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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 ***PETITIONERS' BRIEF IN OPPOSITION TO COMMON FUND INSURERS' GENERAL MOTION TO DISMISS***

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Petitioners ROBERT FLYNN and CARL MILLER submit this brief in opposition to Common Fund Insurers' General Motion to Dismiss.

INTRODUCTION

Various insurers have submitted a motion asking the Court to dismiss them from this common fund litigation. These insurers contend that the common fund created by this litigation violates their state and federal constitutional rights to due process of law; this, based on the claim they were not provided more notice and more opportunity to be heard. They contend this Court lacks jurisdiction over them because

the named petitioners have been paid and have not mediated more with these insurers. Next, they contend that they are not required to comply with the law without a specific request from each of the *Flynn/Miller* beneficiaries. Finally, they contend that if their motion to dismiss fails, this Court should turn Montana common fund jurisprudence on its head and base the recovery on the expense incurred by the named claimants rather than the gain received by the silent beneficiaries.

The motion to dismiss is without merit and should be denied.

BACKGROUND

As these insurers have stated in their footnote #1, they "have previously briefed these issues in *Schmill v. Liberty*." Schmill opposed that motion to dismiss by providing a detailed history of salient common fund proceedings and demonstrating that controlling precedent required rejection of that motion to dismiss. See Schmill's response to the motion to dismiss in *Schmill*.[1] This Court denied the insurers' motion. The insurers cannot distinguish *Schmill* from this pending action. They have made no meaningful effort to do so. Rather than repeat the history and arguments set forth in Exh. "A", Petitioners adopt the same as though set forth in full herein.

As a matter of law, the *Schmill* litigation created a global common fund. This Court has so held. Likewise, as a matter of law, the above captioned *Flynn/Miller* litigation created a global common fund.

I. Due Process

In earlier rulings in this litigation this Court disposed of the State Fund's due process argument in a single paragraph:

> Finally, the State Fund maintains that it will be denied due process of law if the claimant "is allowed to maintain his common fund from non-participating claimants." (Respondent's Brief Re: Common Fund Attorney Fees at 8.) How is not clear.

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[1] *Schmill v. Liberty*, WCC 2001-0300, Docket Entry # 422, attached as Exhibit A (for the documents attached thereto, see wcc.dli.mt.gov/common_fund/Schmill/schmill_422.pdf).

> The State Fund is receiving due process right now by defending against the common fund claim. It has been given both notice of the claim and an opportunity to be heard, the very things it claims it is being denied. What it really objects to is the timing of the claim. Moreover, any common fund fees will be assessed against the benefitted claimants, not the State Fund.

See Decision on Order Regarding Retroactivity and Attorney Fees; Docket Entry # (DE#) 63, ¶ 19. Here as well, the insurers are "receiving due process right now." The insurers are and have been on notice of the controlling precedent. They do not claim otherwise. They are and have been on notice of the attorney's lien. They do not claim otherwise. *Flynn I* was decided December 5, 2002, DE# 25. The Supreme Court issued remittitur on December 26, 2002, DE# 27. The same day, Flynn filed Notice of Attorney's Lien, DE# 26. This lien is a matter of public record. Petitioners provided each of the insurers with a copy of the lien on February 24, 2004, DE# 85. All this notice is, of course, redundant given the binding effect of Montana's common fund jurisprudence. Ignorance of the law is no defense.[2] Neither the insurers nor the claimants who are the beneficiaries can avoid the mandate of law by claiming they were unaware of that law. Yet claimed ignorance of these proceedings and ruling over the course of years is the premise underlying these insurers' motion.

In any event, the insurers are not claiming that by lack of notice or opportunity they have paid some claimants full benefits and now must satisfy the lien from their own purse. That might violate due process, but it did not happen. On the contrary; the insurers have had full notice of controlling common fund jurisprudence, and they have not paid. They have actively participated in this action to the extent they have chosen and they have not paid. These insurers have presented their arguments in this Court and the Supreme Court in this action and they have still not paid. They have not even paid those claimants who would be entitled to additional benefits under the insure's artificially constrictive and novel reading of controlling precedent.

