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Colonial American Casualty & Surety
Commerce & Industry Insurance Company
Everest National Ins. Co.
Fairfield Ins. Co.
Farmers Insurance Exchange
FedEx Ground Package System, Inc.
Fidelity & Deposit Co. of Maryland
Granite State Insurance Company
Great American Alliance Insurance Co.
Great American Assurance Co.
Great American Insurance Co.
Great American Insurance Co. of NY
Great American Spirit Insurance Company
Greenwich Insurance Company
Hartford Accident & Indemnity Co.
Hartford Casualty Insurance Co.
Hartford Fire Insurance Co.
Hartford Insurance Co. of the Midwest
Hartford Underwriters Insurance Co.
Illinois National Insurance Co.
Insurance Company of the State of Pennsylvania
Markel Insurance Company
Maryland Casualty Company
Mid-Century Insurance Co.
Middlesex Insurance Company
Millers First Insurance Company
Montana Health Network Workers' Compensation Insur. Trust
National Union Fire Insurance Company of Pittsburgh, PA
New Hampshire Insurance Company

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MAY - 5 2006

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

DOCKET ITEM NO. 411

Northern Insurance Co. of New York
 P P G Industries Inc.
 Property & Casualty Insurance Co. of Hartford
 Republic Indemnity
 Sentinel Insurance Company Ltd.
 Sentry Insurance Mutual Co.
 Sentry Select Insurance Company
 Stillwater Mining Company
 Truck Insurance Exchange
 Twin City Fire Insurance Co.
 Universal Underwriters Group
 Valiant Insurance Company
 XL Ins. Co. of New York Inc.
 XL Reinsurance America
 XL Specialty Ins. Company
 United National Casualty Insurance Company
 Zurich American Insurance Co.
 Zurich American Insurance Co. of Illinois

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DALE REESOR,

Petitioner,

vs.

MONTANA STATE FUND,

Respondent/Insurer.

WCC No. 2002-0676

**BRIEF RE: EXISTENCE OF
 COMMON FUND**

Pursuant to this Court's *Amended Order Delineating Issues and Setting Briefing Schedule*, the above listed Insurer Respondents ("Other Insurers") respectfully submit this Brief.

BACKGROUND

In 2002, Petitioner Dale Reesor commenced this action against Montana State Fund, claiming that that Section 39-71-710, MCA, unconstitutionally denied him equal protection under law because he received reduced permanent partial disability ("PPD") benefits upon eligibility for Social Security Retirement Income. Reesor did not purport to bring his action in a representative capacity, and did not assert that Montana State Fund represented a class of respondent insurers liable for any PPD benefits reduced pursuant to the statute.

The Workers' Compensation Court ("WCC") rejected Reesor's claims. The Montana Supreme Court, however, reversed the WCC in late 2004. In *Reesor v. Montana State Fund*, 2004 MT 370, 325 Mont. 1, 103 P.3d 1019, the Montana Supreme

Court held that § 39-71-710's termination of PPD benefits upon a claimant's eligibility for Social Security Retirement Income was an unconstitutional denial of equal protection because it amounted to age based discrimination without any rational relationship to a legitimate government interest.

Following that decision, Reesor did not request entry of judgment against Montana State Fund for the amount of PPD benefits at issue. Instead, Reesor's counsel asserted a purported "common fund attorney fee lien" in the amount of 25% of any additional benefits owed to other workers' compensation claimants as a result of the *Reesor* decision.¹ Counsel's purported lien assumes retroactivity of the *Reesor* decision for the seventeen year period from July 1, 1987 through December 22, 2004.² At no time prior to the *Reesor* decision were Other Insurers notified of any potential liability for the claim Reesor brought against Montana State Fund.

On April 22, 2005, the Workers' Compensation Court issued a Summons notifying all Montana workers' compensation insurers of the *Reesor* decision and the asserted attorney fee lien.³ The Court's Summons notes that no determination has been made with respect to whether *Reesor* created a common fund. In its *Amended Order Delineating Issues and Setting Briefing Schedule*, the Court requested briefing on issues that will determine whether Reesor's counsel may enforce the *Reesor* precedent against every workers' compensation insurer in the State via the common fund doctrine.

