants have appropriated and/or are 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 no accounting in the case of Defendant Gage and his law firm and/or inadequate or no accounting in the case of Defendant Scherr. All Defendants have wrongfully converted all sums they claim as expenses in Cause No. 88-7707, and accordingly, Plaintiffs seek a judgment of this Court denying defendants claims for expenses in Cause No. 88-7707.



## ACTION TO VOID CONTRACT

15. Because of the various acts of misconduct and/or negligence previously stated herein, Plaintiffs seek a judgment of this court that the contingency fee contracts executed in connection with Cause No. 88-7707, be declared null and void ab initio and also be declared as against the public policy of this State, and that the lien of Defendants' Scherr and Gage against the \$200,000.00 in the registry of the Court be extinguished.

## EXEMPLARY DAMAGES

16. Defendants' conduct as described above was intentional, egregious, wanton and malicious with a flagrant disregard for the rights of Plaintiffs. Therefore, Plaintiffs request that the Court assess punitive damages against Defendants.

## PREJUDGMENT INTEREST

Plaintiffs would show that they are entitled to recover prejudgment interest in this cause and specifically plead for prejudgment interest recovery.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that Defendants be cited to appear and answer, and that, after trial, plaintiffs have judgment against Defendants for the total sum of \$2,303,900.00 and further,

1. Cancellation of Defendant James Franklin Scherr's attorney lien in the \$200,000.00 recovered by Martie Georges in Cause No. 88-7707;
2. Pre and post judgment interest as allowed by law;
3. Such further relief to which Plaintiffs may be entitled.

Respectfully submitted,

Jones & Georges  
303 Texas Ave., Sta. 800

El Paso, TX 79901  
(915)534-0040  
FAX: 534-0055


By: 

Marjorie Wilcox Georges  
State Bar No. 21453075  
Attorney for Plaintiffs

### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was forwarded to James Franklin Scherr at 109 N. Oregon, 8th Floor, El Paso, Texas 79901, fax number 532-1759, Noel Gage at 6044 Gateway E., Ste. 800, El Paso, Texas 79905 fax number 532-2423; Teresa Ford and Phillip Werner at 1300 Post Oak Blvd., Ste. 700, Houston, Texas 77056, fax number (713)961-3542 and Donald M. Hudgins, 24 Greenway Plaza, Suite 1007, Houston, Texas 77046, fax number (713) 623-2793 and Don Wilhelm at 713-4391178 on this, the 2th day of June, 1995.

- regular mail
- certified mail
- hand delivery
- telecopier transmission

  
Martie Georges

**HUDGINS, HUDGINS & WARRICK**

a professional corporation  
ATTORNEYS AT LAW  
24 GREENWAY PLAZA, SUITE 1007  
HOUSTON, TEXAS 77046  
(713)623-2550 FAX (713)623-2793

June 7, 1995

Mr. Oscar Allen  
The Home Insurance Company  
P.O. Box 4357  
Houston, Texas 77210

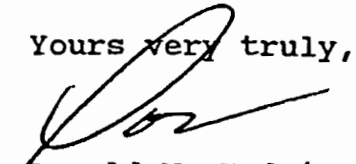
Re: Claim No. : 640-L-600813-174  
Insured : James Scherr  
Claimant : Ben Beard, et al  
Style : Beard v. Scherr

Dear Oscar:

Enclosed is a copy of Plaintiffs' Fifth Amended  
Petition for your review which we just received.

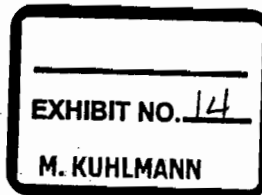
Please call if you have any questions or concerns.

Yours very truly,



Donald M. Hudgins

DMH:ct  
Enclosures



JUN 9 1995

CLAIM NO. 640-L-600813-174

00437



vs.

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§  
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BEN BEARD, DAVID BAILEY, AND  
DAN PETROSKY

Counter Defendants

**PLAINTIFFS' SIXTH AMENDED ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Ben Beard, David Bailey, and Dan Petrosky, Plaintiffs, and file this their Sixth Amended Original Petition against James Scherr, Noel Gage, and Gage, Beach and Ager, Defendants and in support thereof would respectfully present the following:

**PARTIES**

1. Ben Beard is an individual residing in Houston, Texas and David Bailey is an individual residing in Bryan, Texas. Dan Petrosky is an individual residing in El Paso, Texas. Defendant James Scherr is an attorney who has previously been served in this case and has filed an answer. Noel Gage is an attorney who has previously been served and who has filed an answer and Gage, Beach & Ager is a partnership which also has been served and has filed an answer.

**VENUE**

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**FACTS**

3. Defendants are attorneys licensed to practice law in the State of Texas. Defendant James

Scherr entered into Contingency fee contracts to represent Plaintiffs in certain causes of action against numerous insurance companies enumerated in Cause No. 88-7707, *Dr. Walter Rhodes et al v. American General Fire and Casualty Company et al* in the 243rd Judicial District Court of El Paso County, Texas, hereinafter referred to as "Cause No. 88-7707". Defendant Scherr entered into an agreement with Defendant Gage, Defendant Gage, Beach & Ager, to assist him in representing Plaintiffs. During the course of representing the plaintiffs, Defendants failed to properly account for monies collected by Defendants on behalf of the Plaintiffs and favored specific other clients at the expense of Plaintiffs. Further, it is believed by Plaintiffs that Defendants wrongfully appropriated, for the benefit of Defendants, certain funds collected on behalf of Plaintiffs. More specifically, and in response to special exceptions of defendant James Franklin Scherr, plaintiffs allege the following facts: 1) in violation of the agreement of the plaintiffs in Cause No. 88-7707 that all funds recovered would be divided equally among the various plaintiffs therein, defendants paid over to William LaRock and Joseph Superville a share greater than they were entitled to receive pursuant to said agreement; 2) in violation of his contingent fee contract with the Plaintiffs in Cause No. 88-7707, 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 Plaintiffs; 3) in violation of the contingent fee contract between James Franklin Scherr and the Plaintiffs herein, Defendants paid to themselves one hundred percent of all monies recovered in a settlement negotiated with one particular insurance company; 4) defendants are currently wrongfully withholding disbursement of funds recovered in settlements in the amount of \$75,000.00 and in the amount of \$95,000.00 the pretext for which is a claim for expenses which defendants have failed to validate or document in spite of repeated requests that they provide proper documentation.

