

Steven W. Jennings
Crowley, Haughey, Hanson,
Toole & Dietrich P.L.L.P.
P. O. Box 2529
Billings, MT 59103-2529
(406) 252-3441
Attorneys for Insurance Company

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OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

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AMERICAN INTERNATIONAL PACIFIC INSURANCE COMPANY
AMERICAN HOME ASSURANCE COMPANY
BIRMINGHAM FIRE INSURANCE COMPANY
COMMERCE & INDUSTRY INSURANCE COMPANY
GRANITE STATE INSURANCE COMPANY
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA
NEW HAMPSHIRE INSURANCE COMPANY
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AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE
AMERICAN INTERNATIONAL INSURANCE CO.
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AMERICAN GENERAL CORP.
LEXINGTON INSURANCE COMPANY
ATLANTIC MUTUAL INSURANCE CO.
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CHUBB INDEMNITY INSURANCE COMPANY
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GREAT AMERICAN ALLIANCE INSURANCE CO.
GREAT AMERICAN SPIRIT INSURANCE COMPANY
REPUBLIC INDEMNITY
GREAT WEST CASUALTY
HARTFORD ACCIDENT & INDEMNITY CO.
HARTFORD CASUALTY INSURANCE CO.
HARTFORD FIRE INSURANCE CO.

HARTFORD INSURANCE CO. OF THE MIDWEST
 HARTFORD UNDERWRITERS INSURANCE CO.
 PROPERTY & CASUALTY INSURANCE CO. OF HARTFORD
 SENTINEL INSURANCE COMPANY LTD.
 TWIN CITY FIRE INSURANCE CO.
 TRUMBULL INSURANCE CO.
 MONTANA HEALTH NETWORK WORKERS COMPENSATION INSURANCE TRUST
 PETROLEUM CASUALTY COMPANY
 AXIS REINSURANCE COMPANY
 GROCERS INSURANCE COMPANY
 GUARANTY NATIONAL INSURANCE COMPANY
 ROYAL INDEMNITY COMPANY
 SECURITY INSURANCE COMPANY OF HARTFORDPANY
 SENTRY INSURANCE MUTUAL COMPANY
 SENTRY SELECT INSURANCE COMPANY
 DAIRYLAND INSURANCE COMPANY
 MIDDLESEX INSURANCE COMPANY
 PPG INDUSTRIES, INC.
 CONNIE LEE INSURANCE COMPANY
 STILLWATER MINING COMPANY
 UNIVERSAL UNDERWRITERS GROUP

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

MOTION TO ADD ADDITIONAL ISSUES TO BE BRIEFED IN THE BRIEFING SCHEDULE SET FORTH IN THIS COURT'S ORDER DELINEATING ISSUES TO BE BRIEFED.

COMES NOW the above listed Respondents (Moving Respondents) and move this Court for an order permitting additional issues to be briefed during the briefing schedule set forth in this Court's *Order Delineating Issues to be Briefed*. This motion is supported by the following brief. Counsel for Petitioner has been contacted regarding this motion and, to the extent that the Moving Respondents do not seek an opportunity to re-brief an issue already briefed in another common fund case, does not object.

ARGUMENT

On December 7, 2005, this Court issued a *Summons* in this case. *Amended Summons and Notice of Attorney Fee Lien*, 12/7/06. The summons listed several hundred insurers, notified them of the attorney's fee lien asserted by Petitioner's counsel, and advised that the insurers were authorized to withhold 25% of any *Schmill* type benefits pursuant to the attorneys fee lien. *Id.* The summons also advised that the insurers were made respondents to the Petitioner's common fund claim and that a response to that claim was due by January 23, 2006. *Id.* The Moving Respondents timely answered the summons and listed their defenses therein. The defenses were set forth as follows:

1. Certain claimants' entitlement to *Schmill* benefits are precluded by the passage of time and the applicability of the doctrine 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 Petitioner's 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 Petitioner's attorneys is prohibited by the due process clause 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. This Court lacks personal jurisdiction over Respondents to compel them to pay *Schmill*-type benefits or to withhold the asserted attorneys fees therefrom. Respondents were never served or notified in the cases of *Schmill v. Liberty Northwest Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290, and *Schmill v. Liberty Northwest Ins. Corp.*, 2005 MT 144, ¶ 17, 327 Mont. 293, ¶ 17, 114 P.3d 204, ¶ 17, and therefore, the decisions in those cases are not binding upon Respondents due to the absence of personal jurisdiction over Respondents.
6. 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 by

Montana statutes or regulations to maintain claim files and records for the length of time necessary to identify all Schmill beneficiaries described in the *Amended Summons and Notice of Attorneys Fee Lien*.

7. 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.
8. 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 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.
9. 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.

Response to Summons, 1/23/06 (Docket # 153).

On August 8, 2006, this Court sent a letter to all parties of record and counsel advising that the Court had scheduled a conference for September 20, 2006. *Letter from J. Bockman to All Parties of Record and Counsel, 8/8/06*. The purpose of the conference was to identify issues to be briefed during the briefing schedule contemplated by the Court and the parties. *Id.* At the conference Petitioner's counsel listed each and every defense raised by the Moving Respondents as issues to likely needing to be briefed.

