

**Bockman, Jacqueline**

**From:** Mike McCarter [marsilius@mt.net]  
**Sent:** Tuesday, April 19, 2005 12:08 PM  
**To:** Attorneys Inc., P.C.; Larry Jones; Brad Luck; Martello, Tom; Thomas J. Harrington; Bockman, Jacqueline  
**Subject:** Re: Brad's comments & Summons

**FILED**

Hi Rex and other counsel,

APR 19 2005

I suspect I will have to resolve the lien date in a formal ruling but think that can wait. To be safe, we can use Rex's date of August 5, 2003. I can rule on the date later on without prejudicing anyone. If that is acceptable and everyone agrees to the revised language I proposed yesterday, then we can dispense with a telephone conference. If there is still disagreement, then I will talk to all of you on April 28th. Just let me know before then whether the conference is needed or whether the summons can go out in its latest iteration.

OFFICE OF  
WORKER'S COMPENSATION JUDGE  
HELENA, MONTANA

Mike

----- Original Message -----

**From:** "Attorneys Inc., P.C." <attorneysinc@montana.com>  
**To:** "Larry Jones" <larry.jones@llawoffice.com>; "Brad Luck" <bjluck@garlington.com>; "Tom Martello" <tmartello@state.mt.us>; "Thomas J. Harrington" <tjharrington@garlington.com>; "Mike McCarter, Workers' Compensation Judge" <marsilius@mt.net>; "Jackie Bockman" <jbockman@mt.gov>  
**Sent:** Tuesday, April 19, 2005 10:54 AM  
**Subject:** Re: Brad's comments & Summons

> Dear Judge McCarter:

>  
> I am writing in response to your request that I explain my position if I  
> disagree with your initial inclination that the common fund date is the  
> date of the original Supreme Court decision on December 5, 2002. I  
> believe that August 5, 2003 is the correct date.  
>  
> The Supreme Court decision of December 5, 2002 in /Flynn/ established that  
> successful social security litigation creates a common fund from which the  
> insurer benefits. The State Fund and other insurers were unwilling to  
> apply this ruling to other claimants until after additional litigation was  
> successfully pursued by Carl Miller in conjunction with the /Flynn/ action  
> and which this Court joined, creating the present /Flynn/Miller/ action.  
> Indeed, I am aware of no insurer which offered or paid any benefits under  
> the Flynn decision before this Court's ruling in /Flynn/Miller/ on August  
> 5, 2003. The State Fund argued that the Supreme Court ruling applied only  
> to Mr. Flynn and could not be applied to others for numerous reasons,  
> including estoppel and due process. On August 5, 2003 this Court rejected  
> each of the State Funds arguments. That ruling, after joinder of /Miller/  
> with /Flynn,/ was successful litigation on behalf of Mr. Miller which I  
> believe meets all the criterial for establishing a Common Fund.  
>

> There is no equitable or legal reason why the common fund should not apply  
> to all claimants who benefited from the joint /Flynn/Miller /litigation.

>  
> If the State Fund had simply begun implementation and payment of /Flynn/  
> Benefits reasonably promptly after the December 5, 2002 Supreme Court  
> decision, or if it had only raised frivolous arguments in its post-remand  
> briefing the result might be different. Here, however, the successful  
> /Flynn/Miller/ litigation created a Common Fund effective on August 5,  
> 2003, unless a later date is established by an appeal to the Supreme  
> Court.

>  
> I agree with the Courts correspondence of April 5, 2005, indicating that  
> we can leave the applicable dates of the lien to be determined at a later  
> date. This makes sense because the number of such claims may be /de  
> minimus/ and, as with the State Fund, the issue may resolve without Court  
> intervention.

>  
> Thank you for consideration of my views.

>  
> Rex Palmer  
> RP: kcb

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> =====  
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>  
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