4. Defendants intentionally defrauded Plaintiffs by causing them to become plaintiffs in the Class Action lawsuit upon the false representation that its prosecution would lead to an end of the discriminatory practices of various insurance companies and further by failing to inform the Plaintiffs of their relationship with two Co-Plaintiffs -- LaRock and Superville -- in Cause No. 88-7707.

#### BREACH OF FIDUCIARY DUTY

5. In addition to the negligence committed by Defendants in Cause No. 88-7707, Defendants jointly and severally breached their fiduciary duty to Plaintiffs in one or more of the following respects:

- (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; and
- (5) in favoring one client to the detriment of and against the interests 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.

In response to Defendant Gage, and Gage, Beach & Ager's Special Exceptions to this paragraph, Plaintiffs assert the following specific acts of conduct. Defendants Gage failed to inform Plaintiffs that he had a special relationship with LaRock and Superville. More specifically, Defendant Gage failed to inform the Plaintiffs that he served in a special corporate counsel relationship to Coronado Chiropractic Clinic, that he was engaged in extensive litigation involving Coronado Chiropractic including defense of a suit by the

Attorney General of Texas alleging deceptive trade practices and fraud against LaRock and Superville, that he was representing the clinic in at least a dozen other causes of action both offensive and defensive; that he was counsel for LaRock and Superville in a cause of action against other members of the putative class; that his principal purpose in participating in the class action litigation was collection of unpaid charges claimed by Coronado Chiropractic; that he had a contingency fee agreement which would permit him to claim a portion of the amounts collected; that he communicated on a regular basis with LaRock and Superville but not with other members of the class; or that he was the recipient of referrals of legal business from Coronado Chiropractic.

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

In response to the special exceptions of Gage and Gage, Beach & Ager, Plaintiffs assert Defendants were more concerned with filling thier own pockets with money by settling with the individual insurance companies than with protecting the interests of thier clients and the unnamed class members.

As a consequence of the aforementioned breaches of their fiduciary duties, defendants, jointly and severally caused Plaintiffs to suffer actual damages and have unjustly enriched themselves.

In connection with the allegations of negligence contained in this paragraph, Plaintiffs specifically plead the following acts of negligence:

- (1) Defendants Scherr and Gage were negligent in their representation of the putative class in that they assigned the principal 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) Defendants Scherr and Gage were negligent in their representation of the named members of the class in that they failed to keep them adequately informed of the progress of the litigation;
- (3) Defendant Scherr and Gage were negligent in their representation of the named members of the class in that they negotiated settlements that did not achieve the stated purposes of the litigation;



(4) Defendants Scherr and Gage were negligent in their representation of the named members of the class in that they did not adequately prepare them for their deposition;

(5) Defendants Scherr and Gage were negligent in their representation of the class in that they did not exhaust their administrative remedies prior to commencement of the litigation;

(6) Defendants Scherr and Gage were negligent in their representation of the class in that they never conducted a hearing for the purposes of certification; and

(7) Defendants Scherr and Gage were negligent in their representation of the class in that they failed to maintain records required by the Texas Rules of Civil Procedure in class action litigation;

(8) Defendants Scherr and Gage were negligent in their representation of the class in that they failed to inform the named members of the class of the legal consequences of the settlements they negotiated;

(9) Defendants Scherr and Gage were negligent 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;

(10) Defendants Scherr and Gage were negligent in undertaking a class action of the nature envisioned in Cause No. 88-7707 when they did not have adequate financial capacity to maintain the class action; and

(11) Defendants Scherr and Gage were negligent in 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 the initial costs.

Plaintiffs anticipate other acts of negligence may be revealed during and leading up to the trial of this cause.

**ACTUAL AND CONSTRUCTIVE FRAUD**

6. Defendants committed fraud against the Plaintiffs by collecting more attorneys fees than

those to which they were entitled under the terms of the contingency fee contract. Further Defendants fraudulently misrepresented their intentions in filing Cause No. 88-7707 as indicated in paragraph IV above. Defendants also fraudulently concealed their true relationship with two of the other class representatives.

7. During the time Plaintiff's were represented by Defendants in Cause No. 88-7707, Defendants knowingly concealed their special relationship with class members LaRock and Superville to the detriment of the Plaintiffs in this cause. Had Plaintiffs known of the special relationship they would not have engaged themselves as Plaintiffs in Cause 88-7707 nor would they have executed the contingency fee contract with Defendant James Franklin Scherr.

8. Defendants knowingly made 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. Defendants knowingly made the following representations:

1. That Defendants intended to represent the class of all Texas Chiropractors for the benefit of all Texas Chiropractors in Cause 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.

9. Plaintiffs would not have entered into the contingency fee contract with Defendants on Cause No. 88-7707 had they known the falsity of the above representations. Plaintiffs relied on the misrepresentations to their substantial injury and damage.

10. By reason of Plaintiffs reliance upon Defendants' representations, Plaintiffs have been

damaged in an amount in excess of the minimum jurisdiction of the Court.

11. Defendants breached the above stated fiduciary duties owed to Plaintiffs as a result of the Attorney Client relationship and as such committed constructive fraud as well as actual fraud upon Plaintiffs. In Response to Special Exceptions of Gage and Gage, Beach & Ager, Plaintiffs herein assert specific acts of conduct.

*Defendant Gage and Gage, Beach & Ager*

(1) Defendants Gage and Gage, Beach & Ager acted fraudulently in failing to reveal to Plaintiffs herein their special relationship with LaRock and Superville;

(2) Defendants Gage and Gage, Beach & Ager acted fraudulently in attempting to recover expenses that were not incurred or not authenticated;

(3) Defendants Gage and Gage, Beach & Ager acted fraudulently in accepting fees in excess of those contracted for by James Franklin Scherr;

(4) Defendants Gage and Gage, Beach & Ager committed fraud by informing Plaintiffs that the settlements being negotiated were consistent with the stated purposes of the lawsuit;

(5) Defendants Gage and Gage, Beach & Ager committed fraud when they filed a claim on behalf of LaRock and Superville against two members of the putative class; and

(6) Defendant Gage and Gage, Beach & Ager committed fraud when they negotiated settlements in disregard of objections imposed by members of the class.