On September 21, 2006, this Court circulated a Minute Entry summarizing the conference. *Minute Entry e-mailed to All Common Fund Distribution Lists on September 21, 2006 (Docket # 283)*. In that memo the Court advised that Petitioner's counsel had been asked to e-mail all parties with the issues she had identified at the conference. *Id.* The Court further advised that, following the e-mail provided by

Petitioner's counsel, it would circulate a draft order delineating the issues to be briefed so that parties could provide comments and input. *Id.*

On October 27, 2006, pursuant to the Court's request, Petitioner's counsel sent a letter to the Court again identifying the issues to be briefed. *Letter L. Wallace to the Honorable Judge J. Shea, 10/27/06* (Docket # 323). Those issues included the defenses raised by Moving Respondent's in their *Response to Summons*.

On November 8, 2006, this Court issued its *Order Delineating Issues to be Briefed*. Prior to issuing this order the Court did not distribute a draft order for comments or input. With the exception of the defenses of laches, estoppel and the statute of limitations (raised in paragraph 1 of the Moving Respondent's *Response to Summons*), the order did not list any of the Moving Respondents defenses as issues to be briefed.

Given that the Moving Respondents' defenses were identified as issues to be briefed in the September 20, 2006 conference as well as Petitioner's counsel's letter of October 27, 2006, the Moving Respondents reasonably believed that the briefing schedule set forth by the Court would include an opportunity to brief their defenses. Moreover, as it appears that the Court's intention is to adjudicate this entire case based upon the briefs requested in the *Order Delineating Issues to be Briefed*, it appears that Moving Respondents will not be afforded an opportunity to brief their defenses at a later date. Clearly, such a denial of the opportunity to brief their defense would amount to a denial of due process.

Before a party may be deprived of a property interest, due process requires, at a minimum, notice and an opportunity to be heard.

Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc., 13 F.3d 69, 72 (3rd Cir., 1993) (citations omitted).

[T]he Constitution requires some kind of a hearing before the State deprives a person of liberty or property.

Zinermon v. Burch, 494 U.S. 113, 127, 110 S.Ct. 975, 984 (1990). See also *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493 (1985) ("the root requirement of the Due Process Clause [is that] as being that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.") (emphasis in original).

Accordingly, the Moving Respondents seek an order amending the *Order Delineating Issues to be Briefed* permitting them to brief the defenses raised in their *Response to Summons*.

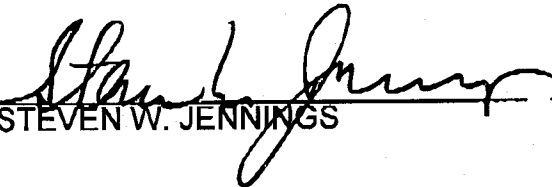
As mentioned above, Petitioner's counsel has objected to the Moving Respondents being permitted to brief any defenses already briefed in other common

fund cases. The Moving respondents advise that the only defense so briefed is that defenses raised in paragraph 8 of the Moving Respondent's *Response to Summons*. That defense, that Petitioner's counsel is only entitled to actual attorneys fees and not an across-the-board percentage, was briefed in *Flynn. Respondents' Brief on Issue of 25% Attorney Fee Lien, 2/27/06, Flynn v. State Fund, WCC No. 2000-0222 (Docket # 484)*. Counsel for Petitioner and counsel for the Moving Respondents have stipulated that, should this Court grant this motion, the Moving Respondents will simply adopt by reference the relevant *Flynn* brief (Docket # 484) rather than re-brief the entire defense.

WHEREFORE the Moving Respondents respectfully request this Court to issue an order amending its *Order Delineating Issues to be Briefed* to permit the Moving Respondents to brief all defenses raised in their responses to the summons with the exception of the defense raised in paragraph 8 of the *Response to Summons*, docketed as item number 223 on this Court's *Schmill* website.

Dated this 13th day of November 2006.

CROWLEY, HAUGHEY, HANSON,
TOOLE & DIETRICH P.L.L.P.
Attorneys for Insurance Company
Great West Casualty Company

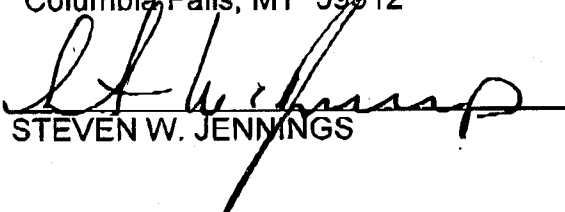

STEVEN W. JENNINGS

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the following counsel of record, by the means designated below, this 13th day of November 2006:

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

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


STEVEN W. JENNINGS

CROWLEY, HAUGHEY, HANSON, TOOLE & DIETRICH P.L.L.P.

ATTORNEYS AT LAW
500 TRANSWESTERN PLAZA II
490 NORTH 31ST STREET
P.O. BOX 2529
BILLINGS, MONTANA 59103-2529
TELEPHONE: (406) 252-3441

Date: November 13, 2006

FAX CORRESPONDENCE:

TO: Workers' Compensation Court
FAX #: (406) 444-7798
FROM: Steven W. Jennings
RE: Schmill v. Liberty NW/Montana State Fund

THIS TRANSMISSION CONSISTS OF 4 PAGES (INCLUDING THIS COVER PAGE).

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DOCUMENTS TRANSMITTED: Motion to Add Additional Issues to be Briefed

COMMENTS: Please file the attached document. If you have any questions, please contact me at 406.252-3441. Thank you!

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