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HELENA, MONTANA

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GREAT AMERICAN SPIRIT INSURANCE COMPANY
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DOCKET ITEM NO. 419

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
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STILLWATER MINING COMPANY
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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 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).

already found a global common fund to exist. *See Schmill II.* Such an argument would trivialize the protections afforded by both the United States and Montana Constitutions.

Indeed, the Supreme Court has addressed, and rejected, this very argument. In *Peralta*, the plaintiff argued that although its attempt at service was ineffective, the default judgment entered against the defendant should stand because "no meritorious defense had been shown" as required to vacate such a judgment under Texas law. *Peralta*, 485 U.S. at 86. Our Supreme Court resoundingly rejected this contention, stating in terms that apply squarely to this case:

> Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, "it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424, 356 S.Ct. 625, 629, 59 L.Ed. 1027 (1915). As we observed in *Armstrong v. Manzo*, 380 U.S., at 552, 85 S.Ct., at 1191, only "wip[ing] the slate clean . . . would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." The Due Process Clause demands no less in this case.

Id. at 86-87. "Wiping the slate clean" is particularly warranted in this case where, as the Montana Supreme Court recognized, neither Liberty nor State Fund challenged the finding of a common fund. *Schmill II*, ¶ 25 ("[T]here is no challenge to the [WCC's] further conclusion that *Schmill I* created a common fund.).

Due process does not permit the enforcement of the judgments in *Schmill I* and *Schmill II* against Responding Insurers. *See In re Marriage of Foster*, 2004 MT 326, ¶ 18, 324 Mont. 114, ¶ 18, 102 P.3d 16, ¶18 (reversing judgment imposing constructive trust on property owned by non-party children); *Hughes*, 203 Mont. at 58, 659 P.2d at 273 ("*A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere.*" (quoting *Pennoyer v. v. Neff*, 95 U.S. 714, 732-33 (1878) (emphasis added by Montana Supreme Court)). *See also Valley Nat'l Bank of Az. v. A.E. Rouse & Co.*, 121 F.3d 1332, 1338 (9th Cir. 1997) (holding "that the judgment against the Varga Group can not be enforced against the Rouse Partnerships [general partners of Varga Group], or against the Rouses individually as partners of those partnerships, because the Rouse Partnerships were neither served nor named in the underlying lawsuit.").

D. Responding Insurers Were Not Adequately Represented by Liberty or Intervenor State Fund in Earlier Proceedings.

Nor can Schmill argue that either original respondent Liberty or intervenor State Fund adequately represented Responding Insurers' interests. In *Schmill II*, Liberty and

State Fund did not even contest Schmill's assertion that *Schmill I* created a common fund. As noted by the Montana Supreme Court:

> After an in-depth analysis of the issue, the WCC concluded that *Schmill I* created a common fund. *The State Fund does not challenge this conclusion.* Liberty does challenge the conclusion, but only on the assumption that *Schmill I* does not apply retroactively. *Liberty goes so far as to say that if Schmill I does apply retroactively then the decision did create a common fund.* Since we have determined that the WCC was correct in concluding that *Schmill I* does apply retroactively, *there is no challenge* to the court's further conclusion that *Schmill I* created a common fund. Therefore, we do not disturb the court's conclusion on this issue.

Schmill II, ¶ 25 (emphasis added). State Fund not only failed to oppose a "global common fund," it *advocated in its favor* before the WCC. *See State Fund's Answer Br. re: Retroactivity, Common Fund Entitlement, Common Fund Fees, and Global Lien of Schmill's Counsel*, 4/14/2004, at 1 ("Lastly, the State Fund asserts that if the attorney fee lien of Schmill's counsel is effective, it should apply with equal force to all insurers and self-insurers in Montana."). Liberty and State Fund clearly did not adequately represent Responding Insurers' interests.

Were this Court to enforce *Schmill I* and *Schmill II* based on the faulty premise that Responding Insurers' interests were represented by Liberty and State Fund, the prejudice would be extreme. On January 23, 2006, in their response to the *Amended Summons*, Responding Insurers set forth the defense, among others, that "[n]o common fund may be maintained against [Responding Insurers] in this case because the purported non-participating beneficiaries of the *Schmill* decision are not ascertainable...." *Response to Summons*, 1/23/06. In *Stavenjord v. State Fund*, 2006 MT 257, 334 Mont. 117, 146 P.3d 724, decided nine months after Responding Insurers filed their *Response to Summons*, the Montana Supreme Court specifically held that no common fund existed in that case because the ODA benefits were not readily identifiable on a "superficial review of case files." *Stavenjord*, ¶ 27. Clearly, had Responding Insurers been given timely notice, opportunity to be heard, and adequate representation, their decision to contest the existence of a common fund may have drastically altered the outcome of at least *Schmill II*, as suggested by *Stanvejord*'s refusal to find a common fund for the precise reasons set forth in Responding Insurers' response to the *Amended Summons* in this case. Thus, the prejudice to Responding Insurers is quite real and quite extreme.