ARGUMENT

The Court has requested that the parties brief the following issues:

- (1) Does a common fund exist in this case?
- (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 limitation apply to claims which failed to timely present a challenge to § 39-71-710?
- (6) Would application of the common fund doctrine violate constitutional guarantees of "freedom of contract and taking without just compensation."

Other Insurers respectfully submit that no common fund can exist consistent with Other Insurers' due process rights. Even if the Court could overlook the glaring due process problems, there exists no readily ascertainable class or identifiable fund as a result of the *Reesor* decision by the Montana Supreme Court. With respect to issues

¹ *Petitioner's Notice of Common Fund Attorney Fee Lien*, 1/18/04.

² *Id.*

³ *Summons and Notice of Attorney Fee Lien*, 4/22/05.

four and five, Other Insurers join in the arguments submitted by Respondents in the *Flynn* common fund litigation concerning the retroactive scope of any possible common fund. Other Insurers did not raise freedom of contract or taking without just compensation and therefore do not address those issues.

I. A Common Fund Cannot Exist In This Case Consistent with Other Insurers' Due Process Rights.

Before a party may be deprived of a property interest, due process requires, at a minimum, notice and an opportunity to be heard.⁴

By claiming a common fund results from the Montana Supreme Court's decision in *Reesor*, Petitioner's counsel seeks to impose liability on workers' compensation insurers that never had an opportunity to be heard or to defend against the claims creating the purported liability. Counsel now seeks to collect PPD benefits from nearly every workers' compensation insurer in the State on behalf of every potential workers' compensation claimant impacted by § 39-71-710 over the course of a seventeen year time frame. Such an effort runs roughshod over Other Insurers' due process rights.

This case proceeded for nearly three years with two parties -- Petitioner Dale Reesor and Respondent Montana State Fund. Following the WCC's decision, the Montana Supreme Court issued its opinion on December 22, 2004. The Summons joining Other Insurers in this case was not issued until April 22, 2005. Any order requiring Other Insurers to pay *Reesor* benefits violates due process because Other Insurers were never given notice and opportunity to be heard on the constitutionality of § 39-71-710, much less the merits of Reesor's claim or whether he is an adequate representative of similarly situated claimants. To now introduce a whole class of Other Insurers when liability has already been established is a fundamental violation of Due Process.⁵

Moreover, Petitioner's invocation of the common fund doctrine to create liability for a class of defendants to a class of potential claimants, none named in the initial action, is also a denial of due process because it removes the procedural safeguards of class and representative actions that are designed to insure due process.

Due process rights of unnamed insurers were not addressed in the Montana decision which held that the common fund doctrine could be imposed globally (i.e., against unnamed defendants). *Ruhd v. Liberty Northwest Ins. Corp.*, 2004 MT 236, 322 Mont. 478, 97 P.3d 561 ("We hold that the common fund for attorneys' fees created by *Rausch* includes fees culled from all claimants regardless of insurer.")⁶

The WCC has followed *Ruhd* in holding, without specifically addressing the due process rights of insurers previously not parties, that all retroactive common fund cases

⁴ *Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 72 (3rd Cir., 1993) (citations omitted).

⁵ See *Hansberry v. Lee*, 311 U.S. 32, 42 (1940).

⁶ *Ruhd v. Liberty Northwest Ins. Corp.*, 2004 MT 236, ¶ 25, 322 Mont. 478, ¶ 2597 P.3d 561, ¶ 25.

are binding on all Montana insurers and not just those named in the underlying case. As noted in *Stavenjord v. Montana State Fund*:

On August 27, 2004, I issued my Decision on Common Fund Retroactivity in this case. In that decision ... I rejected the "global lien" asserted by the claimant's attorney. Thereafter, the Montana Supreme Court decided *Ruhd v. Liberty Northwest Ins. Corp.*, 2004 MT 236, in which it held that the common fund doctrine applies globally to all affected claimants irrespective of their responsible insurers. In light of that decision, my decision in this case must be amended to hold that the common fund lien is global and applies to all claimants who are benefited by the *Stavenjord* decision irrespective of the insurer.⁷

Other Insurers respectfully submit that a common fund cannot exist consistent with Due Process. Not only did Other Insurers never have an opportunity to be heard and defend themselves in the action giving rise to liability, the requested application of the common fund doctrine short-circuits the procedural and Constitutional safeguards applicable to representative (class) actions.

