

A TRAIN WITHOUT TRACKS:
MONTANA'S WORKERS' COMPENSATION "COMMON FUNDS"

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Insurers insuring Montana workers' compensation claims are now repeatedly summoned in cases in which the "common fund doctrine" is being applied to create a pool of attorney fees for claimants' counsel. From the first case in which the doctrine was applied to the present, the doctrine has undergone unprecedented expansion, being used as a tool with or variation to class action certification of cases striking down provisions of the Montana Workers' Compensation and Occupational Disease Acts.¹ Implementation of the doctrine has created numerous legal issues for resolution by the workers' compensation court as it oversees separate common funds each involving up to 650 insurers.

I. How Did We Get Here?

A. Origin of the Doctrine

The "common fund" doctrine is an equitable exception to the American rule requiring each party in litigation to assume the party's own attorney fees and costs absent specific contractual or statutory provision.² Historically, the doctrine arose in litigation involving bonds whose interest and value had been destroyed or impaired by wrongful acts of the bond's issuers.³

Generally, the doctrine "authorizes the spread of fees among those individuals benefitting from the litigation which created the common fund."⁴ As stated by the Montana Supreme Court, "when a party has an interest in a fund in common with others and incurs legal fees in order to establish, preserve, increase, or collect that fund, then that party is entitled to reimbursement of his or her reasonable attorney fees from the proceeds of the fund itself."⁵

Montana adopted the doctrine in 1981, in *Means v. Montana Power Co.*, in which lead counsel for 37 plaintiffs whose property was burned by negligent fire was awarded common fund fees to be paid by all plaintiffs proportionately.

[W]hen a party through active litigation creates or increases a fund, others sharing in the fund must bear a portion of the litigation costs, including reasonable attorney fees, thus spreading the cost of the litigation among all beneficiaries so that the active beneficiary is not forced to bear the burden alone while "stranger" beneficiaries receive benefits at no cost to themselves.⁶

B. Expansion to Workers' Compensation

Expanding the doctrine to workers' compensation cases in 1997 in *Murer v. State Compensation Mutual Insurance Fund [Murer III]*, the court outlined three elements necessary to establish a common fund:

- (1) one party, the "active beneficiary," must create, reserve, or increase a common fund, which must be an existing, identifiable monetary fund or benefit to which all beneficiaries are entitled;
- (2) the active beneficiary must incur legal fees in establishing the common fund; and
- (3) the common fund must benefit ascertainable, nonparticipating beneficiaries.⁷

Holding that the petitioner's attorney was entitled to common fund attorney fees respecting benefits due as a result of *Murer II*,⁸ fees were to be withheld from all claimants' additional benefits, but were not to be an additional assessment against insurers.⁹

On remand, the workers' compensation court¹⁰ thus identified four necessary tasks to administer the common fund:

- (1) identify claimants entitled to additional benefits;
- (2) determine amount of benefits due each claimant;
- (3) pay the benefits;
- (4) determine attorney fees.

This first case involved one insurer, 7,672 claimants, additional benefits totaling \$1.95 million, and common fund fees of \$300,307. It was a small beginning.¹¹

The doctrine was next invoked in *Broeker v. Great Falls Coca-Cola Bottling Co.*¹² The *Broeker* court held that COLA's must be excluded when computing social security offsets.¹³ On remand, claimant's attorney sought common fund fees. The workers' compensation court used a process similar to that in *Murer III* to identify claimants entitled to benefits, a process made more difficult due to the age of claims and less sophisticated recordkeeping technology.¹⁴ The labor-intensive administration resulting from establishment of common funds led the workers' compensation court to establish an open-information nonadversarial process to administer them in *Murer III* and *Broeker*.

In *Rausch v. State Compensation Insurance Fund [Rausch I]*,¹⁵ the Supreme Court held that PTD claimants are entitled to lump-sum impairment awards upon reaching MMI and once again held that claimants' attorneys were entitled to common fund fees. The State Fund, now familiar with prior administration of common funds, cooperated with attorneys to identify claimants, necessitating little involvement by the workers' compensation court on remand. That was to change.

