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Attorneys for Fairmont Insurance Company,
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FILED

MAR 1 3 2006

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CASSANDRA SCHMILL,	)
Petitioner,	) WCC NO. 2001-0300
-vs-	)
LIBERTY NORTHWEST INSURANCE CORPORATION,	) **RESPONSE TO SUMMONS**
Respondent/Insurer,	)
and	)
MONTANA STATE FUND,	)
Intervenor.	)

Respondents Fairmont Insurance Company, Fairmont Premier Insurance Company and TIG Insurance Company respond to the Court's Amended Summons and Notice of Attorney Fee Lien, dated December 7, 2005, as follows.

Response to Summons

DOCKET ITEM NO. 242

RESPONDENTS DISPUTE THE ENTITLEMENT OF <u>SCHMILL</u> BENEFICIARIES TO ADDITIONAL BENEFITS

Respondents dispute the entitlement of claimants insured by them to additional benefits under the <u>Schmill</u> decision. The grounds upon which Respondents dispute said entitlement are as follows:

1. Certain claimants' entitlement to <u>Schmill</u> benefits are precluded by the passage of time and the applicability of the doctrines of waiver, estoppel, laches, and/or various statutes of limitations.

2. An order requiring Respondents to identify all <u>Schmill</u> beneficiaries creates an unreasonable and undue burden upon Respondents.

3. An order requiring Respondents to pay <u>Schmill</u> benefits and/or to pay or withhold the attorney lien in favor of Petitioner's attorneys is prohibited by the due process clause of the Montana Constitution, Article II, Section 17. Respondents were not parties to the <u>Schmill</u> case and were not given notice and opportunity to be heard on the merits of the case.

4. An order requiring Respondents to pay <u>Schmill</u> benefits and/or to pay or withhold the attorney lien in favor of Petitioner's attorneys is prohibited by the due process clause of the 14th Amendment to the United States Constitution. Respondents were not parties to the <u>Schmill</u> case and were not given notice and opportunity to be heard on the merits of the case.

5. No common fund may be maintained against Respondents in this case because the purported non-participating beneficiaries of the <u>Schmill</u> decision are not ascertainable for several reasons, including but not limited to the fact that Montana insurers are not required by Montana statutes or regulations to maintain claim files and records for the length of time necessary to identify all <u>Schmill</u> beneficiaries described in the Amended Summons and Notice of Attorney Fee Lien.

6. Petitioner's common fund attorney fee lien does not and cannot extend to "all Montana insurers and self-insurers" who proportionally reduced occupational disease benefits for non-occupational factors between July 1, 1987 and June 22, 2001. Petitioner's purported attorney lien notice is overbroad because <u>Schmill</u> does not apply to claims that were settled, made final, or closed prior to April 10, 2003, the date of the <u>Schmill</u> decision.

7. Even if a common fund were created through the efforts of Petitioner, neither Petitioner nor her attorneys are entitled to a fixed percentage of additional benefits that may be awarded to non-participating beneficiaries with whom neither Petitioner nor her attorneys have any relation. Under the common fund doctrine, non-participating beneficiaries should contribute, in proportion to the benefits actually received by them, only to the litigation costs incurred by Petitioner in the <u>Schmill</u> litigation, including reasonable

Response to Summons

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attorney fees. The maximum amount of costs and attorneys' fees recoverable by the participating litigants and/or their attorney is limited to those costs and fees actually incurred in creating the benefit for the non-participating beneficiaries.

8. Respondents request and reserve the right to assert additional grounds and defenses, or to adopt the grounds and defenses presented by others responding to the Summons.

WHEREFORE, Respondents respectfully request the Court to enter an order:

a. Denying the entitlement to Schmill benefits by any potential claimants insured by Respondents; or alternatively,

b. Denying the enforcement of the attorney fee lien asserted by Petitioner's attorneys.

DATED this _13th_ day of March, 2006.

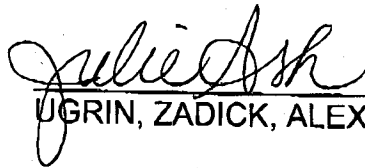UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.

By: _____
Mary K. Jaraczeski
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Great Falls, Montana 59403
Attorneys for Fairmont Insurance Company,
Fairmont Premier Insurance Company and
TIG Insurance Company

CERTIFICATE OF MAILING

I hereby certify that the foregoing was duly served upon the respective attorneys for each of the parties entitled to service by depositing a copy in the United States mails at Great Falls, Montana, enclosed in a sealed envelope with first class postage prepaid thereon and addressed as follows:

Laurie Wallace
Bothe & Lauridsen, P.C.
P.O. Box 2020
Columbia Falls, Montana   59912

DATED this _13_ day of March, 2006.

Julie Ash
UGRIN, ZADICK, ALEXANDER & HIGGINS, P.C.

Response to Summons

UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.

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March 13, 2006

Our File: TI12-13 (Schmill)

Montana Workers Compensation Court
Jackie Bockman
Deputy Clerk of Court
P.O. Box 537
Helena, MT 59624-0537

>   Re: **WCC No. 2001-0300**
>   **Schmill v. Liberty Northwest Ins. Co.**

Dear Ms. Bockman:

Enclosed for filing please find the Response to Summons of Respondents/Insurers Fairmont Insurance Company, Fairmont Premier Insurance Company and TIG Insurance Company. Please conform the copy and return to me in the self-addressed, stamped envelope provided.

Sincerely yours,

UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.

Julie M. Ash
Legal Secretary to Mary K. Jaraczeski

cc (w/encl.): L. MacDonald