The *Amended Summons* was constitutionally insufficient to give Responding Insurers timely notice and a meaningful opportunity to be heard on issues already conclusively decided. In light of the failure to effect proper service of process to exercise personal jurisdiction over Responding Insurers, this Court cannot enforce any decisions entered prior to December 2005 against Responding Insurers. As to Responding Insurers,

those prior judgments are "void as a matter of law," and Responding Insurers must be dismissed from this action.

II. AFTER WIPING THE COMMON FUND SLATE CLEAN, IT IS READILY APPARENT THAT NO COMMON FUND RESULTED FROM *SCHMILL I* AS TO RESPONDING INSURERS.

As previously noted, *Schmill II* determined that a common fund existed for all those beneficiaries whose Occupational Disease benefits were reduced under section 39-72-706, MCA. This ruling was made in the absence of any serious objection to the existence of a common fund by the two parties then defending the action (Liberty and State Fund). Over a year after the court found a common fund essentially by default, the Montana Supreme Court in *Stavenjord* denied common fund status in that case, which similarly addressed whether Occupational Disease and Workers' Compensation benefits should be comparable under the equal protection clause.

Stavenjord set forth the three (3) elements necessary to establish a common fund for workers' compensation claims:

> First, a party ... must create, reserve, preserve, or increase an identifiable monetary fund of benefit in which all active and non-participating beneficiaries have an interest. Second, the active beneficiary must incur legal fees in establishing the common fund. Third, the common fund must benefit ascertainable, non-participating beneficiaries.

Stavenjord, ¶ 24 (citing *Ruhd v. Liberty Northwest Ins. Corp.*, 2004 MT 236, ¶ 16, 322 Mont. 478, ¶ 16, 97 P.3d 561, ¶ 16). The Court reiterated the requirement that non-participating beneficiaries and the benefits due them must be "readily identifiable on a superficial review of case files." *Stavenjord,* ¶ 27.

Those criteria cannot be met in this case. There are no known identifiable electronic tags associated with Responding Insurers' Occupational Disease claims where an apportionment has been made pursuant to section 39-72-706, MCA, by which potential *Schmill* claimants with injury dates back to July 1, 1987, may be readily ascertainable by a simple computer search.[6] As such, Responding Insurers would be required to manually identify and search each occupational disease file to determine if an apportionment was sought or assessed pursuant to section 39-72-706, MCA. Further, even if non-participating *Schmill* claimants could be found, each file would need to be

[6] Indeed, this Court is well aware of the difficulties in ferreting out potential *Stavenjord* and *Schmill* ODA claimants. In *Stavenjord*, the State Fund recently detailed its extensive efforts to locate potential *Stavenjord* and *Schmill* beneficiaries, including iterative searches followed by manual review of microfiche files by staff dedicated to common fund work. *Transcript of Proceedings (Apr. 17, 2007), Stavenjord v. State Fund*, WCC No. 2000-0207 (Docket Entry # 111). Those extraordinary efforts resulted in a list of beneficiaries that "is probably over-inclusive, containing people who likely in the long run will not qualify." *Id.* at 57-58.

comprehensively examined and perhaps augmented to determine what benefits might be due to each claimant. It is not a simple process such as that employed in *Rausch*, where payment of undisputed impairment awards were being delayed until each claimant reached age 65. Therefore, Responding Insurers assert that neither the claimants nor their benefits are "readily identifiable on superficial review of the case files," and common fund certification cannot be sustained as to Responding Insurers.

III. THIS CASE MUST BE DISMISSED BECAUSE THIS COURT LACKS SUBJECT MATTER JURISDICTION.

A. Because Schmill Lacks Standing to Assert a Claim against Responding Insurers, There is No Case or Controversy Before the Court, and It Therefore Lacks Subject Matter Jurisdiction.