C. The Global Lien

Prior to August 31, 2004, the common fund doctrine was applied only to the respondent insurer in the case, and initial cases all involved the Montana State Fund. *Ruhd v. Liberty Northwest Insurance Corp.*,¹⁶ however, began continued expansion of the doctrine. *Ruhd I*¹⁷ claimants made the same claim as *Rausch* claimants, but against Liberty Northwest. The court held in their favor based upon the *Rausch* decision. On remand, *Rausch* attorneys claimed common fund fees from claimants insured by Liberty as well as from claimants insured by other insurers. The workers' compensation court held that the common fund applied only to the respondent insurer and that *Ruhd*'s attorney was entitled to fees from claimants insured by Liberty. The Supreme Court reversed, holding that the common fund for fees created by *Rausch* includes "fees culled from all claimants regardless of insurer."¹⁸ The *Rausch* common fund expanded to include Liberty claimants. *Ruhd*'s attorney was not permitted to participate; his fee was determined by the workers' compensation court. *Ruhd II* made the common fund doctrine a global lien for subsequent cases.

The ruling significantly affected administration of common funds. For the *Rausch/Ruhd* common fund:

- (1) Department of Labor identified claimants determined to be PTD;
- (2) approximately 60 insurers had paid PTD benefits and were served with summonses requiring them to identify PTD claimants potentially entitled to further benefits;
- (3) under a confidentiality order, *Rausch* attorneys were now permitted to review *Ruhd* claimant information.

A variation on the global lien, in *Flynn v. State Compensation Insurance Fund*,¹⁹ the supreme court held that the State Fund should bear a proportionate share of attorney fees incurred to recover social security disability benefits that offset workers' compensation benefits it ultimately owed to the claimant. Acknowledging that generally the common fund doctrine assigned responsibility for fees only among individuals who benefit from the litigation, the court reasoned that the State Fund, which had not participated in the litigation, nevertheless benefitted by the claimant's recoupment of social security benefits and therefore should be required to contribute to claimant's attorney's fees. This is the first case in which contribution to the common fund was required from insurers, rather than withholding from claimants' benefits.

D. Retroactive Expansion

Initial common fund decisions applied prospectively. *Schmill v. Liberty Northwest Insurance Corp.*

[*Schmill II*]²⁰ again expanded the doctrine in two significant ways. *Schmill I* claimants claimed apportionment under the Montana Occupational Disease Act²¹ violated the Equal Protection Clause of the Montana Constitution and they must be paid full benefits without reduction for nonoccupational factors.²² The supreme court agreed and in post-remand proceedings their attorneys requested common fund fees on a global retroactive basis.

Liberty opposed the request, arguing that *Schmill I* was not retroactive, that the claim for fees was barred because no request was made in the original petition, and that the common fund was not global. Affirming and reversing the workers' compensation court, the supreme court held that *Schmill I* was retroactive; attorney fees need not be pleaded in the original petition; and, based on its holding in *Rausch*, that the common fund was a global lien for fees from all claimants.²³

The impact of *Schmill II* cannot be underestimated. There is yet no estimate of the number of claimants that may attempt to access benefits under the decision, but summonses have issued to 650 insurers.²⁴ *Schmill II* also increased the likelihood that other cases declaring unconstitutional²⁵ provisions of the Workers' Compensation Act will be applied retroactively,²⁶ giving rise to further common funds, in addition to benefits for which no premium was collected.

II. Curative Legislation: 2003's SB 470²⁷

Anticipating an explosion of litigation over common fund issues as attorneys routinely sought class action and common fund certification of their claims, and responding to the administrative implications of common fund liens, a coalition of business, labor, and insurance industry representatives sought legislation in 2003²⁸ prohibiting the award of common fund attorney fees.²⁹

The legislation passed and provides: "Attorney fees may be awarded only under the provisions of [relevant subsection] and may not be awarded under the common fund doctrine or any other action or doctrine in law or equity." Effective April 21, 2003, the legislation applies to injuries occurring on or after that date.³⁰ A 2005 attempt by the trial bar to repeal the statute was unsuccessful.³¹

III. Where Are We Now?

Regardless of curative legislation, eight common fund cases are pending in various procedural stages.³² More are likely to be filed for injuries that occurred before April 21, 2003. The number of insurers (carriers and self-insureds) summoned in later global cases has given rise to numerous procedural questions or hurdles. Additionally, effective September 7, 2005, Governor Brian Schweitzer appointed a new workers' compensation judge, James Jeremiah Shea, who has revised procedures developed under Judge McCarter.