These insurers do not suggest a single defense or argument that this Court has denied them from raising. They have enjoyed full due process of law. They simply disagree with controlling precedent. Due process does not protect the defendant from

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[2] *State v. Tichenor*, 2002 MT 311, ¶ 46, 313 Mont. 95, 60 P.3d 454.

the binding effect of controlling precedent.

II. Jurisdiction

This Court has ruled that "[a]s in *Rausch*, the global attorney fee lien recognized in *Schmill II* places the Responding Insurers within the jurisdiction of the WCC."[3]

Likewise here. This Court has observed that "any common fund fees will be assessed against the benefitted claimants,"[4] not the insurers, DE# 63, ¶19. Consequently, the enforcement of the attorneys lien is not a direct action against the insurers. Here, the common fund is the benefit payments due *Flynn/Miller* claimants. As such, enforcement of the attorney's lien on that fund constitutes an action *in rem*. A judgment *in rem* adjudicates the status of a thing or subject-matter, unlike a judgment *in personam* which binds a judgment debtor. *Gassert* (1908).[5]

This principle is consistent with this Court's observation in *Schmill*:

> *Stavenjord II* suggests that the Supreme Court contemplates that when benefits are found "retroactively" payable as the result of workers' compensation decisions, insurers must take the imitative to locate and notify claimants impacted by a decision, even if common fund fees are not to be paid.[6]
>
> . . .
>
> Common fund precedent requires the WCC to compel Responding Insurers to review open claims within the relevant time frame, to identify potential beneficiaries, and to pay appropriate benefits and attorneys' fees.

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[3] *Schmill v. Liberty*, 2008 MT WCC 38, ¶ 19.

[4] *Schmill v. Liberty*, WCC 2001-0300, Docket Entry # 422, attached as Exhibit A (for the documents attached thereto, see wcc.dli.mt.gov/common_fund/Schmill/schmill_422.pdf).

[5] *Gassert v. Strong* (1908), 38 Mont. 18, 98 P.497.

[6] *Schmill v. Liberty*, 2008 MT WCC 38, ¶ 17.

This Court has inherent jurisdiction over the subject matter of the duties it is required to perform. This Court's enforcement of the common fund attorney fee lien in this action is well within its established jurisdictional mandate in § 39-71-2950 MCA.

Next, these insurers contend for an unprecedented mediation predicate for common fund recoveries. By their very nature, common fund recoveries arise post judgment. Since the entitlement to common fund attorney fees did not arise until after the common fund was created, there was neither the opportunity nor the need for Flynn and Miller to mediate a claim for common fund attorney fees.

The insurers have no standing to seek mediation of fees which are paid by the claimants, not the insurers. Likewise, the beneficiaries are not required to mediate because they are allies not adversaries of Flynn and Miller. Even if the mediation statute did apply to common fund litigation, it would not apply to claims arising before the enactment of the statute. See *Buckman* (1986)[7]; *Carmichael* (1988)[8]; §39-71-2408, MCA, which became effective July 1, 1987. The class of claims subject to the common fund begins 13 years before enactment of the mediation statute. If mediation were required, it has been satisfied by the appellate mediation which has occurred in the course of the Supreme Court resolution of the definition of final, settled and inactive claims.[9] To hold otherwise would put form over substance. The parties have long since satisfied any conceivable purpose of mediation which in any event is not required in post-judgment common fund litigation.

This Court has subject matter jurisdiction over the common fund and the related attorneys lien. The insurers' arguments here ignore the controlling authority, and instead attempt to divert this Court's attention to matters that are not relevant to the determination of subject matter jurisdiction. These unsupportable arguments are just the type of "loose talk about jurisdiction" which the Montana Supreme Court has

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[7] *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986).

[8] *Carmichael v. Workers' Comp. Court*, 237 MT 410, 763 P.2d 1122 (1988).

[9] *Flynn/Miller v. Montana State Fund and Liberty Northwest Insurance, 2008 MT 394, 347 Mont. 146, 197 P.3d 1007.*

warned against. *Lorang* (2008).[10]

This Court has the sole power—and the duty—to adjudicate the matters at issue. Therefore, this Court has subject matter jurisdiction here. *Lorang* (2008).[11] As well, this Court has personal jurisdiction over the parties. The insurers have submitted themselves to the jurisdiction of the Court without objection, and have fully participated in briefing in both the Workers' Compensation Court and the Supreme Court.

