

**FILED**

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OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

Attorneys for Responding the Insurers Listed on Exhibit "A" (Affidavit Insurers)

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

**WCC No. 2000 - 0222**

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**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.**

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**REQUEST FOR DISMISSAL**

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- I. THE INSURERS WHO FILED AFFIDAVITS ON OR BEFORE MARCH 8, 2012, SHOULD NOW BE DISMISSED: FLYNN HAD 90 DAYS TO CONDUCT DISCOVERY AND DID NOT OBJECT TO DISMISSAL.**

On or prior to March 8, 2012, the Affidavit Insurers filed affidavits asserting that they had no Flynn claimants and requesting dismissal. These affidavits used the form

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prepared and promulgated by the Court for the purpose of expediting dismissal of those insurers who had no common fund exposure.<sup>1</sup>

The affidavits stated as follows:

I understand that the Montana Workers' Compensation Court may allow a period of up to 90 days from the date of filing this affidavit within which counsel for Petitioner[s] may conduct discovery and investigation for the limited purpose of proving or disproving the foregoing statement(s) made by me on behalf of [NAMED INSURER]. After such 90 days, if no objection is lodged by counsel for Petitioner[s], the Court will dismiss the insurer/self-insurer from this action based on the sworn statements made by me in this affidavit.<sup>2</sup>

The 90<sup>th</sup> day following March 8, 2012, fell on June 6. Within that period, Flynn did not conduct any discovery; nor did his counsel contact Affidavit Insurers' counsel to discuss or coordinate discovery. Likewise, Flynn did not request that the Court extend the 90-day discovery period. More importantly however, and regardless of whether Flynn conducted discovery within the 90 day period, he has not objected to dismissal of Affidavit Insurers. Accordingly, pursuant to the form affidavit promulgated by the Court, "the Court **will** dismiss the insurer/self-insurer from this action." *Id.* (emphasis added). Thus, the Affidavit Insurers respectfully request the Court to issue an order dismissing them from this action.

## **II. FLYNN'S BELATED EFFORT TO SERVE UNTIMELY DISCOVERY SHOULD NOT DELAY OR PREVENT DISMISSAL.**

After the 90-day discovery window closed, Flynn served discovery requests on counsel for Affidavit Insurers via the U.S. Mail.<sup>3</sup> The discovery appears to be an attempt to needlessly prolong this action and delay the eventual dismissal of the Affidavit Insurers. Flynn's tardiness certainly cannot be attributed to excusable neglect. Flynn has been aware of the 90-day discovery period since the Court first promulgated the dismissal-by-affidavit process in its December 6, 2005, *Memo From Court to Counsel and All Parties With Blank Affidavit*. The 90-day discovery period was "for the

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<sup>1</sup> The Court adopted the affidavit process for dismissal in on December 6, 2005, when it issued a memo to "counsel and All Parties of Record in All common Fund Matters." *Memo From Court to Counsel and All Parties With Blank Affidavit*, 12/6/05 (Docket # 390; *Flynn v. State Fund*, 2000 – 0222).

<sup>2</sup> See Form Affidavit attached to *Memo From Court to Counsel and All Parties With Blank Affidavit*, 12/6/05 (Docket # 390; *Flynn v. State Fund*, 2000 – 0222). See also Affidavits, 3/7/12, ¶ 5 (docket #'s 635 – 665).

<sup>3</sup> See Letter R. Palmer to S. Jennings, 6/7/12 (attached hereto).

limited purpose of proving or disproving” the statements made in the affidavits.<sup>4</sup> Moreover, as noted above, the form affidavits expressly state that the “Workers’ Compensation Court may allow a period of up to 90 days from the date of filing this affidavit within which counsel for Petitioner[s] may conduct discovery.” Indeed, the Court has taken the extraordinary step of reminding common fund counsel about the 90 day discovery period in weekly emails.

