Bradley J. Luck
Malin Stearns Johnson
GARLINGTON, LOHN & ROBINSON, PLLP
199 West Pine • P. O. Box 7909
Missoula, MT 59807-7909
Telephone (406) 523-2500
Telefax (406) 523-2595

Thomas E. Martello
Montana State Fund
P. O. Box 4759
Helena MT 59604-4759

Attorneys for Respondent/Insurer

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DALE REESOR,

Petitioner,

v.

MONTANA STATE FUND,

Respondent.

WCC No. 2002-0676

STATE FUND'S OPENING BRIEF REGARDING EXISTENCE OF A COMMON FUND, EXISTENCE OF ASCERTAINABLE CLASS AND FUND, RETROACTIVITY, LACHES AND STATUTES OF LIMITATIONS ISSUES, AND CONSTITUTIONALITY OF APPLICATION OF COMMON FUND DOCTRINE.

COMES NOW the Respondent, Montana State Fund ("State Fund"), and hereby files its Opening Brief Regarding Existence of a Common Fund, Existence of Ascertainable Class and Fund, Retroactivity, Laches and Statutes of Limitations Issues, and Constitutionality of Application of Common Fund Doctrine. For the reasons stated herein, the State Fund asserts that a common fund does not exist, and that there is neither an ascertainable class nor an ascertainable fund. Even if a common fund did exist under *Reesor*, this fund is not retroactive. If the Court does recognize a common

fund, for any claimants who failed timely to present a challenge to the Montana Code Annotated, claims now presented are barred by laches and statutes of limitations. Finally, the State Fund contends that application of the Common Fund doctrine violates constitutional guarantees of "freedom of contract" and "taking without just compensation."

I. INTRODUCTION

This case arises out of the Montana Supreme Court's decision in *Reesor v. Montana State Fund*, 2004 MT 370, 325 Mont. 1, 103 P.3d 1019, which held that the limitation on permanent partial disability (PPD) benefits for claimants receiving or eligible for Social Security or similar retirement benefits as set forth in Montana Code Annotated § 39-71-710 (1999) violated the Equal Protection Clause of the Montana Constitution. *Reesor*, ¶ 19. On January 20, 2005, Reesor's counsel filed a Notice of Common Fund Attorney Fee Lien, asserting a lien against all Plan I, II, & III workers' compensation insurers for all claimants injured between June 30, 1987,[1] and December 23, 2004. (*See* Notice of Common Fund Attorney Fee Lien). Following a February 3, 2005, status conference, this Court determined that, under *Russette v. State Compen. Ins. Fund* (1994), 265 Mont. 90, 874 P.2d 1217, any *Reesor* common fund may encompass only those claimants injured between July 1, 1987 and June 30, 1991, and those injured after June 30, 1995. (Minute Entry, Feb. 3, 2005, Status Conference). The Court also determined that claimants injured after June 30, 2003, may be included in the common fund class, but that attorney fees may not be taken with respect to such claimants.

II. ISSUES

On March 14, 2006, this Court issued an Order delineating the following issues for briefing:

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?

---

[1] This date should be July 1, 1987.

5. Do laches or statutes of limitations apply to claims which failed to timely present a challenge to Montana Code Annotated?

6. Does application of the common fund doctrine violate constitutional guarantees of "freedom of contract and taking without just compensation"?

III. STATEMENT OF FACTS

On January 13, 2000, Dale Reesor was injured during the course and scope of his employment with Northwest Equipment in Cascade County, Montana. Reesor was sixty-five years old at the time of his injury, and had been receiving social security retirement benefits since May 24, 1999, his sixty-fifth birthday. Reesor filed a workers' compensation claim, and the State Fund, which was Northwest Equipment's workers' compensation insurer, paid temporary total disability (TTD) benefits to Reesor from January 22, 2000, through August 2, 2002. Reesor reached maximum medical improvement on May 10, 2002, and his doctor rated him at four percent permanent partial impairment. The State Fund paid out the impairment award portion of Reesor's entitlement between June 10, 2002 and September 15, 2002, for a total award of $2,975.00. Under Montana Code Annotated § 39-71-710, Reesor was statutorily ineligible for additional PPD benefits enumerated in Montana Code Annotated § 39-71-703.

Reesor filed a petition for hearing before the Workers' Compensation Court, alleging Montana Code Annotated § 39-71-710, violated constitutional guarantees of equal protection by depriving him of a larger PPD award due to his age. This Court rejected Reesor's claim and held that Montana Code Annotated § 39-71-710, survived constitutional scrutiny because the deprivation of Reesor's additional PPD benefits was roughly offset by Reesor's eligibility for social security retirement benefits. *Reesor,* ¶ 1.

