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FILED

FEB 7 2006

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

Attorneys for Montana Insurance Guaranty Assoc.

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ROBERT FLYNN

And

CARL MILLER, individually and on behalf
of others similarly situated,

Petitioners,

v.

MONTANA STATE FUND,

Respondent/Insurer

And

LIBERTY NORTHWEST INSURANCE
COMPANY,

Intervenor.

WCC No. 2000-0222

**BRIEF OF MONTANA INSURANCE
GUARANTY ASSOCIATION**

COMES NOW the Montana Insurance Guaranty Association, by and through counsel and pursuant to this Court's Order of December 6, 2005, submits this Brief in response to this Court's December 6, 2005 Order Setting Briefing Schedule.

INTRODUCTION

The Montana Insurance Guaranty Association (hereinafter "Association") is a non-profit, unincorporated legal entity, formed pursuant to the Montana Insurance Guaranty Association Act, Montana Code Annotated §§ 33-10-101 -236. As it relates to the Common Fund litigation, the primary purpose of the Montana Insurance Guaranty Association Act (hereinafter "The Association Act") is to provide a mechanism for the payment of covered claims due to the insolvency of an insurer. The Association is

DOCKET ITEM NO. 457

essentially made up of insurers who write insurance in this State and is funded through assessments against the member insurers. The Association Act, Mont. Code Ann. §§ 33-10-103, -116 (2005).

The Montana Insurance Guaranty Association has the statutory responsibility to adjust claims against an insolvent insurer, including workers' compensation claims. The Association Act, Mont. Code Ann. § 33-10-105(1) (2005). However, the Association also has the statutory right to "employ or retain persons necessary to handle claims and perform other duties of the association." The Association Act, Mont. Code Ann. § 33-10-105(2) (2005). The Association has exercised this right and has retained Western Guaranty Fund Services to adjust the Montana workers' compensation claims. See Ex. "A", Aff. Gary J. Hale (Feb. 1, 2006).

The Western Guaranty Fund Services (hereinafter "WGFS") is a non-profit, unincorporated entity. The WGFS provides administrative services not only for the Montana Insurance Guaranty Association, but also for guaranty associations of other states throughout the Northwest. Ex. "A" at 1-2.

As the Montana Insurance Guaranty Association Act states, the Association is "obligated to the extent of the covered claims existing prior to the determination of insolvency and arising within 30 days after the determination of insolvency or before the policy expiration date if less than 30 days after the determination or before the insured replaces the policy or causes its cancellation if the insured does so within 30 days of the determination." The Association Act, Mont. Code Ann. § 33-10-105(1)(a)(i) (2005). Procedurally, the Association's obligation to cover claims against the insolvent insurer is managed as follows:

1. Once an insurer goes into liquidation, claims files where there is an ongoing benefit entitlement are forwarded to the WGFS for handling. The WGFS then assumes responsibility for investigating, adjusting, compromising, settling, or otherwise resolving the claims.

2. Claims files which are otherwise closed and for which benefits are not currently being paid are forwarded to the liquidated insurer or other entity designated by the statutory Receiver as the repository of the claims files.

3. If a claim which was previously inactive becomes active based on a demand from a covered claimant, the WGFS requests the claims file from the liquidated insurer or designated entity so that it can investigate, adjust, compromise, settle, or otherwise resolve the claim.

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4. The liquidated insurer or other designated entity otherwise maintains control of all claims files.

5. Upon final resolution of a claim, the WGFS returns the claims file to the liquidated insurer or designated entity.

Ex. "A" at 2.

It is important to note that neither the Montana Insurance Guaranty Association, nor the WGFS maintains possession of, has direct access to or direct control over the claims files of the insolvent insurer. Rather, upon issuance of the Order of Insolvency, the Receiver becomes responsible for overseeing the liquidation of the insolvent insurer, and the claims files are transferred to the liquidated insurer or other entity designated by the Receiver. Neither the Montana Insurance Guaranty Association nor the WGFS is provided with a list of files maintained by the insolvent insurer, nor is the Montana Insurance Guaranty Association or the WGFS provided with access to any computer databases maintained by the Receiver or the insolvent insurer. The only information in the possession of the Montana Insurance Guaranty Association or the WGFS relates to those active claims against the insolvent insurer which were adjusted by the WGFS. Ex. "A" at 2.

