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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CASSANDRA SCHMILL, Petitioner, vs. LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent/Insurer, and MONTANA STATE FUND, Intervenor.	WCC No. 2001-0300 **RESPONDING INSURER'S RESPONSE BRIEF TO PETITIONER'S OPENING BRIEF REGARDING RETROACTIVITY**

COME NOW the above listed Respondents ("Responding Insurers") and submit this brief in response to *Petitioner's Opening Brief Regarding Retroactivity (Petitioner's Brief)*.[1] While Responding Insurers do not dispute that "open" claims never reduced to judgment may be subject to retroactive application of *Schmill I*, "settled" and "final" claims are not subject to retroactivity and should not be included within the *Schmill* common fund. Settled claims include those in which benefits were terminated upon payment in full as well as those in which the parties settled with the Department of Labor and Industry's approval. Final claims include those reduced to judgment.

BACKGROUND

In *Schmill v. Liberty Northwest Ins. Co.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290 (*Schmill I*), the Montana Supreme Court held that § 39-72-706, MCA, violated equal protection by permitting apportionment of occupational disease benefits based on non-occupational factors when no such apportionment of benefits was permitted for similarly situated claimants who suffered an occupational injury rather than an occupational disease. In *Schmill v. Liberty Northwest Ins. Co.*, 2005 MT 144, 327 Mont. 293, 114 P.3d 204 (*Schmill II*), the Montana Supreme Court held that the decision in *Schmill I* applied retroactively and remanded the case back to this Court. Accordingly, this Court has requested briefing on the following issues.

[1] In submitting this brief, Responding Insurers do not admit any liability for *Schmill*-type benefits and the attorneys fee lien asserted in this case, and do not waive any of the defenses asserted in response to the *Amended Summons and Notice of Attorney Fee Lien* issued in this common fund proceeding.

1. What *Schmill* claims (with entitlement dates between July 1, 1987, and June 22, 2001) are subject to review and increase in benefits based upon a retroactive application of *Schmill I*?

2. Whether the scope of retroactive application is limited by any applicable statute of limitations or laches?

3. Whether the Uninsured Employers Fund falls within the ambit of the Montana Supreme Court's decision in *Schmill II*?

Responding Insurers in this brief address the first issue. Because this Court has already decided the second issue in *Flynn*, Responding Insurers do not address issue 2, noting that finality on the issue should arrive with the Montana Supreme Court's resolution of the pending *Flynn* appeal. Responding Insurers take no position on issue 3.

ANALYSIS

I. WHICH *SCHMILL* CLAIMS ARE SUBJECT TO RETROACTIVE APPLICATION OF *SCHMILL I*?

Pursuant to *Stavenjord v. Montana State Fund*, 2006 MT 257, 334 Mont. 117, 146 P.3d 724 (*Stavenjord II*), and this Court's recent order in *Flynn v. Montana State Fund*, 2006 MTWCC 31, open OD claims involving PTD and TTD benefits previously apportioned are subject to retroactive adjustment based on *Schmill I*. Claims made final or settled prior to *Schmill I*, whether by judgment, settlement, or payment in full, are not eligible for retroactive benefits.

Respondents preliminarily note that neither this Court nor the Montana Supreme Court has found that claims made under Responding Insurers' policies are included in the common fund arising from *Schmill I* -- the subject of this proceeding.[2] Recognizing that the Court may wish to address this issue at a later date,[3] Responding Insurers submit -- to avoid any contention of waiver in the future -- that the common fund limitations recognized recently in *Stavenjord II* must also be applied in determining which *Schmill* claims involving Responding Insurers, if any, may be included within the *Schmill I* common fund.[4] Subject to that reservation, Responding Insurers address in

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[2] While it is true that the Supreme Court held in *Schmill II* that its earlier decision in *Schmill I* created a common fund as to Liberty Northwest and the Montana State Fund (the only respondents involved in the case at the time), neither the Workers' Compensation Court nor the Montana Supreme Court has ever considered or found that a *global common fund* has been created. The "global lien" resulting from *Schmill I* can obviously extend only to those claims included within the common fund. *See Schmill II*, ¶27. The Supreme Court did not address, and indeed could not address consistent with absent insurers' due process rights, whether *Schmill I* results in the creation of a common fund with respect to any particular Responding Insurer or the group collectively.

