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Listed on Exhibit A

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

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.

WCC No. 2000-0222

**COMMON FUND INSURERS'  
OPENING BRIEF ON CLAIMS  
"PAID IN FULL"**

**FILED**

JUN - 8 2009

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

COME NOW the Common Fund Insurers listed on Exhibit A hereto, and pursuant to the Court's April 22, 2009 status conference and minute book hearing entry, submit this opening brief on those claims that are "paid in full" and therefore settled for purposes of Montana common fund retroactivity.

As explained below, if "paid in full" is to have any meaning, it must include those claims where benefit payments ceased prior to the Montana Supreme Court's first decision in this case, *Flynn v. State Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397 ("*Flynn I*"), on December 2, 2002. Under *Flynn II*, 2008 MT 394, claims paid in full are settled and not subject to retroactive adjustment under the common fund doctrine. As a result, if benefit payments terminated without dispute prior to *Flynn I*, then the claim was "paid in full." Conversely, if a claim was open on December 2, 2002, i.e. in negotiation or being paid in regular intervals, then the claim is subject to retroactive adjustment (unless of course the payments were made pursuant to a judgment or settlement delineating the amounts to be paid over time - separate grounds to consider the claim final or settled). Recognizing the finality of claims paid in full is consistent with Supreme

Court common fund precedent and legislative policy goals, and offers a pragmatic solution to the daunting alternative suggested by Petitioners where "paid in full" would be meaningless and insurers could be expected to analyze claim files stretching back to 1974.

## I. BACKGROUND

In *Flynn I*, the court held that State Fund must contribute to the litigation costs and attorney fees that Petitioners incurred in pursuing Social Security Disability ("SSD") awards, in proportion to the benefits that State Fund actually received by offsetting Petitioners' workers' compensation indemnity benefits as authorized by Montana law. Following *Flynn I*, this Court found that *Flynn I* resulted in a global common fund. 2003 MTWCC 55, DE# 63; see also 2004 MTWCC 17, DE# 86<sup>1</sup> (Order Clarifying Global Lien).<sup>2</sup> Over a year later, around May 4, 2005, nearly all workers' compensation insurers registered to write business in the State since 1974, including Common Fund Insurers, were summoned to appear as respondents in this common fund action. Summons, DE# 132.

On behalf of claimants who may benefit from *Flynn I*, Petitioners seek in this common fund action to collect from those insurers who, as authorized by then-existing law, partially offset workers' compensation indemnity benefits to account for the claimants' receipt of SSD benefits. Petitioners seek rather extraordinary relief: to require Common Fund Insurers to analyze claim files stretching back to 1974 to determine if any claimants may be eligible for a retroactive adjustment of indemnity benefits based on *Flynn I*.

While Common Fund Insurers dispute that a common fund action may even be maintained against them,<sup>3</sup> the Court directed the parties to first brief issues relating to the scope of potential common fund retroactivity. On September 29, 2006, the Court issued an Order Determining Status of Final, Settled, Closed, and Inactive Claims. 2006 MTWCC 31, DE# 537. The Court found, consistent with *Dempsey v. Allstate Insurance Co.*, 2004 MT 391, 325 Mont. 207, 104 P.3d 483, and *Schmill v. Liberty Northwest Insurance Corp.*, 2005 MT 144, 327 Mont. 293, 114 P.3d 204 ("*Schmill II*"), that final and settled claims are not subject to retroactive common fund adjustment. To determine what claims are settled, the Court "reasonably relied upon the definition of 'settled claim' as provided by our legislature in § 39-71-107(7)(a), MCA (2005)," and

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<sup>1</sup> References to documents filed in this action are identified by reference to their docket number on the electronic docket maintained by the Court in the format "DE# [docket entry number]."

<sup>2</sup> Common Fund Insurers were not parties and did not have notice or an opportunity to be heard when the Court determined that *Flynn I* resulted in a global common fund. Only after that decision did the Court issue summonses to Common Fund Insurers and other industry participants. The Common Fund Insurers have not yet had an opportunity to challenge the applicability or accuracy of the common fund rulings.

