

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

FILED

AUG 30 2007

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

AIU INSURANCE COMPANY
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
AIG NATIONAL INSURANCE CO.
AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE
AMERICAN INTERNATIONAL INSURANCE CO.
ILLINOIS NATIONAL INSURANCE CO.
LEXINGTON INSURANCE COMPANY
AMERICAN RE-INSURANCE COMPANY
AMERICAN ALTERNATIVE INSURANCE COMPANY
ATLANTIC MUTUAL INSURANCE CO.
CENTENNIAL INSURANCE CO.
BITUMINOUS FIRE & MARINE INSURANCE CO.
BITUMINOUS CASUALTY CORP.
OLD REPUBLIC INSURANCE COMPANY
OLD REPUBLIC SECURITY ASSURANCE CO.
CENTRE INSURANCE COMPANY
CHUBB INDEMNITY INSURANCE COMPANY
CHUBB NATIONAL INSURANCE COMPANY
EXECUTIVE RISK INDEMNITY INC.
FEDERAL INSURANCE COMPANY
GREAT NORTHERN INSURANCE COMPANY
PACIFIC INDEMNITY COMPANY
QUADRANT INDEMNITY COMPANY
VIGILANT INSURANCE COMPANY
CLARENDON NATIONAL INSURANCE COMPANY
COMBINED BENEFITS INSURANCE COMPANY
EVEREST NATIONAL INSURANCE COMPANY
FARMERS INSURANCE EXCHANGE
TRUCK INSURANCE EXCHANGE
MID-CENTURY INSURANCE CO.
FACTORY MUTUAL INSURANCE COMPANY
GREAT AMERICAN INSURANCE CO.
GREAT AMERICAN INSURANCE CO. OF NY
GREAT AMERICAN ASSURANCE CO.
GREAT AMERICAN ALLIANCE INSURANCE CO.
GREAT AMERICAN SPIRIT INSURANCE COMPANY
REPUBLIC INDEMNITY OF AMERICA
REPUBLIC INDEMNITY OF CALIFORNIA
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.
MARKEL INSURANCE COMPANY
EVANSTON INSURANCE COMPANY
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 HARTFORD
SCOR REINSURANCE COMPANY
GENERAL SECURITY INSURANCE COMPANY
GENERAL SECURITY NATIONAL INSURANCE COMPANY
SENTRY INSURANCE MUTUAL COMPANY
SENTRY SELECT INSURANCE COMPANY
DAIRYLAND INSURANCE COMPANY
MIDDLESEX INSURANCE COMPANY
PPG INDUSTRIES, INC.
CONNIE LEE INSURANCE COMPANY
STILLWATER MINING COMPANY
PENN STAR INSURANCE COMPANY
UNIVERSAL UNDERWRITERS GROUP
FAIRFIELD INSURANCE COMPANY
GENERAL REINSURANCE CORP.
GENESIS INSURANCE COMPANY
NORTH STAR REINSURANCE CORP.
UNIVERSAL UNDERWRITERS GROUP
XL INSURANCE AMERICA INC.
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

RESPONDENTS' MOTION TO STAY
PROCEEDINGS

COME NOW the above listed Responding Insurers, and respectfully move this Court to stay any implementation of its Order of July 10, 2007, pending resolution of the same issues on appeal in *Flynn v. State Fund*, and what should be dispositive gateway and common fund implementation issues in this case. To be clear, Responding Insurers do not request that the entire action be stayed, and submit that consideration of the issues identified in their contemporaneously filed Status Report on Outstanding Issues and Disputes should proceed. Counsel for petitioner has advised that she opposes this motion. In further support of this motion, Responding Insurers state as follows.