[3] *See* this Court's *Order Denying Motion to Add Additional Issues to be Briefed.*

[4] *Stavenjord II* reaffirms that the common fund doctrine applies only when an active party by litigation creates or increases an "identifiable monetary fund or benefit" for readily "ascertainable, non-participating beneficiaries." *Stavenjord II*, ¶ 24 (citation omitted.) In rejecting the common fund claim in that case, the Court specifically noted that "benefits due to non-participating *Stavenjord* beneficiaries will not be readily identifiable on superficial review of case files, nor can benefits due be calculated with

this brief which potential *Schmill* claims should and should not be subject to retroactive application of *Schmill I*.

A. "Open" Claims in Which Benefits Are Still Being Paid Would Be Subject to Retroactive Application of *Schmill I*, While Settled Claims Would Not.

In *Petitioner's Brief* Petitioner begins by identifying five classes of claims that might entitle the claimants to *Schmill* type benefits. Consistent with *Schmill I*, Petitioner's classification system is based upon whether an apportionment of TTD or PTD benefits was ever taken by the insurer under § 39-72-706, MCA. Petitioner then analyzes each class of claims under the criteria set forth in *Stavenjord II*, which held in the context of workers' compensation claims that retroactivity applies to "open" claims -- defined as claims "still actionable, in negotiation but not yet settled, now in litigation or pending on direct appeal." *Stavenjord II*, ¶ 16.

Responding Insurers do not dispute that open claims should be subject to retroactive application of *Schmill I* under Montana law because they have never been settled or made final by judgment. Petitioner's classification scheme identifies "open" claims as Class I claims.[5] Certain Class III claims[6] in which PTD benefits are still being paid also would be considered "open" (so long as such claims have not been reduced to judgment), and therefore subject to retroactive application of *Schmill I*.

The parties also agree that claims "settled by way of a petition for settlement approved by DLI or a stipulated judgment"[7] are not subject to retroactive application of *Schmill I*.

The parties disagree on whether a claim paid in full constitutes a "settled claim" that is not subject to retroactivity. Under Petitioner's classification system, such disputed claims include Class II claims[8] and Class III claims in which TTD or PTD benefits were terminated upon retirement.[9] In addition, the parties disagree on the

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certainty by way of mathematical formula." *Id.* ¶ 27. Following *Stavenjord II*, the only potential *Schmill* claims that can conceivably be included within the common fund created by *Schmill I* are those that are "readily identifiable on superficial review of case files" and whose benefits can be calculated with a "simple universal formula." *Id.*

[5] Petitioner describes Class I claims as "[c]laims in which TTD benefits are being paid and were either apportioned in the past, or are still being apportioned." *Petitioner's Brief*, p. 2.

[6] Petitioner describes Class III claims as "[c]laims in which TTD benefits were paid at an apportioned rate, the claimant was found to be PTD and benefits were paid at an apportioned rate, PTD benefits are either continuing to be paid, or stopped automatically because the claimant reached retirement age." *Petitioner's Brief*, p. 2.

[7] Petitioner describes these as Class IV claims. *Petitioner's Brief*, p. 2.

[8] Petitioner describes Class II claims as "[c]laims in which TTD benefits were paid at an apportioned rate, the claimant returned to work with no wage loss, no additional benefits were paid other than medical benefits." *Petitioner's Brief*, p. 2.

[9] Petitioners' Class III actually conjoins two separate classes of claims. The first class is those claims in which TTD benefits were paid at an apportioned rate, the claimant was found to be PTD and such PTD benefits were paid at an apportioned rate, and PTD benefits are still being paid. Unless the benefits amounts have been reduced to judgment, these would qualify as "open" claims. The second class is those claims in which TTD benefits were paid at an apportioned rate, the claimant was found to be PTD, such PTD benefits were paid at an apportioned rate and PTD benefits were terminated upon retirement. Responding Insurers submit

effect of final "judgments," which Responding Insurers submit should not be subject to retroactive review if the judgment addresses the amount of past or prospective TTD or PTD benefits due the injured claimant.

B. Class II Claims Where Benefits Payments Were Terminated After a Claimant Returned to Work with No Wage Loss Are Not Subject to Retroactivity Because TTD Benefits Were Paid in Full.

1. This Court Has Already Held that a Claim "Paid in Full" is a "Settled" Claim not Subject to Retroactivity.

Petitioner defines Class II claims as those claims "in which TTD benefits were paid at an apportioned rate, the claimant returned to work with no wage loss, [and] no additional benefits were paid other than medical benefits."[10] Class II claims are thus claims in which TTD benefits were paid in full because, following a return to work with no wage loss, the claimant would no longer be entitled to TTD benefits.

