IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 21

WCC No. 2000-0222

ROBERT FLYNN and CARL MILLER, Individually and on Behalf of Others Similarly Situated

Petitioners

vs.

MONTANA STATE FUND

Respondent/Insurer

and

LIBERTY NORTHWEST INSURANCE CORPORATION

Intervenor.

ORDER DENYING COMMON FUND INSURERS' GENERAL MOTION TO DISMISS

Summary: Common Fund Insurers moved this Court to dismiss the common fund claims asserted against them on five grounds: (1) Because Common Fund Insurers were not parties to *Flynn I*, enforcement of the *Flynn* common fund violates their right to due process; (2) Petitioners lack standing to pursue common fund claims against Common Fund Insurers; (3) Petitioners failed to mediate the common fund claims against Common Fund Insurers; (4) requiring Common Fund Insurers to identify potential *Flynn* beneficiaries impermissibly reverses the burden of proof; and (5) Petitioners' counsel's attorney fees are limited to the actual amount incurred by the active litigants.

Held: Common Fund Insurers' motion to dismiss is denied. Common Fund Insurers' due process and standing arguments were rejected by the Montana Supreme Court in *Schmill v. Liberty Northwest Ins. Corp.* (*Schmill III*). Mandatory mediation does not apply to *Flynn* common fund benefits because *Flynn I* resolved the dispute concerning

the entitlement to these benefits. Requiring Common Fund Insurers to identify *Flynn* beneficiaries does not shift the burden of proof to Common Fund Insurers. The insurers' burden in this case is to identify claimants whose right to increased benefits has already been established as a matter of law pursuant to *Flynn I*. This Court has previously rejected Common Fund Insurers' fee calculation argument in *Rausch v. Montana State Fund.* In *Rausch*, this Court held that Common Fund Insurers' argument was based upon a fundamental misinterpretation of the common fund doctrine.

Topics:

Constitutional Law: Due Process: Procedural Due Process. *Flynn* common fund benefits arose automatically for beneficiaries as a result of the Montana Supreme Court's decision in *Flynn I.* Common Fund Insurers' corresponding duty to pay arose automatically as a matter of law. Pursuant to the Montana Supreme Court's holding in *Schmill III*, the Court concluded that enforcement of the *Flynn* global common fund against Common Fund Insurers does not violate their constitutional right to due process.

Constitutional Law: Standing. Although Common Fund Insurers argued that Petitioners in *Flynn* lack standing to pursue claims against them because Petitioners were not personally injured by Common Fund Insurers and no case or controversy exists between Petitioners and Common Fund Insurers, the Court concluded that here, as in *Schmill III*, Petitioners' attorney initiated an in rem action to adjudicate the common fund and Petitioners have standing to bring this in rem action.

Mediation: General. After a common fund is established, what remains is an in rem action. Since the mandatory mediation requirement applies only when benefits are in dispute and *Flynn I* resolved any disputes regarding entitlement to *Flynn* common fund benefits, the mandatory mediation requirement does not apply.

Common Fund Litigation: Insurers. Under *Schmill III*, beneficiaries are not required to file a second claim once entitlement to a common fund is established. Beneficiaries' right to increased benefits arises automatically, as does the insurers' responsibility to pay each beneficiary. The insurers in *Flynn* bear the burden of identifying claimants whose right to increased benefits was established as a matter of law in *Flynn I.*

Proof: Burden of Proof: Identifying Common Fund Beneficiaries. Under *Schmill III*, beneficiaries are not required to file a second claim once entitlement to a common fund is established. Beneficiaries' right to increased benefits arises automatically, as does the insurers' responsibility to pay each beneficiary. The insurers in *Flynn* bear the burden of identifying claimants whose right to increased benefits was established as a matter of law in *Flynn I.*

Attorney Fees: Common Fund. Common Fund Insurers contend that Petitioners' counsel's attorney fees should be limited to the actual amount incurred by the litigants in *Flynn* – in this case $326. The Court previously rejected this fee calculation argument in *Rausch v. Montana State Fund* and again rejects the argument here.

Factual and Procedural Background

¶1 Common Fund Insurers[1] move this Court to dismiss the common fund claims asserted against them. Common Fund Insurers raise the following issues for the Court's determination:

I. Because Common Fund Insurers were not parties to the case at the time, this Court's decisions finding a global common fund cannot be enforced against Common Fund Insurers consistent with the due process clause of the United States and Montana Constitutions.