12. Plaintiffs have suffered actual damages as a result of these acts.

13. Defendants knew that the representations, *cited specifically elsewhere in these pleadings* — *specifically in Paragraphs 5 and 11*, were false when they made them and thus the representations

were willful and malicious and constitute conduct for which the law allows exemplary damages. In this connection, Plaintiffs will show that they have incurred significant expenses, including attorneys fees in the investigation and prosecution of this action. Accordingly, Plaintiffs request the award of exemplary damages against defendants *in an amount of not less than \$2,000,000.00*.

### CONVERSION

14. Defendant *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, \$50,000.00, \$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. All Defendants have wrongfully converted all sums they claim or claimed as expenses in Cause No. 88-7707, and accordingly, Plaintiffs seek a judgment of this Court denying defendants claims for expenses in Cause No. 88-7707.

### ACTION TO VOID CONTRACT

15. Because of the ~~various acts of misconduct and/or negligence~~ previously stated herein, Plaintiffs seek a judgment of this court that the contingency fee contracts executed in connection with Cause No. 88-7707, be declared null and void ab initio and also be declared as against the public policy of this State, and that the lien of Defendants' Scherr and Gage against the \$200,000.00 in the registry of the Court be extinguished.

### EXEMPLARY DAMAGES

16. Defendants' conduct as ~~described above was intentional~~, egregious, wanton and malicious with a flagrant disregard for the rights of Plaintiffs. Therefore, Plaintiffs request that the Court assess punitive damages against Defendants.

## PREJUDGMENT INTEREST

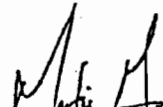
Plaintiffs would show that they are entitled to recover prejudgment interest in this cause and specifically plead for prejudgment interest recovery.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that Defendants be cited to appear and answer, and that, after trial, plaintiffs have judgment against Defendants for the maximum amount of \$2,303,900.00 and further,

1. Cancellation of Defendant James Franklin Scherr's attorney lien in the \$200,000.00 recovered by Martie Georges in Cause No. 88-7707;
2. Pre and post judgment interest as allowed by law;
3. Such further relief to which Plaintiffs may be entitled.

Respectfully submitted,

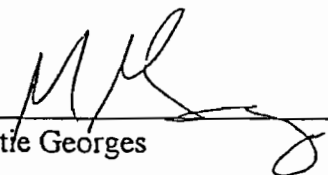
Jones & Georges  
303 Texas Ave., Ste. 800  
El Paso, TX 79901  
(915)534-0040  
FAX: 534-0055

By:   
Marjorie Wilcox Georges  
State Bar No. 21453075  
Attorney for Plaintiffs

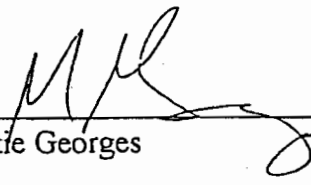
## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was forwarded to James Franklin Scherr at 109 N. Oregon, 8th Floor, El Paso, Texas 79901, fax number 532-1759, Noel Gage at 6044 Gateway E., Ste. 800, El Paso, Texas 79905 fax number 532-2423; Teresa Ford and Phillip Werner at 1300 Post Oak Blvd., Ste. 700, Houston, Texas 77056, fax number (713)961-3542 and Donald M. Hudgins, 24 Greenway Plaza, Suite 1007, Houston, Texas 77046, fax number (713) 623-2793 and Don Wilhelm at 713-4391178 on this, the 19th day of June, 1995.

- regular mail
- certified mail
- hand delivery
- telecopier transmission

  
\_\_\_\_\_  
Martie Georges

- regular mail
- certified mail
- hand delivery
- telecopier transmission

  
\_\_\_\_\_  
Martie Georges

THE HOME  
INSURANCE  
COMPANY



2925 BRIARPARK  
SUITE 800  
HOUSTON, TEXAS 77042  
713-787-7800

P.O. BOX 4357  
HOUSTON, TX 77210

June 23, 1995

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED P 337 255 142  
James F. Scherr  
109 North Oregon, Suite 800  
El Paso, TX 79901



Re: Claim No.: 640-R-600813-174  
Insured: James Scherr  
Claimant: Ben Beard, et al.  
Policy Limits: \$200,000 Each Claim/\$600,000 Aggregate  
Deductible: \$5,000

Dear Mr. Scherr:

We have received plaintiff's sixth amended original petition regarding the above-captioned matter.

In order to protect your interests, we have previously agreed to retain the law firm of Hudgins, Hudgins & Warwick. We trust that you will provide the firm with your continued full cooperation in the defense of this litigation.

A review of these plaintiff's six amended original petition in this matter reveals allegations of actual and constructive fraud; conversion; action to void contingency fee contract; among other things. Additionally, the plaintiff's sixth amended original petition seeks to recover exemplary damages. Therefore, we are providing you with a defense under a reservation of rights. At this time, I refer you to the following provisions in your policy:

Section B - Coverage

Professional Liability and Claims Made Clause

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;

Damages, whenever used in this policy, means a monetary judgment or settlement, including any such judgment or settlement for personal injury, and does not include fines or statutory penalties, or sanctions whether imposed by law or otherwise, nor the return of or restitution of legal fees, costs and expenses.

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Exclusions

Section C - Exclusions

I. This policy does not apply:

- (a) to any judgment or final adjudication based upon or arising out of any dishonest, deliberately fraudulent, criminal, maliciously or deliberately wrongful acts or omissions committed by the Insured;

The sixth amended original petition is seeking to recover exemplary damages in the amount of \$2,000,000. Please be advised that The Home Insurance Company is reserving its rights for any payment, judgment or award of this nature.

Please be advised that the damages sought exceed your per claim or aggregate limit of liability. Accordingly, if you have relevant excess insurance, you should place that carrier on notice. Similarly, you have at your own cost and expense, the right to retain counsel to represent your uninsured interest in this matter. Should you decide to do so, please have your counsel communicate directly with counsel retained on your behalf by the Company.

Furthermore, The Home reserves any and all other rights it may now have or subsequently acquire, including the right to deny coverage and withdraw from the defense of this matter. The Home shall assert such rights if and when circumstances warrant. The Home also reserves its right to reimbursement from you of any expenses paid in the defense of this action, if it is later determined that this claim is not covered under your policy.

Therefore, for the reasons set forth above, and for such other good and sufficient reasons as may hereafter appear, this Company is providing you with a defense under a full reservation of all of its rights with respect to coverage.

Should you feel that any of the information upon which this reservation has been made is in error, or there is any further information you wish to bring to our attention which may impact our coverage determination, please forward same promptly and we will review our position at that time. Please do not hesitate to contact the undersigned directly should you determine that such a reevaluation is in order.