Significantly, Petitioner does not contend that Class II claims were not paid in full in arguing that Class II claims are subject to retroactivity. Rather, Petitioner argues that paid-in-full claims are not "settled" claims and thus not subject to retroactivity under the holding in *Stavenjord II*.[11] Although Petitioner relies on this Court's recent holding in *Flynn* for other purposes, she tellingly does not address the Court's holding that the definition of a "settled" claim includes a claim previously paid in full. In *Flynn*, the Court adopted the definition of a "settled claim" as provided at § 39-71-107(7)(a), MCA:

> Section 39-71-107(7), MCA, sets forth a clear definition of what constitutes a "settled claim." Just as it is not this Court's function to expand upon directives from the Supreme Court, it is not this Court's function to rewrite what the legislature has already defined. Therefore, the Court concludes that the language of § 39-71-107(7)(a), MCA (2005), defining a "settled claim," as "a department-approved or court-ordered compromise of benefits between a claimant and an insurer *or a claim that was paid in full*," shall be the definition of a "settled claim" for purposes of this case.[12]

Thus, as a matter of law, a "settled claim" is one that was paid in full. Accordingly, because it is undisputed that Class II claims have been paid in full, they are "settled claims" and thus not subject to retroactivity.

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these claims have been paid in full and therefore are "settled claims" not subject to *Schmill I*'s retroactive application. Hereinafter, for ease of reference, Responding Insurers will refer to the former as Class III(a) claims and the latter as Class III(b) claims.

[10] *Petitioner's Brief*, p. 2.

[11] As in *Stavenjord II*, this Court in Flynn recognized that, under Schmill II, "settled claims" are not subject to retroactivity. *Flynn v. Montana State Fund*, 2006 MTWCC 31, WCC No. 2000-0222, *Order Determining Status of Final, Settled, Closed and Inactive Claims*, 9/2/906, *Order Setting Briefing Schedule* (Docket # 537), ¶5.

[12] *Flynn v. Montana State Fund*, 2006 MTWCC 31, WCC No. 2000-0222, *Order Determining Status of Final, Settled, Closed and Inactive Claims*, 9/2/906 (Docket # 537), ¶ 16 (emphasis added).

2. Petitioners' Arguments that a Claim "Paid in Full" is not a "Settled" Claim Fail.

Disregarding this Court's recent ruling in *Flynn*, Petitioner argues that "[t]here is *no legal basis* to support th[e] argument" that a claim paid in full is a "settled" claim for purposes of the retroactivity analysis.[13] Rather than address the Court's ruling in *Flynn*, Petitioner focuses on the statutory definition that this Court relied upon to determine that settled claims include those paid in full. Petitioner contends that the statutory definition of settled claim in § 39-71-107, MCA, should be ignored because it is not expressly applicable to the entire WCA and ODA, and because it was enacted in 2001. As explained below, both arguments fail. Moreover, Responding Insurers note the irony in Petitioner's position -- Petitioner's premise their common fund claim on retroactive application of *Schmill I* while ignoring this Court's order in *Flynn* and its presumptive retroactive impact.

a. Although § 39-71-107(7)(a) was Enacted in 2001, its Definition of "Settled" is to be Applied in this Case Because that Definition is a Procedural Rule.

In her attempt to persuade this Court to abandon its *Flynn* definition of "settled claims" as including claims "paid in full," Petitioner argues that § 39-71-107(7)(a) is not applicable in this case because it was enacted in 2001, after the relevant time period in this case. Petitioner misapprehends the law.

Specifically with respect to workers' compensation cases, the Montana Supreme Court has directed that procedural statutes in effect at the time of trial should be applied:

> EBI/Orion's reliance of *Buckman* and thus the 1987 version of the law, however, is misplaced. The *Buckman* rule only applies to substantive rights of a claimant, such as the right to benefits allowed at the time of injury. We have held that the statutes in effect at the time of trial control when the subject is procedural rather than substantive.[14]

Moreover, even when the application of a procedural rule denies or limits a substantive right, such a scenario does not transform a procedural rule into a substantive rule that may not be applied at the time of trial. As recognized by the Ninth Circuit Court of Appeals:

> The application of virtually any procedural rule can result in the denial of a "substantive" right, yet this does not transform the procedural rule into a substantive rule.[15]

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[13] *Petitioner's Brief*, p.3 (emphasis added).