[1] AIU Ins. Co., American International Pacific Ins. Co., American Home Assurance Co., Birmingham Fire Ins. Co., Commerce & Industry Ins. Co., Granite State Ins. Co., Ins. Co. of the State of Pennsylvania, National Union Fire Ins. Co. of Pittsburgh, Pa, New Hampshire Ins. Co., AIG National Ins. Co., American International Specialty Lines Ins., American International Ins. Co., Illinois National Ins. Co., American General Corp., American Alternative Ins. Corp., American Re-Insurance Co., Bituminous Fire & Marine Ins. Co., Bituminous Casualty Corp, Old Republic Ins. Co., Old Republic Security Assurance Co., Centre Ins. Co., Clarendon National Ins. Co., Everest National Ins. Co., Truck Ins. Exchange, Mid Century Ins. Co., Farmers Insurance Exchange, Federal Express Corporation, Great American Ins. Co., Great American Ins. Co. of NY, Great American Assurance Co., Great American Alliance Ins. Co., Great American Spirit Ins. Co., Republic Indemnity of America, Hartford Accident & Indemnity Co., Hartford Casualty Ins. Co., Hartford Fire Ins. Co., Hartford Ins. Co. of the Midwest, Hartford Underwriters Ins. Co., Property & Casualty Ins. Co. of Hartford, Sentinel Ins. Co. Ltd., Twin City Fire Ins. Co., Trumbull Ins. Co., Markel Ins. Co., Petroleum Casualty Co., SCOR Reinsurance Co., Sentry Ins. Mutual Co., Sentry Select Ins. Co., Middlesex Ins. Co., PPG Industries, Inc., Connie Lee Ins. Co., Fairfield Ins. Co., United States Aviation Underwriters, Universal Underwriters Group, XL Ins. America, Inc., XL Ins. Co. of New York, XL Reinsurance America, XL Specialty Ins. Co., Greenwich Ins. Co., Zurich North America, American Guarantee & Liability Ins. Co., American Zurich Ins. Co., Assurance Co. of America, Colonial American Casualty & Surety, Fidelity & Deposit Co. of Maryland, Maryland Casualty Co., Northern Ins. Co. of New York, Valiant Ins. Co., Zurich American Ins. Co., and Zurich American Ins. Co. of Illinois.

II. Petitioners lack standing to pursue any claims against Common Fund Insurers. Absent a genuine case or controversy, the Court lacks subject matter jurisdiction, and the case must be dismissed as to Common Fund Insurers.

III. Petitioners' claims against Common Fund Insurers must be dismissed because they have not mediated with Common Fund Insurers, a jurisdictional prerequisite to summoning Common Fund Insurers before this Court.

IV. Requiring Common Fund Insurers to identify and solicit claims from potential *Flynn I* beneficiaries would impermissibly reverse the burden of proof.

V. In the alternative, in the event this Court does not dismiss this action as against Common Fund Insurers, this Court should rule that any claim for common fund attorney fees by the petitioners' counsel is limited to $326 – the amount of fees actually incurred by the active litigants.[2]

¶2 Common Fund Insurers acknowledge issues I - V set forth above were previously briefed in *Schmill v. Liberty Northwest Ins. Corp*., WCC No. 2001-0300. Common Fund Insurers contend that the Order adopting the Special Master's recommendations in that case, however, did not address the substantive arguments made by Common Fund Insurers here. The Special Master's recommendation in *Schmill* was certified for appeal by this Court. Issues I – V set forth above were argued to the Montana Supreme Court in *Schmill*. After Common Fund Insurers' General Motion to Dismiss in *Flynn* was fully briefed, the Supreme Court issued *Schmill v. Liberty Northwest Ins. Corp.* (*Schmill III*).[3]

Discussion

Issue I: Due Process

¶3 In *Schmill III*, Common Fund Insurers[4] argued that enforcement of *Schmill I* and *Schmill II* violated their right to due process under the Montana and United States

---

[2] Common Fund Insurers' General Motion to Dismiss (Insurers' Motion to Dismiss) at 1-2, Docket Item No. 607.

[3] *Schmill III,* 2009 MT 430, 354 Mont. 88, 223 P.3d 842.

[4] Although the Common Fund Insurers in *Schmill III* were generally the same insurers as named herein in *Flynn*, a comparison of the listed insurers reflects small variations of some of the named insurers.