The entire purpose of class action certification is to protect the due process rights of individual class members, whether claimants or respondents, or both as in this case. While states are free to establish their own class action rules several courts have addressed the minimum requirements of such rules.

The court also has a duty to the defendants in a class action proceeding to ensure that the litigation will comply with due process...⁸

Due process requires that defendants to a class action receive notice before a class-certification hearing and have an opportunity to be heard on the question of certification.⁹

[T]he court has the power and the duty to ensure that all defendants be given adequate notice of the action and an opportunity to present individual defenses if desired. Should the district court fail to afford any defendant due process, he would be entitled to have an adverse judgment set aside or reversed on appeal.¹⁰

[T]he interests of absentee members of a class cannot be adequately protected unless the absentees are afforded notice of the same quality required to be given other interested parties under Mullane and

⁷ *Stavenjord v. Montana State Fund*, WCC No. 2000-0207, 2004 ML 2672, Order Amending Decision on Common Fund Retroactivity, 9/16/04.

⁸ *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 740, 2004 WL 1879025, 8 (2004).

⁹ *Philadelphia American Life Ins. Co. v. Turner*, 131 S.W.3d 576, 597, 2004 WL 393155, 6 (Tex.App.-Fort Worth, 2004).

¹⁰ *Kerney v. Fort Griffin Fandangle Ass'n, Inc.*, 624 F.2d 717, 721 (5th Cir. 1980).

subsequent cases. ... where the court stressed that its holding was based not only on Fed.R.Civ.P. 23 but also on the due process requirements set down in Mullane and Schroeder.¹¹

Due process requires that before a court can issue a judgment binding individual members of a class it must first ensure that, 1) a class-certification hearing is held in which all class members have been afforded the opportunity to be heard on the question of certification, 2) proper notice has been given class members, and 3) class members have been afforded the opportunity to present individual defenses. In substituting the common fund doctrine for a class action, Montana ensures that none of these requirements are met. The Respondents in this case were never afforded a class-certification hearing, the class members were never given notice of the action, and the class members were never provided the opportunity to present individual defenses. Thus, use of the common fund doctrine to bind a class of defendants after-the-fact would inherently deny Other Insurers due process. Other Insurers were not given any opportunity to assess or argue whether Petitioner Reesor is similarly situated with other potential claimants, whether he and his counsel are adequate representatives, whether his claims are typical, or other whether common issues of fact or law would predominate in any action. Instead, Other Insurers have received a Summons that, if a common fund is found to exist, effectively amounts to an invoice from the Court issued after it determined liability by looking at Petitioner Reesor's claim against the State Fund. An order requiring Respondents to pay *Reesor* benefits, and attorneys fees therefrom, under the common fund doctrine would be unconstitutional.

II. A Common Fund Does Not Exist Because the Non-Participating Beneficiaries are Not Readily Ascertainable.

The Montana Supreme Court has stated that several elements must be present for a common fund to exist.

There are three elements necessary to establish a common fund. First, a party, styled the active beneficiary, must create, reserve, preserve, or increase an identifiable monetary fund or benefit in which all active and non-participating beneficiaries have an interest. Second, the active beneficiary must incur legal fees in establishing the common fund. Third, the common fund must benefit ascertainable, non-participating beneficiaries.¹²

Explaining the third element, this Court has stated that the non-participating beneficiaries must be *similarly situated* with the active beneficiary and *identifiable* before the third element is satisfied. As noted in *Schmill v. Liberty Northwest Ins. Corp.*:

¹¹ *Hutchins v. Smith*, 538 P.2d 610, 612 -613 (Okla. App. 1975).

