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FILED
NOV 18 2009
OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

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 TO PETITIONER'S MOTION TO AMEND

COME NOW the Responding Insurers listed on Exhibit A attached hereto and submit this brief in opposition to Petitioners' motion to amend their petition.

I. PETITIONERS' MOTION TO AMEND MUST BE DENIED BECAUSE THERE HAS BEEN NO ORDER REQUIRING RESPONDING INSURERS TO IDENTIFY AND PAY POTENTIAL *FLYNN* BENEFICIARIES.

Petitioners seek to amend the petition to add claims against Responding Insurers for penalties and attorneys fees on the basis that Responding Insurers have failed to identify and pay potential *Flynn* Beneficiaries. Specifically, "Petitioners contend that the insurers who have been notified of the claims in this action have a duty to identify and pay claimants the benefits to which they are entitled pursuant to the claims and orders in this action." (Docket #606, *Pets' Mot. to Amend Pet.*)

DOCKET ITEM NO. 610

Petitioners' motion must be denied because Responding Insurers have never been the subject of any order or judgment requiring them to identify and pay potential *Flynn* beneficiaries. The Summons did not require insurers who offered defenses to identify and pay *Flynn* beneficiaries; it stated:

> If you dispute the entitlement of claimants insured by you to additional benefits under the Flynn decision, then your response must set forth the particular grounds and defenses you may have and you need not at present provide the information required in the next paragraph numbered as 5.

(Docket #132, *Summons*, ¶ 4 (emphasis added).)

Responding Insurers disputed any obligation to pay common fund benefits to *Flynn* beneficiaries. (Docket # 278.) Many of these defenses are now being briefed with Responding Insurers' General Motion to Dismiss. (Docket #607.) Thus, not only did Responding Insurers challenge Petitioners' claim to common fund benefits from the start, neither the Summons nor any ruling from this Court or the Montana Supreme Court imposes any "duty to identify and pay claimants the benefits to which they are entitled pursuant to the...orders in this action." (Docket #606.) Because Petitioners' motion to amend is premised on this erroneous assumption that a court has already ruled that Responding Insurers have a duty to identify and pay common fund *Flynn* benefits, it must be denied.

II. PETITIONERS' MOTION TO AMEND MUST BE DENIED BECAUSE NO CLAIMS HAVE BEEN PRESENTED TO RESPONDING INSURERS FOR RETROACTIVE BENEFITS UNDER *FLYNN*.

No claims for retroactive benefits under *Flynn* have been presented to Responding Insurers in this action. To the extent *Flynn* common fund beneficiaries exist and are insured by Responding Insurers, it is their duty to come forth and make their claims. This has long been the law in Montana:

> [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.

As the Court is aware, *Flynn* was decided on December 5. 2002. Since that time, no claimant has requested retroactive benefits under *Flynn* from Responding Insurers. And, despite litigating this case for over nine years, Petitioners do not, and presumably cannot, identify any such beneficiaries covered by Responding Insurers' insurance policies. Petitioners' motion must be denied.

III. PETITIONERS' MOTION TO AMEND MUST BE DENIED BECAUSE THEY CANNOT ALLEGE THE FACTS WHICH MUST BE INCLUDED IN A PETITION PURSUANT TO § 24.5.301, A.R.M.

Without an allegation that even a single *Flynn* beneficiary exists and is insured by Responding Insurers, Petitioners cannot comply with § 24.5.301, A.R.M. The operative Petition does not even name any Responding Insurers. (Docket #1.) More significantly, Petitioners' proposed amendment to the Petition does not provide any of the details required by the rules governing this Court – it does not identify the accidents or occupational diseases, any particular claimant's contentions, a statement that a particular claimant and the insurer have mediated, a statement that all medical records have been exchanged, or lists of exhibits and witnesses. *See* § 24.5.301, A.R.M.

IV. PETITIONERS MOTION TO AMEND THE PETITION IS UNTIMELY AND MUST BE DENIED.

The Petition which Petitioners seek to amend has been fully and finally adjudicated. (Docket #17; *Flynn*.) The Petition did not include a claim for attorneys fees directed against Responding Insurers. (Docket #1.) To the extent Petitioners wished to amend the Petition to assert a claim for penalties against Responding Insurers, they were required, under § 24.5.301(3), A.R.M., to do so prior to final adjudication. They failed to do this. Such failure "constitute[s] a waiver and shall bar any future claim with respect to such attorney fees and/or penalty." § 24.5.301(3), A.R.M.[1]

Likewise, the time for Petitioners to amend under Rule 15, Mont. R. Civ. P. has also expired. The Court has previously noted the applicability of Montana Rule of Civil Procedure 15 in the absence of any specific rule governing workers' compensation proceedings. *See Schneider v. Liberty Northwest*, 2001 MTWCC 34, WCC No. 2000-0041, ¶ 2 (applying Mont. R. Civ. P. 15, stating that "[w]hile the Montana Rules of Civil Procedure do not directly apply to the Workers' Compensation Court, the Court will apply those rules when its own rules are silent on a matter and the rules are not inconsistent with the purpose and nature of the proceedings in this Court").