Constitutions because they were not named parties and were not given notice or opportunity to be heard prior to the creation of the *Schmill* global common fund.[5] Common Fund Insurers raise the same issue in *Flynn*, arguing that their due process rights have been violated because they were not parties to the case at the time the *Flynn* global common fund was created.[6]

¶4 In *Murer v. State Comp. Mut. Ins. Fund*,[7] the Supreme Court concluded that State Fund was required to increase the benefit payments to a substantial number of nonparty claimants. Relying on *Murer*, the Supreme Court in *Schmill* stated that a right to past-due benefits arises ***automatically***, and if retroactivity applies, beneficiaries are not required to file a second claim. The Supreme Court concluded that this automatic obligation arises "*regardless of which insurer [the claimants] happen to be insured under*."[8] Ultimately, the Supreme Court held:

> Due process is not violated when a court construes the meaning of a statute applicable to all workers' compensation insurers bound by uniform laws. Once all potential beneficiaries are granted a vested right . . . a corresponding duty to pay on the part of ***all*** insurers arises automatically as a matter of law.[9]

¶5 In this case, *Flynn* common fund benefits arose automatically for beneficiaries as a result of the Supreme Court's decision in *Flynn v. State Comp. Ins. Fund* (*Flynn I*).[10] Common Fund Insurers' corresponding duty to pay arose automatically as a matter of law. Pursuant to the holding in *Schmill III,* I conclude that enforcement of the *Flynn* global common fund against Common Fund Insurers does not violate their constitutional right to due process.

Issue II: Standing

¶6 Common Fund Insurers argue that the petitioners (Flynn and Miller) in *Flynn* lack standing to pursue any claims against Common Fund Insurers. Common Fund Insurers

---

[5] *Schmill III,* ¶ 10.

[6] Insurers' Motion to Dismiss at 1.

[7] *Murer*, 283 Mont. 210, 942 P.2d 69 (1997).

[8] *Schmill III,* ¶ 13 (emphasis in original).

[9] *Schmill III*, ¶ 15 (emphasis added).

[10] *Flynn I*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397.

argue that no case or controversy exists between Flynn and Miller and Common Fund Insurers. Common Fund Insurers argue that, "To establish standing, Petitioners must allege and show they have personally been injured by Common Fund Insurers . . . ."[11]

¶7 In *Schmill III* the insurers similarly argued that the petitioner (Schmill) lacked standing in the case because she did not allege a personal injury traceable to the insurers' conduct. The insurers argued that Schmill had no interest in the outcome of the enforcement of the established common fund entitlements nor to Schmill's attorney fees lien.[12] The Supreme Court rejected the insurers' argument, holding:

> Insurers have misidentified the legal nature of a common fund attorney fees lien. Our *Schmill* decisions resulted not only in an entitlement to benefits, but an entitlement to payment of benefits owed. The common fund consists of *Schmill* claimants' benefits. By filing an attorney fees lien against this fund, [Schmill's attorney] initiated an in rem action. This is an action that simply adjudicates the status of a particular subject matter; here, the common fund from which the fees will be satisfied.
>
> . . . The common fund includes benefits payable from all insurers who had previously apportioned occupational disease benefits [the issue resolved in *Schmill*]. In essence, the lien does not simply attach to Schmill's benefits alone. It attaches to the entire common fund.[13]

¶8 The Supreme Court's holding in *Schmill III* is dispositive of Common Fund Insurers' standing argument in this case. In *Flynn I*, the Supreme Court held that after a claimant successfully recovers social security disability benefits, thereby allowing the workers' compensation insurer to offset benefits paid to the claimant, the insurer, pursuant to the common fund doctrine, must bear a proportionate share of the costs and attorney fees incurred by the claimant in pursuing social security benefits.[14] Flynn and Miller established this entitlement. This entitlement is the *Flynn* common fund. As in *Schmill*, Flynn and Miller's attorney initiated an in rem action to adjudicate the *Flynn* common fund. Pursuant to *Schmill III,* Flynn and Miller have standing to bring this in rem action.

---

[11] Insurers' Motion to Dismiss at 11.

[12] *Schmill III*, ¶ 18.

[13] *Schmill III,* ¶ 19-20.

[14] *Flynn I*, 2002 MT 279, 312 Mont.410, 60 P.3d 397.