BACKGROUND

Responding Insurers submit this motion against the backdrop of two pending common fund cases in which the Court has addressed the same issue -- what claims are final and settled for purposes of judicial retroactivity. In *Flynn v. State Fund*, WCC No. 2000-0222,¹ No. DA 06-0734 on appeal, this Court held that a "final claim" was not subject to retroactive judicial decisions. It defined a "final claim" as "a claim in which a final judgment has been entered by the Worker's Compensation Court only if the claim is not currently pending on appeal." (*Flynn*, Order Determining Status of Final, Settled, Closed and Inactive Claims, 9/29/06, Docket No.537 (the "*Flynn Order*").) The Court also held that "settled claims" are not subject to retroactivity, and adopted the legislative definition of a "settled" claim as "a department-approved or court-ordered compromise of benefits between a claimant and an insurer or a claim that was paid in full," § 39-71-

¹ The Court invited any and all parties named in any common fund action to submit briefs regarding the "final, closed, or inactive issue," but Schmill apparently opted not to present her arguments to the Court at that time. See *Flynn*, Order Setting Briefing Schedule, 12/6/07 (Docket No. 389).

107(7)(a), MCA. (*Id.* ¶ 16; *but cf.* ¶ 26 (omitting disjunctive "paid in full" language).) The *Flynn Order* is currently on appeal, and has been fully briefed by the parties.

After the *Flynn Order* was entered and appealed, the Court set a briefing schedule in this case. The State Fund, joined by Responding Insurers, moved to stay briefing and consideration of retroactivity issues pending the Supreme Court's determination of those same issues in *Flynn*. (See State Fund's Motion for Stay and Mem. in Support, 11/16/06, Docket No. 330; see also Docket No. 336 (joinder by Responding Insurers in motion).) Nevertheless, after tweaking how the issue was framed, the court ordered that briefing proceed on the issue of which *Schmill*-type claims were subject to review and increase in benefits based upon a retroactive application of *Schmill I*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290. (Order Vacating and Resetting Briefing Schedule, 12/11/06, Docket No. 346.)

The Court's Order of July 10, 2007

Following the appointment of a special master, on July 10, 2007, the Court adopted the "Findings and Conclusions by Special Master on Issues Presented Pursuant to December 11, 2006, Order of the Workers' Compensation Court." (Order Adopting Order of Special Master, 7/10/07, Docket No. 380 (the "Order").) The *Order* addresses whether claims "paid in full" should be considered "settled" and therefore exempt from retroactive judicial decisions, and what claims are "final" and therefore exempt. Both of these issues are squarely addressed in the *Flynn Order* presently under review by the Supreme Court.

The *Order* provides that claims settled by Department-approved settlement or a Court-ordered compromise of benefits are exempt from retroactive application of *Schmill I*. (*Order*, ¶ 3b.) In contrast to the *Flynn Order*, which included claims "paid in full," (*Flynn Order*, ¶ 16), the Special Master found that "claims paid in full should not be deemed 'settled'" based on *Stavenjord II*'s² definition of open claims as "actionable," and because the *Flynn Order* without explanation omitted "paid in full" in the final iteration of the adopted statutory definition (*id.*, ¶ 26). (Findings and Conclusions by Special Master on Issues Presented Pursuant to December 11, 2006 Order of the Workers' Compensation Court ("*Special Master's Findings*"), ¶¶ 39-40.)³ The issue of whether a claim "paid in full" should be considered "settled" in light of *Stavenjord II* is squarely before the Montana Supreme Court in *Flynn*.

The *Order* also departs from the *Flynn Order* by providing that "final judgments" are not excluded from retroactive adjustment "if the circumstances of the particular judgment indicate that the underlying occupational disease claim is no longer *actionable*." (*Order* ¶ 3c (emphasis added).) To determine which claims are still actionable notwithstanding the entry of a final judgment, the Special Master encourages

² *Stavenjord v. Montana State Fund*, 2006 MT 257.

³ The Special Master also noted in dictum that because circumstances might "later exist to justify additional benefits," claims where payments had terminated years or decades ago were still actionable and not paid in full. (*Id.* ¶¶ 41-42.)

the parties to seek agreement on classifications of judgments for presentation to him for ruling, or alternatively, he proposes that "judgment" cases can be handled on a case-by-case basis." (*Special Master's Findings* ¶ 51.)⁴