III. Duty to Indemnify Underpaid Claimants

The insurers contend that merely identifying underpaid *Flynn/Miller* beneficiaries "reverses" the "burden of proof." As noted in the previous section regarding jurisdiction, workers' compensation insurers have an affirmative duty to review claims, identify potential beneficiaries, and pay sums due. This process does not "reverse" the "burden of proof." In fact, it has nothing to do with the "burden of proof" in these proceedings. The process established with the State Fund in this very litigation confirms that, with a modest administrative effort, the insurer can satisfy its duty to investigate and notify claimants who must then prove the amount of fees and costs they incurred to obtain the social security award which they share equally with the insurer.

IV. Attorneys Fees

The insurers' argument concerning attorneys fees exhibits a profound misunderstanding about Montana's common fund jurisprudence. The award of attorneys fees for the creation of a common fund is rooted in equity, e.g., "The basis of the doctrine being rooted in the equitable concepts of quasi-contract, restitution and recapture of unjust enrichment." *Means* (1981).[12]

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[10] *Lorang v. Fortis* , 2008 MT 252, ¶ 60. See also footnote 6 indicating that "Justice Scalia has coined the phrase "drive-by jurisdictional rulings" to describe incautious treatment of jurisdictional law."

[11] *Lorang*, ¶ 57 (holding that subject matter jurisdiction is the "fundamental authority to hear and adjudicate a particular class or proceedings" or "type of controversy").

[12] *Means v. Mont. Power Co.*, 191 Mont. 395 (1981).

The common fund doctrine is predicated on the principle that "[t]hose who share the fund would be unjustly enriched if they could take the benefit without the burden."[13] "Recovery of fees under the common fund rule is special because it is a recovery *against allies, not adversaries. It is not fee shifting but fee sharing.*" Id. (emphasis added.) Dobbs also explains: "Restitutionary recoveries are based on the defendant's gain, not the plaintiff's loss."[14]

Montana follows the rule that a common fund attorneys fee is based on the benefit received by the silent or non-participating beneficiary, not the cost to the participating or active litigant. This historical fact flows directly from the equitable nature of the remedy. The insurers clearly recognize this fact. Indeed, this Court has so ruled. Since these insurers clearly disagree with the law, they might argue for a change in existing law. Instead, by taking selected citations out of context, they posture that existing law supports them. Their pretense and argument ultimately fail as being wholly inconsistent with the historical development of common fund jurisprudence and its equitable underpinnings.

CONCLUSION

The moving insurers have received and continue to receive due process. This Court has jurisdiction over both the subject matter and the parties. The insures have made no principled argument to change the existing law concerning attorney fees for creating a common fund.

The motion to dismiss should be denied.

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[13] Dobbs, Law of Remedies, § 3.10(2), p. 280, 2d ed, 1993.

[14] Id. § 12.1, at 9.

DATED this 20th day of November, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of Nov 2009, a true and correct copy of the foregoing was served upon the following by U.S. mail, hand-delivery, Federal Express, facsimile or email:

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IN THE WORKERS COMPENSATION COURT OF THE STATE OF MONTANA
IN AND FOR THE AREA OF KALISPELL
BEFORE THE WORKERS' COMPENSATION JUDGE

CASSANDRA SCHMILL, Petitioner, vs. LIBERTY NW INS. CORP., Respondent/Insurer, and MONTANA STATE FUND, Intervenor.	WCC NO. 2001-0300 PETITIONER'S REPSONSE TO RESPONDING INSURERS' "GATEWAY LEGAL ISSUES" AND MOTION TO DISMISS

COMES NOW the Petitioner, CASSANDRA SCHMILL, by and through her attorney of record, and files the following response to the Responding Insurers' brief on "Gateway Legal Issues" and Motion to Dismiss. For the reasons stated herein, the Responding Insurers' Motion to Dismiss should be denied.