The Montana Supreme Court reversed the decision of this Court, holding that Montana Code Annotated § 39-71-710, unconstitutionally deprived Reesor of increased PPD benefits because of his age. *Reesor*, ¶ 19. On January 20, 2005, Reesor's counsel filed a Notice of Common Fund Attorney Fee Lien, asserting a lien against all Plan I, II, & III workers' compensation insurers for all claimants injured between June 30, 1987 and December 23, 2004. (*See* Notice of Common Fund Attorney Fee Lien). The Common Fund Attorney Fee Lien did not differentiate between PPD and permanent total disability (PTD) claimants. This Court later narrowed the time period requested in the lien, holding that, if a *Reesor* common fund existed, it may encompass only those

claimants injured between July 1, 1987 and June 30, 1991, and those injured after June 30, 1995. (Minute Entry, Feb. 3, 2005, Status Conference). The Court also determined that claimants injured after June 30, 2003, may be included in the common fund class, but that attorney fees may not be taken with respect to such claimants. (Minute Entry, Feb. 3, 2005).

On March 14, 2006, this Court ordered briefing on various *Reesor* implementation issues, including the existence of a common fund, the retroactivity of *Reesor*, whether late-filed claims are barred by statutes of limitations or the doctrine of laches, and whether imposition of a common fund violates constitutional guarantees of freedom of contract and taking without just compensation. For the reasons described below, the State Fund submits that imposition of a common fund is inappropriate in this case for several reasons, including the lack of ascertainable class and fund, the fact that *Reesor* should not be applied retroactively, and constitutional concerns with application of a *Reesor* common fund. In addition, claims not timely filed must be barred under statutes of limitations and the doctrine of laches.

IV. ARGUMENT

A. A Common Fund Does Not Exist Under *Reesor*.

In *Murer v. State Compen. Mut. Ins. Fund* (1997), 283 Mont. 210, 942 P.2d 69, the Montana Supreme Court explained that, when a party creates a common fund directly benefiting "an ascertainable class of non-participating beneficiaries," and particularly when the individual does not have a sufficient economic stake in the outcome of his case to justify pursuing his rights without a common fund, that individual is entitled to reimbursement of attorney fees under the common fund. *Murer,* 283 Mont. at 222-223, 942 P.2d at 76.

As the *Murer* court explained, part of the rationale behind the doctrine is to allow a claimant to recover reasonable attorney fees from those who benefit from his pursuit of his rights:

> [W]e conclude that when a party, through active litigation, creates a common fund which directly benefits an ascertainable class of non-participating beneficiaries, those non-participating beneficiaries can be required to bear a portion of the litigation costs, including reasonable attorney fees. Accordingly, the party who creates the common fund is entitled, pursuant to the

> common fund doctrine, to reimbursement of his or her reasonable attorney fees from that fund.

Murer, 283 Mont. at 223, 942 P.2d at 76.

Murer, however, did not suggest unlimited access to common fund entitlement. Rather, critical language from *Murer*, which underscores the purpose of the doctrine, explains where there may exist some parameters on the applicability of the common fund doctrine:

> Application of the common fund doctrine is especially appropriate in a case like this where the individual damage from an institutional wrong may not be sufficient from an economic viewpoint to justify the legal expense necessary to challenge that wrong. The alternative to the doctrine's application is simply for the wrong to go uncorrected.

Murer, 283 Mont. at 222-223, 942 P.2d at 76.

In *Murer*, Murer's individual economic stake in the outcome of the litigation was quite small because he was only challenging whether the temporary cap on his benefits applied to his claim. Unfortunately, the current trend in common fund litigation ignores one of the doctrine's purposes of providing an incentive to litigate issues whose economic benefits are minimal. Rather than apply the common fund doctrine to situations akin to *Murer*, attorneys are now seeking to invoke the doctrine every time they succeed on a legal matter, regardless of the economic stakes at issue in the precedent-setting litigation. Such an approach is a misapplication of the doctrine. Unlike in *Murer*, Reesor's economic stake in his litigation was significant, and it justified the legal expense necessary to challenge the disparate treatment. As the Montana Supreme Court recognized in its *Reesor* decision, Reesor initially received a total impairment award of $2,975.00; because of the Court's determination regarding Montana Code Annotated § 710's unconstitutionality, Reesor's entitlement increased by $20,081.25. *Reesor*, ¶ 5. Reesor was able to increase his impairment award ten times, more than enough to be "sufficient from an economic viewpoint to justify the legal expense necessary to challenge that wrong." *Murer*, 283 Mont. at 222-223, 942 P.2d at 76. Application of the common fund doctrine to this case would be inappropriate.

//

//

B. There Is Not An Easily-Ascertainable Class Of Non-Participating Beneficiaries, Nor Is There An Ascertainable Fund.

1. *Satterlee* limits any common fund class to PPD claimants.

The Montana Supreme Court's holding in *Reesor* was limited to whether the age limitation on PPD benefits set forth in Montana Code Annotated § 39-71-710, violated the Equal Protection Clause of the Montana Constitution. *Reesor*, ¶¶ 2, 7. However, Reesor's counsel has not limited his lien to PPD claimants. Instead, Reesor's counsel attempts to apply *Reesor* to PTD claimants.