On September 27, 2005, Judge Shea outlined proposed procedures for cases as they go forward and has given a 45-day comment period.³³ Still to be resolved are the procedures to be used for insurers in liquidation and in cases that are final, closed, or inactive. The issues will be decided within the *Flynn* common fund implementation.³⁴ Parties will be permitted to intervene in *Flynn* for the limited purpose of briefing the issues.

Judge Shea has included for comment one new substantive proposal relating to a request for interim attorney fees by *Rausch/Ruhd* counsel. The practice has been to wait until all common fund benefits are paid and then calculate and pay fees. Judge Shea states that his decision on this issue will be applicable to other common fund litigation.³⁵

Issuance of summonses to 650 insurers also has raised the question of whether responsive appearances in the workers' compensation court by out-of-state counsel, claims adjusters, or nonlawyer representatives constitute the unauthorized practice of law. Speaking for the Unauthorized Practice of Law Commission, Deputy Attorney General John Conner has advised that the practice does not constitute the unauthorized practice of law.³⁶ Parties wishing to raise legal issues must obtain Montana counsel, however.³⁷

Judge McCarter has compared the litigation bloom around "common funds" to a runaway train. Just before leaving the bench, he commented that now there are no tracks--problematic, according to some, when we have just switched engineers.

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1. Mont. Code Ann. §§ Title 39, chapters 71 and 72 (2003). The Occupational Disease Act was repealed in 2005 and the Workers' Compensation Act amended to address occupational diseases. 2005 Mont. Laws Ch. 416.
 2. See, e.g., *Mt. West Farm Bureau Mut. Ins. Co. v. Hall*, 2001 MT 314, ¶ 3, 308 Mont. 29, 38 P.3d 825.
 3. *Trustees v. Greenough*, 105 U.S. 527, 528-29 (1881). Growth and expansion of the doctrine in later federal decisions is traced in *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). *Boeing* also discusses features that distinguish common fund cases from cases in which shifting of fees is inappropriate. *Id.*
 4. *Rausch v. St. Compen. Ins. Fund*, 2002 MT 203, 311 Mont. 210, 54 P.3d 25, citing, *Mt. West Farm Bureau Mut. Ins. Co. v. Hall*, 2001 MT 314, ¶ 14, 308 Mont. 29, 38 P.3d 825.
 5. *Murer v. St. Compen. Mut. Ins. Fund*, 283 Mont. 210, 222, 942 P.2d 69, 76 [*Murer III*].
 6. *Means v. Mont. Power Co.*, 191 Mont. 395, 404, 625 P.2d 32, 37 (1981).
 7. *Mt. West Farm Bureau*, ¶¶ 15-18.
 8. *Murer III*, 283 Mont. at 223, 942 P.2d at 76. *Murer v. St. Compen. Mut. Ins. Fund*, 267 Mont. 516, 885 P.2d 428 (1994) [*Murer II*] held that caps on benefits enacted in 1987 and 1989 expired July 1, 1991, and benefits paid after that date should have been paid at noncapped rates.
 9. *Murer III*, 283 Mont. at 222-23, 942 P.2d at 76-77, cited with *appr.* in *Schmill v. Liberty N.W. Ins. Corp.*, 2005 MT 144, ¶ 22, 327 Mont. 293, 114 P.3d 204.
 10. The Montana workers' compensation court is statutory. Mont. Code Ann. §§ 39-71-2901 through -2914. Its proceedings and hearings are subject to the Montana Administrative Procedure Act. Final decisions may be appealed directly to the Montana supreme court. The court is bound by common law and statutory rules of evidence. Its rules are codified at ARM 24.5.301 et seq.

The workers' compensation judge serves a six-year term and is appointed by the Governor. The judge must have the same qualifications as a district court judge, and when appointed has all of the privileges and emoluments afforded a district judge. Mont. Code Ann. § 2-15-1707.

The common fund doctrine developed during the 12-year tenure of Hon. Mike McCarter.