Issue III: Mediation

¶9 Common Fund Insurers contend that the Court should dismiss Flynn's and Miller's claims against Common Fund Insurers because they have not mediated their claims against Common Fund Insurers. Common Fund Insurers contend:

> [T]here can be no dispute that Petitioners' claims to common fund benefits and attorney fees fall within the purview of the mediation statutes. The "common fund entitlements" that Petitioners seek to recover on others' behalf are benefits arising under the Workers' Compensation Act, and counsel's attorney fee lien is derived exclusively from those benefits.[15]

Common Fund Insurers' reliance on the mediation requirement within the context of an established common fund is misplaced.

¶10 Flynn and Miller no longer seek to recover "common fund entitlements" on others' behalf as Common Fund Insurers contend. As the Supreme Court noted in *Schmill III*, the entitlement to benefits, as well as the entitlement to payment of benefits owed, is established by the case from which the common fund arises; [16] in this case, *Flynn I*. After the common fund is established, what remains is an in rem action. "This is an action that simply adjudicates the status of a particular subject matter; here, the common fund from which the fees will be satisfied."[17] The mandatory mediation requirement applies when benefits are in dispute.[18] In the present case, there is no longer any dispute concerning the entitlement to *Flynn* common fund benefits. That entitlement was resolved in *Flynn I*. Therefore, the mandatory mediation requirement does not apply.

Issue IV: Burden of Proof

¶11 Common Fund Insurers argue that requiring them to identify and solicit claims from potential *Flynn* beneficiaries impermissibly reverses the burden of proof. Common Fund Insurers contend:

---

[15] Insurers' Motion to Dismiss at 13.

[16] *Schmill III*, ¶ 19.

[17] *Id.*

[18] *See* § 39-71-2401, MCA, *et seq.*, and *Preston v. Transp. Ins. Co.,* 2004 MT 339, ¶ 36, 324 Mont. 225, 102 P.3d 527.

> [T]o the extent that potential *Flynn I* beneficiaries are covered under policies written by Common Fund Insurers, and such persons desire to pursue a claim for retroactive benefits under *Flynn I*, they must step forward and assert their claims.[19]

Common Fund Insurers do not dispute that some claimants may be entitled to retroactive benefits "if they choose to assert such claims and qualify for such benefits."[20]

¶12 Common Fund Insurers' motion in this case was filed before the Supreme Court issued *Schmill III*. Although *Schmill III* does not squarely address Common Fund Insurers' burden of proof argument, the Supreme Court's analysis in *Schmill III* is informative. The Supreme Court noted in *Schmill III* that once entitlement to common fund benefits is established, "beneficiaries are ***not*** required to file a second claim."[21] The Supreme Court held: "The beneficiaries' right to increased benefits arises automatically and the same is true of all insurers' responsibility to pay each beneficiary."[22] In this case, *Flynn* beneficiaries have already filed workers' compensation claims. These claims were not solicited by the insurers. The insurers' burden in this case is to identify claimants whose right to increased benefits has already been established as a matter of law pursuant to *Flynn I*.

Issue V: Attorney Fees

¶13 Common Fund Insurers argue that any claim for common fund attorney fees must be limited to the actual cost incurred by the active litigants in *Flynn* – in this case, $326. This Court has previously rejected this fee calculation argument in *Rausch v. Montana State Fund.*[23] In *Rausch*, this Court held that Common Fund Insurers' argument was based upon a fundamental misinterpretation of the common fund doctrine as that doctrine has been applied to Montana Workers' Compensation cases for many years. Regarding the calculation of attorney fees applied to common fund litigation, this Court stated, "[T]hat horse left the barn more than a decade ago, an entire herd has followed, and I am reluctant to pick up [the insurers'] lasso at this point."[24] I

---

[19] Insurers' Motion to Dismiss at 14 (footnote omitted).

[20] *Id*. at 15.

[21] *Schmill III*, ¶ 13 (emphasis added).

[22] *Id.*

[23] *Rausch*, 2007 MTWCC 54.

[24] *Rausch*, ¶ 6.

maintain my reluctance. Therefore, I reject Common Fund Insurers' argument that the common fund attorney fees must be limited to the actual cost incurred by the active litigants.

ORDER

¶14 For the reasons set forth above, Common Fund Insurers' motion to dismiss is **DENIED**.

DATED in Helena, Montana, this 1st day of July, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Parties of Record Via Website
Submitted: December 11, 2009