[14] *EBI/Orion Group v. Blythe* (1997), 281 Mont. 50, 54, 931 P.2d 38, 40.

[15] *In re Hill*, 811 F.2d 484, 487 (9th Cir. 1987).

The definition of a "settled" claim as provided by § 39-71-107(7)(a) is clearly procedural in nature. Workers' compensation claimants have no substantive right to "settlement." Rather, under certain conditions of injury and disease, they have the substantive rights to receive certain benefits. Indeed, as shown above, the *Blythe* Court expressly identified injured workers' substantive rights as the "right to benefits." "Settlement" clearly is not a benefit. It is one optional method, *i.e.*, procedure, by which disputed claims are resolved.

Moreover, the right to settlement cannot be a substantive right enjoyed by injured or diseased workers because insurers may decline a worker's request to settle. As long as an insurer pays the benefits in the amounts and times required by the Act (i.e., does not deny a worker his substantive rights), an insurer with unquestioned liability may freely deny any and all requests for settlement without penalty. Indeed, although the Workers' Compensation Act requires injured or diseased workers to attempt settlement through mediation prior to bringing a petition before this Court, the mediation is non-binding, and insurers are free to refuse settlement offers and even a mediator's recommendations for settlement.[16] Accordingly, under *Blythe*, the definition of "settled claim" in § 39-71-107(7)(a), MCA, can only be interpreted as a procedural rule that is to be applied at the time of trial regardless of when it was enacted.

b. Application of the Definition of "Settled," as set Forth at § 39-71-107(7)(a), MCA, is not Restricted to § 39-71-107, MCA, and Disputes Arising Thereunder.

In her attempt to re-define "settled" claims to exclude claims that were "paid in full," Petitioner also argues that the statutory definition of "settled," as provided by § 39-71-107(7)(a), MCA, is relevant only to in-state adjusting requirements, and not as a general definition applicable to the entire Workers' Compensation Act. Specifically, Petitioner points to language in the statute indicating that the definition therein is provided "for the purposes of this section" (i.e., § 39-71-107, MCA). Thus, Petitioner argues, since this case does not involve a dispute over in-state adjusting, the statutory definition of settled claims may not be used to determine the meaning of a "settled" claim in this case. This argument fails for at least three reasons.

First, Petitioner's reliance on the prefatory language "for the purpose of this section" is too restrictive. That prefatory language does not state "for the purpose of this section *only*." Section 39-71-107(7)(a), MCA, contains no language stating that the definition provided therein is inapplicable to other sections within the Act. Moreover, Petitioner points to no other statutory or regulatory definition of settled claim that conflicts with the definition in §39-71-107. Petitioner's interpretation of § 39-71-107(7)(a), MCA, attempts to read into the statute a restriction on its applicability that the legislature omitted. As recognized by the Montana Supreme Court:

> [I]t is the obligation of the reviewing court, in interpreting a statute or an Act of legislation, to simply ascertain and declare what is in terms or in

[16] See §§ 39-71-2401 through 2411, MCA.

> substance contained therein, not to insert what has been omitted or to omit what has been inserted.[17]

Petitioner's conclusion that § 39-71-107(7)(a) cannot be applied to the Act must therefore be rejected because such a conclusion impermissibly inserts into the statute language which the legislature omitted.

Second, even if Petitioner's statutory mis-interpretation could be credited, the statutory definition is still applicable. This Court's decision in *Flynn* made it so by adopting it as part of the common law of workers' compensation.

As shown above, in *Flynn* this Court recognized that it was tasked with defining what constitutes a "settled" claim in order to implement the Supreme Court's mandate to supervise payment of retroactive *Flynn* claims.[18] Even assuming that § 39-71-107(7)(a)'s definition of a "settled claim" was not intended by the legislature as general definition applicable to the entire Act, this Court, after considering alternative definitions, simply borrowed that definition as an accurate, reasonable and fair definition for determining the scope of retroactivity. Accordingly, whether § 39-71-107(7)(a) was mandatory authority or simply persuasive authority for the Court's chosen definition of "settled," this Court has reasonably and correctly adopted that definition and incorporated it into the case law of workers' compensation.

The fact that this Court may have adopted a definition that was not mandatory does not negate its authority to do so nor does it lessen the precedential weight of that definition. Courts frequently find themselves in the business of shopping around for definitions. In so doing Court's often turn to Webster's Dictionary,[19] contracts,[20] and even the IRS Tax Code in cases completely unrelated to federal tax issues.[21] Thus, the fact that the original author of a definition, whether it was Merriam Webster, the IRS, or a state legislature, may not have contemplated its use in the context in which a Court applies it, does not prevent any court from adopting such definitions. This is particularly so when the Court borrows a legislatively-supplied definition, like § 39-71-107(7)(a), in which the legislature did not prohibit its use in other contexts.

