

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2001-0300

CASSANDRA SCHMILL

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer

and

MONTANA STATE FUND

Intervenor.

**ORDER SUSTAINING PETITIONER'S OBJECTIONS TO DISMISSING
CERTAIN INSURERS**

¶ 1 On April 20, 2012, Petitioner Cassandra Schmill filed an objection to the affidavits filed by the following insurers on March 7, 8, and April 10, 2012:

American Alternative Ins. Co.
American Reinsurance
Bituminous Casualty Corp.
Bituminous Fire & Marine Ins. Co.
Centre Ins. Co.
Clarendon National Ins.
Dairyland Ins. Co.
Fairfield Ins. Co.
Farmers Ins. Exchange
Genesis Underwriting Management/Genesis Ins. Co.
Great American Alliance Ins. Co.
Great American Assurance Co.
Great American Ins. Co.
Great American Ins. Co. of New York
Great American Spirit Ins. Co.
Greenwich Ins.
Hartford Accident and Indemnity Co.

Hartford Casualty Ins. Co.
Hartford Fire Ins. Co.
Hartford Ins. Co. of Midwest
Hartford Underwriters Ins. Co.
Middlesex Ins. Co.
Montana Health Network Workers' Compensation Ins. Trust
Petroleum Casualty Co.
Property & Casualty Ins. Co. of Hartford
Republic Indemnity
Republic Indemnity of California
Sentinel Ins. Co., LTD
Sentry Indemnity Co./Sold to Connie Lee Ins. Co. 12/17/87
Sentry Ins. A Mutual Co.
Sentry Select Ins. Co.
Stillwater Mining Co.
Truck Ins. Exchange
Trumbull Ins. Co.
Twin City Fire Ins. Co.
Universal Underwriters Ins. Co.
XL Specialty Ins. Co.¹

¶ 2 On July 2, 2012, Schmill filed an objection citing the same grounds for the following insurers who filed Affidavits on March 28, May 16, 17, 21, and 24, and June 4, 5, and 22, 2012:

American Guarantee
American Zurich
Assurance
Chubb Indemnity Ins. Co. (including Chubb National Ins. Co.,
Executive Risk Ind. Inc., Federal Ins. Co., Great Northern Ins. Co.,
Pacific Ind. Co., and Quadrant Ind. Co.)
Colonial American
Everest
Fidelity & Deposit
Gen Re
Maryland Casualty Co.
Mid Century Ins. Co.
Northern Ins.
Northstar
Old Republic
PPG Industries, Inc.
Republic Indemnity of California
Zaic-Valiant

¹ Petitioner's Objection to Dismissing Certain Insurers (First Objection), Docket Item No. 526.

Zurich American
Zurich American Illinois²

¶ 3 As noted by the Insurers, the only substantive difference between Schmill's two objections is that the latter objection is directed at insurers who had not filed affidavits at the time of her earlier objection.³ Therefore, I will resolve both objections in this Order. Schmill objects to the dismissal of these insurers because, as attested to by their counsel, these insurers searched their files for *Schmill* claims back to April 10, 2003.⁴ Schmill contends that the correct starting date for this search is June 22, 2001. Schmill argues that this date was agreed to by the parties during a hearing before this Court on July 14, 2005, and that the date of June 22, 2001, was then used in the Amended Summons and Notice of Attorney Fee Lien which was posted on the Court's website on December 7, 2005.⁵

¶ 4 The Insurers oppose Schmill's objection to their dismissal and argue that the date of April 10, 2003, is the correct date to use because this is the date the Montana Supreme Court issued its first opinion in this case.

¶ 5 Pertinent to the present issue is a July 14, 2005, hearing which was held in this Court. At that time, the following discussion occurred:

THE COURT: . . . [W]e'll come up with a summons. The dates to be covered by the summons, the lien says July 1, 1987, through June 22, 2001. Do we have any adjustments to that or is everybody in agreement that those are the lien dates?

MS. WALLACE: I agree.

MR. THUESEN: Why are those the lien dates?

THE COURT: I think that's because the Schmill decision essentially declares the act, the apportionment, unconstitutional back to 1987. That's really the key date because that's when the Legislature adopted the act, and the rationale was different. The rationale changed. June 22, 2001 was what, the date of my decision?

MS. WALLACE: Which was affirmed on appeal.

THE COURT: Right. So we'll use those.

