

FILED

APR - 6 2006

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

Steven W. Jennings
Crowley, Haughey, Hanson,
Toole & Dietrich P.L.L.P.
P. O. Box 2529
Billings, MT 59103-2529
(406) 252-3441
Attorneys for Respondents:
AIG National Insurance Co.
AIU Insurance Company
American General Corp.
American International Insurance Co.
American International Pacific Insurance Company
American International Specialty Lines Insurance
American Home Assurance Company
Birmingham Fire Insurance Company
Commerce & Industry Insurance Company
Granite State Insurance Company
Illinois National Insurance Co.
Insurance Company of the State of Pennsylvania
National Union Fire Insurance Company of Pittsburgh, PA
New Hampshire Insurance Company
Bituminous Casualty Corp.
Bituminous Fire & Marine Insurance Co.
Farmers Insurance Exchange
Mid-Century Insurance Co.
Truck Insurance Exchange
FedEx Ground Package System, Inc.
Great American Alliance Insurance Co.
Great American Assurance Co.
Great American Insurance Co.
Great American Insurance Co. of NY
Great American Spirit Insurance Company
Republic Indemnity
Hartford Accident & Indemnity Co.
Hartford Casualty Insurance Co.
Hartford Fire Insurance Co.
Hartford Insurance Co. of the Midwest
Hartford Underwriters Insurance Co.
Property & Casualty Insurance Co. of Hartford
Sentinel Insurance Company Ltd.
Twin City Fire Insurance Co.
Millers First Insurance Company
Montana Health Network Workers' Compensation Insurance Trust
Middlesex Insurance Company
P P G Industries, Inc.
Sentry Insurance Mutual Co.
Sentry Select Insurance Company
Stillwater Mining Company
Universal Underwriters Group

DOCKET ITEM NO. 391

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DALE REESOR,

Petitioner,

vs.

MONTANA STATE FUND,

Respondent/Insurer.

WCC No. 2002-0676

**MOTION TO EXTEND BRIEFING
DEADLINE**

COMES NOW the above listed respondents ("Respondents") and move this Court for an order extending the briefing deadline for simultaneous opening and answer briefs until June 17 and July 17, respectively. Counsel for Petitioner has been advised of this motion and opposes it.

BACKGROUND

On April 22, 2005, this Court issued a *Summons and Notice of Attorneys Fee Lien* advising Respondents that the Montana Supreme Court held, in *Reesor v. Montana State Fund*, MT 370, that § 39-71-710, MCA, (1999) imposed an unconstitutional age-related limit on permanent partial disability benefits. The summons further advised that the existence of a common fund had not yet been determined, but the Court would issue a briefing schedule on that question.

On March 14, 2006, this Court issued its *Order Delineating Issues and Setting Briefing Schedule*. That order established April 17 as the deadline for simultaneous opening briefs and May 17, 2006 as the deadline for simultaneous answer briefs on the following issues: (1) does a common fund exist; (2) is there an ascertainable class; (3) is there an ascertainable fund; (4) if there is a common fund, is it retroactive; (5) do laches or statutes of limitations apply to claims which failed to timely present a challenge to Montana Code Annotated; and (6) does application of the common fund doctrine violate constitutional guarantees of "freedom of contract and takings without just compensation?"

ARGUMENT

In effect, the Court's decision to decide this case based upon the briefs submitted pursuant to the *Order Delineating Issues and Setting Briefing Schedule* amounts to an order to dispose of this case via summary judgment rather than trial. Respondents could not anticipate they would be required to prepare summary judgment briefs within thirty days as set forth in the *Order Delineating Issues and Setting Briefing Schedule*. Rather, in reliance upon this Court's rules, Respondents anticipated receiving a pre-trial schedule order establishing a trial date with at least 75 days notice. See § 24.5.310(4), A.R.M. ("Upon receipt of a petition regarding a dispute meeting the requirements of

these rules, the court will issue a scheduling order...setting a trial at a time that will allow 75 days notice to be given of the trial."). As a result, Respondents have not completed their factual investigation with respect to whether Petitioners can prove the existence of a common fund.

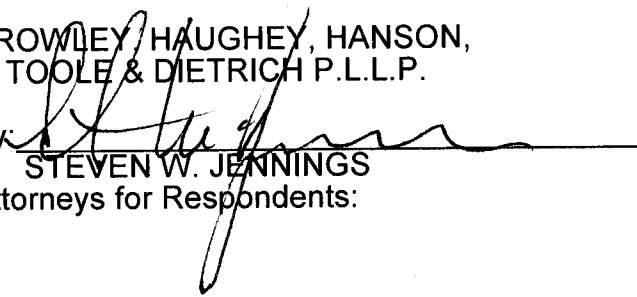
Respondents will argue that a common fund does not exist in this case because not all beneficiaries of the *Reesor* decision are ascertainable, and therefore, the common fund, consisting of the aggregate value of such benefits, cannot be identified. Respondents have reason to believe that not all insurers involved in this action have kept records of claims going back as far as 1987 (the Retroactive date of *Reesor* assuming retroactivity is applicable). Thus, Respondents are attempting to determine if the absence of such records prevents identification of all *Reesor* beneficiaries. Should factual investigation reveal this to be the case, Respondents intend to procure affidavits to that effect.

In addition, Respondents intend to show that the difficulties and costs involved in searching their records, militates towards a finding that *Reesor* beneficiaries are not readily ascertainable and thus, that no common fund exists. Alternatively, Respondents intend to show that even if this Court finds that the search burden does not preclude a holding that *Reesor* beneficiaries are readily ascertainable the burden of such search should fall upon the Petitioner who bears the burden of establishing the existence of a common fund.

