Steven W. Jennings
CROWLEY FLECK PLLP
P. O. Box 2529
Billings, MT 59103-2529
(406) 252-3441
Attorneys for Common Fund Insurers
Listed on Exhibit A

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ROBERT FLYNN and CARL MILLER, Individually and on Behalf of Others Similarly Situated, Petitioners, vs. MONTANA STATE FUND, Respondent/Insurer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Intervenor.	WCC No. 2000-0222 Common Fund Insurers' Response Brief on Claims "Paid in Full"

COME NOW the Common Fund Insurers listed on Exhibit A hereto, and pursuant to the Court's April 22, 2009 status conference and minute book hearing entry, submit this response brief on those claims that are "paid in full" and therefore settled for purposes of Montana common fund retroactivity.

As explained in detail in Common Fund Insurers' opening brief, the only logical definition of claims "paid in full" in the workers' compensation context must include those claims where benefit payments ceased prior to December 2, 2002, when the Montana Supreme Court decided *Flynn v. State Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397 ("*Flynn I*"). Recognizing the finality of claims paid in full is not only consistent with Supreme Court common fund precedent and legislative policy goals, it offers a workable solution to the extreme

alternative suggested by Petitioners Flynn and Schmill where "paid in full" is meaningless, and insurers could potentially[1] be expected to analyze claim files stretching back to 1974.

Both Flynn and Schmill seek to persuade this Court to ignore the Montana Supreme Court's determination that a claim "paid in full" is not subject to the retroactive adjustment under the common fund doctrine. They do this by attempting to define out of existence the category of claims "paid in full." Indeed, Schmill goes so far as to argue, contrary to the Montana Supreme Court's ruling in this very case, that there can be no such thing as a "paid in full," contending that because claimants may potentially relapse into disability at some point in the future, no workers' compensation claim may ever be "paid in full." (DE# 588 at 6.[2]) Flynn takes a circular approach, arguing that because the *Flynn I* decision is retroactive, the "paid in full" exception to common fund retroactivity should not apply because it would deny the retroactive benefit of the *Flynn I* decision. (DE# 592 at 2.) Ultimately, both Flynn's and Schmill's arguments fail because our Supreme Court in this very case has already held that claims "paid in full" are settled and not subject to retroactive adjustment under the common fund doctrine.

I. Flynn's Argument Ignores our Supreme Court's Consistent Rulings that Retroactivity Does Not Apply to Cases that were Settled "Prior to" the Decision Giving Rise to the Purported Common Fund.

Flynn argues simplistically and succinctly that if an insurer has not "completely discharged its obligation to pay its fair share of the costs and fees incurred to obtain a social security award," then it has not "paid in full" any particular claim. (DE# 592 at 2.) Flynn's argument thus puts the cart before the horse, suggesting that the potential liability flowing from *Flynn I* precludes any claim from being considered "paid in full."

Montana common fund precedent directly refutes Flynn's argument. In the common fund context, our Supreme Court has consistently and repeatedly noted that the policy of finality dictates that the "retroactive effect of a decision . . . does not apply to cases that became final or were settled prior to a decision's issuance." *Schmill v. Liberty Northwest Ins. Corp.*, 2005 MT 144, ¶ 17, 327 Mont. 293, 114 P.3d 204 ("*Schmill II*") (emphasis added) (quoting *Dempsey v. Allstate Insurance Co.*, 2004 MT 391, ¶ 31, 325 Mont. 207, 104 P.3d 483); *accord, Stavenjord v. State Fund*, 2006 MT 257, ¶¶ 16-17 ("*Stavenjord II*"); *Flynn v. State Fund*, 2008 MT 394, ¶ 8 ("*Flynn II*"). Claims "paid in full" prior to *Flynn I* are settled and not subject to retroactive adjustment under the common fund doctrine. *See Flynn II*, ¶¶ 21, 26.

