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HARTFORD FIRE INSURANCE CO.
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HARTFORD UNDERWRITERS INSURANCE CO.
PROPERTY & CASUALTY INSURANCE CO. OF HARTFORD
SENTINEL INSURANCE COMPANY LTD.
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MARKEL INSURANCE COMPANY
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MONTANA HEALTH NETWORK WORKERS COMPENSATION INSURANCE TRUST
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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 RESPONDING INSURERS' BRIEF AND MOTION TO DISMISS ON "GATEWAY LEGAL ISSUES"

Responding Insurers respectfully submit this brief on "gateway legal issues" that entitle Responding Insurers to dismissal from this common fund action as a matter of law.

SUMMARY OF ARGUMENT

In this action, Petitioner Cassandra Schmill seeks to summon the entire workers' compensation industry to dig through claims files dating back twenty years to unearth potential beneficiaries of the judgment she obtained declaring the Occupational Disease Act unconstitutional to the extent that it allowed benefits to be apportioned and reduced by non-occupational factors. No court has ever certified Schmill as an adequate representative of such potential beneficiaries. Moreover, Schmill does not allege that any of the Responding Insurers withheld benefits from her on the basis of the unconstitutional statute. Nevertheless, Schmill claims that the judgment she obtained against Liberty Northwest Insurance Corporation ("Liberty") in 2003 may be enforced against Responding Insurers on the basis of a "global common fund" theory. Schmill contends that her judgment against Liberty now obligates every insurer that has ever written workers' compensation insurance in this state to conduct expansive and burdensome file reviews stretching back twenty years in order to identify and pay beneficiaries of her ruling (with a portion going to her counsel).

Schmill's "global common fund" theory violates Responding Insurers' constitutional rights to Due Process under the Fourteenth Amendment of the United States Constitution and Article 2, Section 17 of the Montana Constitution. A bedrock principle of our jurisprudence, due process requires that a defendant be provided notice and opportunity to be heard or adequate representation before a court may deprive it of

property. Due process simply does not allow an individual litigant to obtain a judgment against one defendant and then, years later, seek to enforce that judgment on behalf of a class of beneficiaries against a class of industry defendants who did not receive notice or adequate representation in the underlying case. Because Responding Insurers were only afforded notice of this litigation after judgment, and most certainly were not adequately represented in prior proceedings, the prior decisions of this Court and the Montana Supreme Court, including the finding of a "global common fund," cannot be enforced against Responding Insurers.

Once the common fund slate is wiped clean of its constitutional infirmities, it is readily apparent that no common fund action may be maintained against Responding Insurers. The Montana Supreme Court's decision in *Stavenjord v. Montana State Fund* (2006), 2006 MT 257, 334 Mont. 117, 146 P.3d 724, recognized the difficulties in applying the common fund doctrine to Occupational Disease Act claimants. As in *Stavenjord*, the identifiable monetary fund or benefit is absent because non-participating *Schmill* beneficiaries are not readily identifiable on superficial review of case files, but only through a labor-intensive and largely manual review of files stretching back over two decades.

As a third and independent reason warranting dismissal, the Court lacks subject matter jurisdiction over this action. Schmill received her benefits from Liberty, and lacks standing to assert any claim against Responding Insurers. In addition, Schmill has failed to comply with this Court's requirement of mandatory mediation, a recognized condition precedent of this Court's jurisdiction. Absent standing and compliance with mandatory mediation requirements, there is simply no justiciable case or controversy for the Court to resolve.

Finally, this Court should refuse to reverse the burden of proof so as to place the onus of identifying, notifying, and then paying potential *Schmill* beneficiaries on Responding Insurers. Even if the Court could overlook the grave constitutional infirmities of Schmill's claim, no legal authority supports Schmill's presumption that workers' compensation insurers must solicit claims whenever the court enters a judgment that may alter other claimants' rights to benefits.

STATEMENT OF UNDISPUTED FACTS

1. In the spring of 1999, Petitioner Cassandra Schmill was diagnosed with chronic left Achilles peritendonitis and tendonosis, an occupational disease. *Schmill v. Liberty Northwest Ins. Corp.*, 2003 MT 80, ¶ 3, 315 Mont. 51, ¶ 3, 67 P.3d 290, ¶ 3 ("*Schmill I*").

2. Liberty accepted the claim pursuant to Montana's Occupational Disease Act ("ODA"). *Id.*

3. After Schmill reached maximum medical improvement, she was given a 3% physical impairment rating of the whole body. *Schmill I*, ¶ 4.

4. In spite of her limitations, Schmill did not suffer an actual wage loss as the result of her occupational disease. Because the ODA did not provide partial disability or impairment benefits, Schmill requested an impairment award under the Workers' Compensation Act for the disability caused by her occupational disease. *Id.*

5. Liberty originally denied Schmill's request because Schmill was not eligible for an impairment award under the ODA. *Schmill I*, ¶ 5.

