

Steven W. Jennings
CROWLEY FLECK PLLP
P. O. Box 2529
Billings, MT 59103-2529
(406) 252-3441
Attorneys for Responding Insurers

FILED

JAN 30 2015

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

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.

REPLY IN SUPPORT OF MOTION TO DISMISS

FACTS

Almost a year ago, on February 18, 2014, AIG insurer's filed an affidavit identifying two *Flynn* beneficiaries and attesting to the fact that their *Flynn* benefits had been paid and the insurers had withheld an amount necessary to pay Mr. Palmer's common fund attorney fee lien. The affidavit further attested that AIG Insurers were prepared to pay Mr. Palmer's attorney fee lien, "as the Court shall direct." Finally, the affidavit attested to the fact that, other than two claimant' identified, a thorough search of claim files revealed no other potential *Flynn* beneficiaries. *Affidavit, 2/12/14 (Flynn docket # 714).*

DOCKET ITEM NO. 721

Following the filing of this affidavit, Mr. Palmer served discovery requests on the AIG Insurer's to investigate the facts set forth in the affidavit. See Notice of Service of Discovery, 4/9/14 (Flynn Docket # 715). AIG Insurer's promptly responded to Mr. Palmer's discovery requests. See Notice of Service of Discovery, 6/20/14 (Flynn Docket # 718).

Since the time Mr. Palmer received AIG Insurer's discovery requests, he has served no further discovery requests nor has he requested this Court to direct AIG Insurer's to pay him his attorney fee lien derived from the two claimants identified in the affidavits. Indeed, Mr. Palmer has not communicated with AIG Insurers' counsel nor this court in any manner concerning AIG insurers' involvement in the *Flynn* case since receiving the discovery responses.

Accordingly, on January 7, 2015, having complied with their obligations to search their files for *Flynn* beneficiaries, to identify *Flynn* beneficiaries, to pay the identified claimants their *Flynn* benefits, to withhold Mr. Palmer's attorney fee lien, and to respond to Mr. Palmer's discovery requests, AIG Insurer's moved for dismissal. *Motion to Dismiss per Affidavit, 1/5/15, (Flynn docket # 719)*.

ARGUMENT

Mr. Palmer objects to dismissal of AIG Insurers. Mr. Palmer is not satisfied with requesting payment of his attorney fee lien and ending these proceedings. Rather, he appears to want these proceedings to continue *ad infinitum* so that the Court can maintain jurisdiction over AIG Insurers until Mr. Palmer can manufacture some heretofore unknown reason to demand more money. Indeed, Mr. Palmer ends his brief by stating that dismissal should be denied until AIG insurer's "file a new motion to dismiss...while simultaneously admitting that they owe money." *Petitioner's Brief in Opposition to AIG Insurers' Motion to Dismiss, 1/20/15 (Flynn docket # 720)*.

AIG Insurers have already admitted "that they owe money." In the affidavit filed by AIG Insurers, the affiant, Tathay McNeilly, identifies two *Flynn* claimants, the date and amount of money paid to them in satisfaction of their common fund entitlement, and the amount withheld therefrom to be paid in satisfaction of Mr. Palmer's attorney fee lien "as the Court shall direct." In their motion for dismissal, AIG insurer's reiterated these facts. Thus, AIG Insurers have indeed admitted that, under the common fund rulings, they owe Mr. Palmer the attorneys' fee lien in the amounts withheld from the identified *Flynn* beneficiaries.

Given AIG Insurers' statement that they are standing ready to pay Mr. Palmer his attorneys fees "as the court shall direct," what more does Mr. Palmer want? Does Mr. Palmer assert entitlement to additional monies? How much? On what basis? Does he assert that more *Flynn* beneficiaries exist than identified in Ms. McNeilly's affidavit? Does he assert that AIG miscalculated the attorneys fees withheld?

If Mr. Palmer disputes the facts set forth in the affidavit he must identify those facts and state the basis for his dispute. If he asserts entitlement to more money than the attorneys fees identified, he needs to make his case. Specifically, he needs assert an amount of money owed and present facts, law and evidence in support of his demand. However, Mr. Palmer completely fails to do this.

Mr. Palmer has had a year to conduct discovery into the facts set forth in the affidavit. Indeed, Mr. Palmer *did* conduct extensive discovery which was promptly answered. The answers Mr. Palmer received were clearly satisfactory to him because he served no follow up discovery nor made any motions to compel. Likewise, he has never asserted entitlement to monies over and above the attorneys fees identified in the affidavit. Indeed, he has not even moved the Court for an order compelling AIG Insurer's to pay him the attorneys fees identified in the affidavit. Yet, despite his extensive discovery, his brief is completely devoid of any assertion that the facts set forth in the affidavit are wrong or inaccurate. His argument against dismissal is nothing more than an assertion that AIG Insurers cannot be dismissed because their affidavit was not a verbatim copy of the Court's pre-printed form affidavit and that AIG insurers must "admit that they owe money." Notably absent from his brief is any assertion that the facts therein are inaccurate or that AIG Insurers owe him, or anybody else, any more money than the attorneys fees identified.