The undersigned counsel represents over 100 insurers in the various common fund actions currently pending before this Court. This large number of insurers creates significant difficulties in gathering the above listed relevant facts. Each insurer must be polled as to its document retention policy and each insurer must investigate and document the cost and burden of searching its files to identify *Reesor* claimants. As this process is time consuming and because Respondents reasonably anticipated more time between notification and the due date for briefs, Respondents respectfully request this Court to issue an order extending the deadlines for simultaneous opening and answer briefs until June 17, 2006 and July 17, 2006, respectively.

Dated this 5th day of April, 2006.

CROWLEY HAUGHEY, HANSON,
TOOLE & DIETRICH P.L.L.P.

By 
STEVEN W. JENNINGS
Attorneys for Respondents:

CERTIFICATE OF SERVICE

I, STEVEN W. JENNINGS, one of the attorneys for the law firm of Crowley, Haughey, Hanson, Toole & Dietrich P.L.L.P., hereby certify that on the 5th day of April, 2006, I mailed a true and correct copy of the foregoing document, postage prepaid, to the following:

Mr. Thomas J. Murphy
Murphy Law Firm
PO Box 3226
Great Falls, MT 59403-3226


STEVEN W. JENNINGS

CROWLEY, HAUGHEY, HANSON, TOOLE & DIETRICH P.L.L.P.

ATTORNEYS AT LAW

500 TRANSWESTERN PLAZA II • 490 NORTH 31ST STREET • BILLINGS, MONTANA 59101

P.O. Box 2529 • BILLINGS, MONTANA 59103-2529

TEL (406) 252-3441 • FAX (406) 252-5292

www.crowleylaw.com

STEPHEN M. BARRETT
COLBY L. BRANCH * #
KATY A. BRANDIS
ALAN C. BRYAN #
ASHLEY BURLESON
DAVID L. CHARLES
PAUL C. COLLINS
GARY M. CONNELLEY
RENEE L. COPPOCK
MARCIA J. DAVENPORT
JASON A. DELMUE
MICHAEL S. DOCKERY
JOHN B. DUDIS, JR.
JON T. DYRE #
MARY SCRIM DYRE
SCOTT A. FISK
BRUCE A. FREDRICKSON *
MICHAEL W. GREEN

ROBERT C. GRIFFIN
PETER F. HABEIN
SCOTT D. HAGEL
NATHAN S. HANEY
KEVIN P. HEANEY
KENNETH G. HEDGE *
JAMES R. HINTZ
BRIAN HOLLAND
LARRY A. HOLLE
STEVEN W. JENNINGS
DANIEL D. JOHNS
DARIN W. JOHNSON
JOEL L. KALEVA
ALLAN L. KARELL
KIELY S. KEANE
PETER M. KIRWAN
WILLIAM D. LAMDIN III
MICHAEL J. LANSING #

KENNETH K. LAY
JOHN R. LEE *
JARED M. LE FEVRE
STEVEN J. LEHMAN
JULIE A. LICHTER
DENISE D. LINFORD #
JASON P. LOBLE
CHRIS MANGEN, JR.
WILLIAM J. MATTIX
JOE C. MAYNARD, JR.
JOHN H. MAYNARD
JOSEPH P. MAZUREK
IAN McINTOSH
DANIEL N. McLEAN
MATTHEW F. McLEAN #
ROBERT G. MICHELOTTI, JR.
STEVEN R. MILCH
KIMBERLY S. MORE

DONALD R. MURRAY, JR.
KRISTIN L. OMVIG
JEFFERY J. OVEN #
SHANE D. PETERSON *
HERBERT I. PIERCE III
FRED C. RATHERT *
STEVEN P. RUFFATTO
GINA S. SHERMAN
SCOTTI M. SHINGLETON
JAMES P. SITES
GARTH H. SJUE *
LEONARD H. SMITH
CHRISTOPHER C. VOIGT #
DAVID M. WAGNER
NEIL G. WESTESSEN
BRYAN P. WILSON
RONALD E. YOUBE

RETIRED
JAMES M. HAUGHEY
BRUCE R. TOOLE

OF COUNSEL
GEORGE C. DALTHORP
JOHN M. DIETRICH
DAVID L. JOHNSON
GARELD F. KRIEG
ARTHUR F. LAMEY, JR.
LOUIS R. MOORE *
MYLES J. THOMAS
FRED E. WHISENAND *

OFFICES
100 NORTH PARK AVENUE
SUITE 300, P.O. BOX 797
HELENA, MT 59624-0797
PHONE (406) 449-4165

111 EAST BROADWAY
P.O. BOX 1206
WILLISTON, ND 58802-1206
PHONE (701) 572-2200

431 FIRST AVENUE WEST
P.O. BOX 759
KALISPELL, MT 59903-0759
PHONE (406) 752-6644

45 DISCOVERY DRIVE
SUITE 200, P.O. BOX 10969
BOZEMAN, MT 59719-0969
PHONE (406) 556-1430

700 S.W. HIGGINS
SUITE 200
MISSOULA, MT 59803
PHONE (406) 829-2732

Attorneys are licensed in Montana unless otherwise noted, * also licensed in North Dakota, # also licensed in Wyoming, + not licensed in Montana

April 5, 2006

Workers' Compensation Court
PO Box 537
Helena, MT 59624-0537

RE: *Dale Reesor vs. Montana State Fund*
WCC No. 2002-0676

Dear Clerk:

On behalf of our clients, please file the enclosed Motion to Extend Briefing Schedule. Please date stamp the enclosed copy of the cover page and return in the envelope provided.

Thank you in advance for your assistance.

Sincerely yours,

CROWLEY, HAUGHEY, HANSON,
TOOLE & DIETRICH P.L.L.P.

Myrna Henschel, PLS

Myrna Henschel, Certified PLS
Legal Secretary to Steven W. Jennings

mlh
Enclosures