<sup>3</sup> Common Fund Insurers asserted in their initial response to the common fund summons numerous objections and reasons why they should be dismissed from this proceeding. See DE# 276, 278. These objections remain pending.

correctly refused to apply a two year statute of limitations to retroactive common fund claims. *Flynn v. State Fund*, 2008 MT 394, ¶¶ 25, 34 ("*Flynn II*").

Under the definition provided by our Legislature and adopted by our Supreme Court, a settled claim includes: (1) a department-approved compromise of benefits between a claimant and an insurer; (2) a court-ordered compromise of benefits between a claimant and an insurer; or (3) a claim that was paid in full. *Id.*, ¶ 26. Within this definitional framework, the question now before this Court is what claims are "paid in full" as contemplated by our Supreme Court in *Flynn II*?

## II. ARGUMENT

### A. **Common Fund Retroactivity Does Not Apply to Claims on Which Benefits Were Paid in Full Prior to the Issuance of *Flynn I* on December 2, 2002.**

In the workers compensation common fund context, the policy of finality dictates that the "retroactive effect of a decision . . . does not apply to cases that became final or were settled prior to a decision's issuance." *Schmill II*, ¶ 17 (emphasis added) (quoting *Dempsey*, ¶ 31); see also *Flynn I*, ¶ 8. The "paid in full" inquiry is thus inherently temporal – were claimants' benefits paid in full prior to *Flynn I* in this case? The inquiry is not whether all potential benefits (including any that may be due only as a result of *Flynn I*) have been paid today or two years from now when and if some claimant may relapse into disability and be eligible for further benefits.

Prior decisions by this Court and its special master have struggled with the temporal nature of this inquiry, ultimately leading this Court to erroneously omit "paid in full" from the definition of "settled claim." See *Schmill v. Liberty Northwest Ins. Corp.*, 2007 MTWCC 27, *Findings and Conclusions by Special Master*, ¶ 39. In *Schmill*, the special master focused on the definition of "open" claims as those "still actionable" in *Stavenjord v. State Fund*, 2006 MT 257 ("*Stavenjord II*"). See *id.*, ¶ 41. The special master reasoned that "even if all benefits claimed to date have been paid in a particular case, the underlying claim remains actionable, generally speaking, if circumstances later exist to justify additional benefits." *Id.* (emphasis added). The special master thus felt that a workers' compensation claim could never be "paid in full" because a claimant might be entitled to further benefits upon relapse or aggravation of a prior compensable injury years after all benefits had ceased. Under the special master's reasoning, including "paid in full" in the definition of a "settled claim" would contradict the *Stavenjord II*'s definition of an "open claim" as one still actionable. See *id.* ("[I]f a 'settled claim' were deemed to include a claim 'paid in full' at any given time, then 'open' or 'actionable' claims could be considered 'settled,' an obvious contradiction in terms, in conflict with the direction of *Stavenjord II* with regard to common fund retroactivity.").

The special master's reasoning is not consistent with precedent from our Supreme Court. The inquiry is not whether a claim might conceivably become "actionable" at some hypothetical point in the future, for example, "due to a relapse into

disability.” *Id.*, ¶ 43. Rather, our Supreme Court has consistently and clearly stated that retroactivity does not apply to claims that were settled, i.e. paid in full, prior to the issuance of the Supreme Court’s common fund decision:

For these purposes, “open claims” will encompass those which are still actionable, in negotiation but not yet settled, now in litigation, or pending on direct appeal.

¶ 16 Conversely, *Stavenjord I* does not apply to occupational disease-related PPD claims that became final by way of settlement or judgment prior to the issuance of this opinion.

*Stavenjord II*, ¶¶ 16-17; see also *Schmill II*, ¶ 17 (quoting *Dempsey*, ¶ 31); *Flynn II*, ¶ 8. Indeed, the court in *Flynn II* found no conflict in the definitions of open and final and settled claims used in *Stavenjord II* and *Schmill II*, characterizing them as different sides of the same coin. *Flynn II*, ¶ 20.

