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WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ROBERT FLYNN and CARL MILLER, Petitioners, vs. MONTANA STATE FUND, Respondent/Insurer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Intervenor.	WCC No. 2000-0222 **COMMON FUND INSURERS' REPLY IN SUPPORT OF THEIR GENERAL MOTION TO DISMISS**

Petitioners' Brief in Opposition to Common Fund Insurers' General Motion to Dismiss reflects a profound misunderstanding of constitutional law, Montana workers' compensation statutes, and the common fund doctrine. Petitioners' brief ignores nearly all of the binding precedent cited by Common Fund Insurers on due process, standing, statutory mediation, and other fundamental judicial concepts.

Rather than addressing well-established precedent and fundamental principles developed over hundreds of years of jurisprudence, Petitioners advance truly shocking arguments, the essence of which is that this Court's finding of a global common fund before Common Fund Insurers were made parties to the case leaves Common Fund Insurers with no defenses to the class-wide liability that Petitioners seek to impose on them. In effect, Petitioners argue that dictum from the Special Master's report in *Schmill v. Liberty Northwest Insurance Corp.*, 2008 MT WCC 38, overrides fundamental constitutional protections that are supposed to be afforded to all litigants, even workers' compensation insurers. Petitioners are gravely wrong; there is no "global common fund" exception to due process, standing, and statutory mediation requirements. Common Fund Insurers must be dismissed under the Montana and United States

DOCKET ITEM NO. 612

Constitutions, Montana statutory law, and decades of judicial precedent ignored by Petitioners.

I. PETITIONERS LACK STANDING TO SUE COMMON FUND INSURERS.

As a preliminary matter, Common Fund Insurers must be dismissed because Petitioners do not (and cannot) argue, much less prove, that they have standing to bring any claims against Common Fund Insurers. To establish standing, Petitioners were required to allege and show they have personally been injured by Common Fund Insurers, "not that the injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Olson v. Dep't of Revenue* (1986), 223 Mont. 464, 470, 726 P.2d 1162, 1166; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (noting the "irreducible constitutional minimum" for standing consists of an injury in fact that is fairly traceable to the defendants' conduct and that can be redressed by a favorable decision).

Petitioners do not dispute that they have already been paid in full by State Fund on their claims. Moreover, Petitioners' brief is silent on the issue of their standing to sue Common Fund Insurers.[1] Petitioners' brief does not address: (1) the constitutional requirement for standing; and (2) Montana and federal precedent establishing that, to demonstrate standing, a litigant must show (or at least allege) an injury traceable to the respondent Common Fund Insurers. And Petitioners' brief in "opposition" makes no attempt to demonstrate, or even allege, any injury traceable to conduct of Common Fund Insurers – who are otherwise strangers to Petitioners.

Under this Court's rules, "[f]ailure of the adverse party to timely file an answer brief may be deemed an admission that the motion is well taken." § 24.5.316(4), A.R.M. Applying this rule, this Court has held that a document labeled as a response brief which fails to address the merits of a motion does not constitute substantive opposition:

> Furthermore, failure of the adverse party to timely file an answer brief may be deemed an admission that the motion is well taken. Merely captioning a document as a "Response to Motion" but failing to substantively address the merits of that motion within the body of the brief is insufficient to constitute substantive opposition to that motion.

Shell v. Valor Ins. Co., 2006 MT WCC 12, ¶ 4 (citing § 24.5.316(4), A.R.M.). Accordingly, as in *Shell*, because Petitioners' "opposition" brief does not substantively address the merits of Common Fund Insurers' standing argument, the General Motion

[1] Petitioners purport to incorporate the arguments raised by Cassandra Schmill in her Petitioner's Response to Responding Insurers' "Gateway Legal Issues" and Motion to Dismiss in their response brief. (*See* Pets.' Br. at 2 & Ex. A.) Schmill's brief similarly fails to address, much less establish, standing. Although the Court denied Responding Insurers' motion to dismiss in *Schmill*, it did so "because [the motion] challenge[d] determinations already made by the Montana Supreme Court in th[at] litigation." *Schmill*, 2008 MT WCC 38 (Special Master's Findings, ¶ 9). That ruling is presently on appeal.

to Dismiss should be granted.
§ 24.5.316(4), A.R.M.