We look forward to working with you toward a satisfactory conclusion to this matter.

Very truly yours,

*Oscar Allen*  
Oscar Allen  
Claim Analyst  
(713) 787-5940

OA:pcs

cc: Don Hudgins  
Hudgins, Hudgins & Warwick  
24 Going Away Plaza, Suite 1007  
Houston, TX 77046

00065

CAUSE NO. 94-03110

BEN BEARD, DAVID BAILEY and  
DAN PETROSKY,

Plaintiffs,

v.

JAMES FRANKLIN SCHERR, NOEL  
GAGE and GAGE, BEACH & AGER,

Defendants,

AND

JAMES F. SCHERR

Counter-Plaintiff,

v.

BEN BEARD, DAVID BAILEY and  
DAN PETROSKY

Counter-Defendants,

and

MARJORIE GEORGES and  
JONES & GEORGES, P.C.

Third Party Defendants.

NOEL A. GAGE

Counter Plaintiff

vs.

BEN BEARD, DAVID BAILEY, AND  
DAN PETROSKY

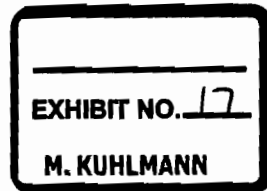
Counter Defendants

and

MARJORIE GEORGES, LUTHER JONES  
AND JONES & GEORGES,

Third Party Defendants

IN THE DISTRICT COURT OF  
HARRIS COUNTY, TEXAS  
129TH JUDICIAL DISTRICT



**PLAINTIFFS' SEVENTH AMENDED ORIGINAL PETITION**

**TO THE HONORABLE JUDGE OF SAID COURT:**

COMES NOW, Ben Beard, David Bailey, and Dan Petrosky, Plaintiffs, and file this their

Seventh Amended Original Petition against James Scherr, Noel Gage, and Gage, Beach and Ager, Defendants and Third Party Defendants Marjorie Georges, Luther Jones and Jones & Georges and file this their Answer to all Third Party Claims of James Franklin Scherr, Noel A. Gage and Gage Beach & Ager and in support thereof would respectfully present the following:

#### PARTIES

1. Ben Beard is an individual residing in Houston, Texas and David Bailey is an individual residing in Bryan, Texas. Dan Petrosky is an individual residing in El Paso, Texas. Defendant James Scherr is an attorney who has previously been served in this case and has filed an answer. Noel Gage is an attorney who has previously been served and who has filed an answer and Gage, Beach & Ager is a partnership which also has been served and has filed an answer. Third Party Defendants Marjorie Georges, Luther Jones and Jones & Georges are all residents of El Paso County, Texas.

#### VENUE

2. Plaintiffs' action against Defendants is properly maintainable in the county of suit for the following reasons: Negotiations that formed the basis of the contract between Ben Beard and Defendant Scherr occurred in Harris County, Texas. Therefore, venue is appropriate in Harris County.

#### FACTS

3. Defendants are attorneys licensed to practice law in the State of Texas. Defendant James Scherr entered into Contingency fee contracts to represent Plaintiffs in certain causes of action against numerous insurance companies enumerated in Cause No. 88-7707, *Dr. Walter Rhodes et al v. American General Fire and Casualty Company et al* in the 243rd Judicial

District Court of El Paso County, Texas, hereinafter referred to as "Cause No. 88-7707".

Defendant Scherr entered into an agreement with Defendant Gage, and his law firm Defendant Gage, Beach & Ager, to assist him in representing Plaintiffs. During the course of representing the Plaintiffs, Defendants failed to properly account for monies collected by Defendants on behalf of the Plaintiffs and favored specific other clients at the expense of Plaintiffs. Further, it is believed by Plaintiffs that Defendants wrongfully appropriated, for the benefit of Defendants, certain funds collected on behalf of Plaintiffs. More specifically, and in response to special exceptions of defendant James Franklin Scherr, Plaintiffs allege the following facts: 1) in violation of the agreement of the plaintiffs in Cause No. 88-7707 that all funds recovered would be divided equally among the various Plaintiffs therein, Defendants paid over to William LaRock and Joseph Superville a share greater than they were entitled to receive pursuant to said agreement; 2) in violation of his contingent fee contract with the Plaintiffs in Cause No. 88-7707, 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 Plaintiffs; 3) in violation of the contingent fee contract between James Franklin Scherr and the Plaintiffs herein, Defendants paid to themselves one hundred percent of all monies recovered in a settlement negotiated with one particular insurance company; 4) Defendants are currently wrongfully withholding disbursement of funds recovered in settlements in the amounts of \$75,000.00 and \$95,000.00, the pretext for which is a claim for expenses which defendants have failed to validate or document in spite of repeated requests that they provide proper documentation.

4. Defendants intentionally defrauded Plaintiffs by causing them to become plaintiffs

in the Class Action lawsuit upon the false representation that its prosecution would lead to an end of the discriminatory practices of various insurance companies and further by failing to inform the Plaintiffs of their relationship with two Co-Plaintiff class representatives -- LaRock and Superville -- in Cause No. 88-7707.

### BREACH OF FIDUCIARY DUTY

5. In addition to the negligence committed by Defendants in Cause No. 88-7707, Defendants jointly and severally breached their fiduciary duty to Plaintiffs in one or more of the following respects:

- (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; and
- (5) in favoring one client to the detriment of and against the interests 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.
- (8) in placing the their own interests ahead of the interests of Plaintiffs and other members of the class.

In response to Defendant Gage, and Gage, Beach & Ager's Special Exceptions to this paragraph, Plaintiffs assert the following specific acts of conduct. Defendants Gage failed to inform Plaintiffs that he had a special relationship with LaRock and Superville. More specifically, Defendant Gage failed to inform the Plaintiffs that he served in a special corporate counsel relationship to Coronado Chiropractic Clinic, that he was engaged in extensive litigation

involving Coronado Chiropractic including defense of a suit by the Attorney General of Texas alleging deceptive trade practices and fraud against LaRock and Superville, that he was representing the clinic in at least a dozen other causes of action both offensive and defensive; that he was counsel for LaRock and Superville in a cause of action against other members of the putative class; that his principal purpose in participating in the class action litigation was collection of unpaid charges claimed by Coronado Chiropractic; that he communicated on a regular basis with LaRock and Superville but not with other members of the class; or that he was the recipient of referrals of legal business from Coronado Chiropractic.

