Todd A. Hammer
David M. Sandler
HAMMER, HEWITT,
SANDLER & JACOBS PLLC
Attorneys at Law
P.O. Box 7310
Kalispell, MT 59904-0310
Telephone: (406) 755-2225
Facsimile: (406) 755-5155

Attorneys for Northwest Healthcare, Corp.

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ALEXIS RAUSCH et. al., Petitioners, vs. **MONTANA STATE FUND.** Respondent/Insurer, and **JEREMY RUHD,** Petitioner, vs. **LIBERTY NORTHWEST INSURANCE CORPORATION,** Respondent/Insurer.	WCC NO. 9907-8274R1 **BRIEF IN SUPPORT OF NORTHWEST HEALTHCARE CORP.'S OBJECTIONS TO SUMMONS AND MOTION TO QUASH SUMMONS**

Northwest Healthcare makes this special appearance and objects to the Summons issued by this Court on January 10, 2005 and moves this Court to quash the Summons. Northwest Healthcare respectfully submits that the Supreme Court did not authorize this Court to issue a summons to non-party insurers and to order them to produce the information when it stated that this Court is to "supervise enforcement of the common fund pursuant to *Rausch*, and all court-approved agreements stemming from it, from all insurers involved." As fully explained below, this Court did not have jurisdiction to issue the Summons and does not currently have jurisdiction over Northwest Healthcare in this case. Indeed, because there is not currently a justiciable controversy involving Northwest Healthcare, there is no one with standing to oppose Northwest Healthcare's objection or Motion to Quash Summons. Moreover, Northwest Healthcare respectfully submits that this Court is creating legal duties for Northwest Healthcare out of whole cloth which were not intended by the Supreme Court. Accordingly, this Court should quash the Summons issued to Northwest Healthcare.

LAW AND ARGUMENT

Although this Court's rules do not contain any provision regarding challenging this Court's jurisdiction, it is well established that a party may make an appearance in a case to challenge the court's jurisdiction. *See, e.g., F. W. Woolworth Co., Inc. v. Employment Sec. Division of Montana State Dept. of Labor and Industry*, 192 Mont. 289, 300-01, 627 P.2d 851, 858 (1981) (explaining that a party can attack a court's jurisdiction by raising the jurisdictional issue in an initial response). For any of the following reasons, this Court should quash the Summons directed to Northwest Healthcare:

A. Northwest Healthcare is not a party to this case and, consequently, this Court had no jurisdiction to issue a summons to Northwest Healthcare.

At the outset, this Court did not have jurisdiction to issue the Summons to Northwest Healthcare, or to any other non-party, particularly since no person with standing has asked this Court to do so. Neither the Montana Workers' Compensation Act nor this Court's rules authorize this Court to *sua sponte* issue a summons to persons or entities that are not parties to a case. Without a specific grant of authority to issue a summons, this Court simply does not have the power to do so.

Indeed, a ruling allowing this Court the power and authority to *sua sponte* issue summons to non-parties would give this Court far more power in this regard than any other court in Montana. This Court has commonly looked to the Montana Rules of Civil Procedure for guidance in matters not governed by its own rules. *See, e.g., Broyles v. Albertson's, Inc.,* 2003 MTWCC 61, ¶ 12 (citation omitted). Rule 4(C)(1), M.R.Civ.P.,

provides that process by which a summons may be issued by Montana's district courts. Notably, there is nothing in this rule authorizing a district court to *sua sponte* issue a summons to a non-party. The rule makes it clear that a district court may issue a summons only after the plaintiff has filed a complaint and, thereafter, requested the district court to do so. It states as follows:

> (1) *Summons--Issuance.* Upon or after filing the complaint, the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall present a summons to the clerk for issuance. If the summons is in proper form, the clerk shall issue it and deliver it to the plaintiff or to the plaintiff's attorney who shall thereafter deliver it for service upon the defendant in the manner prescribed by these rules. Issuance and service of the summons shall be accomplished within the times prescribed by Rule 4E of these rules. Upon request, the clerk shall issue separate or additional summons against any parties designated in the original action, or against any additional parties who may be brought into the action, which separate or additional summons shall also be served in the manner and within the times prescribed by these rules. The party requesting issuance of the summons shall bear the burden of having it properly issued and served.