Although Petitioners' failure to address standing is reason alone to dismiss their claims against Common Fund Insurers, the record is clear that Petitioners lack standing. As noted in section II of Common Fund Insurers' opening brief, Petitioners lack standing to bring this action against Common Fund Insurers because they cannot demonstrate, and do not even allege, any injury traceable to conduct of Common Fund Insurers. And a litigant who lacks standing does not present the Court with a justiciable case or controversy. Common Fund Insurers should be dismissed with prejudice.

II. DUE PROCESS MANDATES DISMISSAL OF COMMON FUND INSURERS.

Petitioners' argument in response to Common Fund Insurers' due process defense does nothing more than highlight the absence of due process afforded to Common Fund Insurers in this case. Petitioners cannot seem to decide (a) if Common Fund Insurers "are receiving due process right now," or (b) if Common Fund Insurers have already "enjoyed full due process of law." DE# 611, *Pets.' Br.* at 3. Neither argument is supported by authority, and neither withstands scrutiny. Simply stated, due process required Petitioners to summon Common Fund Insurers into the case before, not after, seeking a global common fund ruling, in order to enforce that ruling against Common Fund Insurers.

Petitioners argue that Common Fund Insurers are receiving due process now – because they are being permitted to brief their defenses at this post-judgment stage. Continuing, Petitioners argue that Common Fund Insurers' due process argument has no merit because the judgment in *Flynn I* has already determined Common Fund Insurers' liability to pay *Flynn* benefits to unknown, unidentified and hypothetical beneficiaries. Of course, this predetermined liability is the precise basis of Common Fund Insurers' due process argument. Should the Court accept that *Flynn I* and the Court's global common fund order may be enforced against Common Fund Insurers after-the-fact, then all the briefing in the world would amount to mere gesture rather than a realistic opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) ("[P]rocess which is a mere gesture is not due process."). If Common Fund Insurers are liable based on *Flynn I* and the Court's global common fund order, liability has been predetermined, and no amount of post-judgment briefing can afford Common Fund Insurers adequate due process.

Petitioners' due process arguments fail for other reasons as well. Petitioners' argument that the Court has already dismissed Common Fund Insurers' due process argument stretches credulity. Petitioners point to the Court's 2003 *Decision and Order Regarding Retroactivity and Attorneys Fees* in which the Court rejected State Fund's argument that due process would be violated if Petitioners were allowed to maintain a common fund consisting of benefits from non-participating claimants. *See* DE# 611, *Pets.' Br.* at 2 (citing DE #63, *Decision and Order Regarding Retroactivity and Attorneys Fees*, 8/5/03). Without addressing the fact that Petitioners had not bothered to summon or serve Common Fund Insurers at that point in time, Petitioners rely on the Court's

statement that "State Fund is receiving due process right now by defending against the common fund claim. It has been given both notice and opportunity to be heard, the very things it claims it is being denied." *Id.*

Once again, Petitioners' argument on this score simply highlights the lack of due process afforded to Common Fund Insurers. As the Court noted, State Fund was afforded due process because it was given notice and opportunity to be heard before any finding of liability or of a common fund. *See* DE# 1, *Pet. for Hearing*, 10/30/00 (naming "State Compensation Ins. Fund" as "Respondent/Insurer"); DE# 3, *Clerk's Certificate of Service*, 11/2/00; DE# 4, *Resp. to Pet. for Hearing*, 12/6/00. State Fund thus received the very due process that was denied to Common Fund Insurers. Moreover, even after the Court entered its Order Clarifying Global Lien (DE #86), the Court continued to recognize that "other insurers should be provided an opportunity to contest ... the existence of a common fund." DE# 93, *Minute Book Hearing #3500*, at 2. Petitioners' calculated efforts to deprive Common Fund Insurers of their constitutional rights by summoning them into the case post-judgment should not be countenanced.