In further response to the special exceptions of Gage and Gage, Beach & Ager, Plaintiffs assert that Defendants principal motivation in pursuing the alleged class action lawsuit was collection of unpaid bills of their client LaRock and Superville to the end of enriching themselves at the expense of the uncertified class; and further that Defendants at no time prosecuted the class action for the purpose of achieving the goals which they promised Plaintiffs would be accomplished.

As a consequence of the aforementioned breaches of their fiduciary duties, defendants, jointly and severally caused Plaintiffs to suffer actual damages and have unjustly enriched themselves.

In connection with the allegations of negligence contained in this paragraph, Plaintiffs specifically plead the following specific acts of negligence:

- (1) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs and members of the putative class in that they assigned the principal 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) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in that failing to keep them adequately informed of the progress of the litigation;
- (3) Defendant Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in that they negotiated settlements that did not achieve the stated purposes of the litigation;

(4) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in that they did not adequately prepare them for their respective depositions;

(5) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in failing to exhaust their administrative remedies prior to commencement of the litigation;

(6) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in that they never conducted a hearing for the purposes of certification; and

(7) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in failing to maintain records required by the Texas Rules of Civil Procedure in class action litigation;

(8) Defendants Scherr and Gage were negligent breached their fiduciary duty to Plaintiffs in failing to inform the named members of the class of the legal consequences of the settlements they negotiated;

(9) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in failing to acknowledge and respond to objections made by various class members to the settlements that were being negotiated;

(10) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in undertaking a class action of the nature envisioned in Cause No. 88-7707 when they did not have adequate financial capacity to maintain the class action; and

(11) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in 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 the initial costs.

#### ACTUAL AND CONSTRUCTIVE FRAUD

6. Defendants committed fraud against the Plaintiffs by collecting more attorneys fees

than those to which they were entitled under the terms of the contingency fee contract. Further Defendants fraudulently misrepresented their intentions in filing Cause No. 88-7707 as indicated in paragraph IV above. Defendants also fraudulently concealed their true relationship with two of the other class representatives.

7. During the time Plaintiff's were represented by Defendants in Cause No. 88-7707, Defendants knowingly concealed their special relationship with class members LaRock and Superville to the detriment of the Plaintiffs in this cause. Had Plaintiffs known of the special relationship they would not have engaged themselves as Plaintiffs in Cause 88-7707 nor would they have executed the contingency fee contract with Defendant James Franklin Scherr..

8. Defendants knowingly made 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. Defendants knowingly made the following representations:

1. That Defendants intended to represent the class of all Texas Chiropractors for the benefit of all Texas Chiropractors in Cause 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.

9. Plaintiffs would not have entered into the contingency fee contract with Defendants on Cause No. 88-7707 had they known the falsity of the above representations. Plaintiffs relied on the misrepresentations to their substantial injury and damage.

10. By reason of Plaintiff's reliance upon Defendants' representations, Plaintiffs have been



damaged in an amount in excess of the minimum jurisdiction of the Court.

11. Defendants breached the above stated fiduciary duties owed to Plaintiffs as a result of the Attorney Client relationship and as such committed constructive fraud as well as actual fraud upon Plaintiffs. In Response to Special Exceptions of Gage and Gage, Beach & Ager, Plaintiffs herein assert specific acts of conduct.

*Defendant Gage and Gage, Beach & Ager*

- (1) Defendants Gage and Gage, Beach & Ager acted fraudulently in failing to reveal to Plaintiffs herein their special relationship with LaRock and Superville;
- (2) Defendants Gage and Gage, Beach & Ager acted fraudulently in claiming expenses that were not incurred or not authenticated;
- (3) Defendants Gage and Gage, Beach & Ager acted fraudulently in accepting fees in excess of those contracted for by James Franklin Scherr;
- (4) Defendants Gage and Gage, Beach & Ager committed fraud by informing Plaintiffs that the settlements being negotiated were consistent with the stated purposes of the lawsuit;
- (5) Defendants Gage and Gage, Beach & Ager committed fraud when they filed a claim on behalf of LaRock and Superville against two members of the putative class; and
- (6) Defendant Gage and Gage, Beach & Ager committed fraud when they negotiated settlements in disregard of objections imposed by members of the class.

12. Plaintiffs have suffered actual damages as a result of these acts.

13. Defendants knew that the representations, *cited specifically elsewhere in these pleadings -- specifically in Paragraphs 5 and 11*, were false when they made them and thus the

representations were willful and malicious and constitute conduct for which the law allows exemplary damages. In this connection, Plaintiffs will show that they have incurred significant expenses, including attorneys fees in the investigation and prosecution of this action.

Accordingly, Plaintiffs request the award of exemplary damages against defendants *in an amount of not less than \$2,000,000.00.*

#### CONVERSION

14. Defendant *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, \$50,000.00, \$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. Each Defendant has wrongfully converted all sums presently or previously claimed as expenses in Cause No. 88-7707, and accordingly, Plaintiffs seek a judgment of this Court denying defendants claims for expenses in Cause No. 88-7707.

#### ACTION TO VOID CONTRACT

15. Because of the various acts of misconduct and/or negligence previously stated herein, Plaintiffs seek a judgment of this court that the contingency fee contracts executed in connection with Cause No. 88-7707, be declared null and void ab initio and also be declared as against the public policy of this State, and that the lien of Defendants' Scherr and Gage against the \$200,000.00 in the registry of the Court be extinguished.

#### EXEMPLARY DAMAGES

16. Defendants' conduct as described above was intentional, egregious, wanton and malicious with a flagrant disregard for the rights of Plaintiffs. Therefore, Plaintiffs request that

the Court assess punitive damages against Defendants.

### PREJUDGMENT INTEREST

Plaintiffs would show that they are entitled to recover prejudgment interest in this cause and specifically plead for prejudgment interest recovery.

### GENERAL DENIAL

Third Party Defendants Marjorie Georges, Luther Jones and Jones & Georges deny each and every third party claim asserted by Noel A. Gage or Gage, Beach & Ager, and demand strict proof thereof. Third Party Defendants Marjorie Georges and Jones & Georges deny each and every third party claim asserted by James Franklin Scherr.

### DENIAL OF SWORN ACCOUNT

Plaintiffs specially deny each and every item in defendant James Franklin Scherr's sworn account, and demands strict proof of all items in the account. In denying this sworn account Defendants further plead that defendant James Franklin Scherr has forfeited all right to compensation based upon his contingency fee contract with Plaintiffs for the reason that James Franklin Scherr is guilty of fraud, breach of fiduciary duty and conversion of client funds, the factual basis for which can be found in Paragraphs 5 and 11 herein.