² Petitioner's Objection to Dismissing Certain Insurers (Second Objection), Docket Item No. 555. The insurers named in the First and Second Objections are referred to collectively as "the Insurers" in this Order.

³ Brief in Opposition to Petitioner's Objection to Dismissing Certain Insurers (Second Response), Docket Item No. 556, at 1.

⁴ See Docket Item No. 525, in which counsel for the Insurers confirmed that this is the "starting date" used by the Insurers in searching their files for potential *Schmill* claims.

⁵ Docket Item No. 79.

MR. ATWOOD: By agreeing to those dates, are we waiving any argument in terms of the extent of retroactivity that, in essence, that this does not involve closed claims?

THE COURT: No. All we're doing is getting the dates for purposes of the summons, and then the responses can raise any defenses that any of the insurers have.⁶

¶ 6 Schmill argues that the Court should require the above-named insurers to use June 22, 2001, as the relevant starting date for determining whether their respective claims are either settled or part of the *Schmill* common fund. Schmill argues that these insurers erred when they used a start date of April 10, 2003, for their respective searches. Schmill asserts that counsel for these insurers was present at the July 14, 2005, hearing in which the parties agreed that the *Schmill* decision covered July 1, 1987, through June 22, 2001. Schmill argues:

If the Court were to adopt the date of April 10, 2003, as proposed by [counsel for these insurers] Mr. [Steven W.] Jennings, all of the hundreds of insurers who have filed affidavits with the Court would have to go back and re-search their records for *Schmill* claims between June 22, 2001, and April 10, 2003. Certainly, this represents a greater burden on the hundreds of insurers who have already submitted affidavits in this case than it does for Mr. Jennings' clients to go back and properly search their files using the date of June 22, 2001.⁷

¶ 7 In response, the Insurers argue that several Montana Supreme Court rulings have set forth April 10, 2003, "as the relevant date for determining entitlement to retroactive adjustment." The Insurers further argue that by using a start date of April 10, 2003, their claim searches encompassed the July 1, 1987, through June 22, 2001, time frame.⁸ The Insurers explain:

Responding Insurers identified all claims in which an apportionment was taken prior to April 10, 2003. As this date is twenty-two months after June 22, 2001, Responding Insurers' search for apportioned claims was actually broader than that required by [Schmill's attorney] Ms. [Laurie] Wallace's *Notice of Attorney Fee Lien*. As a result, the search conducted by Responding Insurers was more than adequate to identify claims in which an apportionment was taken prior to June 22, 2001.⁹

¶ 8 The Insurers raise additional arguments regarding the search dates and

⁶ Docket Item No. 72 at 31-32.

⁷ First Objection at 3.

⁸ Responding Insurers' Brief in Opposition to *Petitioner's Objection to Dismissing Certain Insurers* (First Response Brief), Docket Item No. 530, at 1.

⁹ First Response Brief at 5.

whether certain potential *Schmill* claimants are entitled to retroactive adjustment of their claims.¹⁰ As the Insurers note, if the date of retroactive applicability is “push[ed] back” from April 10, 2003, to June 22, 2001, the window for potential claims subject to the *Schmill* attorney fee lien is twenty-two months longer.¹¹ However, as the Insurers themselves point out, by using the April 10, 2003, date, they searched a larger date range for apportioned claims and found none. Therefore, they are not affected by the window for potential claims subject to the *Schmill* attorney fee lien regardless of whether the window ends on June 22, 2001, or April 10, 2003. Therefore, their retroactivity arguments are not relevant to their situation.

¶ 9 As *Schmill* notes above, the parties agreed to the June 22, 2001, date, and to change that date at this stage would force the other common fund insurers to have to re-search their files for *Schmill* claims between June 22, 2001, and April 10, 2003, while the Insurers subject to *Schmill*’s objections have, as they pointed out, actually performed a broader search which encompassed the agreed-to start date of June 22, 2001. Therefore, rather than requiring other common fund insurers to re-search their files to encompass a broader set of dates, the Insurers subject to *Schmill*’s objections need only adjust their affidavits accordingly. *Schmill*’s objections are sustained and the Insurers are ordered to comply with the June 22, 2001, date for their file reviews.

Order

¶ 10 Petitioner’s objection to dismissing the insurers named above is **SUSTAINED**.

DATED in Helena, Montana, this 11th day of February, 2013.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Parties of Record – Via WebSite

Submitted: May 18 and July 16, 2012

¹⁰ First Response at 5-7.

¹¹ First Response at 5.