Second, Petitioners' argument that Common Fund Insurers "have enjoyed full due process of law" because Flynn filed a Notice of Attorneys' Lien in December 2002 fails as a matter of law. DE# 611, *Pets.' Br.* at 3. Petitioners argue that *Flynn I* and the subsequent finding of a global common fund may be enforced after-the-fact against Common Fund Insurers because "the insurers are and have been on notice of the controlling precedent" and "they are and have been on notice of the attorneys fee lien," and therefore had notice and opportunity to defend. *Id.* Petitioners fail to mention that their December 2002 Notice of Attorneys' Lien specifically gave "notice to the State Compensation Insurance Fund and its counsel of the undersigned's attorneys' lien ...." DE# 26. Indeed, State Fund was the only recipient referenced in the certificate of service. *Id.* More fundamentally, Petitioners cite to no legal authority whatsoever standing for the proposition that notice of an attorney lien extends beyond the parties of the case to every other insurer that has ever written business in Montana – or that such a "matter of public record" between two party litigants could ever satisfy due process as to insurers joined as respondents years later.

Of course, the analysis of whether and when any particular Common Fund Insurer may have had knowledge of the pending *Flynn* litigation misses the point entirely. As a matter of law, knowledge that a case is pending cannot bind a nonparty to a judgment rendered therein:

> The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger . . . Unless duly summoned to appear in legal proceeding, a person not privy may rest assured that a judgment recovered therein will not affect his legal rights.

Chase Nat'l Bank v. Norwalk, 291 U.S. 431, 441 (1934). Petitioners know full well that service of process rules are mandatory and must be strictly followed; indeed, if the Court were to follow Petitioners' arguments to their logical conclusion, summons would

be unnecessary, and judgments could be enforced at whim against any entity similarly situated to the defendant. But the reality is that service of process rules are mandatory and must be strictly followed; knowledge of the action is not, and has never been, a substitute for valid service. *In re Marriage of Grounds* (1995), 271 Mont. 350, 352, 897 P.2d 200, 201. Petitioners' argument that due process was satisfied by virtue of alleged knowledge of the *Flynn* litigation is not just specious; it runs contrary to established Montana precedent.

It is quite telling that Petitioners chose not to address Common Fund Insurers' argument that if the slate is wiped clean consistent with binding due process precedent, no common fund could ever exist as to Common Fund Insurers. *See* DE# 607, Gen. Mot. to Dismiss at 7-8 (citing *Stavenjord v. State Fund*, 2006 MT 257, 334 Mont. 117, 146 P.3d 724). In light of the absence of any substantial opposition on this point, the Court should not hesitate to dismiss Common Fund Insurers from this global common fund proceeding. *See Shell,* 2006 MT WCC 12, ¶ 4 (citing § 24.5.316(4), A.R.M.).

III. NEITHER THE LEGISLATURE NOR THE COURT HAS RECOGNIZED ANY COMMON FUND EXCEPTION TO THE JURISDICTIONAL MEDIATION REQUIREMENTS.

In their General Motion to Dismiss, Common Fund Insurers demonstrated that this Court lacks jurisdiction because Petitioners have failed to satisfy the statutory mediation prerequisites to the exercise of the Court's jurisdiction as set forth in § 39-71-2400, *et seq.*, MCA. Ignoring the statute as well as judicial decisions interpreting and applying this well-settled jurisdictional requirement, Petitioners are forced into the absurd argument that this action is "not a direct action against the insurers,"[2] but rather, an "in rem" action against the corpus of the common fund. DE# 611, *Pets.' Br.* at 4. This argument fails for two reasons.

First, this is clearly not an "in rem" action because Petitioners do not seek a judgment as to the status of property. Rather, they seek a judgment requiring Common Fund Insurers to pay money in the form of *Flynn* benefits and common fund attorneys fees. They also seek injunctive relief by seeking to require Common Fund Insurers to identify and locate potential *Flynn* beneficiaries whom Petitioners are unable or unwilling to locate.[3] Thus, because they seek a money judgment and injunctive relief <u>against Common Fund Insurers</u>, this is clearly an "in personam" action.

[2] If this is "not a direct action against the insurers," then Petitioners present no case or controversy against Common Fund Insurers, and Petitioners have failed to state a claim for which relief can be granted.