UNDISPUTED FACTS

The Petitioner submits the following additional undisputed facts to those listed by Responding Insurers:

1. On October 11, 2001, Schmill and Liberty NW participated in an appellate mediation following Liberty's appeal of the decision of the WCC dated June 22, 2001. The mediator was Geoff Keller, attorney for Safeco Companies who have joined in the opening brief regarding the gateway legal issues submitted by the Responding Insurers. (Ex. 1.)

2. On January 9, 2002, the State Fund filed a Motion to File an Amicus Brief in the *Schmill* appeal before the Montana Supreme Court. (Ex. 2.)

3. On January 23, 2002, a Notice of Claim of Attorney Fee Lien was served on all insurers and self-insureds in *Rausch v. Montana State Fund.* (Ex. 3.)

4. On April 10, 2003, the Supreme Court issued its decision in *Schmill I.*

5. On April 25, 2003, the WCC issued an order in *Schmill* authorizing Liberty NW and all other Plan I and II insurers to withhold 25% of *Schmill* benefits to pay Petitioner's counsel's attorney fee lien. The Court went on to state that it "will consider a motion to intervene by insurers, self-insured employers, and/or claimants when they are received." (Ex. 4.) The Court's order was posted on the website.

6. On May 5, 2003, the State Fund filed a Motion to Intervene in *Schmill*, which was granted on May 21, 2003. (Ex. 5.)

7. On February 23, 2004, all insurers and self-insured employers were served with a Notice of Claim of Attorney Fee Lien in *Flynn v. Montana State Fund.* (Ex. 6.)

8. On February 26, 2004, an Order Clarifying Global Lien in *Flynn* was e-mailed to all common fund attorneys, including counsel for Responding Insurers and Safeco Companies, Steve Jennings and Geoff Keller, respectively. In its Order, the WCC clarified that while the WCC had only authorized common fund fees to be paid from *Flynn* benefits paid by the State Fund as the named insurer, other insurers and self-insured employers were authorized to withhold attorney fees from *Flynn* benefits in the event that the Supreme Court found that the common fund extended to non-party insurers and self-insured employers. (Ex. 7.)

9. On June 4, 2004, the WCC issued its decision in *Schmill II.*

10. On January 10, 2005, a Summons was issued to select insures and self-insured employers in *Rausch/Ruhd v. Montana State Fund/Liberty NW* directing those insurers to withhold an attorney fee from the common fund benefits owed to the *Rausch/Ruhd* claimants. (Ex. 8.)

11. On April 22, 2005, a Summons and Notice of Attorney Fee Lien was

served on the Responding Insurers and Safeco Companies in the case of *Reesor v. Montana State Fund*. (Ex. 9.)

12. On June 7, 2005, the Supreme Court issued its decision in *Schmill II*.

ARGUMENT

I. The Responding Insurers have been afforded all the due process to which they are entitled.

Responding Insurers claim that because they were not parties in the *Schmill* case prior to April 10, 2003, when the Supreme Court decided *Schmill I*, or June 7, 2005, when the Supreme Court decided *Schmill II*, principles of due process prevent them from being bound by the decisions in either *Schmill I* or *Schmill II*. According to Responding Insurers, due process violations which exempt them from the holdings in *Schmill I* and *Schmill II* include (1) the WCC's lack of personal jurisdiction over Responding Insurers at the time of the decisions in *Schmill I* and *Schmill II*; and (2) the WCC's issuance of the Amended Summons without affording the Responding Insurers notice and an opportunity to be heard. In light of these due process violations, the Responding Insurers contend that the Court cannot enforce the judgments of *Schmill I* and *Schmill II* against them. (Responding Insurers' brief, p. 11.) The Responding Insurers' due process arguments are without merit and should be rejected for several reasons.

A. Responding Insurers became legally liable to pay past due *Schmill* benefits as of June 7, 2005, regardless of their status as either a party or a non-party to either of the two *Schmill* decisions.

