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FEB 13 2006

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

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Attorneys for Respondents:
American Economy Insurance Company
American States Insurance Company
American States Preferred Insurance Company
First National Insurance Company of America
General Insurance Company of America
Safeco Insurance Company of America
Safeco Insurance Company of Illinois

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CASSANDRA SCHMILL,

Petitioner,

vs.

LIBERTY NORTHWEST INSURANCE
CORPORATION,

Respondent/Insurer,

and

MONTANA STATE FUND,

Intervenor.

WCC No. 2001-0300

RESPONSE TO SUMMONS

COME NOW the above listed Respondents ("Respondents"), and in response to this Court's *Amended Summons and Notice of Attorney Fee Lien*, dated December 7, 2005, state as follows:

**RESPONDENTS DISPUTE THE ENTITLEMENT OF SCHMILL BENEFICIARIES TO
ADDITIONAL BENEFITS**

Respondents dispute the entitlement of claimants insured by them to additional benefits under the *Schmill* decision. The grounds upon which Respondents dispute said entitlements are as follows:

1. Certain claimants' entitlement to *Schmill* benefits are precluded by the passage of time and the applicability of the doctrines of waiver, estoppel, laches, and/or various statutes of limitations.
2. An order requiring Respondents to identify all *Schmill* beneficiaries creates an unreasonable and undue burden upon Respondents.
3. An order requiring Respondents to pay *Schmill* benefits and/or to pay or withhold the attorney lien in favor of Petitioners' attorneys is prohibited by the due process clause of the Montana Constitution, Article II, Section 17. Respondents were not parties to the *Schmill* case and were not given notice and opportunity to be heard on the merits of that case.
4. An order requiring Respondents to pay *Schmill* benefits and/or to pay or withhold the attorney lien in favor of Petitioners' attorneys is prohibited by the due process clause of the of the 14th Amendment to the United States Constitution. Respondents were not parties to the *Schmill* case and were not given notice and opportunity to be heard on the merits of that case.
5. No common fund may be maintained against Respondents in this case because the purported non-participating beneficiaries of the *Schmill* decision are not ascertainable for several reasons, including but not limited to the fact that Montana insurers are not required by Montana statutes or regulations to maintain claim files and records for the length of time necessary to identify all *Schmill* beneficiaries described in *Amended Summons and Notice of Attorney Fee Lien*.
6. Petitioner's common fund attorney's lien does not and cannot extend to "all Montana insurers and self-insurers" who proportionally reduced occupational disease benefits for non-occupational factors between July 1, 1987 and June 22, 2001. Petitioner's purported attorney lien notice is overbroad because *Schmill* does not apply to claims that were settled, made final, or closed prior to April 10, 2003, the date of the *Schmill* decision.
7. Even if a common fund were created through the efforts of Petitioners, neither Petitioners nor their attorney are entitled to a fixed percentage of additional benefits that may be awarded to non-participating beneficiaries with whom neither Petitioners nor their attorney have any relation. Under the common fund doctrine, non-participating beneficiaries should contribute, in proportion to the benefits actually received by them, only to the litigation costs incurred

by Petitioners in the *Schmill* litigation, including reasonable attorney fees. The maximum amount of costs and attorneys' fees recoverable by the participating litigants and/or their attorney is limited to those costs and fees actually incurred in creating the benefit for the non-participating beneficiaries.

- 8. Respondents request and reserve the right to assert additional grounds and defenses, or to adopt the grounds presented by others responding to the summons as circumstances apply and warrant.

WHEREFORE, Respondents respectfully request this Court to enter an order:

- a. denying the entitlement to *Schmill*-type benefits by any potential claimants insured by Respondents; or alternatively,
- b. denying the enforcement of the attorney fee lien asserted by Petitioners' attorneys.

Dated this 13th day of February, 2006.

MATOVICH & KELLER, P.C.

By: 
 GEOFFREY R. KELLER
 Attorneys for Listed Respondents

CERTIFICATE OF SERVICE

I, GEOFFREY R. KELLER, one of the attorneys for the law firm of MATOVICH & KELLER, P.C., hereby certify that on the 13th day of February, 2006, I mailed a true and correct copy of the foregoing document, postage prepaid, to the following:

Ms. Laurie Wallace
Bothe & Lauridsen, P.C.
PO Box 2020
Columbia Falls, MT 59912


 per GEOFFREY R. KELLER

MATOVICH
& KELLER, P.C.
Attorneys at Law

*Carey E. Matovich
Geoffrey R. Keller
Brooke B. Murphy
Shane P. McGovern
Benjamin O. Rechtfertig
Jacquelyn M. Hughes*

February 13, 2006

Via Facsimile and U.S. Mail

Patricia Kessner
Clerk of Court
Workers' Compensation Court
P.O. Box 537
1625 11th Avenue
Helena, Montana 59624-0537

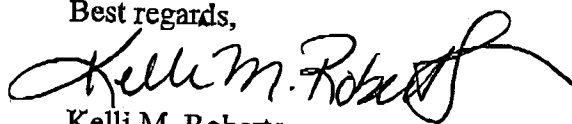
Re: Cassandra Schmill v. Liberty Northwest Insurance Corporation and Montana State
Fund
WWC No.: 2001-0300

Dear Ms. Kessner:

Enclosed you will find an original and one (1) copy of Respondent's Response to
Summons. Please file the original and return the date stamped copy to this office in the enclosed
postage prepaid envelope.

Should you have any questions regarding the foregoing, please feel free to contact me
directly.

Best regards,



Kelli M. Roberts
Legal Assistant

Enclosures

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To: Patricia J. Kessner - Clerk of Court Fax No.: (406) 444-7798	From: Kelli M. Roberts
Date: February 13, 2006	Total pages: 4
Regarding: Schmill v. Liberty Northwest Insurance Corporation and Montana State Fund WWC No:2001-0300	Document (X) will () will not follow by mail.

Please contact Mary Ann if problems occur with the transmission of this fax.

Please file the attached copy of Response to Summons. The original will be sent under separate cover.

Should you have any questions regarding the foregoing, please contact Geoff Keller.

Sincerely,

Kelli M. Roberts
Legal Assistant

CONFIDENTIALITY NOTICE:

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