[3] Likely recognizing that an admission that this is an action against the *Flynn* beneficiaries would defeat the argument that this is an "in rem" action, Petitioners creatively argue that no mediation was required with the beneficiaries either because "they are allies not adversaries of Flynn and Miller." DE# 611, *Pets.' Br.* at 5. The *Flynn* beneficiaries are anything but allies of Flynn, Miller or their counsel. Those parties seek to take 25% of any benefits that may be owed to *Flynn* beneficiaries.

Second, even if we indulge in the erroneous assumption that this is an "in rem" action, Petitioners cite no case or statute carving out an "in rem" exception to the mediation requirements set forth in § 39-71-2400, *et seq.*, MCA. To the extent we can call the common fund a distinct piece of property (a "rem"), it is nothing more than the aggregate cash total of the retroactive workers' compensation benefits that may be owed under *Flynn*. A dispute over such benefits must be mediated before the Court has jurisdiction:

> A dispute concerning benefits arising under this chapter, other than the disputes described in subsection (2), must be brought before a department mediator as provided in this part.

§ 39-71-2401, MCA. Whether "in rem" or "in personam," the dispute in this action concerns "benefits arising under [the Workers Compensation Act]," and mediation is statutorily required. There is no exception for "in rem" actions, and the Court should not read one into the statute.

Petitioners also argue that because common fund proceedings arise post judgment, "there was neither the opportunity nor the need for Flynn and Miller to mediate a claim for common fund attorney fees." DE# 611, *Pets.' Br.* at 5. This argument is nothing more than a poor rationale to ignore the statutory mediation requirements.

While it is true that this Court has jurisdiction over common fund proceedings, that jurisdiction arises because disputes over the common fund are disputes concerning benefits arising under the Workers' Compensation Act.[4] Accordingly, mediation is required under § 39-71-2401, MCA because the very source of the Court's jurisdiction is a dispute over benefits. Indeed, the statute that expressly provides this Court with jurisdiction over disputes arising from benefits refers to, and mandates, mediation before this Court's jurisdiction attaches:

> After parties have satisfied dispute resolution requirements provided elsewhere in this chapter, the workers' compensation judge has exclusive jurisdiction to make determinations concerning disputes under this chapter ....

§ 39-71-2905(1), MCA (emphasis added). Disputes regarding common fund benefits are not exempt from the jurisdictional mediation requirements set forth in § 39-71-2400, *et seq.*, MCA. Petitioners not only fail to cite any statute or judicial decision in support of the exemption they seek, they altogether fail to explain why they did not seek to

[4] If disputes regarding common funds are not disputes concerning benefits arising under the Workers' Compensation Act, then this Court does not have jurisdiction over common fund disputes. *See Thompson v. State*, 2007 MT 185, ¶ 26, 338 Mont. 511, ¶ 26, 167 P.3d 867, ¶ 26 (holding Workers' Compensation Court had no jurisdiction to issues rulings that did not concern workers' compensation benefits).

mediate with Common Fund Insurers prior to joining them as respondents to these global common fund proceedings. Having failed to comply with statutory mediation requirements before joining Common Fund Insurers as respondents, Petitioners failed to properly invoke the jurisdiction of the Court, and the case must be dismissed as to Common Fund Insurers. *Preston v. Transportation Ins. Co.*, 2004 MT 339, ¶ 36, 324 Mont. 225, ¶ 36, 102 P.3d 527, ¶ 36; *Peterson v. Montana Schools Group Ins. Authority*, 2005 MTWCC 30, ¶ 12 (citations omitted).

IV. ATTORNEYS FEES ARE LIMITED TO THOSE ACTUALLY INCURRED.

In their General Motion to Dismiss, Common Fund Insurers demonstrated that in the event they or *Flynn* beneficiaries are liable for payment of the Petitioners' attorneys fee lien, that liability is limited to the actual attorneys fees incurred by Petitioners (and only in proportion to the benefit received), but not the 25% across-the-board tax advanced by Petitioners' counsel. In their opposition brief Petitioners make no real effort to refute Common Fund Insurers' argument on this issue. Indeed, they note that recovery of attorney fees under the common fund doctrine is "*not fee shifting but fee sharing*." DE# 611, *Pets.' Br.* at 7.