Furthermore, as pointed out by the Montana Supreme Court in *Stavenjord II*, judicial decisions are presumed to be retroactively applicable.[22] As a judicial decision, the definition of a "settled claim" provided by this Court in *Flynn* is retroactively

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[17] *Montana Power Co. v. Montana Public Service Com'n*, 2001 MT 102, ¶ 26, 305 Mont. 260, ¶ 26, 26 P.3d 91, ¶ 26.

[18] *Schmill II* held that retroactivity did not apply to settled claims, but left it to this Court to determine in the first instance what Workers' Compensation claims should be considered final or settled. *Schmill II*, ¶19.

[19] *Butte-Silver Bow Local Government v. State* (1989), 235 Mont. 398, 404, 768 P.2d 327, 330 (adopting the definition of "resource" provided by Websters 3rd New International Dictionary).

[20] *Jacobsen v. Farmers Union Mut. Ins. Co.*, 2004 MT 72, ¶ 29, 320 Mont. 375, ¶ 29, 87 P.3d 995, ¶ 29 (adopting the definition of "bodily injury" as set froth in an insurance contract).

[21] *Van Der Meulen v. Southwestern Life Ins. Co.*, 514 S.W.2d 469, 472 (Tex. Civ. App., 1974) (adopting the IRS definition of "annuity" in an action to determine whether the owner of single premium deferred annuity contract was entitled to specific performance of loan provision or cash surrender of the contract).

[22] *Stavenjord II*, ¶ 14.

applicable to all claims made prior to the date of the *Flynn* order adopting that definition. Thus, it makes no difference when § 39-71-107(7)(a) was enacted or whether the Legislature intended the definition provided therein to be a general definition or not.

Third, after arguing that the definition of a "settled claim" provided at § 39-71-107(7)(a) may be disregarded, Petitioner urges this court to accept a definition that is identical thereto in all respects except that it drops the "paid in full" language.[23] However, Petitioner provides no support for this pared-down definition. Petitioner fails to cite any authority requiring this Court to reject its *Flynn* definition or showing that this Court's *Flynn* definition was decided incorrectly. Rather, Petitioner relies solely on her arguments that § 39-71-107(7)(a) is inapplicable to this case. As shown above, those arguments fail.

For the reasons discussed above, Petitioner's arguments that § 39-71-107(7)(a) is inapplicable to this case fail. In *Flynn* this Court adopted the definition of a "settled claim" provided by § 39-71-107(7)(a). Accordingly, pursuant to that definition, a claim paid in full is a "settled claim" that is not subject to retroactivity. Therefore, as Petitioner does not and cannot dispute that benefits for Class II claims were terminated as paid in full, those claims are "settled" and not subject to retroactivity.

C. Class III(b) Claims – Those Class III Claims in Which PTD Benefits Were Terminated Upon Retirement – Are Not Subject to Retroactivity Because Such Claims Were Paid in Full.

For the very same reasons noted above, Petitioner's Class III(b) claims – those in which TTD benefits were paid at an apportioned rate, the claimant was found to be PTD, such PTD benefits were paid at an apportioned rate, and such PTD benefits were terminated upon the claimant's retirement – are not subject to retroactive application of *Schmill I*. In *Satterlee v. Lumberman's Mutual Casualty Co.*, 2005 MTWCC 55, WCC No. 2003-0840, this Court held that § 39-71-710, MCA, limitation on PTD benefits upon retirement is constitutional.[24] Because Class III(b) claimants are not entitled to further PTD after retirement, their PTD benefits were paid in full upon retirement. As with Class II claims, Petitioner does not argue that Class III(b) claims were not paid in full. Instead, Petitioner relies upon the same argument she advances in support of Class II claims. Accordingly, by definition and precedent, Class III(b) claims were paid in full and therefore "settled."

D. Judgments (Class V Claims) Are Not Subject to Retroactivity.

The Montana Supreme Court has consistently recognized the importance of finality in excluding from retroactivity claims previously reduced to judgment. *See*

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[23] *Petitioner's Brief*, p. 2. ("Settled claims are those claims which a department approved settlement or Court ordered compromise of benefits has been made between the claimant and the insurer.").