See also, <http://wcc.dli.state.mt.us/wcourthome.asp>.
 11. Governor's Conference on Workers' Compensation, 2005 Report from Workers' Compensation Court [2005 WCC Report to Gov. Conf.]
 12. *Broeker v. Great Falls Coca-Cola Bottling Co.*, 275 Mont. 502, 914 P.2d 967 (1996).
 13. Mont. Code Ann. § 39-71-701, -701.
 14. 2005 WCC Report to Gov. Conf.
 15. *Rausch v. St. Compen. Ins. Fund*, 2002 MT 203, 311 Mont. 210, 54 P.3d 25.
 16. *Ruhd v. Liberty N.W. Ins. Corp.*, 2004 MT 236, 322 Mont. 478, 97 P.3d 561 [*Ruhd II*].

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17. *Ruhd v. Liberty N.W. Ins. Corp.*, 2002 MT 290N, 313 Mont. 411, 63 P.3d 513 [*Ruhd I*].
 18. *Ruhd II*, ¶ 25.
 19. *Flynn v. St. Compen. Ins. Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397.
 20. *Schmill v. Liberty N.W. Ins. Corp.*, 2005 MT 144, 327 Mont. 293, 114 P.3d 204 [*Schmill II*].
 21. Mont. Code Ann. Title 39, chapter 72.
 22. *Schmill v. Liberty N.W. Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290 [*Schmill I*].
 23. *Schmill II*, 2005 MT 144, 327 Mont. 293, 114 P.3d 204.
 24. 2005 WCC Report to Gov. Conf.
 25. Other pending cases:

with equal protection challenges:

Stavenjord v. St. Compen. Ins. Fund, 2003 MT 67, 314 Mont. 466, 67 P.3d 229- OD limitation on PPD benefits already struck down (on appeal to supreme court; scheduled for argument October 25, 2005).

Reesor v. St. Compen. Ins. Fund, 2004 MT 370, 325 Mont. 1, 103 P.3d 1019 - termination of PPD benefits upon reaching retirement age already struck down

Satterlee v. Lumberman's Mut. Cas., WCC No. 2003-0840 - termination of PTD benefits upon reaching retirement age

not involving equal protection challenges:

Flynn v. St. Compen. Fund, 2002 MT 279, 312 Mont. 410, 60 P.3d 397 - attorney fees in social security proceedings offset the SS offset

Hiett v. Missoula County Public Schools, 2003 MT 213, 317 Mont. 95, 75 P.3d 341 - primary medical services include services to "sustain" MMI

Mathews v. BJS Construction Inc. & Liberty N.W. Ins. Corp., 2003 MT 116, 315 Mont. 441, 68 P.3d 865 - IC exemption not conclusive

Wild v. Fregein Construction Co. & St. Comp. Ins. Fund, 2003 MT 115, 315 Mont. 425, 68 P.3d 855 - same as *Mathews*

26. *Schmill II* holds: (1) if retroactive application will further the operation of the rule, the decision must be applied retroactively; and (2) when a statute is struck down on constitutional grounds, retroactive application will promote equality and thus the rule of law.

27. 2003 Mont. Laws Ch. 464, codified in part at Mont. Code Ann. §§ 39-71-611 (3) and -612 (4).

28. Montana meets in regular session biennially for 90 legislative days, commencing the first business day following New Year's Day.

29. SB 450 also provided for streamlined disclosure of health care information for adjusting claims, excluding impairment ratings based exclusively on pain, and increasing PPD benefit maximum from 350 to 375 weeks.

30. 2003 Mont. Laws Ch. 464, § 6.

31. HB 468, 2005 Regular Session.

32. Status of pending common funds may be monitored at http://wcc.dli.state.mt.us/common_fund_litigation.asp

Rausch/Ruhd - common fund implementation underway

Schmill - remanded for common fund implementation

Flynn/Hiett/Reesor/Satterlee - common funds asserted, 650 summonses served

Stavenjord/Mathews/Wild - common funds asserted, on appeal

33. Email from Workers' Compensation Court [Clerk of WCC Jacqueline Bockman jbockman@mt.gov] to common fund-Flynn distribution list (Sep. 27, 2005) [WCC email Sep 27].

34. *Id.* See also, WCC minute entry in *Schmill/Rausch/Flynn/Reesor* (Jul. 14, 2005) [Minute entry Jul. 14].

35. WCC email Sep 27.

36. Letter from Attorney John Conner to Hon. James Jeremiah Shea (Sep. 24, 2005).

37. Minute entry Jul. 14.