Quite simply, Mr. Palmer wants to delay dismissal until AIG Insurers admit that they owe him money but does not bother to state how much or why.

AIG Insurers' purpose in filing the recent motion for dismissal was to attempt to move these proceedings to a conclusion by prompting Mr. Palmer to move this Court for an order directing AIG Insurers' to pay the attorney fee lien. AIG Insurers are hesitant to force a conclusion to these proceedings by simply mailing a check to Mr. Palmer in satisfaction of his attorney fee lien. Recall that the monies therefor come from the *Flynn* beneficiaries *Flynn* entitlement. Thus, in order to avoid a potential claim by the identified *Flynn* beneficiaries that AIG Insurers wrongfully sent their money to Mr. Palmer, AIG Insurer's wish to do so only under the authority of a Court order. The request for such an order must properly come from Mr. Palmer. Thus, AIG Insurers filed their recent motion in the hopes that Mr. Palmer would request payment of his attorneys fees as a condition of dismissal – a condition AIG Insurers would readily accede. Significantly, AIG Insurers have also requested dismissal from the *Schmill* common fund case. Opposing counsel in that case has stated "If the Court is prepared to order the disbursement of the withheld attorney fees to either Ms. Allison [the *Schmill* claimant identified in AIG Insurers' *Schmill* affidavit] or the Petitioner, then the petitioner would not object to the concurrent dismissal of the AIG insurers from this action." *Petitioners' Response to AIG Insurers' Motion to Dismiss, 1/14/15 (Schmill docket # 599)*. AIG Insurer's had hoped for a similar response from Mr. Palmer.

The resolution of this case comes from a Court order for AIG insurers to pay Mr. Palmer the attorneys fees lien identified in the affidavit followed by an order of dismissal. If Mr. Palmer does not wish to request such an order in preference to baselessly continuing these proceedings after AIG has undisputedly proven an absence

of further liability, then the resolution of this case is found in an order requiring AIG Insurers to pay the withheld attorneys fee to the *Flynn* beneficiaries followed by an order of dismissal.

As mentioned above, in the absence of any factual basis to oppose dismissal, Mr. Palmer spends his entire brief pleading with the Court to deny dismissal because AIG Insurers' affidavit was not a verbatim copy of the Court's pre-printed form affidavit. Mr. Palmer argues that the affidavit "fails to comply with both form and substance prescribed by the Court" and that "[t]he form and substance prescribed by the Court are not optional." According to Mr. Palmer "[a] non-conforming affidavit does not satisfy the criteria to establish the basis for dismissal or to trigger discovery."

Mr. Palmer's assertion is simply untrue. A non-conforming affidavit may indeed establish the basis for dismissal by establishing the absence of any further liability.

On December 6, 2005, the Court established the affidavit process for dismissal via its memo *TO: Counsel and All parties of Record in All common Fund Matters*. In that memo, the court provided a form affidavit for insurers seeking dismissal. The form affidavit contained various boxes an insurer could check indicating the reasons for dismissal. The boxes all contemplated a lack of liability due to the absence of *Flynn* beneficiaries. Specifically, the reasons corresponding to the boxes were; 1) the insurer never wrote workers' compensation insurance in Montana; 2) the insurer never had any Montana claims; 3) the insurer had no claimants meeting the criteria set forth in the *Flynn* summons; or 4) the insurer was in liquidation during the relevant period. *MEMO TO: Counsel and All parties of Record in All common Fund Matters, 12/6/05 (Flynn docket # 390)*. Thus, the form affidavit did not contemplate an insurer seeking dismissal on the grounds that it had identified *Flynn* beneficiaries and fully executed its obligation to pay the *Flynn* benefits.

Significantly, in the memo accompanying the form affidavit, the Court provided instructions to those insurers seeking dismissal.

Attached is a blank form affidavit. If any insurer, self-insured, or guaranty association believes it should be dismissed from any of the common fund matters, you are directed to complete the affidavit and return it to the Workers' Compensation Court. **If none of the enumerated reasons apply, you must prepare a separate affidavit for the Court's review.**

MEMO TO: Counsel and All parties of Record in All common Fund Matters, 12/6/05 (Flynn docket # 390) (emphasis added).

Thus, contrary to Mr. Palmer's assertion that "the form and substance [of the affidavit] prescribed by the Court are not optional," the form and substance are indeed optional "if none of the enumerated reasons apply."