¹² *Ruhd v. Liberty Northwest Ins. Corp.*, 2004 MT 236, ¶16, 322 Mont. 478, ¶16, 97 P.3d 561, ¶16; See also

[I]t is not enough that the petitioner in this workers' compensation case establishes a general principal of law applicable to other claimants, she must show that the litigation entitles *similarly situated, identifiable* claimants to specific monetary benefits.¹³

This Court has also held that, in addition to being similarly situated with the active beneficiary and identifiable, the non-participating beneficiaries must be *readily* ascertainable. In *Mathews*, the Court rejected the assertion that a common fund was created because "the Mathews' decision does not establish a direct entitlement to benefits on behalf of other *readily* ascertainable claimants."¹⁴

The *Mathews* rule that non-participating beneficiaries must be readily ascertainable is simply an affirmation of the rule accepted by virtually all jurisdictions. Indeed, one leading commentator has summarized the elements of a common fund, based on the national case law, as follows:

Three factors should be present before a court adopts the common fund approach: (1) those benefiting from the litigation should be small in number and *easily identifiable*; (2) the benefits should be traceable with some accuracy; and (3) the benefits should be capable of being shifted with some exactitude to those benefiting.¹⁵

Explaining that the rationale behind the requirement that non-participating beneficiaries be readily ascertainable, the Tenth Circuit has noted that:

The [non-participating] beneficiaries of the [common] fund must, therefore, be readily identifiable, so that the fees may be charged against their portion of the fund with some exactitude. In the absence of such identifiable beneficiaries ... the common fund exception is inapplicable.¹⁶

Identifying *Reesor* beneficiaries is no easy task. Other Insurers cannot today represent to the Court that the number of beneficiaries is "small in number." To just determine the potential number of beneficiaries, individual files must be searched according to specific criteria that has not yet been defined. For example, whether beneficiaries include those claimants whose files have been "closed," "settled," "final," or "inactive" may dramatically impact the scope of the file review as well as the potential number of beneficiaries. The Montana Supreme Court has held that retroactive decisions do not apply to cases that were closed, inactive, became final, or were settled prior to a decision's issuance.¹⁷ As shown by the briefing on this issue in *Flynn*, there is no

¹³ *Schmill v. Liberty Northwest Ins. Corp.*, 2004 MTWCC 47, WCC No. 2001-0300, Decision and Judgment Regarding Common Fund Issues, ¶ 46 (emphasis added).

¹⁴ *Mathews*, 2004 MTWCC 55 at ¶ 32.

¹⁵ 20 Am. Jur. 2d *Costs* § 65 (2005) (emphasis added).

¹⁶ *Morganroth & Morganroth v. DeLorean*, 213 F.3d 1301, 1319 (10th Cir. 2000) [quoting 10 *Moore's Federal Practice* § 54.171[2][a][iii] at pp. 54-253 to 54-254 (3d ed.1999)].

¹⁷ *Schmill v. Liberty Northwest Ins. Co.*, 2005 MT 144, ¶¶ 17 & 19, 327 Mont. 293, ¶¶ 17 & 19, 114 P.3d 204, ¶¶ 17 & 19.

simple consensus on what constitute closed, settled, final, or inactive files, or how such files should be treated within any retroactivity analysis.

In *Flynn v. State Compensation Ins. Fund*, WCC No. 2000-0222, this Court noted that the *Schmill* decision, while exempting closed, settled, final, or inactive cases from retroactivity, did not define those terms. Accordingly, the Court invited all common fund litigants to submit briefs on the meaning of "closed," "settled," "final," or "inactive" for the purpose of determining retroactive applicability. Several common fund litigants responded and submitted briefs providing conflicting definitions of "closed," "settled," "final," or "inactive." Not only is the WCC's decision with respect to the meaning of these terms still pending, but any decision will likely be appealed, which means that an ultimate decision by the Montana Supreme Court is likely years away.

In *Flynn*, respondents proposed the following definition of "closed or inactive."