ARGUMENT

Issue One: Procedure for Handling Common Fund Claims by the Montana Insurance Guaranty Association

The Montana Insurance Guaranty Association has previously addressed some of the procedural problems that are unique to the Association. These problems were addressed in the Association's Response to Summons in *Rausch, et al.*, filed by the Association on February 14, 2005. As noted in its initial Response to Summons and its Second Response to Summons, dated May 31, 2005, the Montana Insurance Guaranty Association is limited in its ability to review files and determine whether any claims meet the Common Fund criteria. With respect to claims files which are in its possession, the Association, through the WGFS, is in the process of surveying its adjusters to determine whether any of the claims which it currently handles meet the Common Fund criteria. This process has been completed, in part, as noted by the Second Response to Summons filed by the Association in connection with *Rausch*. The WGFS is in the process of completing the survey of its adjusters to determine whether any files can be identified which meet the Common Fund criteria for the other Common Fund claims – *Flynn, Reesor, and Schmill*. Ex. "A" at 2.

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Upon completion of this file review process, Affidavits will be filed by the WGFS in accordance with the procedure outlined by this Court.

With respect to claims files which are not in its possession, the Montana Insurance Guaranty Association believes that the obligation to review the files for purposes of assessing whether any claims meet the Common Fund criteria rests with the liquidated insurer. As noted, the Montana Insurance Guaranty Association does not have possession of the claims files. Nor does the Association or its agent, WGFS, have the resources to review the hundreds of files of the liquidated insurers. Further, two of the major liquidated insurers, Reliance and Legion, have agreed to review their claims files to determine if any meet the Common Fund criteria, and, if so, those claims files will be forwarded to WGFS for handling. See *Br. of Reliance Ins. Co.* (Jan. 30, 2006); *Legion Ins. Co.'s Joinder in Br. of Reliance Ins. Co.* (Jan. 23, 2006). The Montana Insurance Guaranty Association/WGFS has agreed to review any such Common Fund claims files received from the liquidated insurers and pay benefits where appropriate. Ex. "A" at 3.

Issue Two: Scope of the Montana Insurance Guaranty Association's Obligation

It is important to keep in mind that the Association is not an insurer and, consequently, its liabilities and obligations under the Common Fund cases must be assessed separately from those of the statutory insurers – Plan One, Two, and Three insurers. As noted by the Montana Supreme Court, "The Montana Insurance Guaranty Association was not adopted as a form of reinsurance for every insurer who becomes insolvent." *Palmer by Diacon v. Mont. Ins. Guar. Assn.* (1989), 239 Mont. 78, 82, 82 779 P.2d 61, 64. "Rather, it is clear the Association was established to soften resulting hardship which may be encountered, under limited circumstances, by a policy holder or claimant when an insurer becomes insolvent." *Palmer by Diacon*, 239 Mont. at 82, 779 P.2d at 64.

In *Rausch*, the Summons sought information predating the insolvency of Reliance National Indemnity Company (October 31, 2001), Legion Insurance Company (July 25, 2003), Fremont Indemnity Company (July 2, 2003), and Credit General Insurance Company (January 1, 2001). As noted in its Response to Summons in *Rausch*, the Montana Insurance Guaranty Association does not believe it is obligated to pay any portion of an impairment award where the judicially created common fund liability accrued in full or in part prior to the date of the insurer's insolvency. *Mont. Ins. Guar. Assn.'s Response to Summons* (Feb. 14, 2005). The same is true with respect to any benefit that may be payable pursuant to the litigation in *Flynn*, *Schmill*, or *Reesor*. Due to the timing of both the Common Fund decisions and the insurers' insolvency, the insolvent insurers were not able to recover, through increased premiums, the cost of the additional benefits that may be owed as a result of the retroactive application of the Common Fund decisions. The Association is not an insurer, nor is it a form of reinsurance. Consequently, the Association does not have the same ability as an

insurer to absorb and recover, through increased premiums, the costs associated with retroactive application of the Common Fund cases. While the Association can soften the hardship of claimants in the case of insurer insolvency, it cannot do so on a continuous basis, readjusting awards and paying out benefits on claims that predated the insurer's insolvency each time there is a substantive change in the law. The unique nature of the Association mandates that its obligation under these Common Fund decisions be limited to only those benefits that accrued subsequent to the date of the insurers' insolvency.