---

[1] Common Fund Insurers raised numerous defenses to the Summons issued by Petitioner, including the failure to afford Common Fund Insurers constitutional due process. (DE # 278.) The due process implications would only be amplified if Common Fund Insurers are precluded from challenging the existence of a common fund. Common Fund Insurers have denied that beneficiaries of *Flynn I* are readily ascertainable, among other objections that remain pending. (*Id.*) Moreover, retroactive benefits, if any, cannot be calculated with mathematical certainty by Common Fund Insurers because claimants do not typically report the amount of attorney fees incurred to obtain wholly separate Social Security Disability benefits. (*Id.*)

[2] References to documents filed in this action are identified by reference to their docket number on the electronic docket maintained by the Court in the format "DE# [docket entry number] at [page number]."

II. A Claimant's Hypothetical Future Relapse into Disability Is a Red Herring and Does Not Mean a Claim Was Not Paid in Full Prior to *Flynn I*.

Cassandra Schmill, the petitioner in an unrelated common fund case styled *Schmill v. Liberty Northwest Ins. Corp.*, WCC No. 2001-0300, presents in her opening brief[3] arguments not raised by Flynn. Schmill contends that workers' compensation claims can never be "paid in full" because there always exists the possibility, however remote, that a claimant will "relapse into disability" and become entitled to additional benefits. (*See* DE# 588 at 1, 6.) Although she does not allege that any potential *Flynn* (or *Schmill*) beneficiaries have actually "relapsed into disability," Schmill points to Montana law allowing benefit adjustments to be made when a claimant's disability is aggravated. (*Id.* at 2-3 (citing § 31-71-739, MCA, and interpretive cases).) According to Schmill, workers' compensation claims "can never be 'paid in full'" because the hypothetical "potential for a change in disability status" may give rise to a claim for additional benefits. (*Id.* at 6.) Under Schmill's reasoning, the Legislature's specific definition of "settled claim," as adopted and applied to the common fund context in *Flynn II*, has no meaning or application, except perhaps for "bee stings and slivers." (*Id.*)

Schmill's argument misses its mark by a wide margin. Allowing a workers' compensation claimant to pursue a claim for additional benefits in the future based on a relapse into disability has absolutely no bearing on whether it became final or was settled prior to the issuance of *Flynn I*. *Schmill II*, ¶ 17; *Stavenjord II*, ¶¶ 16-17; *Flynn II*, ¶ 8. It is certainly telling that Schmill does not identify or even allege that any potential common fund beneficiary relapsed into disability from the time that *Flynn I* was decided over six years ago until today. Nor does Flynn. The issue is simply a red herring.

This Court should not allow a hypothetical change in disability status to nullify the Montana Supreme Court's holding that settled claims include those "paid in full." If and when a claimant suffers a relapse into disability, she may seek benefits based on her aggravated physical condition. Her claims related to past benefits paid, however, remain settled. *See Paulich v. Republic Coal Co.* (1940), 110 Mont. 174, 102 P.2d 4, 6 ("It is true that so far as the period covered by the compensation accepted is concerned, the judgment is conclusive on respondent and he cannot now question it.").[4]

---

[3] Although Schmill did not seek leave to file a brief in this action, both this Court and the Montana Supreme Court have recognized that this case – *Flynn* – should serve "as a general model for determining the *final, closed, or inactive issue*" remanded in *Schmill II*. *See Flynn II*, ¶ 8 (citing this Court). This Court has also indicated that it would consider Schmill's submission as an amicus curiae brief. (DE#593.) While Common Fund Insurers do not object to Schmill briefing this issue, they note that Schmill errs in arguing that "the Court's ruling in this case will not apply to the *Schmill* common fund." (DE# 588 at 1.) This Court's earlier ruling on claims "paid in full" in *Schmill* was interlocutory and is obviously subject to this Court's reconsideration following *Flynn II* via this round of briefing.

[4] *Meznarich v. Republic Coal Co.* (1935), 101 Mont. 78, 53 P.2d 82, the primary case upon which Schmill relies, does not hold to the contrary. The Court in that case ruled that petitioner could continue to petition for additional benefits until he had been paid for the maximum number of weeks permitted by statute, but the decision says nothing about retroactively adjusting past benefits paid and settled.

III. Common Fund Insurers' Recommended Definition of Claims "Paid in Full" Is Consistent with the Workers' Compensation Act and Common Fund Precedent.