"Closed or inactive claim" is a claim in which benefits were terminated without the claimant disputing the termination by filing a petition in the Worker's Compensation Court within two years of termination.¹⁸

If the Court affirms this definition then the burden upon Respondent's to search their "closed or inactive" files would likely not be inordinately large. However, if the Court announces another definition of "closed or inactive" then the burden of the search required to ascertain *Reesor* claimants would be enormous because each closed file (back to the retroactive date of July 1, 1987) would have to be reviewed to see if it fell within the Court's definition of "closed or inactive."

As stated in the affidavit provided by Farmers Insurance Company¹⁹, the cost of searching their closed files for *Reesor* claimants would be approximately \$32,320.²⁰ Similarly, while the AIG Group²¹ cannot estimate the total cost of such a search (because it has no idea of the number of Montana closed claim files it would have to review), it is certain that such a search would cost tens of thousands of dollars. As stated in the attached affidavit, the cost for AIG to review each closed file would be \$48.00 assuming one-half hour for each file reviewed.²² Thus, assuming that 1,000 files would have to be reviewed, the cost of the search would be \$48,000. Clearly, in the event that insurers are required to review a significant number of closed files the burden

¹⁸ *Respondent's Opening Brief*, 1/30/06, p.6 (Document # 445).

¹⁹ The Farmers Insurance Company entity also includes subsidiaries Farmers Insurance Exchange, Truck Insurance Exchange, and Mid-Century Insurance Company. Affidavit of Amy Cardillo, 4/27/06.

²⁰ Affidavit of Amy Cardillo, 4/27/06.

²¹ AIG Group includes subsidiary insurance companies AIU Insurance Company, American International Pacific Insurance Company, American Home Assurance Company, Birmingham Fire Insurance Company, Commerce & Industry Insurance Company, Granite State Insurance Company, Insurance Company of the State of Pennsylvania, National Union Fire Insurance Company of Pittsburgh, Pa, and New Hampshire Insurance Company. Affidavit of Bill McCarty (Draft copy attached hereto. Original signed and notarized copy to be filed upon receipt from affiant).

²² Affidavit of Bill McCarty (Draft copy attached hereto. Original signed and notarized copy to be filed upon receipt from affiant).

imposed in searching for potential *Reesor* claimants is enormous and likely dwarfs the benefits they would have to pay to any such claimants they are able to identify.

Expenses of this magnitude clearly preclude any finding that non-participating *Reesor* claimants are *readily* ascertainable. Accordingly, in the event that the Court adopts a definition of "closed or inactive" files that differs from that proposed by Respondents or otherwise requires a search of a significant number of closed files, then no common fund could exist because the non-participating beneficiaries would not be readily ascertainable.

III. *Reesor* Did Not Result in an Identifiable Monetary Fund.

The Montana Supreme Court has stated that a common fund requires the existence of an identifiable monetary fund.

The fund must be an existing, identifiable monetary fund or benefits to which all of the beneficiaries maintain an interest.²³

Not surprisingly, the Montana Supreme Court has adopted this rule from the Common Fund Doctrine as applied in virtually all jurisdictions. Explaining this element of the common fund the 9th Circuit has stated as follows:

[T]hird parties are not personally liable for the litigation costs. Any claim must be satisfied out of the fund. A concomitant element of the doctrine, indeed one of its foundation stones, is that there must exist some identifiable assets on which a court can impose a charge.²⁴

Similarly, a leading commentator has explained that the party asserting the common fund must demonstrate the value thereof.

Under the common-fund doctrine ... parties purporting to have brought about a pecuniary benefit to others bear the burden of establishing both its value and the resulting enrichment of others that justifies an equitable award of attorney's fees.²⁵

This requirement obviously goes hand in hand with the requirement to all non-participating beneficiaries be identifiable. Without such identification, each non-participating beneficiaries benefit cannot be determined and therefore, the value of the common fund, comprised of the aggregate benefits, cannot be determined. Petitioner in this case has put forth no evidence whatsoever that the common fund is an identifiable fund. Likewise, he has put forth no evidence of the value of the common fund. Indeed, given that most Montana insurers have not even responded to this

²³ *Mountain West Farm Bureau Mutual Ins. Co. v. Hall*, 2001 MT 314, ¶ 15, 308 Mont. 29, ¶ 15, 38 P.3d 825, ¶ 15.