While a relapse into disability or other changed factual circumstances may give rise to a future claim for additional benefits, such hypothetical contingencies provide no reason to jettison the policy of finality consistently recognized by our Supreme Court in common fund cases, or to ignore the legislative and judicial definition of “settled claim” as one “paid in full.” Hypothetical contingencies do not mean that claims were actionable “prior to the issuance” of *Flynn I* – the critical temporal juncture for purposes of the retroactivity analysis. And hypothetical changed circumstances should not be used as a justification to order all insurers in the State to conduct a comprehensive file review of every Montana workers compensation claim file in order to identify and retroactively adjust claims that were settled by payment in full years or even decades earlier.

**B. Paid in Full in this Case Means that Benefits Were Paid in Full, i.e. the Insurer Ceased Paying Benefits without Dispute Prior to December 2, 2002.**

Under *Schmill II*, *Stavenjord II*, and *Flynn II*, the retroactivity inquiry as to settled claims is narrow: was the claim settled, i.e. by payment in full or by department-approved or judicially-approved compromise, prior to the issuance of *Flynn I* on December 2, 2002? If all benefits were paid under the law as it existed prior to *Flynn I* – as evidenced by the undisputed termination of benefit payments – then the claim was settled and is not subject to retroactive adjustment.<sup>4</sup>

<sup>4</sup> In earlier briefs to this Court, Common Fund Insurers suggested that a two-year period without dispute after termination of benefit payments would be both appropriate to measure finality and consistent with the statute of limitations for claimants to dispute an insurer’s denial of benefits. See DE# 445. The Supreme Court in *Flynn II*, however, eschewed any application of the statute of limitations. See *Flynn II*, ¶ 33.

On the other hand, if the claimant was still receiving benefits at the time *Flynn I* was decided, then the claim should be considered open and subject to retroactive adjustment. Or, if the parties were still negotiating the amount of indemnity benefits to be paid, or if negotiations had broken down and the claim was subject to litigation or an appeal at the time that *Flynn I* was decided, it would also still be considered open and subject to retroactive adjustment.

**C. Any Other Reading Would Render our Legislative and Supreme Court's Definition of Settled Claim Meaningless.**

Both the Legislature and the Supreme Court have consistently defined "settled claims" to include claims paid in full as well as those compromised with the approval of the judiciary or the Department of Labor. See *Flynn II*, ¶ 25. For "paid in full" to have any meaning, it must mean "paid in full" under the law and facts that existed prior to a decision such as *Flynn I* giving rise to potential retroactive benefits. Determining whether a claim is "paid in full" based on whether additional benefits might be sought as the result of a later relapse into disability or judicial decision would render "paid in full" meaningless. No claim could ever be "paid in full," contrary to what our Legislature and Supreme Court decided.

Recognizing that claims are settled if paid in full under the law and facts that existed prior to *Flynn I* is not only consistent with precedent, it also serves the purpose of the workers compensation system to be "primarily self-administering" by allowing the parties to settle claims without the involvement of the judicial system or the Department of Labor. See § 39-71-105(3), MCA (noting a purpose of the Workers Compensation Act is to be "primarily self-administering" and to "minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities"). Indeed, *Flynn II* recognized that "using the definition provided by the legislature furthers the expression of legislative will absent a contrary indication and further provides consistency between the retroactivity of judicial decisions established by our cases and application of the [Workers Compensation] Act." *Flynn II*, ¶ 25. There is simply no need to re-write what our Legislature and Supreme Court have consistently defined.

Exempting claims paid in full from retroactive application of *Flynn* is not only consistent with the policy of finality and precedent, it also serves pragmatic purposes. *Flynn* retroactivity conceivably stretches back over three decades to 1974. A claim in which benefit payments were terminated in 1977, for example, has long been considered "settled" and closed in every practical sense.<sup>5</sup> Moreover, identifying eligible *Flynn* claimants would be extremely difficult, expensive, and time-consuming insofar as any search would likely involve claims closed long before computers were used to manage and track claim information. Finality and fairness dictate that claims "settled" by payment in full should not be re-opened today.

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<sup>5</sup> Indeed, any contrary ruling could require not only re-opening of claims long considered settled by the parties, but also the re-opening of any deceased claimant's estate proceedings, which conceivably may have been closed for decades.