Since there is nothing giving this Court the authority to issue a summons on its own, this Court has not acquired jurisdiction over Northwest Healthcare. Rule 4(B)(2), M.R.Civ.P., provides as follows

> *Acquisition of Jurisdiction.* Jurisdiction may be acquired by our courts over any person through service of process as herein provided; or by the voluntary appearance in an action by any person either personally, or through an attorney, or through any other authorized officer, agent or employee.

No one with standing has followed the procedure to have this Court issue a summons to Northwest Healthcare; i.e., no person with standing has filed any sort of claim against Northwest Healthcare or requested that this Court issue a summons to Northwest Healthcare. The procedure employed by this Court is akin to a district court *sua sponte* making a third-party claim under Rule 14, M.R.Civ.P. Montana's district courts obviously do not have the power to *sua sponte* make third-party claims. Moreover, Northwest Healthcare has not voluntarily appeared in this case. Accordingly, this Court had no jurisdiction to issue the Summons and, consequently, this Court should quash the Summons.

B. This Court does not currently have jurisdiction over Northwest Healthcare because no dispute exists between Northwest Healthcare and any claimants injured or suffering occupational diseases since June 30, 1991 or any attorneys and because no dispute has been presented pursuant to the Workers' Compensation and Occupational Disease Acts and this Court's rules.

Assuming for sake of argument that this Court had the authority to *sua sponte* issue summons to non-parties, it currently has no jurisdiction over Northwest Healthcare. It is well established that this Court lacks jurisdiction where the parties have not completed the mediation process required by § 39-71-2408(1) and §39-71-2905(1), MCA. *See, e.g., Preston v. Transportation Ins. Co.*, 324 Mont. 225, 102 P.3d 527, 530-531 (2004).

Presumably because there is presently no dispute between Northwest Healthcare and any permanently totally disable claimants or the *Rausch* attorneys, Northwest Healthcare has not mediated any dispute with any claimant over their entitlement to an impairment award, or with any attorney who has made a claim for common fund attorney fees. Since Northwest Healthcare has not been a party to any such mediation, this Court does not have jurisdiction over Northwest Healthcare.

Likewise, this Court's jurisdiction extends only to the "adjudication of disputes arising under Title 39, chapter 71 and chapter 72, MCA." Rule 24.5.101(2)(a), ARM. Along these same lines, this Court recently recognized that its jurisdiction extends only to justiciable controversies:

> ¶4 "Courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions." *Marbut v. Secretary of State*, 231 Mont. 131, 135, 752 P.2d 148, 150 (1988). In *Gryczan v. State*, 283 Mont. 433, 442, 942 P.2d 112, 117 (1997), the Supreme Court laid out the following test to distinguish hypothetical questions from true cases and controversies:
>
> > The test of whether a justiciable controversy exists is: (1) that the parties have existing and genuine, as distinguished from theoretical, rights or interests; (2) the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion; and (3) the controversy must be one the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status or legal

> relationships of one or more of the real parties in interest, or lacking these qualities, be of such overriding public moment as to constitute the legal equivalent of all of them.

Hernandez v. ACE USA, 2003 MTWCC 47, ¶4.

There is currently no dispute or case and controversy between Northwest Healthcare and any claimants impacted by the Supreme Court's decision in *Rausch* or the *Rausch* attorneys. Northwest Healthcare is well aware of the Supreme Court's decisions in *Rausch* and *Ruhd*, and the fact that the *Rausch* attorneys have filed liens. Until an actual controversy arises between Northwest Healthcare and a claimant entitled to benefits under *Rausch* or the *Rausch* attorneys, there is no justiciable controversy for this Court to handle. Thus, this Court does not currently have jurisdiction over Northwest Healthcare, and this Court should therefore quash the Summons.

C. This is not a class action, and class action claims have not been asserted in this action against any of the self-insureds which have not been made parties to this action.

