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FILED

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OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

Attorneys for Respondent/Insurer Liberty NW Ins. Corp

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CASSANDRA SCHMILL,

Petitioner,

v.

LIBERTY NW INS. CORP.,

Respondent/Insurer.

And

MONTANA STATE FUND,

Intervenor.

WCC No. 2001-0300

**STIPULATION FOR SCHMILL
IMPLEMENTATION PLAN FOR
SAFECO AND THE OHIO CASUALTY
INSURANCE COMPANY**

COME NOW the above common fund Petitioner and her attorney and the Respondent Liberty NW Ins. Corp. and the workers' compensation insurers identified below through their attorney and submit the following *Schmill* common fund implementation plan for Safeco and the Ohio Casualty Insurance Company and request the Court to issue an order adopting the implementation for the reasons set forth with particularity below.

Whereas the Montana Supreme Court in *Schmill v. Liberty Northwest Ins. Corp. and Montana State Fund, 2003 MT 80 (Schmill I)* held that it was a violation of the equal protection clauses of the Montana and United States Constitution to allow for apportionment deductions for non-occupational factors in the Occupational Disease Act, since repealed; and

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SAFECO AND THE OHIO CASUALTY INSURANCE COMPANY**

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DOCKET ITEM NO. 626

Whereas The Montana Supreme court in *Schmill v. Liberty Northwest Ins. Corp. and Montana State Fund*, 2005 held *Schmill I* was retroactive to all cases not yet final or settled at the time of its issuance, and was therefore a common fund case that created a global lien; and

Whereas this Court in *Flynn v. Montana State Fund*, 2010 MTWCC 20 held that "paid in full" meant:

A claim in which all benefits to which a claimant is entitled pursuant to the statutes applicable to that claim are paid prior to the issuance of a judicial decision. If any benefits are paid on the claim after the issuance of a judicial decision, the claim can no longer be considered "paid in full" and is subject to retroactive application of the judicial decision

And whereas the Montana Supreme Court held in *Flynn-Miller v. Montana State Fund and Liberty Northwest Ins. Corp.*, 2011 MT 30 this Court's definition of "paid in full" properly applies the retroactive principles to be applied in common fund cases; and

Whereas the Liberty-affiliated companies as of the time of this pleading affected by the above decisions include the following workers' compensation insurers:

American Economy Insurance Company (Safeco)
American States Insurance Company (Safeco)
Employers Insurance Company of Wausau
First National Insurance Company of America (Safeco)
General Insurance Company of America (Safeco)
LM Insurance Corporation
Liberty Insurance Corporation
Liberty Mutual Fire Insurance Company
Liberty Mutual Insurance Company
Liberty Northwest Insurance Corporation
Safeco Insurance Company of America
The First Liberty Insurance Corporation
The Ohio Casualty Insurance Company
Wausau Underwriters Insurance Company

And, whereas the parties request that this implementation plan apply to the following workers' compensation insurers only (hereinafter Safeco and Ohio Casualty);

American Economy Insurance Company (Safeco)
American States Insurance Company (Safeco)
First National Insurance Company of America (Safeco)

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SAFECO AND THE OHIO CASUALTY INSURANCE COMPANY**

General Insurance Company of America (Safeco)
Safeco Insurance Company of America
Ohio Casualty Insurance Company

And, whereas the parties agree that in the interests of efficiency, economy and finality that this Court adopt the following common fund implementation plan for the *Schmill* common fund which the parties believe adequately searches for and identifies *Schmill* common fund cases and provides for the appropriate payment of common fund benefits and attorney fees; and

Whereas following the identification of the respective Safeco companies and Ohio Casualty identified claims systems that would contain open and closed (i.e., settled by ERD petition, Workers' Compensation Court Order or paid in full) Montana workers' compensation claims for the requisite time period; and

Whereas after the possible common fund OD files are identified, as proposed in the implementation procedure set out below, they will have to be manually reviewed to determine if they fall within the *Schmill* common fund. The Ohio Casualty Insurance Company claim file information is available in the electronic claim systems and that information can be individually reviewed to determine if a claim is in the common fund; and

Whereas, for Safeco claims, once an electronic claim is closed and reaches the end of the retention period, it is permanently removed from the system. Thus, some claims for Safeco may not be available for identification or review. The content of individual files identified may or may not contain sufficient information to determine if an apportionment was taken; and

Whereas the parties have negotiated the following implementation plan confident that it is sufficiently comprehensive, given the time span covered and the complexities inherent in identifying relevant cases, is in the best interest of justice and is in the best interests of potential common fund claimants and the parties.