Under *Flynn II*, claims paid in full are settled and not subject to retroactive adjustment under the common fund doctrine. And common fund precedent is now well-settled that claims are settled if paid in full prior to the issuance of the decision establishing liability. *Flynn II*, ¶ 8; *Schmill II*, ¶ 17; *Stavenjord II*, ¶¶ 16-17. As a result, if benefit payments terminated without dispute prior to *Flynn I*, then the claim was "paid in full." The termination of benefit payments indicates that benefits were either "paid in full," or the case was otherwise resolved by judgment or judicial or department-approved compromise.

Recognizing the finality of claims paid in full is consistent with both common fund precedent and our Legislature's policy goals. Both the Legislature and the Supreme Court have consistently defined "settled claims" to include claims paid in full as well as those compromised with the approval of the judiciary or the Department of Labor. *See Flynn II*, ¶ 25. The definition is consistent with the legislative purpose that the workers' compensation system should be "primarily self-administering" by allowing the parties to settle claims without the involvement of the judicial system or the Department of Labor. *See* § 39-71-105(3), MCA (noting a purpose of the Workers' Compensation Act is to be "primarily self-administering" and to "minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities"). Indeed, *Flynn II* recognized that "using the definition provided by the legislature furthers the expression of legislative will absent a contrary indication and further provides consistency between the retroactivity of judicial decisions established by our cases and application of the [Workers' Compensation] Act." *Flynn II*, ¶ 25. This Court should not render superfluous and meaningless the definition provided by our Legislature and specifically adopted by our Supreme Court in this very case.

Exempting claims paid in full from retroactive application of *Flynn* also serves pragmatic purposes. *Flynn* retroactivity conceivably stretches back over three decades to 1974. A claim in which benefit payments were terminated in 1977, for example, has long been considered "settled" and closed in every practical sense.[5] Moreover, identifying eligible *Flynn* claimants would be extremely difficult, expensive, and time-consuming insofar as any search would likely involve claims closed long before computers were used to manage and track information. Finality and fairness dictate that claims "settled" by payment in full years or decades ago should not be re-opened today.

In light of the legislative policy goals and precedent, this Court should view with considerable skepticism the arguments advanced by Flynn and Schmill that no workers' compensation claim may ever be settled by payment in full. Any result that requires insurers to locate files sent to cold storage years or even decades after benefits were paid in full would render meaningless the inclusion of a claim paid in full in the definition of settled claim. It would run contrary to the Act's purpose that the workers' compensation system be primarily

[5] Indeed, any contrary ruling could require not only re-opening of claims long considered settled by the parties, but also the re-opening of any deceased claimant's estate proceedings, which conceivably may have been closed for decades.

self-administering. Indeed, it would penalize insurers for not involving the judiciary or Department of Labor to settle every claim. That cannot be what our Legislature or Supreme Court envisioned. *Stavenjord II*, *Schmill II*, *Flynn II*.

IV. Conclusion

For the foregoing reasons, Common Fund Insurers respectfully submit that a claim is "paid in full" and settled for purposes of common fund retroactivity if benefit payments terminated prior to the issuance of *Flynn I* on December 2, 2002.

Dated this 23rd day of July, 2009.

CROWLEY FLECK P.L.L.P.
Attorneys for Common Fund Insurers

By: /s/ Joe Maynard for
STEVEN W. JENNINGS

CERTIFICATE OF SERVICE

I, STEVEN W. JENNINGS, one of the attorneys for the law firm of Crowley Fleck P.L.L.P., hereby certify that on the 23rd day of July, 2009, I mailed a true and correct copy of the foregoing document, postage prepaid, to the following:

Mr. Rex Palmer
Attorneys Inc., PC
301 W. Spruce
Missoula, MT 59802
Attorney for Petitioners

Laurie Wallace
Bothe & Lauridsen, P.C.
P.O. Box 2020
Columbia Falls, MT 59912
Attorney for petitioner in Schmill

Mr. Bradley Luck
Garlington, Lohn & Robinson
P.O. Box 7909
Missoula, MT 59807
Attorney for State Fund

Mr. Larry W. Jones
700 S.W. Higgins, Suite 108
Missoula, MT 59803
Attorney for Liberty Northwest