6. On March 12, 2001, Schmill filed a petition with the Workers' Compensation Court ("WCC") in which she alleged that she was entitled to the same impairment award that was available to injured workers under the Workers' Compensation Act. *Id.*

7. After Schmill filed her petition, Liberty withdrew its denial and agreed to pay Schmill an impairment award. *Id.*

8. Liberty deducted twenty percent from Schmill's impairment award for non-occupational factors that contributed to her disability pursuant to § 39-72-706, MCA. *Id.*

9. Schmill disputed the deduction for non-occupational factors on the grounds that § 39-72-706, MCA, violated equal protection by treating similarly situated ODA claimants less favorably than claimants with industrial injuries compensated under the Workers' Compensation Act. *Schmill I*, ¶ 7.

10. On June 11, 2001, Liberty and Schmill filed a stipulation with the WCC agreeing that the sole issue remaining for adjudication was the constitutionality of § 39-72-706, MCA. *Stipulation for Admission on Agreed Facts*, 6/11/01 ("*Stipulation*"); *Decision and Judgment*, 6/22/01, ¶ 2.

11. On June 22, 2001, the WCC concluded that § 39-72-706, MCA, violated the Montana and United States Constitutions' guarantees of equal protection because it provided disparate treatment to workers with what are now defined as occupational diseases. The WCC held that Schmill was entitled to a full impairment award without deduction for non-occupational factors. *Decision and Judgment*, 6/22/01, ¶ 7; *Schmill I*, ¶ 8.

12. In its *Decision and Judgment* of June 22, 2001, the WCC ruled that Schmill was not entitled to attorney fees. *Decision and Judgment*, 6/22/01, ¶ 9.

13. Liberty appealed the WCC's decision.[1] *Schmill I*, ¶ 1.

14. Schmill did not appeal the WCC's denial of her attorney fees. *Id.*

15. On April 10, 2003, the Montana Supreme Court affirmed the WCC. *Schmill I*, ¶ 23.

[1] The Montana State Fund ("State Fund") appeared as an amicus curiae. *See Schmill I.* At some point that is not reflected on the WCC's docket, the State Fund intervened in the action.

16. Following *Schmill I*, counsel for Schmill filed in her case against Liberty a *Notice of Attorney Fee Lien*, stating that:

> The undersigned's attorney fee lien is being asserted against all occupational disease cases in which an apportionment was taken prior to and including June 22,2001, for dates of occupational disease occurring on or after July 1, 1987. The lien is asserted against all insurers providing workers' compensation benefits to Montana workers for occupational diseases occurring from July 1, 1987 through June 22,2001. The amount of the lien is 25% of all benefits not paid pursuant to an apportionment calculation and subsequent reduction.

Notice of Attorney Fee Lien, 7/11/03.

17. Following a hearing on the issues raised by the *Notice of Attorney Fee Lien*, the WCC ruled that: 1) *Schmill I* could be applied retroactively; 2) *Schmill I* created a common fund from which Schmill was entitled to attorney fees under the common fund doctrine; and 3) the common fund attorney fee lien applied only to retroactive *Schmill* benefits paid to non-participating beneficiaries by Respondent Liberty. *Decision and Judgment Regarding Common Fund Issues*, 6/4/04.

18. Liberty appealed the WCC's decision. In *Schmill v. Liberty Northwest Ins. Corp.*, 2005 MT 144, 327 Mont. 293, 114 P.3d 204 ("*Schmill II*"), the Montana Supreme Court upheld the WCC's rulings with respect to retroactivity and the existence of a common fund. The Court, however, reversed the WCC's determination that Schmill's common fund attorney fee lien applied only to benefits due claimants insured by Liberty. *Schmill II*, ¶ 27. Specifically, *Schmill II* held that:

> the common fund created in *Schmill I* applied a global lien against all claimants who may benefit from the decision, not just those whose benefits are paid by Liberty.

Schmill II, ¶ 27.

19. On December 7, 2005, more than two and one-half years after the Montana Supreme Court had declared § 39-72-706, MCA, unconstitutional, and six months after that Court issued its ruling on retroactivity, common fund, and the scope of the attorney fee lien, the WCC issued an *Amended Summons* listing each and every insurer licensed to write workers' compensation insurance in Montana. *Amended Summons and Notice of Attorney Fee Lien*, 12/7/05 ("*Amended Summons*").

20. The *Amended Summons* advised insurers of the decisions rendered in *Schmill I* and *Schmill II*, stating that:

> each of you is made a respondent to the petitioner's common fund claim and summoned to answer the petitioner's request for enforcement of her attorney's lien. Your written answer must be received at the [WCC] ...on or before January 23, 2006.