Petitioners do not even respond to the argument that the 25% tax advocated by Petitioners' counsel far exceeds the payment required by the common fund doctrine. Petitioners instead focus on the equitable reasons for requiring non-participating beneficiaries to contribute to the fees incurred by the active litigant.[5] Of course, Petitioners' reticence to address this issue is quite understandable. The very case they cite in support of their policy argument, *Means v. Montana Power Co.* (1981), 191 Mont. 395, 625 P.2d 32, states quite clearly that all that is owed under the common fund is the actual attorneys fees incurred.

> The "common fund" concept provides that when a party through active litigation creates, reserves or increases a fund, others sharing in the fund must bear a portion of the litigation costs including reasonable attorney fees. The doctrine is employed to spread the cost of litigation among all beneficiaries so that the active beneficiary is not forced to bear the burden alone and the "stranger" (i.e., passive) beneficiaries do not receive their benefits at no cost to themselves.

Means, 625 P.2d at 37 (emphasis added). Of course, Petitioners are fully aware that the common fund doctrine is not a license to plunder the non-participating beneficiaries, but rather is limited to reimbursement of the attorneys fees incurred. The attorneys fee lien filed by Petitioners' counsel in this action expressly recognizes that the amount of the lien is limited to the actual litigation costs incurred:

[5] Common Fund Insurers do not dispute that the common fund doctrine is based on the equitable principle that it is only fair to require non-participating beneficiaries to share the burden of the legal fees actually incurred in obtaining the benefit.

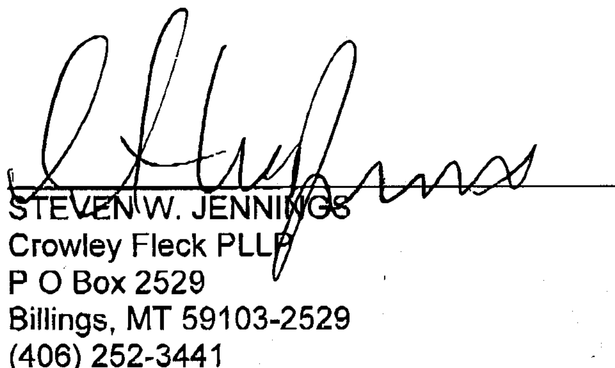
> Those absent claimants should be required to contribute in, proportion to the benefits they receive or will receive, to the cost of the litigation, including reasonable attorney's fees allowable by law at the time of the claimants' respective industrial injuries.

DE# 132, *Amended Notice of Attorney's Lien*, 12/26/02 (emphasis added). It is thus undisputed that in the event Common Fund Insurers or non-participating *Flynn* beneficiaries are liable to pay attorney fees to Petitioners' counsel, that liability encompasses only the actual litigation costs incurred by Petitioners and only in proportion to the benefit actually received.

V. CONCLUSION.

The global common fund doctrine as interpreted by Petitioners violates Common Fund Insurers' constitutional rights to due process, ignores constitutional standing requirements, jettisons legislatively mandated mediation requirements, and improperly shifts the burden of proof to Common Fund Insurers by requiring them to solicit and pay claims. For the foregoing reasons, Common Fund Insurers respectfully request that the Court enter an order dismissing Common Fund Insurers from this case with prejudice. In the alternative, Common Fund Insurers respectfully request an order to the effect that Petitioners' counsel claim for common fund attorneys fees is limited to fees incurred by Flynn – $326.

Dated this 9th day of December, 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 ~~7th~~ 9th day of December 2009:

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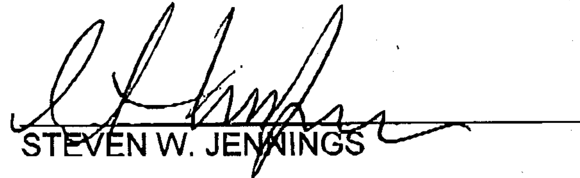

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EXHIBIT A

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SINCERELY.

JENNILEE C. BAEWER, Certified PLS

Legal Admin. Assistant to Steven W. Jennings