In *Schneider*, the Court ruled that it would not permit litigants to amend in order to "advance new theories on unsuspecting opponents," notwithstanding that Rule 15 is

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[1] § 24.5.301(3), A.R.M. states as follows:

> Any claim for attorney fees and/or penalty with respect to the benefits or other relief sought by the petitioner shall be joined and pleaded in the petition. Failure to join and plead a claim for attorney fees and/or penalty with respect to the benefits or other relief sought in the petition shall constitute a waiver and shall bar any future claim with respect to such attorney fees and/or penalty.

generally to be applied liberally to allow amendments. *Schneider*, ¶ 4. And as noted below, the Summons by which Responding Insurers were brought into this action was drafted and approved by Petitioners' counsel, and it makes not the slightest hint of a claim for penalties. To the contrary, it contemplates that insurers disputing the entitlement to retroactive common fund benefits would not be required to identify and pay *Flynn* beneficiaries while those insurers' defenses are being adjudicated in this proceeding. To assert such a claim now -- more than four years after the Summons was served -- is clearly advancing a new theory on unsuspecting opponents. Petitioner's motion to amend must be denied. *Schneider*.

V. PETITIONER'S MOTION TO AMEND MUST BE DENIED BECAUSE THEY FAIL TO OFFER ANY EVIDENCE THAT RESPONDING INSURERS HAVE ACTED UNREASONABLY.

To obtain an award for penalties and attorneys fees, Petitioners must demonstrate that Responding Insurers have acted unreasonably. § 39-71-2907, MCA. *See also Nielson v. State Fund*, 2004, MTWCC 12, WCC No. 9902-8158, ¶ 8 ("The final question is whether the claimant is entitled to a penalty and attorney fees with respect to the fifty percent impairment award. To award either, I must find that the State Fund has acted unreasonably in opposing the award."). Responding Insurers cannot be found to have acted unreasonably for at least three reasons.

First, as mentioned above, no claimant has asserted a claim for retroactive benefits under *Flynn* against Responding Insurers. Indeed, not only is there a complete absence of any such claims, Petitioners themselves do not allege the existence of any particular claimant entitled to *Flynn* benefits. Accordingly, Responding Insurers cannot be found to have unreasonably denied hypothetical claims never presented by claimants or the Petitioners themselves.

Second (as also noted above), the Summons expressly provided Responding Insurers with the option of disputing entitlements and offering defenses thereto. Responding Insurers cannot have acted unreasonably where they have done nothing more or less than that which was precisely ordered, authorized, and contemplated by the Summons. In effect, Petitioners seek to penalize Responding Insurers for defending themselves in the precise manner authorized by the Summons. Petitioners' request to penalize Responding Insurers for defending themselves is particularly offensive because Petitioners' counsel drafted the very Summons at issue:

> Mr. Palmer has drafted a proposed common fund summons to other insurers and has forwarded it to Mr. Jones for comment. He will forward it to me by e-mail. I will work on it and then solicit their further input.

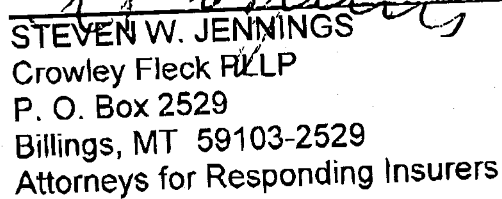
(Docket #111, *Minute Book Hearing # 3570*, 3/17/05.) True to its word, the Court solicited input from Petitioners' counsel after making edits to the Summons. (Docket #115, *Minute Book Hearing # 3577*, 4/1/05 ("The Court will revise and circulate the summonses in *Flynn*...for final review by the parties.").) Petitioners now wish to

penalize Responding Insurers for their compliance with the Summons, which was drafted and approved by Petitioners' counsel.

Third, the defenses offered by Responding Insurers are eminently reasonable. From the start, Responding Insurers have argued that no common fund action may be maintained against them because *Flynn* beneficiaries are not ascertainable. Fifteen months after Responding Insurers raised that defense in this case, the Montana Supreme Court ruled that a common fund cannot exist unless its beneficiaries are readily identifiable upon "superficial review of case files." *Stavenjord v. State Fund*, 2006 MT 257, ¶ 27, 334 Mont. 117, 146 P.3d 724 (*Stavenjord II*). Even if Responding Insurers do not prevail on that defense (and they certainly should), it could not be considered unreasonable where the Montana Supreme Court has accepted that defense in a common fund action on similar facts. Responding Insurers' due process, standing, and other defenses are also eminently reasonable, and supported by decades of precedent. (*See* Docket #607.)

WHEREFORE, for the reasons set forth above, Responding Insurers respectfully request this Court to issue an order denying Petitioners' motion to amend the Petition.

Dated this 18th day of November 2009.



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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 18th day of November 2009:

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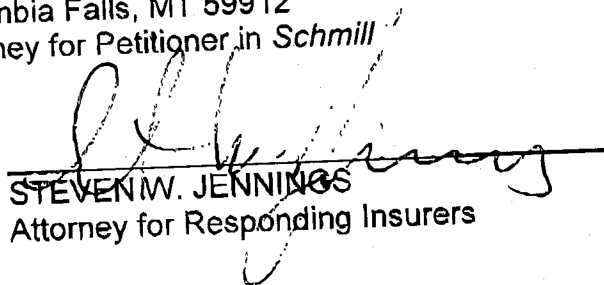

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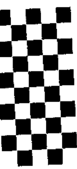
EXHIBIT A

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



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FACSIMILE TRANSMITTAL

To:	Clerk of Workers Comp Court	Fax:	(406) 444-7798
From:	Steven W. Jennings	Date:	11/18/2009
Re:	FLYNN Common Fund	Pages:	8 Pages
Cc:			

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ATTACHED HERETO PLEASE FIND COMMON FUND INSURERS' RESPONSE BRIEF TO PETITIONERS' MOTION TO AMEND. THE ORIGINAL IS BEING MAILED VIA U.S. MAIL TODAY.

SINCERELY,

JENNILEE C. BAEWER, Certified PLS

Legal Admin. Assistant to Steven W. Jennings