Amended Summons and Notice of Attorney Fee Lien, 12/7/05, ¶ 4.

21. The *Amended Summons* further advised that:

> Since the Supreme Court in *Schmill v. Liberty Northwest Ins. Corp.*, 2005 MT 144, ¶25, 327 Mont. 293, 114 P.3d 204, found a common fund to have been created in this case, the future proceedings will be to enforce common fund entitlements and the petitioner's attorney fee lien.

Id., ¶ 6.

22. At no point prior to the issuance of the *Amended Summons* in December 2005 were Responding Insurers summoned to appear as party respondents to this action.[2]

23. At no point since being diagnosed with an occupational disease has Schmill mediated, or requested to mediate, her claim to enforce common fund entitlements or the associated attorney fee lien.

ARGUMENT

I. BECAUSE DUE PROCESS HAS NOT BEEN AFFORDED RESPONDING INSURERS, THE JUDGMENTS ENTERED IN THIS CASE MAY NOT BE ENFORCED AGAINST THEM.

In one of our Supreme Court's seminal decisions, the Court recognized that "[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). Montana decisions echo this bedrock principle that those who are not parties to an action may not be bound by it. *See Plumb v. Fourth Jud. Dist. Ct.* (1996), 279 Mont. 363, 379, 927 P.2d 1011, 1021 (contribution statute violated due process to the extent that it allowed apportionment of liability "to parties who were not named in the pleadings and did not have the opportunity to appear and defend themselves"); *State ex rel. McKnight v. Dist. Ct.* (1941), 111 Mont. 520, 111 P.2d 292, 295 ("[N]o one acquainted with the elemental Anglo-Saxon requirement of due process and a fair

[2] The docket does not reflect proof of service upon Responding Insurers, or the method of service for that matter. Should the Court find that this action may proceed against Responding Insurers, each Responding Insurer reserves its right to argue that service was improper and/or ineffective.

opportunity to be heard could have expected to bind those not made parties."). Yet that is exactly what Schmill seeks to accomplish by way of this common fund proceeding – to bind hundreds of insurers to judgments entered in a case in which they were not parties.

Responding Insurers were not parties and were not afforded notice or an opportunity to be heard when the Montana Supreme Court (1) declared § 39-72-706, MCA, unconstitutional, *Schmill I*, and (2) found that its earlier decision created a global common fund, *Schmill II*. Moreover, Liberty and intervenor State Fund certainly were not motivated to, and did not, adequately represent Responding Insurers' interests – they conceded common fund liability if this Court found *Schmill I* applied retroactively. Therefore, any attempt to enforce *Schmill I* or *Schmill II* against Responding Insurers would violate their due process rights under both the United States and Montana Constitutions. *See Hughes v. Salo* (1983), 203 Mont. 52, 59, 659 P.2d 270, 273 ("Montana has long recognized that the judgment of a court acting without jurisdiction is invalid from its inception.").

A. The Court Lacked Personal Jurisdiction Over Responding Insurers at the Time that *Schmill I* and *Schmill II* Were Decided.

Personal jurisdiction is "'an essential element of the jurisdiction of a district ... court,' without which the court is 'powerless to proceed to an adjudication.'" *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (quoting *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 382 (1937)); *see also In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d 539, 545 (9th Cir. 1996) ("An injunction against the Republic in the absence of personal jurisdiction over it would be futile, as the court would be powerless to enforce its injunction."). The requirement that a court obtain personal jurisdiction, before it can exercise power over a party, is rooted in due process:

> The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause . . . It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.

Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104 (1987) (citations omitted). *See also Yahoo! Inc. v. La Ligue Contre Le Racisme & L'Antisemitisme*, 433 F.3d 1199, 1229 (9th Cir. 2006) ("The personal jurisdiction requirement is not merely a rule of civil procedure; it is a constitutional constraint on the powers of a State, as exercised by its courts, in favor of the due process rights of the individual.") (Ferguson, J., concurring) (citations omitted). Absent personal jurisdiction, a court's exercise of power over a person violates due process.

A court acquires personal jurisdiction by service of a summons. "Service of the summons is the means by which the district court acquires personal jurisdiction over the defendant." *Richland Nat. Bank & Trust v. Swenson* (1991), 249 Mont. 410, 423, 816 P.2d 1045, 1053. And the purpose of a summons is to give the defendant notice and opportunity to be heard – an essential component of due process to which defendants are entitled. *Ioerger v. Reiner*, 2005 MT 155, ¶ 18, 327 Mont. 424, ¶ 18, 114 P.3d 1028, ¶ 18

(holding that due process would not allow plaintiff to serve and join sole member of LLC to action after judgment had been entered) (citations omitted).