The Responding Insurers contend that they are not bound by the decisions in *Schmill I* and *Schmill II* because they were not parties to these actions. In other words, according to Responding Insurers, they have no duty to follow case law unless they are a party litigant. Responding Insurers assert that it is only when individual claimants come forward and assert a right to *Schmill* benefits do they have a duty to "evaluate the claim." (Responding Insurers' Brief, p. 19.) Even then, Responding Insurers state that they do not have a duty to pay all *Schmill* claims, but only those they deem qualify "upon the facts of the claim and law set forth in *Schmill I* and *Schmill II*." (Id.) The Supreme Court has rejected the Responding Insurers' unique interpretation of the legal effects of common fund decisions.

In *Ruhd v. Liberty NW Ins. Corp.*, WCC No. 2002-0500, the claimant, who was permanently and totally disabled, filed a petition for hearing before the WCC seeking payment of an impairment award from the insurer, Liberty NW. The WCC had previously concluded that permanently totally disabled claimants whose employers where insured by the State Fund were not entitled to impairment awards

in *Rausch v. Montana State Fund*, 2001 MTWCC 15. Both *Rausch* and *Ruhd* were appealed to the Montana Supreme Court and on September 5, 2002, the Supreme Court reversed the WCC's decision in *Rausch.*

Ruhd maintained his appeal alleging that *Rausch* only applied to State Fund claims. Writing in the context of the common fund fees claimed by the *Rausch* attorneys, the Supreme Court rejected this argument by stating that:

> "There is no question that the intervenors [Rausch], via active litigation, are directly responsible for securing the right of all permanently totally disabled claimants to receive an impairment award, regardless of the insurer . . . As soon as we decided *Rausch*, however, liability for immediate payment of impairment awards was established against all insurers." *Ruhd v. Liberty NW Ins. Corp.*, 2004 MT 236, ¶¶ 9 & 22, 322 Mont. 478, ¶¶19 & 22, 97 P.3d 561, ¶19 & 22.

If the legally binding nature of case law on both parties and non-parties was not clear enough, the Supreme Court went on to explain the futility of requiring individual claimants to pursue separate claims against other non-party insurers:

> "A conclusion contrary to what is held here could easily spawn unnecessary litigation. Acknowledging, as the parties posit, that there are 600 licensed insurers that could be implicated, it appears from the record that there are only 165 permanently totally disabled claimants covered by 48 active insurers in the State of Montana. Holding that intervenors are only entitled to common fund fees from State Fund claimants, and that Mr. Angel is entitled to common fund fees from Liberty claimants, could inspire at least one claimant covered by each of the other 46 insurers to file a suit which could lead nowhere but to where we are right now. The law established by *Rausch* will not be changed by further suits. Redundant litigation, which could lead to disparate fee awards, and thus disparate recovery, should not be encouraged." *(Id.* ¶24.)

Common fund cases create a vested right in all claimants to immediate payment of benefits established by the underlying decision. *Murer v. State Compensation Mut. Ins. Fund*, 283 Mont. 210, 223, 942 P.2d 69, 77 (1997). Once that vested right has been created, a corresponding duty on the part of all insurers

arises as a matter of law to pay the increased benefits. (*Id.*) Because these rights and duties arise automatically, there is no due process requirement that all insurers must be joined as parties to the underlying claims in order to be bound by the decisions.

This Court rejected similar arguments from non-party insurers in *Rausch/Ruhd* after the cases were remanded for implementation of the common fund. In a motion objecting to the WCC's summons issued to all Montana workers' compensation insurers and self-insured employers who paid permanent total disability benefits to certain claimants requiring them to identify all permanent total disability claimants and the status of any impairment awards, the non-party insurers claimed that the Court lacked jurisdiction over them due to their non-party status. (Brief in Support of Plum Creek Timber Co., LP's Objections to Summons and Motion to Quash Summons in *Rausch/Ruhd* attached hereto as Ex. 10.) First, the Court noted that by serving them with a summons, the "non-parties" became "parties."

Second, the Court cited the foregoing language from *Murer* and held that "[c]laimants have a vested right to benefits which flow from the decision-in-chief." (Order Denying Motion to Quash Summons and Objections, *Rausch/Ruhd*, dated February 22, 2005, attached hereto as Ex. 11.)

As the foregoing case law makes clear, the Responding Insurers' duty to pay *Schmill* benefits arose immediately upon the finding of a common fund, regardless of their status as either parties or non-parties. Under such circumstances, no due process violation occurred.