Although this Court did not specify what it intends to do with the information has requested, it appears the procedure this Court is employing in the case at bar is, in essence, turning the *Rausch* case into a class-action suit against every insurer that has done business in Montana. This, however, is not allowed in Montana. Rule 23(a), M.R.Civ.P., states:

> **Rule 23(a). Prerequisites to a class action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In *Murer v. Montana State Compensation Mut. Ins. Fund,* 257 Mont. 434, 849 P.2d 1036, (1993), the Supreme Court held that claimants are not entitled to bring a class action suite against insurers with whom they have had no dealing:

> Generally in the application of the typicality requirement of Rule 23(a)(3), the plaintiffs are not entitled to bring a class action against defendants with whom they have had no dealings. There are numerous

> defendants in this action with which the plaintiffs have had no dealing. The leading case construing this requirement is *La Mar v. H & B Novelty and Loan Co.* (9th Cir.1973), 489 F.2d 461. The court stated: "in our view, under proper application of Rule 23 of the Federal Rules of Civil Procedure, the plaintiffs here are not entitled to bring a class action against defendants with whom they had no dealing." *La Mar,* 489 F.2d at 464.
>
> The third prerequisite was that the claims of the representative parties be typical of the class. Obviously this requirement is not met when the "representative" plaintiff never had a claim of *any* type against *any* defendant. There is nothing in the rule to suggest that the zeal or talent of the "representative" plaintiff's attorney can supply this omission. We believe that this prerequisite is also lacking when the plaintiff's cause of action, although similar to that of other members of the class, is against a defendant with respect to whom the class members have no cause of action. Those who purchased tickets from the appellee airlines, from whom the representative plaintiff purchased no tickets, have no cause of action by reason of such purchases against the airline from whom the representative plaintiff purchased. In brief, typicality is lacking when the representative plaintiff's cause of action is against a defendant unrelated to the defendants against whom the cause of action of the members of the class lies.

Id., 849 P.2d at 1038.

By ordering Northwest Healthcare to furnish the information described in paragraph 4 of the Summons, this Court is changing this case from a common fund case to a class-action suit against ever insurer in Montana. Since neither the claimants in *Rausch* nor their attorneys have had dealings with Northwest Healthcare, a class-action suit clearly would not permitted under Rule 23(a), M.R.Civ.P., and *Murer.* Moreover, even if the *Rausch* claimants or their attorneys could currently bring a class action, there is no reason to dispense with the law on class actions, the jurisdictional requirements of this Court, or the procedural rules of this Court. Indeed, to dispense with these requirements would violate Northwest Healthcare's right to due process of law. Therefore, this Court should quash the Summons.

D. Northwest Healthcare has no duty to solicit claims or to advise claimants of their legal rights in regard to said claims. *See Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *see also Dennehy v. Anaconda Mineral Company*, WCC No.: 8612-4030, 1989 WL 253344 (holding that self-insured had no trust relationship with claimants.)

Although this Court states that it will determine at a later date whether the information it has order to be provided is protected from disclosure to the attorneys in

Rausch, *Fisch*, *Frost*, and *Ruhd*, it is clear this Court is essentially ordering Northwest Healthcare to solicit claims for impairment awards and, thereby, solicit claims for common fund attorney fees. In ordering Northwest Healthcare to furnish such information, this Court is creating a legal duty for Northwest Healthcare out of whole cloth that runs directly counter to Northwest Healthcare's duties under the current law.

In *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973), the court made it clear that a private insurer does not have trust relationship with a claimant or a potential claimant and that private insurers are under no duty to solicit claims. The claimant in *Ricks* filed a written claim for compensation nearly four years after his industrial accident. *Id.* at 471, 512 P.2d at 1306. The district court ruled that Argonaut Insurance was estopped from relying upon the statute of limitations because it did not advise the claimant that he had one year to file a written claim for benefits. *Id.* at 473, 512 P.2d at 1307.