Issue Three: Retroactive Application

The Montana Insurance Guaranty Association joins in the Brief of the Montana State Fund as it relates to retroactive application of the Common Fund cases.

CONCLUSION

The Association is neither an insurer nor a reinsurer for every insurer that becomes insolvent. Procedurally, its obligation to review claims and determine if they meet the Common Fund criteria must be limited to only those active claims which come into its possession for investigation, adjustment, and resolution. For those claims which are not being actively adjusted by the Association, responsibility for assessing the claims to determine if they meet the Common Fund criteria rests with the insolvent insurers. Further, due to the unique status of the Association, its obligation to pay claims should be limited to only those benefits which accrued subsequent to the date of the insurers' insolvency. Finally, the Common Fund decision should be given only limited retroactive effect and should not be applied to any claims that are "final."

RESPECTFULLY SUBMITTED this 6th day of February, 2006.

Attorneys for Montana Insurance Guaranty Assoc.

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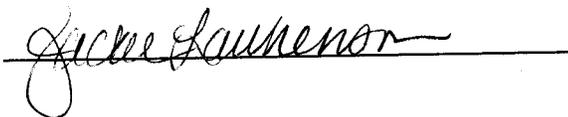
By _____


Kelly M. Wills

CERTIFICATE OF SERVICE

The undersigned, a representative of GARLINGTON, LOHN & ROBINSON, PLLP, hereby certifies that on the 6 day of February, 2006, a true and correct copy of the foregoing BRIEF OF MONTANA INSURANCE GUARANTY ASSOCIATION was mailed, postage prepaid, to the following:

Rex L. Palmer, Esq.
301 W. Spruce
Missoula, MT 59802

A handwritten signature in cursive script, reading "Jacke Launenon", is written over a horizontal line.

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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ROBERT FLYNN

And

CARL MILLER, individually and on behalf
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v.

MONTANA STATE FUND,

Respondent/Insurer

And

LIBERTY NORTHWEST INSURANCE
COMPANY,

Intervenor.

WCC No. 2000-0222

AFFIDAVIT OF GARY J. HALE

STATE OF Colorado)
County of Denver) :ss

GARY J. HALE, being first duly sworn deposes and says:

1. That I am the Claims Supervisor for Western Guaranty Fund Services (hereinafter "WGFS").

2. That WGFS is a non-profit, unincorporated entity established for the purpose of providing administrative services, including claims adjusting, for the Guaranty Associations of various states throughout the Western United States.



3. That the Montana Insurance Guaranty Association contracts with WGFS to provide administrative services and adjust claims, including workers' compensation claims, against insolvent insurers. WGFS is the statutory agent of the Montana Insurance Guaranty Association.

4. That neither WGFS nor the Montana Insurance Guaranty Association is an insurer.

5. When an insurer becomes insolvent, claims files for claims with an ongoing benefit entitlement are forwarded to WGFS as the contractual agent for the Montana Insurance Guaranty Association for administration and adjusting in accordance with the Montana Insurance Guaranty Association Act.

6. That the Montana Insurance Guaranty Association/WGFS does not otherwise control or possess the claims files of the insolvent insurers. Those claims files which do not have an ongoing benefit entitlement are kept by the insolvent insurer or by an entity designated by the statutory Receiver as the repository for the claims files.