STEVEN W. JENNINGS

EXHIBIT A

AIU Ins. Co., American International Pacific Ins. Co., American Home Assurance Co., Birmingham Fire Ins. Co. Commerce & Industry Ins. Co., Granite State Ins. Co., Ins. Co. of the State of Pennsylvania, National Union Fire Ins. Co. of Pittsburgh, Pa, New Hampshire Ins. Co., AIG National Ins. Co., American International Specialty Lines Ins., American International Ins. Co., Illinois National Ins. Co., American General Corp., American Alternative Ins. Corp., American Re-Insurance Co., Bituminous Fire & Marine Ins. Co., Bituminous Casualty Corp, Old Republic Ins. Co., Old Republic Security Assurance Co., Centre Ins. Co., Clarendon National Ins. Co., Everest National Ins. Co., Truck Ins. Exchange, Mid Century Ins. Co., Farmers Insurance Exchange, Federal Express Corporation, Great American Ins. Co., Great American Ins. Co. of NY, Great American Assurance Co., Great American Alliance Ins. Co., Great American Spirit Ins. Co., Republic Indemnity of America, Hartford Accident & Indemnity Co., Hartford Casualty Ins. Co., Hartford Fire Ins. Co., Hartford Ins. Co. of the Midwest, Hartford Underwriters Ins. Co., Property & Casualty Ins. Co. of Hartford, Sentinel Ins. Co. Ltd., Twin City Fire Ins. Co., Trumbull Ins. Co., Markel Ins. Co., Petroleum Casualty Co., SCOR Reinsurance Co., Sentry Ins. Mutual Co., Sentry Select Ins. Co., Middlesex Ins. Co., PPG Industries, Inc., Connie Lee Ins. Co., Fairfield Ins. Co., United States Aviation Underwriters, Universal Underwriters Group, XL Ins. America, Inc., XL Ins. Co. of New York, XL Reinsurance. America, XL Specialty Ins. Co., Greenwich Ins. Co., Zurich North America, American Guarantee & Liability Ins. Co., American Zurich Ins. Co., Assurance Co. of America, Colonial American Casualty & Surety, Fidelity & Deposit Co. of Maryland, Maryland Casualty Co., Northern Ins. Co. of New York, Valiant Ins. Co., Zurich American Ins. Co., and Zurich American Ins. Co. of Illinois

CROWLEY | FLECK PLLP
ATTORNEYS

Jennilee C. Baewer
Legal Admin. Assistant
500 Transwestern Plaza II
490 North 31st Street, Suite #500
Billings, MT 59101
406-255-7215
406-252-5292 - Fax
jbaewer@crowleyfleck.com

July 23, 2009

Clerk of Court
Workers' Compensation Court
P. O. Box 537
Helena, MT 59624-0537

RE: Flynn v. Liberty NW Ins. Co. & MT State Fund
WCC No. 2000 – 0222
MT Supreme Court No. DA 06-0734

Dear Clerk of Court:

Enclosed please find the original Common Fund Insurer's Response Brief on Claims "Paid in Full", which was fax filed on today's date.

Please call if you have any questions.

Sincerely,

Jennilee C. Baewer

JENNILEE C. BAEWER, Certified PLS
Legal Admin. Assistant to Steven W. Jennings
Enclosure

CROWLEY FLECK PLLP
ATTORNEYS

Transwestern Plaza II
490 North 31st Street
Billings, MT 59101
Phone: (406) 252-3441
Fax: (406) 256-8526

FACSIMILE TRANSMITTAL

To:	**Clerk of Workers Comp Court**	Fax:	**(406) 444-7798**
From:	**Steven W. Jennings**	Date:	**7/23/2009**
Re:	**FLYNN Common Fund Response Brief**	Pages:	**8 Pages**
Cc:	**[Name]**		

☐ Urgent ☐ For review ☐ Please comment ☐ Please reply ☐ Please recycle

ATTACHED HERETO PLEASE FIND COMMON FUND INSURERS' RESPONSE BRIEF REGARDING CLAIMS "PAID IN FULL". THE ORIGINAL IS BEING MAILED VIA U.S. MAIL TODAY.

SINCERELY.

JENNILEE C. BAEWER, Certified PLS

Legal Admin. Assistant to Steven W. Jennings