

1 RONALD W. ATWOOD, P.C.  
2 RONALD W. ATWOOD  
3 200 Oregon Trail Building  
4 333 S.W. Fourth Avenue  
5 Portland, OR 97204-1748  
6 Telephone: (503) 525-0963

**FILED**

**JUN 17 2005**

7 Of Attorneys for Louisiana Pacific Corporation  
8 OFFICE OF  
9 WORKERS' COMPENSATION JUDGE  
10 HELENA, MONTANA

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

13 WCC No. 2000-0222

14 ROBERT FLYNN,

15 Petitioner,

16 vs.

17 MONTANA STATE FUND,

18 Respondent/Insurer,

19 and

20 LIBERTY NORTHWEST INSURANCE  
21 CORPORATION

22 Intervenor.

**RESPONSE TO SUMMONS OF  
LOUISIANA PACIFIC CORPORATION**

23 Pursuant to the Court's Summons of May 4, 2005, respondent  
24 Louisiana Pacific Corporation files its Response.

25 The Summons resulted from a Notice of Attorney's Lien filed  
26 by Mr. Flynn's attorney, Mr. Rex Palmer, claiming a lien with  
respect to benefits payable as a result of the Montana Supreme  
Court's decision in *Flynn v. Montana State Fund*, 2002 MT 279,  
312 Mont. 410, 60 P.3d 397 (2002).

1. According to paragraph 1. of the Court's Summons, *Flynn*  
"held that an insurer is liable for one-half of the  
attorney fees a claimant incurs in obtaining social

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Attorney at Law

1 security disability benefits which are offset by the  
insurer against his or her workers' compensation benefits."

2 2. Paragraph 4. of the Court's Summons provides:

3 "4. If you dispute the entitlement of claimants  
4 insured by you to additional benefits under the *Flynn*  
5 decision, then your response must set forth the  
6 particular grounds and defenses you may have and you  
need not at present provide the information required  
in the next paragraph numbered as 5."

7 3. Louisiana Pacific Corporation disputes that any claimants  
8 insured by it are entitled to additional benefits under  
*Flynn*, for the following reasons:

9 (a) This is not a proper "common fund" case, for the  
10 reasons set forth in Justice Rice's dissent in  
11 *Flynn*. As he lamented in the penultimate paragraph  
12 of his dissent: "\* \* \* Arguably, the [common fund]  
13 doctrine is now applicable to virtually anyone  
deriving a benefit from a claimant's settlement or  
award. That was not, and is not, the purpose of the  
doctrine."

14 (b) There is no reason why Mr. Palmer, who performed no  
15 service in obtaining social security disability  
16 benefits for anyone other than his own clients,  
17 should be entitled to an insurer-paid fee under  
*Flynn* for claimants for whom he did not obtain  
18 social security benefits. If the common fund is an  
equitable concept, the misapplication of that  
19 concept results in "unjust enrichment" by granting  
fees to lawyers who have not earned them.

20 (c) *Flynn* should not be applied retroactively to cases  
21 that have become final or were settled prior to the  
22 decision's issuance. *Dempsey v. Allstate Insurance*  
*Co.*, 325 Mont. 207, 104 P.3d 483 (2004). See also  
23 *Schmill v. Liberty Northwest Insurance Corporation*,  
2005 WL 1332128 (June 7, 2005) (expanding on  
24 *Dempsey's* "final or settled" language to mean "in  
the context of workers' compensation law").

25 4. Louisiana Pacific Corporation wishes to advise the Court,  
26 in the event it is subsequently requested to provide the  
information requested in paragraph 5, of the practical and  
logistical difficulties in doing so. The company has been

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Attorney at Law

1 self-insured since January 1, 1973 and has operated at  
2 least three mills in Montana for over thirty years; the  
3 number of potential files is mind-numbing and finding the  
4 *Flynn*-type claimants will be a Herculean task. The closed  
5 files are simply in boxes, some of which are labeled  
6 clearly, some of which are not; there is no centralized  
7 database of just the workers' compensation cases, and the  
8 Corporate Records database may or may not correctly  
9 identify records related to the company's workers'  
compensation history in Montana, the claims involved, the  
issues associated with each case, or benefits paid. There  
are literally thousands of boxes retained in storage.  
Identifying cases in which *Flynn* might apply would require  
someone to pull hundreds of boxes and to review thousands  
of claims with no guarantee that any applies to the facts  
and law in *Flynn*.