Under the Montana Constitution, the courts of this state are not empowered to hear cases that do not present actual cases or controversies. Montana's Constitution imposes the same restrictions on Montana courts that the "cases and controversies" clause of the United States Constitution imposes on federal courts:

> The constitutional provision in Article VII, Section 4 of the Montana Constitution which extends original jurisdiction of a district court to "cases at law and in equity," has been interpreted as embodying the same limitations as those imposed on federal courts by the Article 3, "case or controversy" provision of the United States Constitution.

Seubert v. Seubert, 2000 MT 241, ¶ 17, 301 Mont. 382, ¶ 17, 13 P.3d 365, ¶ 17 (citations omitted); *see also Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 669 (9th Cir. 2005) ("The requirement that a case or controversy exist under the Declaratory Judgment Act is "identical to Article III's constitutional case or controversy requirement." If a case is not ripe for review, then there is no case or controversy, and the court lacks subject-matter jurisdiction.").

Consistent with this rule, this Court has also held that the absence of a case or controversy renders it without subject matter jurisdiction to hear a case. In *Noonkester v. State Fund*, 2004 MTWCC 61, WCC No. 2002-0493 (8/27/04), the Court was faced with a petition filed by a minor claimant's father after the minor was injured in an automobile accident. Upon obtaining the age of majority the minor withdrew his claim for workers' compensation benefits in favor of a tort action against his employer. Seeking a ruling from this Court that the claimant was acting in the course and scope of his employment when injured (for the purpose of invoking workers' compensation exclusivity in the tort action), the employer argued that this Court had jurisdiction to hear the claim based upon the petition filed by the minor's father. Ruling that the minor could repudiate his claim upon reaching the age of majority, this Court held that the absence of a claim rendered the Court without an actual case or controversy and thus, without subject matter jurisdiction to hear the case. This Court stated that:

> The claimant may therefore repudiate the claim. However, if he does so, there is no justiciable controversy and his petition must be dismissed . . . .

Noonkester, ¶ 30. The Montana Supreme Court affirmed this Court's holding. 2006 MT 169, ¶ 25, 332 Mont. 528, ¶ 25, 140 P.3d 466, ¶ 25. *See also Quigg v. State Fund*, 2005 MTWCC 3, WCC No. 2004-1119 (1/14/05), *aff'd*, 2005 MT 267N ("The matter before the Court is the respondent's Motion for Summary Judgment. Finding that there is no present case and controversy, the motion is granted.").

In the absence of a plaintiff with standing, there is no actual case or controversy. A suit brought by a plaintiff without standing does not present a "case or controversy," and an Article III federal court therefore lacks subject matter jurisdiction over the suit. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-03 (1998). Likewise, the Montana Supreme Court has also ruled that standing is a requirement based on the "case or controversy" provisions of the United States and Montana Constitutions. *See Missoula City-County Air Pollution Control Bd. v. Board of Environmental Review* (1997), 282 Mont. 255, 260, 937 P.2d 463, 466. Not surprisingly, this Court has also ruled that where a party lacks standing, there is no case or controversy, stating in no uncertain terms:

> Finally, insofar as a real controversy may exist concerning the effect of the claimant's waiver upon her tort claim against Boyne, Liberty is without standing to litigate that controversy. "A party has no standing when there is no personal stake in the outcome of the controversy."

Liberty Northwest Ins. Corp. v. Behr, 1998 MTWCC 56, ¶ 6, WCC No. 9806-7992 (7/9/98) (citing *In re Paternity of Vainio* (1997), 284 Mont. 229, 235, 943 P.2d 1282, 1286).

As in *Behr*, Schmill lacks standing because she has no personal stake in the outcome of this case. Schmill purportedly seeks to "enforce common fund entitlements and the petitioner's attorney fee lien." *Amended Summons*. However, the common fund entitlements she seeks to enforce are not her own but rather, those of unidentified potential beneficiaries of *Schmill I* and *Schmill II*. Schmill has never been certified to act on behalf of other potential beneficiaries. Moreover, Schmill's benefits were paid by Liberty at the conclusion of *Schmill I*. Schmill thus has no stake in the outcome of this case because she will not benefit from the payment of the "common fund entitlements" she seeks to enforce. She simply has no standing to "enforce common fund entitlements."