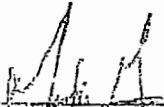
WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that Defendants be cited to appear and answer, and that, after trial, plaintiffs have judgment against Defendants for the maximum amount of \$2,303,900.00; that Counter Plaintiffs take nothing in their suit against Third Party Defendants and further,

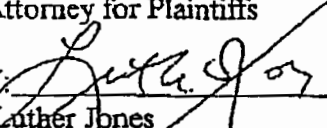
1. Cancellation of Defendant James Franklin Scherr's attorney lien in the \$200,000.00 recovered by Martie Georges in Cause No. 88-7707;

- 2. Pre and post judgment interest as allowed by law;
- 3. Such further relief to which Plaintiffs may be entitled.

Respectfully submitted,

Jones & Georges  
 303 Texas Ave., Ste. 800  
 El Paso, TX 79901  
 (915)534-0040  
 FAX: 534-0055

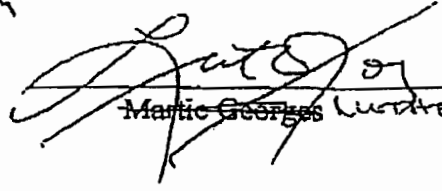
By:   
 Marjorie Wilcox Georges  
 State Bar No. 21453075  
 Attorney for Plaintiffs

BY:   
 Luther Jones  
 State Bar No. 10928000  
 Attorney for Plaintiffs and Third  
 Party Defendants

VERIFICATIONS ATTACHED

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was forwarded to Phillip Werner at 1300 Post Oak Blvd., Ste. 700, Houston, Texas 77056, fax number (713)961-3542 and Donald M. Hudgins, 24 Greenway Plaza, Suite 1007, Houston, Texas 77046, fax number (713) 623-2793 and Don Wilhelm at 1360 Post Oak Blvd., Suite 700, Houston, Texas, fax number 713-439-1178 and Anthony Griffin, 1115 Moody, Galveston, Texas, fax number (409) 763-0386 on this the ~~25~~ 24<sup>th</sup> day of ~~June~~ July, 1995 by telecopier transmission. Hand deliver.

  
 Phillip Werner


**VERIFICATION**

STATE OF TEXAS            )  
                                  )  
COUNTY OF BRAZOS        )

Before me, the undersigned Notary Public, on this day personally appeared *David Bailey*, who, after being duly sworn, stated under oath that he is the Plaintiff/Counter-defendant in Cause No. 9403110, that he has read the attached Plaintiff's Seventh Amended Petition; and that every statement contained in the paragraph titled **DENIAL OF SWORN ACCOUNT** is within his personal knowledge and is true and correct.

*David Bailey*  
\_\_\_\_\_  
DAVID BAILEY

SUBSCRIBED AND SWORN TO BEFORE ME, on this the \_\_\_\_ day of June, 1995.

 **SANDRA SCHMIDT**  
Notary Public State of Texas  
My Commission Expires  
OCTOBER 23, 1997

*Sandra Schmidt*  
\_\_\_\_\_  
NOTARY PUBLIC in and for the State of TEXAS

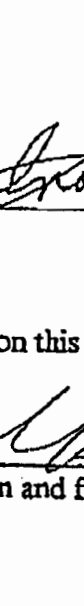
VERIFICATION

STATE OF TEXAS )  
 )  
COUNTY OF EL PASO )

Before me, the undersigned Notary Public, on this day personally appeared *Dan Petrosky*, who, after being duly sworn, stated under oath that he is the Plaintiff/Counter-defendant in Cause No. 9403110, that he has read the attached Plaintiffs Seventh Amended Petition; and that every statement contained in the paragraph titled DENIAL OF SWORN ACCOUNT is within his personal knowledge and is true and correct.

  
\_\_\_\_\_  
DAN PETROSKY

SUBSCRIBED AND SWORN TO BEFORE ME, on this the 28<sup>th</sup> day of June, 1995.

  
\_\_\_\_\_  
NOTARY PUBLIC in and for the State of T E X A S

B18-2.455



**HUDGINS, HUDGINS & WARRICK**

a professional corporation  
ATTORNEYS AT LAW  
24 GREENWAY PLAZA, SUITE 1007  
HOUSTON, TEXAS 77048  
(713)623-2550 FAX (713)623-2793

July 30, 1995

Mr. Oscar Allen - VIA FACSIMILE  
The Home Insurance Company  
P.O. Box 4357  
Houston, Texas 77210

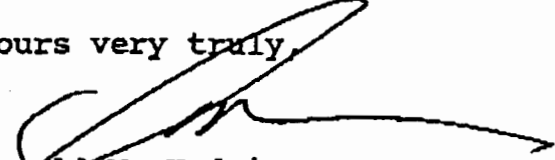
Re: Claim No. : 640-L-600813-174  
Insured : James Scherr  
Claimant : Ben Beard, et al  
Style : Beard v. Scherr

Dear Oscar:

Enclosed is a copy of Plaintiffs' Seventh Amended Petition for your review. Also, as you may know, this case has been reset for trial on September 18, 1995. The Plaintiffs' attorney has indicated a willingness to mediate the case but does not want to contribute money towards doing so. I will continue to keep you informed as future developments occur.

Please call if you have any questions or concerns.

Yours very truly,

  
Donald M. Hudgins

*we are pursuing  
1/2 day mediation.  
(4 hrs.) DM*

DMH:ct  
Enclosures

EXHIBIT NO. 18  
M. KUHMANN



THE HOME  
INSURANCE  
COMPANY



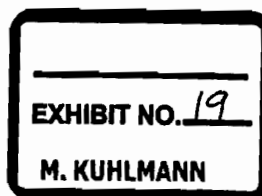
2925 BRIARPARK  
SUITE 800  
HOUSTON, TEXAS 77042  
713-787-7800

P.O. BOX 4357  
HOUSTON, TX 77210

August 1, 1995

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED P 020 835 180

James F. Scherr  
109 North Oregon, Suite 800  
El Paso, TX 79901



File # 0414-1-00000-174  
Insured: James Scherr  
Claimant: Ben Beard, et al.  
Policy Limits: \$200,000 Each Claim/\$600,000 Aggregate  
Deductible: \$5,000

Dear Mr. Scherr:

We have received plaintiff's seventh amended original petition regarding the above-captioned matter.