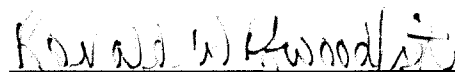
- 10 5. Louisiana Pacific Corporation can advise the Court at this  
11 time that it is aware of no current files that fall within  
12 the *Flynn* category of affected claimants. If subsequently  
13 instructed to do so by the Court, Louisiana Pacific  
14 Corporation will make a diligent search of its files but at  
15 this point believes that there are no additional benefits  
16 payable under the *Flynn* decision, for the reasons stated  
17 above.
- 18 6. Louisiana Pacific Corporation incorporates in this Response  
any and all defenses that are raised by any of the other  
Respondents/Insurers in this proceeding.
- 19 7. Louisiana Pacific Corporation reserves the right to seek  
20 amendment of this Response as circumstances dictate.

21 WHEREFORE, having fully answered the Court's Summons and  
22 notice to appear, Louisiana Pacific Corporation pray for relief  
23 in accordance with the positions and defenses set forth above.

24 Respectfully submitted this 14<sup>th</sup> day of June, 2005.

25 **RONALD W. ATWOOD, P.C.**

26 By:



RONALD W. ATWOOD, MSB #5959

of Attorneys for Louisiana Pacific  
Corporation

Ronald W. Atwood, P.C.  
Attorney at Law

CERTIFICATE OF SERVICE BY MAIL

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I, Kimberley J. Wouters, hereby declare and state:

I am over the age of eighteen years, employed in the City of Portland, County of Multnomah, State of Oregon, and not a party to the within action. My business address is Ronald W. Atwood, P.C., 333 S.W. Fifth Avenue, 200 Oregon Trail Building, Portland, Oregon, 97204.

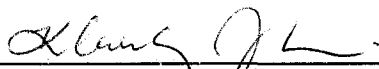
On June 14, 2005, I served the within **RESPONSE TO SUMMONS OF LOUISIANA PACIFIC CORPORATION** on the parties in said caused by placing a true thereof enclosed in a sealed envelope with postage prepaid thereon in the United States Post Office at Portland, Oregon, addressed as follows:

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

Mr. Rex L. Palmer  
Attorneys Inc., P.C.  
301 W. Spruce  
Missoula, MT 59802

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED June 14, 2005 at Portland, Oregon.

  
\_\_\_\_\_  
KIMBERLEY J. WOUTERS  
Legal Secretary

Ronald W. Atwood\*

Sara Turner  
*Legal Assistant*

Enoy Lawless  
*Legal Assistant*

\* Licensed in Oregon,  
Washington and Montana

**Ronald W. Atwood, P.C.**

Attorney at Law

200 Oregon Trail Building  
333 S.W. Fifth Ave.  
Portland, OR 97204-1748  
(503) 525-0963

FAX (503) 525-0966

E-mail: ratwood@ronaldwatwood.com

June 14, 2005

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

Re: *Robert Flynn v. Montana State Fund and Liberty  
Northwest Insurance Corporation*  
WCC No. 2000-0222

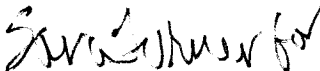
Dear Staff:

We have enclosed the RESPONSE TO SUMMONS OF LOUISIANA  
PACIFIC CORPORATION for your review and consideration.

Thank you for your time and attention to this matter.

Very truly yours,

**RONALD W. ATWOOD, P.C.**



RONALD W. ATWOOD

RWA/kjw

Enclosure

cc w/enc.: Mr. Rex L. Palmer  
Mr. Guy Boileau