Similarly, Schmill has no standing to enforce an attorney fee lien. An important distinction must be made here. Schmill is not requesting payment of her own attorney fees. Indeed, the WCC has already ruled that Schmill was not entitled to attorney fees, and she never appealed that decision. Thus, in prosecuting this action Schmill does not seek to enforce an award of attorney fees. Rather, she seeks to enforce the attorney fee

lien filed by her counsel, Laurie Wallace. The real party in interest to that lien is Ms. Wallace, not Schmill. Indeed, the *Amended Summons* makes it clear that the purported party claiming the lien is Wallace, not Schmill:

> Following [*Schmill I*], the *petitioner's attorney filed a notice of attorney fee lien*, a copy of which is attached. In that lien notice, the *petitioner's attorney claims an attorney fee lien* upon the common fund of occupational disease cases in which an apportionment was taken... .

Amended Summons, ¶2 (emphasis added). Any money due under the attorney fee lien is due to Wallace, not Schmill, further evidenced by the fact that Wallace seeks to recover 25% of all benefits paid as a result of *Schmill I*. Schmill has no standing to enforce Wallace's lien because she has no stake in the outcome of such a claim.

Because Schmill has no standing to enforce potential common fund entitlements of other potential beneficiaries of *Schmill I*, or to enforce Wallace's attorney fee lien, this action does not present the Court with an actual case or controversy. Absent an actual case or controversy, this Court lacks subject matter jurisdiction, and the action must be dismissed.

B. This Court Lacks Subject Matter Jurisdiction Because Petitioner has not Mediated her Claim for Benefits Arising Under the Workers' Compensation Act.

Even if this Court could disregard the fundamental requirement of standing, this Court still does not have jurisdiction to enforce common fund entitlements or Wallace's attorney fee lien because the jurisdictional requirements set forth at § 39-71-2401 *et seq.*, MCA, have not been met. Under § 39-71-2401, MCA, mediation is required before a party may petition the Workers' Compensation Court:

> A dispute concerning benefits arising under this chapter ... must be brought before a department mediator as provided in this part. If a dispute still exists after the parties satisfy the mediation requirements in this part, either party may petition the workers' compensation court for a resolution.

§ 39-71-2401, MCA. *See also* § 39-71-2408, MCA ("Except as otherwise provided, in a dispute arising under this chapter, the insurer and claimant shall mediate any issue concerning benefits and the mediator shall issue a report following the mediation process recommending a solution to the dispute before either party may file a petition in the workers' compensation court."). Analyzing this statutory requirement, both this Court and the Montana Supreme Court have held that failure to mediate renders the Court without jurisdiction to proceed. As stated by the Montana Supreme Court:

> As § 39-71-2408(1), MCA, states, mediation is mandatory under the Workers' Compensation Act before a party can

> even petition the Workers' Compensation Court for relief. In addition, *the Workers' Compensation Court does not have jurisdiction* during the pendency of a statutorily-mandated mediation, given that a claimant may only petition the Workers' Compensation Court "after satisfying dispute resolution requirements otherwise provided" in the Workers' Compensation Act-such as mandatory mediation.

Preston v. Transportation Ins. Co., 2004 MT 339, ¶ 36, 324 Mont. 225, ¶ 36, 102 P.3d 527, ¶ 36 (emphasis added). *See also Kutzler v. Montana State Fund*, 2005 MTWCC 5, ¶ 11, WCC No. 2004-1147 (1/26/05) ("[T]he failure to complete mediation is a jurisdictional defect and the appropriate remedy is dismissal.") (citations omitted); *Taves v. AIU*, 2003 MTWCC 43, ¶ 8, WCC No. 2003-0794 (1/26/03) ("The Workers' Compensation Court lacks jurisdiction over the dispute alleged in the petition since it was not mediated as required by section 39-71-2401, MCA. Therefore, the petition in this matter is dismissed without prejudice.") (emphasis removed).

Moreover, the mediation statutes require not only that mediation occur, but that all issues litigated must first be mediated. In the words of our legislature:

> It is the intent of this part that the mediation process be used to resolve cases on an informal basis at minimal cost to the parties, and to this end, the parties are required to fully present their cases at the mediation level. However, if a cause proceeds to the workers' compensation court, the parties are not precluded from presenting additional evidence before the court. If a new issue is raised at the workers' compensation court that was not raised at mediation, the court shall remand the issue to the mediator for consideration.

§ 39-71-2406, MCA.

