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AUG 30 2007

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WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

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- AMERICAN HOME ASSURANCE COMPANY
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- COMMERCE & INDUSTRY INSURANCE COMPANY
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- INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
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- GREAT AMERICAN ALLIANCE INSURANCE CO.
- GREAT AMERICAN SPIRIT INSURANCE COMPANY
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- REPUBLIC INDEMNITY OF CALIFORNIA
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HARTFORD CASUALTY INSURANCE CO.
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HARTFORD UNDERWRITERS INSURANCE CO.
PROPERTY & CASUALTY INSURANCE CO. OF HARTFORD
SENTINEL INSURANCE COMPANY LTD.
TWIN CITY FIRE INSURANCE CO.
TRUMBULL INSURANCE CO.
MARKEL INSURANCE COMPANY
EVANSTON INSURANCE COMPANY
MONTANA HEALTH NETWORK WORKERS COMPENSATION INSURANCE TRUST
PETROLEUM CASUALTY COMPANY
AXIS REINSURANCE COMPANY
GROCERS INSURANCE COMPANY
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SECURITY INSURANCE COMPANY OF HARTFORD
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UNIVERSAL UNDERWRITERS GROUP
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XL INSURANCE COMPANY OF NEW YORK
XL REINSURANCE AMERICA
XL SPECIALTY INSURANCE COMPANY
GREENWICH INSURANCE COMPANY
AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY
AMERICAN ZURICH INSURANCE COMPANY
ASSURANCE COMPANY OF AMERICA
COLONIAL AMERICAN CASUALTY & SURETY
FIDELITY & DEPOSIT COMPANY OF MARYLAND
NORTHERN INSURANCE COMPANY OF NEW YORK
VALIANT INSURANCE COMPANY
ZURICH AMERICAN INSURANCE COMPANY
ZURICH AMERICAN 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

RESPONDING INSURERS' STATUS
REPORT TO SPECIAL MASTER

COME NOW the above listed Responding Insurers and, pursuant to this Court's *Notice of Special Master's Request for Status*, submit the following status report regarding unresolved legal issues and practical implementation issues that would benefit from resolution. This report is submitted concurrently with Responding Insurers' Motion to Stay implementation of the Court's Order of July 10, 2007.

UNRESOLVED "GATEWAY" LEGAL ISSUES

In responding to the summons issued in this case, Responding Insurers raised several defenses and legal issues that have not yet been addressed, and that should dispose of this common fund action in its entirety. Those issues are as follows:

1. Whether Responding Insurers' right to due process under both the United States and Montana Constitutions precludes the entry of any order requiring Responding Insurers to identify and pay additional benefits on the basis of judgments, decisions, or orders entered in this case prior to 2006. The common fund proceedings in this case attempt to impose common fund liability upon a global class of insurer respondents only *after* individual petitioner Cassandra Schmill obtained decisions from the Montana Supreme Court that (1) held unconstitutional the apportionment provision of the Occupational Disease Act, § 39-72-706, MCA (1987-2002), *Schmill I*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290, and (2) determined that *Schmill I* created a global common fund, *Schmill II*, 2005 MT 144, 327 Mont. 293, 114 P.2d 204. Responding Insurers were not parties to this case, did not have notice of the proceedings, and were not adequately represented prior to the filing of their responses in 2006 to the Amended Summons. As such, the judgment affirmed in *Schmill I*, and the common fund judgment affirmed in part and reversed in part in *Schmill II*, are void as to Responding Insurers.

2. Responding Insurers have no obligation to search their files stretching back two decades to identify potential *Schmill* beneficiaries. Such an obligation, premised upon judgments to which Responding Insurers were not parties, would impose an undue and unreasonable burden on the Responding Insurers. Claimants bear the burden of proving they are entitled to the benefits they seek.

3. No common fund action may be maintained against the Responding Insurers because the result of the *Schmill I* decision did not result in the creation of an identifiable monetary fund or benefit for readily ascertainable beneficiaries, at least as to Responding Insurers. Potential claimants are not readily identifiable upon a superficial file review, and benefits therefore may not be calculated with certainty with a mathematical formula applicable to all claim files.

4. Whether this Court's summons, by which Responding Insurers were brought into this case after it had been decided on the merits, was sufficient to empower this Court to exercise personal jurisdiction over the Responding Insurers.

PRACTICAL IMPLEMENTATION ISSUES

Assuming that a common fund were to exist as to Responding Insurers (and it should not), numerous implementation issues require resolution by the Court, including the following:

5. Notwithstanding any final order on the scope of retroactivity, what *Schmill* beneficiaries are readily identifiable so as to be included in any common fund?

6. Whether deceased claimants may be included within any common fund.

7. What are appropriate search parameters and what identification documentation should be required?

8. How should potential *Schmill* beneficiaries be notified?

9. Whether potential *Schmill* beneficiaries may opt out of any common fund.

10. What procedure should be implemented to locate claimants with changed addresses?

11. What mathematical formula allows *Schmill* benefits to be calculated with mathematical certainty across all claim files?

12. Whether overpayments on the files may be deducted from the increased benefits paid.

13. What calculations should be used where a Social Security offset is present on a file?

14. Whether Petitioner's counsel is entitled to a fixed percentage of additional benefits awarded to *Schmill* beneficiaries, or, if under the common fund doctrine, the attorney fee lien asserted by counsel is capped at an amount equal to those fees actually incurred by petitioner *Schmill* in prosecuting her case.

15. How should competing common fund liens be resolved?


ADDITIONAL UNRESOLVED LEGAL ISSUE

16. Whether the Court should stay any implementation or execution of its July 10, 2007, Order Adopting Order of Special Master pending the resolution of the appeal in *Flynn v. Montana State Fund*, No. WCC 2000-0222 on what "final" and "settled" claims are excluded from retroactive judicial decisions, and the resolution of "gateway" legal and practical implementation issues identified above.

WHEREFORE, Responding Insurers respectfully request this Court to issue an order establishing a briefing schedule on the above listed "gateway" legal issues and simultaneously staying enforcement or execution of the *Order Adopting Order of Special Master*.

Dated this 30th day of August 2007.

CROWLEY, HAUGHEY, HANSON,
TOOLE & DIETRICH P.L.L.P.
Attorneys for Respondent Insurers


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 30th day of August 2007:

U.S. Mail
 FedEx
 Hand-Delivery
 Facsimile
 Email

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Attorneys are licensed in Montana unless otherwise noted; * also licensed in North Dakota; # also licensed in Wyoming; + not licensed in Montana

August 30, 2007

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

RE: *Schmill v. Liberty NW Ins. Co. & MT State Fund*
WCC No. 2001-0300

Dear Clerk:

Enclosed for fax filing, please find Respondent Insurer's Status Report to Special Master. The original will be sent via U.S. Mail today.

Also enclosed for fax filing, please find Respondent Insurer's Motion to Stay Proceedings. The original will be sent via U.S. Mail today.

After filing the originals sent via U.S. Mail, please conform the copies and return them to our office in the envelope provided.

Thank you in advance for your assistance with this matter.

Sincerely yours,

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

Jennilee C. Baewer
JENNILEE C. BAEWER
Legal Administrative Asst to Steven W. Jennings

SWJ:jcb
Enclosures