This is a reminder that service in the common fund matters is not effected by mail, but via the website. Please be sure you are checking the link set forth below for filing of documents. **Petitioners’ counsel, please note the 90-day window to conduct discovery with the parties filing Affidavits.**<sup>5</sup>

In addition to these 15 weekly email reminders, at the March 8, 2012 omnibus hearing Flynn’s counsel was reminded on the record about the discovery contemplated by the affidavit process.<sup>6</sup> Flynn was well aware of the discovery process contemplated by the affidavits and chose not to follow it.

In addition, Flynn’s belated efforts to take discovery cannot delay dismissal because, as stated in the Court’s form affidavit, the only event that could prevent or delay dismissal would be Petitioner’s objection thereto – and not the service, conduct or commencement of discovery. Even at this late date, Flynn has never objected to the dismissal of the Affidavit Insurers. Having declined to conduct discovery, Flynn may not now argue that dismissal is inappropriate because he needs time to conduct discovery to manufacture a basis for an objection. Since no objection to dismissal has been lodged, dismissal is appropriate and should be entered without further proceedings.<sup>7</sup>

### III. CONCLUSION

The Affidavit Insurers have litigated for seven years to define the scope of retroactivity, they have searched their files, and have submitted sworn affidavits attesting to the fact that they have no eligible claims. Flynn had 90 days to pursue

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<sup>4</sup> *Memo From Court to Counsel and All Parties With Blank Affidavit*, 12/6/05 (docket # 390; *Flynn v. State Fund*, 2000 – 0222).

<sup>5</sup> *Email J. Poole to WCC Schmill Distribution 2001-0300*, 10/31/11, 11/9/11, 11/16/11, 11/21/11, 11/29/11, 12/6/11, 12/13/11, 12/28/11, 1/3/12, 1/13/12, 1/17/12, 2/24/12, 3/30/12, 5/11/12, 6/1/12 (emphasis added).

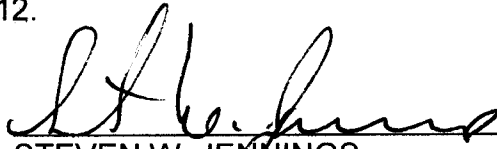
<sup>6</sup> *Transcript of Omnibus Hearing*, 3/8.12, pp. 50-51.

<sup>7</sup> *See Affidavits*, 3/7/12, ¶ 5 (docket #'s 635 – 665) (“After such 90 days, if no objection is lodged by counsel for Petitioner[s], the Court **will** dismiss the insurer/self-insurer from this action...”) (emphasis added).

discovery after the affidavits were filed (in addition to the years that this case has been pending prior to the filing of the affidavits), and chose not to do so within that window. Pursuant to the submission of affidavits using the form promulgated by the Court, it is time to let the Affidavit Insurers out of this case – particularly since Flynn has never objected to dismissal and has no basis for doing so.

WHEREFORE, the Affidavit Insurers respectfully request that this Court issue an order dismissing them from this case.

Dated this 14<sup>th</sup> day of June 2012.

  
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was served upon the following counsel of record, by the means designated below, this 14<sup>th</sup> day of June 2012.

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### **Responding Affidavit Insurers**

- American Alternative Ins. Corp.
- American Re-Insurance Co.
- Bituminous Fire & Marine Ins. Co.
- Bituminous Casualty Corp
- Old Republic Security Assurance Co.
- Centre Ins. Co.
- Clarendon National Ins. Co.
- Truck Ins. Exchange
- 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 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.
- Petroleum Casualty Co.
- Sentry Ins. Mutual Co.
- Sentry Select Ins. Co.
- Middlesex Ins. Co.
- PPG Industries, Inc.
- Connie Lee Ins. Co.
- Fairfield Ins. Co
- Universal Underwriters Group
- XL Ins. America, Inc.
- XL Ins. Co. of New York
- XL Reinsurance. America
- XL Specialty Ins. Co.
- Greenwich Ins. Co.
- Evanston Ins. Co.
- Markel Ins. Co.