Applying this statute, this Court has held that "[m]ediation of a claim for benefits is a jurisdictional prerequisite. The requirement extends to 'any issue' the claimant wishes to litigate." *Peterson v. Montana Schools Group Ins. Authority*, 2005 MTWCC 30, ¶ 12, WCC No. 2005-1295 (6/2/05) (citations omitted). In *Peterson*, this Court dismissed a claim for permanent total disability benefits because the claimant's claim for those particular benefits had not been mediated, although the parties had mediated other disputed issues. *Id.* ¶¶ 6, 13.

In another recent case, this Court stated that its only option when presented with issues not mediated was to dismiss the petition. As the Court explained:

> In dismissing the present petition, the Court recognizes that in the past some petitions have merely been held in abeyance rather than dismissed where mediation is

> incomplete. This practice has simply saved the petitioner from having to refile a petition and the Court from having to open a new court file upon completion of mediation. However, in the future, all petitions which are filed before completion of mandatory mediation will be dismissed. While it may be more convenient to simply stay proceedings until mediation is completed, *the failure to complete mediation is a jurisdictional defect and the appropriate remedy is dismissal.* The mediation requirement is notorious and there is no excuse for failing to comply with it.

Kutzler, ¶ 11 (emphasis added).

Schmill has never requested to mediate her claim to enforce common fund entitlements or Wallace's attorney fee lien. And there can be no dispute that these issues fall within the purview of the mediation statutes. Schmill seeks to enforce common fund entitlements and Wallace's attorney fee lien. Such "common fund entitlements" are for benefits calculated under the Workers' Compensation Act, and Wallace's attorney fee lien is derived exclusively from those benefits. Thus, mediation is required under § 39-71-2401 *et seq.*, MCA, before this Court has jurisdiction to hear Schmill's claim. Accordingly, pursuant to the mediation requirements set forth at § 39-71-2401 *et seq.*, MCA, as well as the holdings in *Preston*, *Peterson*, *Kutzler*, and *Taves*, this Court lacks jurisdiction to hear Schmill's claim to enforce common fund entitlements and Wallace's attorney fee lien. Responding Insurers must be dismissed from this action.

IV. RESPONDING INSURERS HAVE NO OBLIGATION TO COMB THEIR FILES TO IDENTIFY POTENTIAL *SCHMILL* BENEFICIARIES BECAUSE ANY ORDER REQUIRING SUCH IDENTIFICATION WOULD IMPERMISSIBLY REVERSE CLAIMANTS' BURDEN OF PROOF.

It is well settled law that plaintiffs in civil cases have the burden to prove their claims. Indeed, that plaintiffs bear such burden is a bedrock principle of American jurisprudence. *Lilienthal's Tobacco v. U.S.*, 97 U.S. 237, 266 (1877) ("Beyond question, the general rule is that the burden of proof in civil cases lies on the party who substantially asserts the affirmative of the issue . . . .").[7]

[7] One of the primary reasons to allocate the burden of proof upon the party asserting the claim is the near logical impossibility of proving a negative. *See* Leo P. Martinez, *Tax Collection & Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 Hastings L.J. 239, 249 (1988) ("The basic allocation rule provides that the party who has the affirmative of an issue is assigned the burden of proof. The reason advanced of the rule is that the negative of an issue is more difficult to prove . . . .") (citations omitted).

Just as the United States Supreme Court has allocated the burden of proof to plaintiffs, so does Montana law. Montana Code Annotated section 26-1-403 provides in pertinent part that:

> in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory, the decision must be made according to the preponderance of the evidence ...

§ 26-1-403, MCA. Consistent with U.S. Supreme Court precedent and Montana law, workers' compensation claimants bear the burden to prove entitlement to the benefits they seek. *Snyder v. Anaconda Co.* (1988), 231 Mont. 198, 202, 757 P.2d 740, 742 ("The claimant bears the burden of showing an entitlement to benefits under the Workers' Compensation Act.") (citations omitted); *see also Briney v. Pacific Employers Ins. Co.* (1997), 283 Mont. 346, 351, 942 P.2d 81, 84 ("The [WCC] correctly concluded that the claimant has the burden of proving that he is entitled to workers' compensation benefits by a preponderance of the probative, credible evidence . . . .") (citations omitted).

As applied to this case, it is the potential beneficiaries of *Schmill I* that have the burden to prove the affirmative – i.e., that they are entitled to the benefits they seek – and to do so by a preponderance of the evidence. That the Montana Supreme Court has held that additional benefits arising from *Schmill I* are retroactively applicable does not alter these fundamental principles. The burden remains on potential beneficiaries of *Schmill I* to assert, and prove, their claims to such benefits. Indeed, the Montana Supreme Court has expressly held that insurers have no duty to solicit workers' compensation claims:

> [T]he duty is upon the claimant to file his claim, not upon the insurer to solicit claims. The Workmen's Compensation Act has not changed the principle that he who asserts a right has the burden of proof or the burden of proceeding.