In order to protect your interests, we have previously agreed to retain the law firm of Hudgins, Hudgins & Warrick. We trust that you will provide the firm with your continued full cooperation in the defense of this litigation.

A review of these plaintiff's six amended original petition in this matter reveals allegations of actual and constructive fraud; conversion; action to void contingency fee contract; among other things. Additionally, the plaintiff's sixth amended original petition seeks to recover exemplary damages. Therefore, we are providing you with a defense under a reservation of rights. At this time, I refer you to the following provisions in your policy:

Section B - Coverage

Professional Liability and Claims Made Clause

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;

Damages, whenever used in this policy, means a monetary judgment or settlement, including any such judgment or settlement for personal injury, and does not include fines or statutory penalties, or sanctions whether imposed by law or otherwise, nor the return of or restitution of legal fees, costs and expenses.

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Exclusions

Section C - Exclusions

I. This policy does not apply:

- (a) to any judgment or final adjudication based upon or arising out of any dishonest, deliberately fraudulent, criminal, maliciously or deliberately wrongful acts or omissions committed by the Insured;

The sixth amended original petition is seeking to recover exemplary damages in the amount of \$2,000,000. Please be advised that The Home Insurance Company is reserving its rights for any payment, judgment or award of this nature.

Please be advised that the damages sought exceed your policy limit or aggregate limit of liability. Accordingly, if you have relevant excess insurance, you should place that carrier on notice. Similarly, you have at your own cost and expense, the right to retain counsel to represent your uninsured interest in this matter. Should you decide to do so, please have your counsel communicate directly with counsel retained on your behalf by the Company.


Furthermore, The Home reserves any and all other rights it may now have or subsequently acquire, including the right to deny coverage and withdraw from the defense of this matter. The Home shall assert such rights if and when circumstances warrant. The Home also reserves its right to reimbursement from you of any expenses paid in the defense of this action, if it is later determined that this claim is not covered under your policy.

Therefore, for the reasons set forth above, and for such other good and sufficient reasons as may hereafter appear, this Company is providing you with a defense under a full reservation of all of its rights with respect to coverage.

Should you feel that any of the information upon which this reservation has been made is in error, or there is any further information you wish to bring to our attention which may impact our coverage determination, please forward same promptly and we will review our position at that time. Please do not hesitate to contact the undersigned directly should you determine that such a reevaluation is in order.

We look forward to working with you toward a satisfactory conclusion to this matter.

Very truly yours,

  
Oscar Allen  
Claim Analyst  
(713) 787-5940

OA:pcs

cc: Don Hudgins  
Hudgins, Hudgins & Warrick  
24 Greenway Plaza, Suite 1007  
Houston, TX 77046

00063



PLEA IN INTERVENTION

TO THE HONORABLE COURT:

Comes now, Dr. Richard Gillespie; Dr. Stewart Stephenson individually and as representative of Accident and Industrial Injury Center, Inc.; Accident and Industrial Injury Center, Inc; Dr. Ted Stephenson; Dr. Odion E. Ojo, individually and as representative of Astrodome Chiropractic and Sports Clinic; Astrodome Chiropractic and Sports Clinic; Dr. Richard G. Ivy; and, Dr. Carlos Xavier Domino, as well as others to be named latter, and file, as Intervenors, this Plea in Intervention and would show the Court as follows:

**PARTIES**

Intervenors are individual chiropractors and their businesses whose names, addresses, and principal place of businesses are as follows:

Intervenor, Dr. Richard Gillespie, 1520 Ranch Road, Suite 12, San Marcos, Texas 78666.

Intervenor, Dr. Stewart Stephenson, Accident & Industrial Injury Center, Inc., 2005 South Texas Street, Bryan, Texas 77801.

Intervenor, Dr. Ted Stephenson, 1313 Briarcrest, Bryan, Texas 77802.

Intervenor, Odion E. Ojo, Astrodome Chiropractic & Sports Clinic, 2630 Westridge, Houston, Texas 77054.

Intervenor, Dr. Richard G. Ivy, 124 North West Newton, Burleson, Texas 76028.

Intervenor, Dr. Carlos Xavier Domino, 5271 Memorial Drive, Houston, Texas 77007.

Plaintiff Ben Beard is an individual residing in Houston, Texas. Plaintiff David Bailey is an individual residing in Bryan, Texas. Plaintiff Dan Petrosky is an individual residing in El Paso, Texas. Defendants have been served and answered herein.

### BACKGROUND FACTS

Defendants are attorneys licensed to practice law in the State of Texas. Defendants filed suit purporting to represent Intervenors in a class action suit for certain causes of action against numerous insurance companies in Cause No. 88-7707, *Dr. Walter Rhodes, et al. v. American General Fire and Casualty, et al.*, in the 243rd Judicial District Court of El Paso County, Texas, hereinafter referred to as "Cause No. 88-7707." See Exhibit A, attached hereto and incorporated herein for all purposes.

On July 28, 1988, Defendants brought Cause No. 88-7707 on behalf of all Texas chiropractors alleging that certain insurance companies had engaged in a civil conspiracy aimed at cutting chiropractic services and charges. Defendants herein, alleged among other things that chiropractors suffered damages due to the insurance companies' non-payment and slow payment of chiropractors' bills; and, that the chiropractic profession was defamed and maligned by acts of certain insurance companies.

Suit was filed on behalf of all Texas chiropractors with Drs. La Rock and Superville named as class representatives. (See Exhibit A).

Defendants had a prior referral relationship with the named representatives LaRock and Superville. 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, Defendants retained one hundred percent of the settlement proceeds. In March of 1994, Defendants entered into an agreed final dismissal of the class action suit.

A portion of the settlement proceeds that rightly belong to the Intervenor are in the registry of this Court. Intervention herein is essential to effectively protect the Intervenor's interest.

## CAUSES OF ACTION

### NEGLIGENCE

Defendants were jointly and severally negligent in proximately causing Intervenor's damages. Defendants were negligent in one or more of the following ways:

- (1) Defendants were negligent in that they failed to certify, or even attempt to certify, a class action suit.
- (2) Defendants were negligent in their representation of the class.
- (3) Defendants were negligent in that they settled class causes of action without the consent of the class or without a denial of certification of the class.
- (4) Defendants were negligent in that they did not do adequate discovery.
- (5) Defendants were negligent in that they failed to maintain records required by the Texas Rules of Civil Procedure in a class action litigation.
- (6) Defendants were negligent in not properly distributing settlement proceeds among the class.
- (7) Defendants were negligent 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) Defendants were negligent 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) Defendants were negligent in settling the suit for a fraction of its actual value for the benefit of certain class representatives.
- (10) Defendants were negligent in selection and retention of Drs. LaRock and Superville as class representatives.