Given the clear definitional precedent in *Flynn II* and its accord with the broader legislative purpose of the Act, the Court should be particularly wary of any arguments by Petitioners that claims in which benefits were paid in full years or even decades ago should be resurrected for retroactive adjustment. Any result that requires insurers to locate files sent to cold storage years or even decades ago after benefits were paid and terminated would render meaningless the inclusion of a claim paid in full in the definition of settled claim. It would run contrary to the Act's purpose that the workers' compensation system be primarily self-administering. Indeed, it would penalize insurers for not involving the judiciary or Department of Labor to settle every claim. Stated simply, that is not what precedent envisions. *Stavenjord II*, *Schmill II*, *Flynn II*.

### III. CONCLUSION

For the foregoing reasons, Common Fund Insurers respectfully submit that a claim is paid in full and settled for purposes of common fund retroactivity if the insurer completed its payment of benefits without dispute prior to the issuance of *Flynn I* on December 2, 2002.

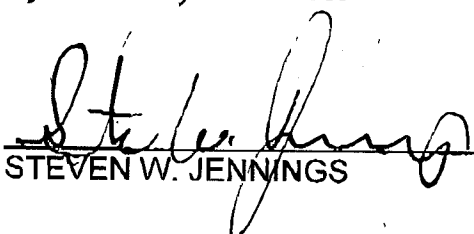
Dated this 8<sup>th</sup> day of June, 2009.

  
STEVEN W. JENNINGS  
CROWLEY FLECK PLLP  
Attorneys for Common Fund Insurers listed  
on Exhibit A

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was served upon the following counsel of record, by the means designated below, this 8<sup>th</sup> day of June 2009:

<input checked="" type="checkbox"/> U.S. Mail	Mr. Rex Palmer
<input type="checkbox"/> FedEx	Attorneys Inc., PC
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<input type="checkbox"/> Facsimile	Missoula, MT 59802
<input type="checkbox"/> Email	<i>Attorney for Petitioners</i>
<input checked="" type="checkbox"/> U.S. Mail	Laurie Wallace
<input type="checkbox"/> FedEx	Bothe & Lauridsen, P.C.
<input type="checkbox"/> Hand-Delivery	P.O. Box 2020
<input type="checkbox"/> Facsimile	Columbia Falls, MT 59912
<input type="checkbox"/> Email	<i>Attorney for petitioner in Schmill</i>
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<input type="checkbox"/> Hand-Delivery	P.O. Box 7909
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<input checked="" type="checkbox"/> U.S. Mail	Mr. Larry W. Jones
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<input type="checkbox"/> Facsimile	<i>Attorney for Liberty Northwest</i>
<input type="checkbox"/> Email	

  
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STEVEN W. JENNINGS

**EXHIBIT A**

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



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June 8, 2009

Clerk of Court  
Workers' Compensation Court  
P. O. Box 537  
Helena, MT 59624-0537

RE: Flynn v. Liberty NW Ins. Co. & MT State Fund  
WCC No. 2000 - 0222  
MT Supreme Court No. DA 06-0734

Dear Clerk of Court:

Enclosed please find the original Common Fund Insurer's Opening Brief on Claims "Paid in Full", which was fax filed on today's date.

Please call if you have any questions.

Sincerely,



JENNILEE C. BAEWER, Certified PLS  
Legal Admin. Assistant to Steven W. Jennings  
Enclosure



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Date: June 8, 2009

**FAX CORRESPONDENCE:**

**TO:** Workers Compensation Court

**FAX #:** 406-444-7798

**FROM:** Steven W. Jennings

**RE:** Flynn v. MT State Fund / Liberty NW  
 WCC No. 2000-0222

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**DOCUMENTS TRANSMITTED: FLYNN -**

**COMMENTS:** Attached hereto for fax filing is Common Fund Insurers' Opening Brief on Claims "Paid in Full". Please file the attached document and be advised that the original is being sent via U.S. Mail today.

If you have any questions, please contact me at 406.252-3441. Thank you!

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