7. That the Montana Insurance Guaranty Association/WGFS only administers/adjusts claims and has possession of claims files where there is an ongoing benefit entitlement or benefit claim. The files for claims that are settled, or for which benefits are no longer being paid or demanded, are kept by the liquidated insurer or the entity designated as the repository for the files.

8. That the Montana Insurance Guaranty Association/WGFS does not have access to any computer databases that contain claims file information that may have been created for and maintained by the insolvent insurer or Receiver. Consequently, the Montana Insurance Guaranty Association/WGFS has no ability to perform a computerized search of the files of the insolvent insurer to identify claims that meet the Common Fund criteria.

9. That WGFS' internal computer database was not created for or by an insurance carrier, but was created solely to track minimal information on payments and receipts for the various guaranty associations for which it provides administrative services and adjusts claims, and does not contain recoverable information requested by the Court in connection with the Common Fund claims on the claims it has handled on behalf of the Montana Insurance Guaranty Association for each of the insolvent insurers. Consequently, WGFS is unable to run a computerized search to identify files in its possession that meet the Common Fund criteria.

10. That the Montana Insurance Guaranty Association/WGFS has initiated the process of interviewing its adjusters to identify files that may meet the Common Fund criteria. Any files that are identified are then reviewed to determine if they meet the Common Fund criteria so that appropriate benefits can be paid and the Common Fund attorney fee liens honored.

11. That the Montana Insurance Guaranty Association/WGFS understands that Reliance and Legion have represented to the Court their intention of reviewing files in their possession to determine if they meet the Common Fund criteria, and that any such files will be forwarded to WGFS for handling. The Montana Insurance Guaranty Association/WGFS agrees to review any such files and pay any benefits and any Common Fund attorney fees that are owed pursuant to the Common Fund litigation.

Further affiant sayeth not.



GARY J. HALE

SUBSCRIBED AND SWORN to before me this 1st day of February, 2006.



Notary Public for the State of Colorado
Residing at: Denver, CO
My Commission Expires: 3/12/2009

(Seal)

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Anita Harper Poe
Shane N. Reely
Larry E. Riley
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Peter J. Stokstad
Kevin A. Twidwell
William T. Wagner
Kelly M. Wills

February 8, 2006

Ms. Patricia Kessner
Clerk, Workers' Compensation Court
P.O. Box 537
Helena, MT 59624

RE: WCC No. 2000-0222
Flynn v. State Fund

Dear Pat:

Enclosed is the original Affidavit of Gary J. Hale. Please replace the unsigned affidavit which we filed on February 6, 2006 as Exhibit A to the Brief of Montana Insurance Guaranty Association with this original.

If you have any questions, please do not hesitate to contact us.

Very truly yours,

GARLINGTON, LOHN & ROBINSON, PLLP

Jackie Lawrenson
Secretary to Kelly M. Wills

:jdl

Enclosure

c: Rex L. Palmer, Esq. (w/enc.)
Mr. W. W. Rodgers (w/enc.)

—
A. Craig Eddy, MD, JD
Of Counsel - Health Law
—

J. C. Garlington
1908 – 1995

Sherman V. Lohn
(Retired)

R. H. "Ty" Robinson
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February 6, 2006

Ms. Patricia Kessner
Clerk Workers' Compensation Court
P.O. Box 537
Helena, MT 59624

RE: Flynn and Miller v. MT State Fund and Liberty Nw. Ins. Co.
WCC No. 2000-0222

Dear Pat:

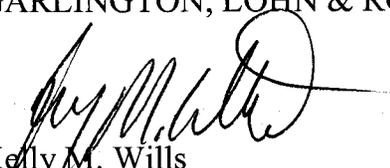
Enclosed for filing with the Court is the original Brief of Montana Insurance Guaranty Association. This Brief was previously fax filed.

The original Affidavit of Gary J. Hale (Ex. "A") is being signed and will be forwarded to the Court upon receipt.

If you have any questions, please do not hesitate to contact us.

Very truly yours,

GARLINGTON, LOHN & ROBINSON, PLLP



Kelly M. Wills

KMW:jdj
Enclosure
c: Mr. W. W. Rodgers (w/enc.)