The parties respectfully request the Court to issue an order adopting as the implementation plan for the above-specified insurers and the *Schmill* common fund claimants as set forth below.

**SCHMILL COMMON FUND IMPLEMENTATION PLAN FOR SAFECO AND THE
OHIO CASUALTY INSURANCE COMPANY**

The following insurers are subject to this implementation plan:

American Economy Insurance Company (Safeco)
American States Insurance Company (Safeco)
First National Insurance Company of America (Safeco)
General Insurance Company of America (Safeco)
Safeco Insurance Company of America
Ohio Casualty Insurance Company

1. The inclusive dates of the occupational disease (OD) claims to be considered for review are those with a date of loss of July 1, 1987 through June 22, 2001.
2. Liberty will conduct its search only by computer review of claims based on computer codes that suggest the claim involved an OD.
3. The initial file selection is based on the use of computer codes that suggest the claim involved is an OD claim.
4. If a file was not properly coded, then it will not be captured.
5. The claims will be reduced by including only files in which an indemnity payment was made.
6. If no benefits were being paid on a claim on June 22, 2001, then it is considered closed and not part of the common fund. If a claim has a date of OD before June 22, 2001 and if no benefits were paid after that date, then it is paid in full and it is not part of the common fund. If a claim has a date of OD before June 22, 2001 and benefits were paid after that date, then it may be part of the common fund.
7. A settled claim or one paid in full will not be reviewed because it is not part of the common fund.
8. If the relevant information is electronically stored, it will be reviewed in that format. Each claim will be individually reviewed.
9. Cases in which apportionment was not made are not part of the common fund.
10. The remaining cases will be identified by claim number and the amount of the apportionment.
11. The apportionment will be divided into 25% as a possible common fund attorney fee and 75% as a possible common fund payment to the claimant.
12. A letter will be sent to the last known address of the claimant setting forth an explanation of why the claimant is eligible for a common fund payment and the amount of the payment. The details of the contents of the letter have been worked out by the parties along the lines of the letter that was used in a State Fund case. A copy of the letter will be sent to the common fund attorney.

13. Liberty will then make the common fund payment to the claimant and allocate the previously determined 25% as a possible common fund attorney fee.
14. Liberty will make an accounting to the Court of all those cases in paragraph 10 by claim number, each amount of apportionment, identify those claims in which a common fund payment was made to a claimant and the amount of possible common fund attorney fees withheld on that claim.
15. The Court will notify the parties if Liberty can release the common fund attorney fees or if a hearing will be held to determine if fees will be paid and if so, the amount.
16. The Court will issue a closure order ending Liberty's responsibility to search for common fund cases and direct it to make a common fund review of a case, if any, that comes to its attention as a common fund case subject to payment such as one falling within the above inclusive dates and meeting the other criteria in which a payment was made after the date of the Court's closure order.

DATED this 14th day of August, 2015.

Attorneys for Respondent/Insurers:

American Economy Insurance Company (Safeco)
American States Insurance Company (Safeco)
First National Insurance Company of America (Safeco)
General Insurance Company of America (Safeco)
Safeco Insurance Company of America
Ohio Casualty Insurance Company

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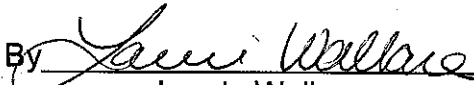
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DATED this 12 day of August, 2015.

Attorney for Petitioner and *Schmill* Common
Fund Claimants:

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By  _____
Laurie Wallace