Our Supreme Court reversed. The court noted that an insurer has no duty to solicit claims, or to send claimants or potential claimants a letter informing them of the time limitations applicable to their claims or potential claims. *Id.* at 473-74, 512 P.2d at 1307-08. In rejecting the argument that Argonaut was estopped from relying on the statute of limitations, the court explained that estoppel applies when the insurer has in some way mislead the claimant. *Id.* at 481, 512 P.2d at 1311. The court noted that Argonaut never mislead the claimant, either directly or by omission. *Id.* Indeed, the claimant and Argonaut never had any contact with each other. In distinguishing *Yurkovich*, the court explained that there is no trust relationship between a private insured and a claimant. The court stated as follows:

> In *Yurkovich* which was a plan III case, the Court did hold that the Board had a duty to fully advise an injured workman of the claim filing requirements. But in *Yurkovich* the claimant wrote to the Board asking for information as to what he should do. In the instant case there is no such request from the claimant. There was no communication whatsoever between claimant and the insurer or the Board. In fact, claimant was represented by counsel who surely should have known of the claim filing requirements. The facts of the instant case are certainly distinguishable from *Yurkovich*. ***In addition, Yurkovich was decided on the theory that the Board was a trustee of the state fund, that it acted in a dual capacity and, therefore, had a greater duty toward claimants. Defendant Argonaut is not in the same position as the Board.***

Id. at 482, 512 P.2d at 1312 (emphasis added.) This holding was extended to self insureds in *Dennehy v. Anaconda Mineral Company*, WCC No.: 8612-4030, 1989 WL 253344.

By requiring Northwest Healthcare to furnish the information listed in paragraph 4 of the Summons, it is imposing the duty upon Northwest Healthcare to solicit claims for impairment awards and, thereby, to solicit claims for common fund attorney fees. As noted in *Ricks* and *Dennehy*, Northwest Healthcare is under no legal duty to do so. Accordingly, this Court should quash the Summons.

E. While the Court's jurisdiction and authority appears to extend to "supervising enforcement of the common fund . . . from all insurers involved" in this action, it does not appear to extend to parties such as Northwest Healthcare which have not been properly made parties to this proceeding, which have not been properly joined by the assertion of class action claims, and which have no duty to solicit claims or advise claimants of their legal rights in regard to such claims. The Montana Supreme Court did not intend to do contravene such law by its statements in *Rausch et. al. v. State Compensation Ins. Fund,* 2002 MT 203, 311 Mont. 210, 54 P.3d 25 and *Ruhd v. Liberty Northwest Ins. Corp.,* 2004 MT 236, 322 Mont. 478 (*Ruhd II),* decided August 31, 2004.

Based upon paragraph 1 of the Summons, it appears that this Court believes it has jurisdiction to order Northwest Healthcare to produce the information base upon the Supreme Court's statement that "[t]he Workers' Compensation Court shall supervise enforcement of the common fund pursuant to *Rausch*, and all court approved settlements stemming from it, from all insurer's involved." *Ruhd v. Liberty Northwest Insur. Corp.*, 322 Mont. 478, 484, 97 P.3d 561, 566 (2004) (*Ruhd II*). Northwest Healthcare respectfully argues that this Court has read too much into *Ruhd II*. The Supreme Court was doing nothing more than reiterating its general holding that the *Rausch* attorneys were entitled to common fund fees from insurers other than the Montana State Fund and that this Court has jurisdiction to consider disputes arising under the payment of such fees, if any such disputes arise. The Supreme Court could not have intended to make wholesale changes to the law governing this Court's jurisdiction or the manner in which cases are litigated. Certainly, if the Supreme Court wanted to make such wholesale changes, it would have specifically said so in *Ruhd II* and provided the method under which this Court was to supervise the enforcement of the common fund.

Northwest Healthcare agrees that this Court could obtain jurisdiction over Northwest Healthcare if a dispute arose between Northwest Healthcare and a claimant claiming an entitlement to benefits under *Rausch* or between Northwest Healthcare and an attorney entitled to a common fund fee. Until such a dispute arises and is handled in accordance with the procedural requirements of the Montana Workers' Compensation and Occupational Disease Acts, this Court simply has no jurisdiction to do anything. Thus, Northwest Healthcare requests that this Court quash the Summons directed to Northwest Healthcare.

CONCLUSION

For the foregoing reasons, this Court should quash the summons it issued to Northwest Healthcare.

DATED this 10th day of February, 2005.

HAMMER, HEWITT, SANDLER & JACOBS, PLLC

Todd A. Hammer
David M. Sandler
P.O. Box 7310
Kalispell, MT 59904-0310