B. Responding Insurers had plenty of notice and ample opportunity to participate in *Schmill* prior to both Supreme Court decisions.

The Responding Insurers also contend that due process violations occurred when they were served with an amended summons without notice and an opportunity to be heard. First, as the Court noted in the Order Denying Motion to Quash Summons and Objections in *Rausch/Ruhd*, since the WCC was given the job of enforcing the common fund and attorney fee lien, it had the jurisdiction to join the non-party insurers. (Ex. 11, Order, ¶2.) The Court has the same authority in this case and thus the Summons was properly issued.

Even if the Court were required to afford the insurers greater notice and an opportunity to be heard, the facts confirm that the Responding Insurers would not have used those opportunities to challenge the WCC's *Schmill* decisions. After the WCC decision finding the apportionment statute unconstitutional, Schmill and Liberty NW participated in an appellate mediation conducted by counsel for Safeco Companies, Geoff Keller. Despite their counsel's intimate knowledge of the issues in *Schmill* as early as October of 2001, Safeco Companies never moved to

intervene in the appeal. In contrast, in January of 2002, the State Fund moved to file an amicus brief in the *Schmill* appeal, which was granted.

On January 23, 2003, a Notice of Attorney Fee Lien in *Rausch* was served on most, if not all, of the Responding Insurers, including Safeco Companies. From this date forward, the Responding Insurers were forewarned of the WCC's sanctioning of both the global common fund doctrine and the enforcement of an attorney fee lien in the common fund cases. None of the Responding Insurers, including Safeco Companies, moved to intervene at that time in *Schmill*.

After *Schmill I* was decided on April 10, 2003, the WCC issued an Order on April 25, 2003, authorizing Liberty NW and other Plan I and II insurers to withhold a 25% attorney fee from all *Schmill* payments. In its Order, the Court went on to expressly invite other "insurers, self-insured employers, and/or claimants" to intervene in *Schmill*. The only insurer to take the Court up on its offer was the State Fund, who filed a Motion to Intervene on May 5, 2003, which was granted. None of the Responding Insurers, including Safeco Companies, moved to intervene.

On February 23, 2004, a Notice of Claim of Attorney Fee Lien in *Flynn* was served on all insurers and self-insured employers, including all Responding Insurers and Safeco Companies. Several days later, a global lien order in *Flynn* was e-mailed to all common fund attorneys, including counsel representing Responding Insurers and Safeco Companies. The briefing before the WCC in *Schmill* regarding the issues of common fund and retroactivity would not be completed for several more months, yet neither the Responding Insurers, nor Safeco Companies, moved to intervene. These insurers were content, instead, to sit back and watch Liberty NW and the State Fund make the legal arguments challenging the *Schmill* common fund.

On June 4, 2004, the WCC issued its second decision in *Schmill*. It would be almost a year to the day before the Supreme Court would decide *Schmill II*, yet none of the Responding Insurers or Safeco Companies took advantage of the time and moved to file an amicus brief challenging the decision of the WCC.

On January 10, 2005, and April 22, 2005, common fund attorney fee lien summonses were issued in *Rausch/Ruhd* and *Reesor,* respectfully, and served on Responding Insurers and Safeco Companies. Again, neither group of insurers took any action in *Schmill*.

The foregoing facts clearly establish that the Responding Insurers and Safeco Companies were given plenty of notice and ample opportunity to participate either as amicus, or as an intervenor in *Schmill* prior to both of the Supreme Court decisions. The Responding Insurers and Safeco Companies chose to do nothing. Under such circumstances it would be error to find a due process violation.

II. A common fund exists in Schmill by order of the Montana Supreme Court.

In their next argument, Responding Insurers claim that *Schmill* does not meet the common fund criteria. The Supreme Court has already ruled that it does. The Responding Insurers had over two years to present their common fund arguments to the WCC and the Montana Supreme Court and chose not to do so. Stare decisis prevents this Court from doing anything but upholding the decision of *Schmill II*.

III. The WCC has subject matter jurisdiction to issue the summons and force the Responding Insurers' compliance with payment of *Schmill* benefits and withholding of proper attorney fees.

