

## Bockman, Jacqueline

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**From:** Attorneys Inc., P.C. [attorneysinc@montana.com]  
**Sent:** Tuesday, April 19, 2005 10:55 AM  
**To:** Larry Jones; Brad Luck; Martello, Tom; Thomas J. Harrington; Mike McCarter, Workers' Compensation Judge; Bockman, Jacqueline  
**Subject:** Re: Brad's comments & Summons

**FILED**

Dear Judge McCarter:

**APR 19 2005**

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.

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

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 criteria 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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