²⁴ *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 770 (9th Cir. 1977) (citations omitted).

²⁵ 20 Am. Jur. 2d *Costs* § 66 (2005).

Court's Summons, it is presently impossible for Petitioner to identify all *Reesor* claimants and thus the total value of the alleged common fund. Moreover, given the unknown extent of retroactive application, there presently is not even a means to determine the class of *Reesor* claimants. Once again, due to this present inability to identify the class, Petitioner cannot identify the value of the fund. Thus, no common fund exists in this case because the fund cannot be identified.

This Court has held that the mere establishment of favorable precedent for certain litigants is insufficient to find a common fund. As noted by this Court in *Mathews v. Liberty Northwest Ins. Corp.*:

[T]he common fund doctrine requires more than the establishment of a precedent which may benefit others; the precedent must in fact "create a common fund which directly benefits an ascertainable class of nonparticipating beneficiaries."²⁶

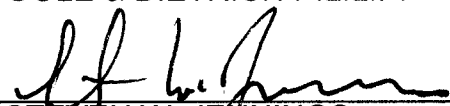
The Montana Supreme Court's opinion did not create a common fund. The only "fund" created is what Montana State Fund owes to *Reesor*. Even if *Reesor* could be read as something more than favorable precedent, the same problems in identifying beneficiaries also plague any efforts to ascertain the amount of any common fund.

CONCLUSION

For the reasons discussed above, a common fund does not exist in this case. Moreover, even if a common fund exists, an order requiring Respondents to pay *Reesor* benefits is unconstitutional.

Dated this 5th day of May, 2006.

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

By: 
STEVEN W. JENNINGS
Attorneys for Respondents

²⁶ *Mathews v. Liberty Northwest Ins. Corp.*, WCC No. 2001-0294, 2004 ML 186 (citing *Murer v. State Fund* (1997), 283 Mont. 210, 942 P.2d 69).

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 May, 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

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American International Insurance Co.
American International Pacific Insurance Company
American International Specialty Lines Insurance
American Reinsurance Company
American Zurich Insurance Co.
Assurance Company of America
Birmingham Fire Insurance Company
Bituminous Fire & Marine Insurance Co.
Bituminous Casualty Corp.
Centre Insurance Company
Clarendon National Insurance Company
Colonial American Casualty & Surety
Commerce & Industry Insurance Company
Everest National Ins. Co.
Fairfield Ins. Co.
Farmers Insurance Exchange
FedEx Ground Package System, Inc.
Fidelity & Deposit Co. of Maryland
Granite State Insurance Company
Great American Alliance Insurance Co.
Great American Assurance Co.
Great American Insurance Co.
Great American Insurance Co. of NY
Great American Spirit Insurance Company
Greenwich Insurance Company
Hartford Accident & Indemnity Co.
Hartford Casualty Insurance Co.
Hartford Fire Insurance Co.
Hartford Insurance Co. of the Midwest
Hartford Underwriters Insurance Co.
Illinois National Insurance Co.
Insurance Company of the State of Pennsylvania
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Republic Indemnity
Sentinel Insurance Company Ltd.
Sentry Insurance Mutual Co.
Sentry Select Insurance Company
Stillwater Mining Company
Truck Insurance Exchange
Twin City Fire Insurance Co.
Universal Underwriters Group
Valiant Insurance Company
XL Ins. Co. of New York Inc.
XL Reinsurance America
XL Specialty Ins. Company
United National Casualty Insurance Company
Zurich American Insurance Co.
Zurich American Insurance Co. of Illinois

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DALE REESOR,

Petitioner,

vs.

MONTANA STATE FUND,

Respondent/Insurer.


WCC No. 2002-0676

AFFIDAVIT OF BILL McCARTY

The above listed insurers hereby submit the attached *Affidavit of Bill McCarty*.

Dated this 11th day of May, 2006.