Responding Insurers, like the insurers in *Rausch/Ruhd* who moved to quash the Court's summons in that case, assert that the Court lacks subject matter jurisdiction over the common fund proceedings because no person with standing has filed a claim against them. Additionally, Responding Insurers argue that there have been no mediations of any claims for *Schmill* benefits against them, which likewise deprives the Court of jurisdiction.

As the Court noted in its Order Denying Motion to Quash Summons and Objection in *Rausch/Ruhd*, the Court has jurisdiction over the common fund proceedings by virtue of the vested right *Schmill* claimants have to payment of those benefits. (Ex. 11, *Rausch/Ruhd* Order, ¶4.) The WCC's jurisdiction extends to all benefit issues. §39-71-2905, MCA. Responding Insurer's brief makes it clear that many workers' compensation insurers in Montana have not and do not intend to abide by their duty to pay *Schmill* benefits absent additional court intervention. The insurers' actions alone, therefore, are sufficient to trigger the Court's jurisdiction. Moreover, since the benefits are due and owing there is no "dispute" which needs to be mediated.

IV. Workers' compensation insurers and self-insured employers have a duty to pay *Schmill* benefits.

Responding Insurers argue that they should not be required to solicit claims in order for *Schmill* claimants to be paid the benefits they are due. In fact, Responding Insurers go so far as to argue that the *Schmill* claimants "have the burden to prove the affirmative - i.e., that they are entitled to the benefits they seek . . ." and, further, that *Schmill* claimants "have a duty to identify themselves and [it is] not Responding Insurers' duty to do so at great burden and expense." (Responding Insurers' Brief, p. 19.)

Neither position espoused by Responding Insurers has legal support as both are founded on the incorrect premise that the *Schmill* claimants do not have a vested right in being paid *Schmill* benefits. As was previously cited, the decisions in *Murer* and *Ruhd* hold otherwise. *Schmill* claimants acquired a vested right to *Schmill* benefits as soon as the decisions in *Schmill I* and *Schmill II* were issued. With that right came the corresponding duty on the part of all workers' compensation insurers and self-insured employers to pay those benefits, any expense and cost to the insurers notwithstanding.

This Court rejected the Responding Insurers' "solicitation" argument in the Order Denying Motion to Quash Summons and Objections in *Rausch/Ruhd* for the reasons stated above. The Court also noted that since the Court had the duty "to enforce the common fund created by *Rausch*[,] [t]hat duty require[d] it to compel each insurer and self-insurer to identify the claimants' entitled to [benefits] and pay those [benefits], as well as enforce the common fund attorney lien." (*Rausch/Ruhd* Order, ¶6.) The same reasoning applies in this case.

CONCLUSION

The *Schmill* claimants acquired a vested right to benefits as soon as the decisions in *Schmill I* and *Schmill II* were issued. That vested right to benefits does not depend in any way on the status of the Responding Insurers as either parties or non-parties to the underlying *Schmill* litigation. That vested right rose as a matter of law and imposes a corresponding duty on the Responding Insurers to pay appropriate *Schmill* benefits. Moreover, to the extent the Responding Insurers wanted to challenge any of the legal holdings in *Schmill I* or *Schmill II*, they could have followed the lead of the State Fund and filed amicus briefs and/or intervened in the underlying claim. Having done neither, the Responding Insurers have no position from which to argue that they were denied due process.

The remaining arguments put forth by the Responding Insurers have already been decided by either the Montana Supreme Court or this Court with regard to other common fund litigation. None of the arguments have merit and should be summarily denied.

WHEREFORE, for the foregoing reasons, the Petitioner respectfully requests that the Responding Insurers' Motion to Dismiss be denied.

DATED this 2 of May, 2008.

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By: Laurie Wallace
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CERTIFICATE OF MAILING

I, Robin Stephens, do hereby certify that on the 2 day of May, 2008, I served a true and accurate copy of the PETITIONER'S RESPONSE TO RESPONDING INSURERS' "GATEWAY LEGAL ISSUES" AND MOTION TO DISMISS by U.S. mail, first class, postage prepaid to the following:

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