(11) Defendants were negligent in using a purported class action as leverage for settlement for a chosen few.

BREACH OF FIDUCIARY DUTY

In addition to the negligence committed by Defendants in Cause No. 88-7707, Defendants jointly and severally breached their fiduciary duties to Intervenor's' at least in the following respects:

- (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) failing to inform Intervenor's 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
- (10) in naming improper class representatives

Defendant Gage failed to inform Plaintiffs that he had a special relationship with LaRock and Superville. More specifically, Defendant Gage failed to inform the Intervenor's that he served in a special corporate counsel relationship to Coronado Chiropractic Clinic; that he was engaged in extensive litigation involving Coronado Chiropractic, including defense of a suit by the Attorney General of Texas alleging deceptive trade practices and fraud against LaRock and

Superville; that he was representing the clinic in at least a dozen other causes of action, both offensive and defensive; that he was counsel for LaRock and Superville in a cause of action against other members of the putative class; that his principal purpose in participating in the class action litigation was collection of unpaid fees claimed by Coronado Chiropractic; that he communicated on a regular basis with LaRock and Superville but not with other members of the class; or that he was the recipient of referrals of legal business from Coronado Chiropractic.

#### ACTUAL AND CONSTRUCTIVE FRAUD

Defendants represented to Intervenor that they intended to represent all chiropractors in the State of Texas in Cause No. 88-7707, when in actuality, the sole beneficiaries of this suit were to be Defendants and Drs. La Rock and Superville. Defendants also stated that any proceeds from Cause No. 88-7707 would be divided among the class. These representations were false; Defendants knew that the representations were false when they were made, or made them recklessly without any knowledge of their truth and as a positive assertion. These representations were made with the intention that the Intervenor would act upon them, and the Intervenor did in fact act upon them. Defendants committed fraud against Intervenor by collecting more fees than they were entitled under the term of the contingent fee contract and making all distributions to LaRock and Superville. Defendants fraudulently misrepresented their intentions in filing Cause No. 88-7707 as indicated above. Defendants also fraudulently concealed their true relationship with La Rock and Superville.

Defendants breached the above stated fiduciary duties owed to Intervenor and thereby committed constructive fraud, as well as actual fraud upon Intervenor. Defendants have proximately caused Intervenor actual damages as a result of these acts.



CONSPIRACY

In addition, Defendants participated in a conspiracy to defraud Intervenor. Intervenor's damages were a proximate result of this conspiracy. The acts of civil conspiracy are set out in the preceding paragraphs.

VIOLATION OF THE TEXAS DECEPTIVE TRADE PRACTICES ACT

Furthermore, at all times material hereto, Intervenor was "consumer" of goods and services as that term is defined in the DTPA. Plaintiffs allege that Defendants violated the following provisions of the DTPA:

1. Sec 17.46(b)(2), to wit: "causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;"
2. Sec. 17.46(b)(5), to wit: "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities which they do not have or that a person has sponsorship, approval, status affiliation, or connection which he does not;"
3. Sec. 17.46(b)(7), to wit: "representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;" and
4. Sec. 17.46(b)(12), to wit: "representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law."

In addition, Defendants committed unconscionable actions and courses of actions as defined by § 17.45(5) DTPA. Defendants' violation of the DTPA was a producing cause of Plaintiffs' damages.

Defendants' violation of the DTPA was a producing cause of Plaintiffs' damages. Plaintiffs are suing for additional damages, as Defendants' conduct was committed knowingly.

Plaintiffs are therefore entitled to three times their actual damages that exceed \$1,000.00, as well as court costs and attorneys' fees.

### CONVERSION

Defendant Scherr has appropriated and/or is attempting to appropriate as expenses substantial sums of money collected on behalf of Intervenors - more specifically the sums of \$86,500.00, \$50,000, \$75,000.00 and \$95,000, all received in separate settlements in Cause No. 88-7707- - expenses for which there is no accounting or inadequate accounting. All Defendants have wrongfully converted all sums they claim or claimed as expenses in Cause No. 88-7707 and accordingly, Plaintiffs seek a judgment of this Court denying claims for expenses in Cause No. 88-7707 and payment of all such sums to Intervenors.

### ACTION TO VOID ATTORNEYS' FEES

As the Defendants violated their fiduciary duties to Intervenors, Intervenors seek a judgment of this Court that the payment of any attorneys' fees to Defendants in Cause No. 88-7707 is against the public policy of this State and that the lien of Defendants Scherr and Gage against the \$200,000.00 in the registry of the Court be extinguished and that the all attorneys fees and/or expenses be returned to this Honorable Court.

### DAMAGES

Intervenors are entitled to their actual damages including their share of the monies in the registry of the Court, punitive or exemplary damages, additional and treble damages under the Deceptive Trades Practices Act, costs of court and expense of litigation, repayment of all settlement proceeds distributed, and attorney's fees of thirty-three percent.

In addition their its contractual damages and extra-contractual damages, Intervenors are entitled to recover from Defendants both prejudgment interest and post judgment interest at the maximum rate allowed by law.

These damages exceed the minimum jurisdictional limits of this Honorable Court.

**JURY DEMAND**

Pursuant to Rule 216 of the Texas Civil Rules of Procedure Intervenors hereby demand a jury.

**NO ELECTION OF REMEDIES**

The foregoing facts and theories are pled cumulatively and alternatively, with no election or waiver of rights or remedies.

WHEREFORE, PREMISES CONSIDERED, Intervenors pray that after hearing hereon, they be awarded the above-mentioned damages and any further relief, both at law and in equity, to which they may show themselves to be entitled under the facts and circumstances of this case.

Respectfully submitted,

ARCHER, WALDNER & VICKERY, LLP.



JOSEPH F. ARCHER  
State Bar No. 0129200  
2929 Allen Parkway, Suite 2410  
Houston, Texas 77019  
Phone: (713) 526-1100  
Fax: (713) 523-5939

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing pleading has been served upon all counsel of record via FAX, U.S. Mail, postage prepaid; or, certified mail, return receipt requested on Aug. 31, 1995.