The issue of what claims are "actionable," the lynchpin of the *Order's* reasoning on what judgments are sufficiently final to avoid retroactive adjustment, is also before the Supreme Court in *Flynn*. As pointed out by several of the *Flynn* appellants, in *Stavenjord II*, decided a week after this Court's *Flynn Order*, the Montana Supreme Court held that "open" claims are subject to retroactivity, and that "open" claims are those that are still "actionable." *Stavenjord II*, ¶ 15. But the court failed to define what "actionable" means. In its opening brief in *Flynn*, Liberty Northwest Insurance Company squarely put the definition of "actionable" at issue: "If the workers' compensation claim has been paid in full, is it still actionable? . . . [W]hat does 'still actionable'... mean?" (*Flynn*, Intervenor/Appellant's Opening Br., 2/14/07, Cause No. DA 06-0734, at 7-8.) Because the *Flynn Order* is presently before the Supreme Court, any action to implement the *Order* may be mooted by the appellate court's pronouncements on this issue.

ARGUMENT

THE COURT SHOULD EXERCISE ITS INHERENT AUTHORITY TO STAY FURTHER ACTION ON ITS ORDER OF JULY 10, 2007, UNTIL OTHER SIGNIFICANT COMMON FUND ISSUES ARE RESOLVED AND UNTIL THE MONTANA SUPREME COURT RESOLVES IN *FLYNN* WHICH CLAIMS ARE "SETTLED" AND "FINAL" AND THEREFORE EXEMPT FROM RETROACTIVE JUDICIAL DECISIONS.

It is well-settled that a trial court may, in the exercise of its discretion, stay all or part of an action pending before it. As our Supreme Court has recognized:

[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.

Landis v. North American Co., 299 U.S. 248, 254 (1936); *Grenz v. Medical Mgmt. Northwest, Inc.* (1991), 250 Mont. 58, 64, 817 P.2d 1151, 1155 ("The judicial resources of the state are finite and must be used efficiently. Additionally, individuals must be protected from having to spend their time, energy, and money defending themselves against claims without merit."); see also *Henry v. District Court of Seventeenth Judicial Dist.* (1982), 198 Mont. 8, 645 P.2d 1350. Responding Insurers' motion, joined by others, seeks to efficiently utilize the resources of both the Court and the parties and prevent the inequity and hardship that would follow if, after further action on the *Order*, the Montana Supreme Court decides, for example, that claims "paid in full" are not subject to retroactive common fund adjustments.

⁴ Neither the Court nor the Special Master addressed whether or how such non-final "judgments" could be included within any common fund given the need for a case-by-case review, but that is a separate implementation issue that should be decided, if necessary, at a later date.

A. The Court Should Refrain From Imposing the Hardship and Inequity that Will Result if the Supreme Court Does Not Adopt the Definitions of "Settled" and "Final" Claims as set Forth in the Order.

The court should stay any implementation of the *Order* to prevent the hardship and inequity that would result if the court were to require, based on the *Order's* definitions of final and settled claims, costly searches by insurers for potential common fund claimants under parameters subject to substantial modification. This is particularly true where several gateway common fund issues and implementation issues remain for the court's consideration. The court should not require the parties to needlessly squander valuable resources, particularly when a stay pending resolution of critical issues poses no threat of harm or prejudice to the petitioner.

The *Flynn Order* currently before the Montana Supreme Court squarely addresses what claims should be considered "final" and "settled" for the retroactivity analysis. Our courts have recognized that when a decision in a related action might significantly alter the course of proceedings, a stay is proper until the ruling is handed down in the related action. See e.g., *Schara v. Anaconda Co.* (1980), 187 Mont. 377, 383-84, 610 P.2d 132, 135-36 (finding district court erred in refusing to stay action to enforce restrictive covenant pending decision in related condemnation action that would have mooted action on covenant). Here, the Montana Supreme Court is expected to substantially clarify in *Flynn* what constitutes a "final" and "settled" claim for purposes of retroactive judicial decisions – the very subject of the *Order*.

Moreover, certain gateway and other implementation issues should also significantly influence whether and how searches for common fund claimants should be conducted. For example, Responding Insurers raise significant constitutional issues with respect to these proceedings in which they were summoned only *after* the court purported to find a global common fund. Other serious implementation issues further cast into doubt the scope of the common fund. Implementation activities based on the *Order* are consequently premature and would unnecessarily impose significant hardship and inequity on the parties.

B. Petitioner Schmill Has Already Received Her Benefits and Will Suffer No Prejudice if the Court Stays Further Action on the Order.