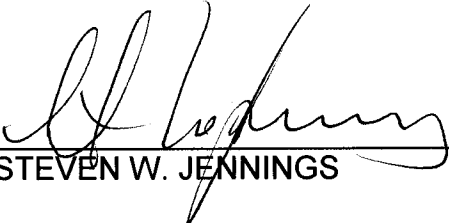
CROWLEY, HAUGHEY, HANSON,
TOOLE & DIETRICH P.L.L.P.

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 17th day of May, 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

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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

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WCC No. 2002-0676

AFFIDAVIT OF BILL McCARTY

STATE OF Arizona)
County of Maricopa) :ss.

I, Bill McCarty, being first duly sworn under oath, depose and state as follows:

1. I reside at 2450 West Keating Avenue, Mesa, Arizona 85202.
2. I currently work for the AIG Domestic Claims, Inc., d/b/a AIG Claim Services, ("AIGCS") a member company of American International Group, Inc. ("AIG") which handles claims for AIU Insurance Company, American International Pacific Insurance Company, American Home Assurance Company, Birmingham Fire Insurance Company, Commerce & Industry Insurance Company, Granite State Insurance Company, Insurance Company of the State of Pennsylvania, National Union Fire Insurance Company of Pittsburgh, Pa, and New Hampshire Insurance Company.
3. My current title is Claim Manager for the AIGCS.

4. My employment duties with the AIGCS include oversight of numerous insurance claims adjusters for the AIG Group.

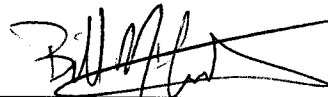
5. As a function of my employment duties with the AIGCS., I have knowledge of claims handling and adjusting procedures as well as file storage and handling.

6. In response to the *Reesor* common fund litigation, pending before the Workers' Compensation Court for the State of Montana, I have investigated the cost of a file review to determine whether the AIG Group has, or had, any claims in which the claimant may be eligible to obtain additional worker's compensation insurance benefits pursuant to the Montana Supreme Court decision entitled *Reesor v. Montana State Fund*, 2004 MT 370, 325 Mont. 1, 103 P.3d 1019.

7. My investigation has revealed that the cost per closed file reviewed would be a minimum of \$48.00. This figure is based upon an hourly rate of \$66.00 for a qualified Montana third-party adjuster and assumes one-half hour per file reviewed. The figure also includes a \$15.00 service fee to locate and pull each file reviewed. (\$33.00 + \$15.00 = \$48.00.)

8. While I presently do not know how many closed files would need to be reviewed to locate potential *Reesor*-type beneficiaries it is my belief that it would likely require review of a least 1,000 files. Assuming 1,000 closed files reviewed the total cost for such a review would be \$48,000. I note that this figure would be a minimum figure as AIG Claim Services, Inc. does not handles all claims for all of its subsidiaries. Thus, depending on the number of such claims the costs incurred by the individual subsidiary, would need to be added to this estimate.

Dated this 9th day of ~~April~~^{May}, 2006.

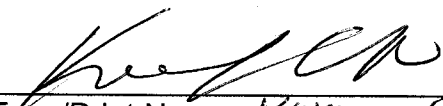


BILL McCARTY

SUBSCRIBED and SWORN to before me this 9th day of ~~April~~^{May}, 2006.



(SEAL)



Type/Print Name: Karen Champagne

Notary Public for the State of Arizona

Residing at: 2929 N Central Blvd, Phoenix

My Commission Expires: 7-12-2008

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

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

May 5, 2006

Ms. Clara Wilson, Deputy Clerk
Workers' Compensation Court
PO Box 537
Helena, MT 59624-0537

VIA FAX & U.S. MAIL

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

Dear Clara:

Please find enclosed our Brief Re: Existence of Common Fund with its attached draft Affidavit of Bill McCarty. Also please find the Affidavit of Amy Cardillo. Hard copies will follow in the mail

Sincerely yours,

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


STEVEN W. JENNINGS

SWJ:swj
Enclosures
c (w/encls.): Thomas J. Murphy, Esq.