Ricks v. Teslow Consolidated (1973), 162 Mont. 469, 483, 512 P.2d 1304, 1312. Thus, to the extent that there are potential *Schmill* beneficiaries covered under policies written by Responding Insurers, those beneficiaries have the duty to step forward and assert claims. In other words, it is their duty to identify themselves and not Responding Insurers duty to do so at great burden and expense. As with any other claim for benefits, if a *Schmill* beneficiary notifies a Responding Insurer of a claim to unpaid benefits, that Responding Insurer will evaluate the claim and decide whether to accept or deny based upon the facts of the claim and law set forth in *Schmill I* and *Schmill II*. If benefits are denied, the claimant may proceed to mediation, and if necessary, litigation bearing the burden of proving his entitlement to *Schmill* benefits.

Moreover, to the extent that Schmill asserts standing to enforce common fund entitlements on behalf of others (without any order certifying her to do so), then the duty to identify such persons falls on her and not Responding Insurers. Quite simply, neither Schmill nor *Schmill* beneficiaries can require Responding Insurers to conduct a time consuming, labor intensive, and expensive file review for the purpose of identifying potential *Schmill* beneficiaries to solicit claims from them so that Wallace can satisfy her

attorney fee lien.[8] To do so would reverse the burden of proof and require Responding Insurers to prove an absence of liability. Such burden shifting is impermissible under Montana law and would be uniquely burdensome in this case. This Court should refuse to shift such a burden to Responding Insurers.

CONCLUSION

This case must be dismissed as to Responding Insurers. First, this Court and the Montana Supreme Court entered final decisions and judgments before Responding Insurers were afforded notice and an opportunity to be heard. The "global common fund" recognized in *Schmill II* (without objection from any existing party to the case at the time) cannot be enforced consistent with Responding Insurers' rights to due process of law. As our Supreme Court and others have recognized, judgments entered without due process are void, and the proper remedy for such a violation of due process is to wipe the slate clean.

Second, after wiping the common fund slate clean, it is readily apparent after *Stavenjord* that no common fund may be maintained as to Responding Insurers. Potential *Schmill* beneficiaries are not readily ascertainable through a superficial file review. Rather, to identify potential *Schmill* beneficiaries would require a labor-intensive manual review of files stretching back over two decades.

Third, this Court lacks subject matter jurisdiction to continue to proceed with this action because there is no actual case or controversy. Schmill lacks standing to enforce common fund entitlements on behalf of other potential unidentified claimants or to enforce payment of Wallace's attorney fee lien. The Court also lacks subject matter jurisdiction because the issues of Responding Insurers' liability for common fund entitlements, if any, and payment of Wallace's attorney fee lien, have never been mediated. Because Schmill both lacks standing and failed to mediate with Responding Insurers, the Court lacks jurisdiction, and dismissal is warranted.

As a fourth and final reason for dismissal, although Schmill seeks to enforce common fund entitlements and payment of the associated attorneys fee lien, she has produced no proof or evidence of the existence of any potential *Schmill* claimants to whom Responding Insurers owe benefits. Montana law is clear that Schmill bears the burden of proof, and that insurers have no obligation to solicit claims. The Court cannot and should not reverse the burden of proof and impose the burden of proving a negative on Responding Insurers.

WHEREFORE Responding Insurers respectfully request this Court to issue an order dismissing Responding Insurers from this case.

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[8] It is conceivable, if not likely, that the expansive file search required to prove an absence of liability (or alternatively, to identify a *Schmill I* beneficiary in order to solicit a claim from such person) will cost more than the ultimate benefits owed. This economic inefficiency – the disproportionate cost of identifying potential *Schmill* claimants versus the cost of likely benefits owed – is another sound justification for the rule that insurers are not required to solicit claims.

Respectfully submitted this 14th day of April 2008.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the following counsel of record, by the means designated below, this 14th day of April 2008:

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Date: April 14, 2008

FAX CORRESPONDENCE:

TO: Workers' Compensation Court

FAX #: (406) 444-7798

FROM: Steven W. Jennings

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DOCUMENTS TRANSMITTED: SCHMILL – Brief re: Gateway Issues.

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