[24] *Satterlee v. Lumbermen's Mutual Casualty Co.*, 2005 MTWCC 55, WCC No. 2003-0840, *Order Denying Motion for Partial Summary Judgment*, 12/12/05 (Docket # 277), ¶ 32. As the Court is aware, *Satterlee* is presently on appeal before the Montana Supreme Court.

Stavenjord II, ¶16; *Schmill II*, ¶17 ("[D]ue to reasons of finality, '[T]he retroactive effect of a decision . . . does not apply to cases that became final or were settled prior to a decision's issuance.'" (quoting *Dempseyv. Allstate Ins. Co.*, 2004 MT 391, 325 Mont. 207, 104 P.3d 483)). A "judgment" reflects "the final determination of the rights of the parties in an action or proceeding." M.R. CIV. P. 54(a).

Petitioner recognizes that final claims ("judgments" in her classification scheme) are not subject to retroactivity, and is willing to accept this Court's definition of a "final claim" as set forth in *Flynn* -- "provided it is limited to judgments which finally resolved the entire OD claim."[25] Petitioner's proposed limitation is legally unsupported and moreover inconsistent with the principles of finality associated with judgments. Petitioner cites no authority to support her proposed limitation, which is contrary to the Supreme Court's instruction in *Stavenjord II* that "benefits previously finalized or closed by either court order, or settlement and release, may not be reopened for consideration." *Stavenjord II*, ¶16. Petitioner's reference to claims continuing after entry of judgment squares neither with *Stavenjord II* nor the definition of judgment, "the final determination of the rights of the parties in an action or proceeding." M.R. CIV. P. 54(a).

If a workers' compensation claimant litigated an OD claim for TTD or PTD benefits (the only type of claims at issue in *Schmill*) to judgment, that claim is not subject to re-opening for adjustment based on the retroactive application of *Schmill I*. The "judgment" controls as the final word on the amount, if any, of TTD or PTD benefits to which the claimant was and is entitled, even if those benefits are still being paid today. *See, e.g., Harland v. Anderson Ranch Co.*, 2004 MT 132, ¶26, 321 Mont. 338, 344, 92 P.3d 1160, 1165 (holding district court erred in looking beyond face of earlier final decree to determine scope of easement granted). Petitioner's proposed limitation is thus untenable.[26] Any claim for PTD or TTD benefits reduced to final judgment is not subject to retroactive application of *Schmill I* unless that judgment is currently on appeal. *Dempsey*, ¶31.

CONCLUSION

For the reasons discussed Responding Insurers do not dispute that open Class I claims and Class III(a) claims never reduced to judgment may be subject to retroactive application of *Schmill I*. Responding Insurers also agree that formally settled Class IV claims are not subject to retroactivity. However, as shown above Class II claims and Class III(b) involving the termination of benefits upon payment in full are not subject to retroactivity because such claims have been settled. Finally, Class V judgments resolving claimant's PTD or TTD claims are not subject to retroactivity.

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[25] *Petitioner's Brief*, p. 5.

[26] Indeed, if we were to accept Petitioner's argument that claims reduced to judgment may still be included within the *Schmill* common fund, each judgment would need to be re-opened by the Court. Because many, if not most, of these litigated claims involved counsel other than Petitioner's counsel, many will require further assistance from their attorneys -- an additional reason why these claims should not be included in the *Schmill* common fund. *See Stavenjord II*, ¶27.

Dated this 16th day of January 2007.

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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 16th day of January 2007:

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Date: January 16, 2007

FAX CORRESPONDENCE:

TO: Workers' Compensation Court

FAX #: (406) 444-7798

FROM: Steven W. Jennings

RE: **Schmill v. Liberty NW/Montana State Fund**

THIS TRANSMISSION CONSISTS OF **13** PAGES (INCLUDING THIS COVER PAGE).

A HARD COPY OF THIS FAX ***WILL*** BE SENT BY MAIL TODAY.

IF FAX IS NOT FULLY RECEIVED, CALL (406) 252-3441, AND ASK FOR **JENNILEE BAEWER.**

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FOR **RETURN** FAX MESSAGES, SEND TO: **(406) 252-5292 - (PRIMARY NUMBER)**

DOCUMENTS TRANSMITTED: Responding Insurer's Response Brief to Petitioner's Opening Brief Regarding Retroactivity.

COMMENTS: Please file the attached document. If you have any questions, please contact me at 406.252-3441. Thank you!

File No. 21-701-001