The Court's form affidavit had no box to check by which AIG Insurers could indicate that they had identified *Flynn* beneficiaries and paid the benefits. As a result, "none of the enumerated reasons appl[ie]d." In such event, AIG was **required** to file an affidavit differing in format from the Court's pre-printed affidavit ("you **must** prepare a separate affidavit for the Court's review.").

Clearly, Mr. Palmer's argument that AIG Insurer's affidavit does not conform verbatim to the Court's pre-printed affidavit, and therefore, that it is an insufficient basis for dismissal it completely without merit. Realizing that the pre-printed affidavit would not be applicable to all cases, the Court expressly required insurers seeking dismissal to file a different affidavit if the reasons given in the pre-printed affidavit were not applicable. AIG Insurers did exactly that. Indeed, regardless of the format of the affidavit, it is not the affidavit that establishes the basis for dismissal. Rather, it is the facts established therein. The facts of AIG Insurers' affidavit are undisputed. Other than the two *Flynn* beneficiaries identified and paid, AIG Insurers have no *Flynn* type claimants. Thus, AIG insurers have no further liability other than to pay Mr. Palmer's attorney fee lien. Again, if Mr. Palmer declines to request payment of that lien in preference to baselessly continuing these proceedings in the hopes that some grounds for further liability will arise at some unknown point in the future, then this case is properly resolved with an order compelling AIG Insurers to pay the amounts withheld to the *Flynn* beneficiaries followed by an order of dismissal.

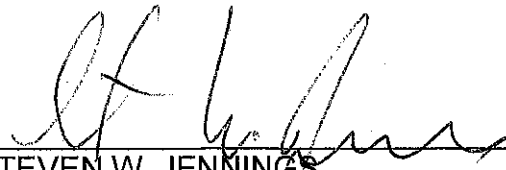
The only argument that Mr. Palmer presents that is not absurd on its face is that the AIG Insurers' affidavit did not indicate that the affiant was speaking for each and every AIG insurer. As Mr. Palmer accurately points out, the AIG affidavit was filed on behalf of 15 AIG affiliated insurers but the only insurer listed in the Affidavit was AIG Property Casualty.

However, that oversight is meaningless. The letter accompanying the AIG affidavit clearly identified on whose behalf the affidavit was being filed. So effective was this letter in advising Mr. Palmer that the affidavit was filed on behalf of all 15 affiliated insurers that he address his discovery to all 15 AIG Insurers. See Notice of Service of Discovery, 4/9/14 (Flynn Docket # 715) (addressing the discovery to each of the 15 AIG Insurers). Thus, Mr. Palmer has already conducted discovery against all AIG Insurers. Yet, in spite of his extensive discovery he is unable to provide *any* evidence for *any* further liability other than the common fund attorneys fee lien AIG Insurers have offered to pay.

AIG Insurers were brought into the case via the Summons dated May 4, 2005. They have litigated this case in good faith for ten years. They have complied with all rulings and they have searched their files, identified *Flynn* beneficiaries, and paid the *Flynn* common fund benefits. They have withheld the appropriate common fund attorneys fees – which they stand ready to pay. They have cooperated in discovery and promptly answered all requests. The time to end this case is now. Mr. Palmer has conducted extensive discovery but presents no evidence of any liability other than the attorneys fees AIG Insurers have offered to pay.

AIG Insurers' request dismissal from this case.

Dated this 28th day of January 2015.



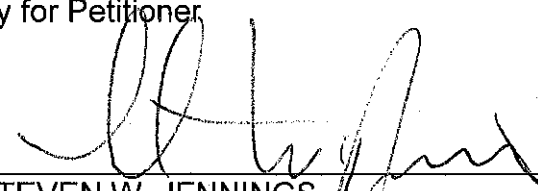
STEVEN W. JENNINGS
Crowley Fleck PLLP
P. O. Box 2529
Billings, MT 59103-2529
Attorneys for Responding Insurers/Appellants

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the following counsel of record, by the means designated below, this 28th day of January 2015:

- U.S. Mail
- FedEx
- Hand-Delivery
- Facsimile
- Email

Mr. Rex Palmer
Attorneys Inc., PC
301 W. Spruce
Missoula, MT 59802
Attorney for Petitioner



STEVEN W. JENNINGS
Attorney for Responding AIG Insurers

EXHIBIT A

- AIU Insurance Co.
- American International Pacific Insurance Co.
- American Home Assurance Co.
- Birmingham Fire Insurance Co.
- Commerce & Industry Insurance Co.
- Granite State Insurance Co.
- Insurance Co. of the State of Pennsylvania
- National Union Fire Ins. Co. of Pittsburgh, PA
- New Hampshire Insurance Co.
- AIG National Insurance Co.
- American International Specialty Lines Insurance
- American International Insurance Co.
- Illinois National Insurance Co.
- American General Corp.