Petitioner Cassandra Schmill will surely not suffer any harm from an interim stay of the court's *Order*. She has already received the previously apportioned occupational disease benefits that the court found violated equal protection because workers' compensation claimants were not subject to the same apportionment. Moreover, it is difficult to fathom any prejudice to her "common fund counsel," if other gateway common fund issues and/or implementation issues are decided in the interim.

To the extent that her counsel objects, however, the court should consider them in their proper context. To the extent that Schmill argues that the result in *Flynn* does not apply because that case involves workers' compensation law and not occupational

disease law,⁵ such an argument is inconsistent with the very nature of her claim – equal treatment of workers' compensation and occupation disease claimants. Moreover, the court should recall that it invited any and all parties named in any common fund action to submit briefs regarding the "final, closed, or inactive issue." (See *Flynn*, Order Setting Briefing Schedule, 12/6/07 (Docket No. 389).) Schmill apparently opted not to present her arguments to the Court at that time, although she had done so previously. (See *Flynn*, Amicus Br. of Laurie Wallace, 7/11/03 (Docket No. 61).) Neither Schmill nor her counsel will endure any prejudice as a result of a stay.

C. A Stay is Particularly Appropriate Because this Case Involves the Entire Workers' Compensation System in Montana.

Petitioner assured the extraordinary public moment of this case when, through counsel, she asserted a common fund lien against all claimants and asked this Court to issue a summons to each and every insurer licensed to do business in Montana since 1987. (*Hearing No. 3623, Volume XVIII, 7/14/05* (Docket No. 70) ("Ms. Wallace will draft and circulate a summons for approval. Service of the summons will be done by claimants' counsel with the Court's assistance.").)

Pursuant to petitioner's request, this Court on December 7, 2005, summoned approximately 650 insurers to respond to the petitioner's common fund claim. This case thus affects each and every insurer licensed to do business in Montana and presents the potential that all such insurers may be eventually required to conduct expansive file reviews to identify claimants and to pay retroactive benefits. Clearly, any case which summons each and every participant in an entire vital industry is a case of extraordinary public moment.

CONCLUSION

For the reasons discussed, this court should stay the enforcement or execution of the *Order* pending the outcome of the Supreme Court's decision in *Flynn* and other gateway and implementation issues identified in Responding Insurers' contemporaneous Status Report on Outstanding Issues and Disputes. Absent such a stay, insurers face the potential of great hardship and inequity if they are required to search and review files that have been closed or settled as paid in full for decades before the Montana Supreme Court provides contrary guidance on what claims are subject to retroactive adjustment. Such a stay will impose no such harm or inequity upon petitioner Schmill, and other issues can be resolved during the course of the stay. Finally, a stay is particularly important in this case because of the extraordinary public interest and significance of this case to the workers' compensation system.

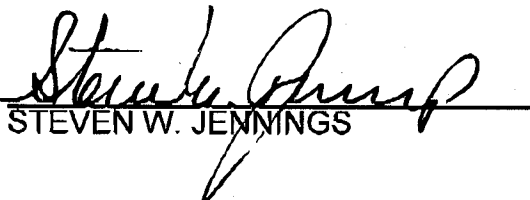
WHEREFORE, Responding Insurers respectfully request that this Court enter an order staying the enforcement or execution of the *Schmill Order* until such time as the

⁵ Schmill advanced such an argument during the status conference on November 21, 2006. (See Transcript of Telephonic Conference Call of 11/21/07 at 4, 5, 10-11 (Docket No. 334).)

appeal in *Flynn* is decided and the Court has resolved issues determinative of whether a common fund may even proceed against Responding Insurers and others.

Dated this 30th day of August 2007.

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

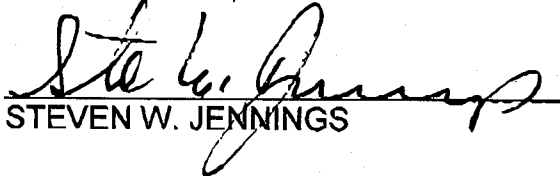

STEVEN W. JENNINGS

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

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


STEVEN W. JENNINGS