In this case, it is undisputed that neither the WCC nor the Montana Supreme Court had personal jurisdiction over Responding Insurers at any time before *Schmill I* or *Schmill II* were decided. It was not until December 2005, six months after *Schmill II* was decided, that the WCC issued the *Amended Summons* to Responding Insurers and others. Having failed to serve or join Responding Insurers before *Schmill I* and *Schmill II* were decided, Schmill cannot now join Responding Insurers for the purpose of executing on those judgments. *See id.*

B. Because Responding Insurers Were Not Provided Notice and an Opportunity to be Heard Prior to the Decisions Establishing Common Fund Liability, Due Process Forbids this Court from Enforcing those Decisions against Responding Insurers.

Responding Insurers in this case seek to preserve the constitutional integrity of this Court's common fund process. The "global common fund" approach threatens the *minimum* due process requirements identified by our Supreme Court as notice and an opportunity for hearing before liability is established:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). "Failure to give notice violates 'the most rudimentary demands of due process of law.'" *Peralta v. Heights Med. Center, Inc.*, 485 U.S. 80, 84 (1988) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965)).

The notice and opportunity to be heard afforded must be "meaningful and timely." *Crismore v. Montana Bd. of Outfitters*, 2005 MT 109, ¶ 15, 327 Mont. 71, ¶ 15, 111 P.3d 681, ¶ 15 (citations omitted); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) ("It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'") (citation omitted). After all, "[t]his right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane*, 339 U.S. at 314; *see also Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 833-34 (3rd Cir. 1973) (vacating all orders issued relating to class settlement where notice to class was fatally defective, stating that "notice procedures utilized in class actions are of constitutional significance and must themselves be viewed in due process terms"). Notice is not timely and meaningful, and thus constitutionally inadequate, if it does not afford a meaningful opportunity to prepare one's case. *In re Gault*, 387 U.S. 1, 33 (1967) (reversing Supreme Court of Arizona on finding that notice to parents the night before a

juvenile delinquency hearing was constitutionally inadequate; due process requires that notice "be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded"); *see also Ioerger*, ¶ 18.

In this case, Responding Insurers were given no opportunity to be heard. The *Amended Summons* was mailed to Responding Insurers[3] more than two and one-half years after *Schmill I* was decided, and six months after the Montana Supreme Court found a global common fund in *Schmill II*. The *Amended Summons* states that these proceedings are to "enforce common fund entitlements and the petitioner's attorney fee lien." *Amended Summons*, ¶ 6. The common fund entitlements are those retroactive benefits recognized in *Schmill I* and *Schmill II*. Schmill thus seeks to enforce the judgments[4] entered in *Schmill I* and *Schmill II* against Responding Insurers in personam. Because it issued post-judgment, the *Amended Summons* deprived Responding Insurers of a meaningful notice and opportunity to be heard in this case, and was thus constitutionally inadequate. *See Ioerger*, ¶ 18; *Mullane*, 339 U.S. at 315 ("But when notice is a person's due, process which is a mere gesture is not due process."). In essence, were the Court to enforce *Schmill I* and *Schmill II* against Responding Insurers, the *Amended Summons* would amount to a work order and invoice[5] premised on proceedings in which Responding Insurers were not parties. Due process forbids this result.

Recognizing that she should have provided notice and an opportunity for Responding Insurers to be heard *before* attempting to enforce earlier decisions against them, Schmill may argue that any due process problems are moot because either (a) the result would have been the same and Responding Insurers are receiving their due process now, or (b) Liberty and Montana State Fund adequately represented Responding Insurers' interests. Both arguments would be specious.

C. Only Wiping the Common Fund Slate Clean Would Restore Responding Insurers to the Position They Would Have Occupied Had Due Process Been Afforded Them in the First Place.

Schmill may attempt to argue that Responding Insurers are now receiving their opportunity to heard, and that the judgments in *Schmill I* and *Schmill II* may be enforced against them as the results would be the same because the Montana Supreme Court has

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[3] Although the summons was entitled "*Amended Summons*," no earlier summons was ever issued. In a Minute Entry of December 7, 2006, the Court explained that the *Amended Summons* was amended by the Court from an earlier summons filed on September 26, 2007, but never served. *Hearing No. 3648, Volume XVIII, 12/7/08*. The original summons is not available for viewing on this Court's website and has never been seen by Responding Insurers. Similarly, the proof of service is generally not available on the Court's online docket.

[4] Schmill seeks more than a money judgment. She seeks to require Responding Insurers to conduct an expansive, burdensome file review to identify, notify, and then determine the appropriate payment amount for beneficiaries of *Schmill I*. Schmill thus seeks to impose substantial administrative and financial burdens on Responding Insurers.

[5] Of course, the invoice would be for an uncertain sum because it would depend on the results of the work order (to dig through all claim files dating from 1987 to 2001).