Under this Court's recent decision in *Satterlee v. Lumberman's Mut. Cas. Co.*, 2005 MTWCC 55, it is clear that any common fund class may include only PPD claimants. In *Satterlee*, this Court expressly held that Montana Code Annotated § 39-71-710, is constitutional as applied to PTD benefits. *Satterlee*, ¶ 32. Accordingly, Reesor's counsel's lien is overbroad, and must be limited by this Court to apply, at most, to eligible PPD claimants.[2]

2. Even for PPD claimants, no ascertainable fund or class exists.

In previous cases, including *Murer*, *Broeker v. Great Falls Coca-Cola Bottling Co.* (1996), 275 Mont. 502, 914 P.2d 967; *Rausch v. Hogan*, 2001 MT 123, 305 Mont. 382, 28 P.3d 460; and *Flynn v. State Compen. Ins. Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397, the common fund claimants were more readily identifiable and their increased entitlement could be determined predominantly by a simple mathematical calculation without anything near the extensive procedures and proceedings involved in ascertaining additional entitlement under *Reesor*.

In *Murer*, the ability to determine, with certainty, the amount of money a non-participating beneficiary was entitled to receive influenced the Montana Supreme Court's decision to apply the common fund doctrine. *See Murer*, 283 Mont. at 223, 942 P.2d at 77 ("The State Fund, therefore, has been able to determine, with certainty, the number of absent claimants involved and the amount of money to which each individual claimant is entitled."). In recognition of that *Murer* requirement, this Court has reiterated in the pending common fund cases that the lack of an ability to mathematically calculate

---

[2] The *Satterlee* Petitioners' Motion for Reconsideration of this Court's *Satterlee v. Lumberman's Mut. Cas. Co.*, 2005 MTWCC 55, is currently pending before this Court.

an absent claimant's increased entitlement eliminates the appropriateness of a common fund:

> If when I go through these cases – The easiest case, for example, was the *Murer* case, because all that required, once you identified them and you identified the dates, it was simply a mathematical computation. So it was what we would call, I think, in the law a ministerial act to determine what those claimants were owed.

Transcr. Hrg. 18:16-22, *Wild v. State Fund* (June 25, 2003) (emphasis added). *See also* Transcr. of Proc. 24:24-25:1, *Ruhd v. Liberty Nw. Ins.* Corp., WCC No. 2002-0500 (Dec. 8, 2003), ("The problem is, is each of those cases may vary factually and that is not a case – those cases are not appropriate for common fund.").

In this case, determination of any *Reesor* common fund entitlement will involve innumerable, time-consuming, highly-individualized determinations. Although Workers' Compensation Act § 703 provides a formula for determining PPD entitlement, the formula cannot be utilized until all the necessary medical and vocational information is gathered on each claimant. *See* Affs. Daniel Gengler (Apr. 11, 2006) (attached as "Ex. A"), Marvin Kraft (Apr. 11, 2006) (attached as "Ex. B"), Cristine E. McCoy (Apr. 12, 2006) (attached as "Ex. C"), and David Ogan (Apr. 12, 2006) (attached as "Ex. D"). Obtaining this information will be burdensome, time-consuming, and expensive, with hard costs potentially exceeding $3 million in addition to a substantial amount of unquantified soft costs. Aff. Gengler ¶¶ 3, 4, 6. Disputes over impairment ratings or vocational restrictions will likely lead to mediation and eventual litigation, and determining entitlement under § 703 may require mini-trials in a vast majority of cases.

Determining entitlement to *Reesor* benefits will take more than a ministerial act and a simple mathematical computation because obtaining the missing information in each claim file will require substantial effort followed by subjective analysis. Missing medical and vocational information are going to take time to arrange for and gather, and disputes over wage loss and related earning capacity issues and the effect of subsequent injuries or diseases on the State Fund's liability will need to be litigated before PPD entitlement can be properly calculated. The process is unimaginably exacerbated by the requirement that each individual claim will require gathering or securing vocational information applicable to past status and an exercise of hindsight

vocational and medical review.[3] Similar to the approach taken in class action cases, the State Fund urges this Court take the position that claims which require "highly individualistic determinations," or which require the Court to conduct a series of mini-trials for resolution, are inappropriate for the application of the common fund doctrine. *See generally Ostrof v. State Farm Mut. Automobile Ins. Co.*, 200 F.R.D. 521, 531-532 (D. Md. May 21, 2001 (discussing the concept as applied to class action claims). Because computing § 703 entitlement would involve "highly individualistic determinations" and would require a series of mini-trials for resolution, the State Fund asserts that no common fund exists as a result of the *Reesor* decision.

C. Any Common Fund Resulting From The *Reesor* Decision Is Not Retroactive.

1. All three *Chevron* factors are met.

---

[3] For instance, a representative claim would include a claimant, like Reesor, who received an impairment award several years ago. The file would first have to be located. Typically, the file would not contain sufficient vocational and medical work-up to consider entitlement to the largest potential additional PPD entitlement, wage loss. To determine the entitlement a vocational consultant would have to analyze, as of several years past, whether the claimant suffered a compensable wage loss due to the industrial injury as of the date of maximum healing. The process would involve an analysis of the time-of-injury job, if possible, and an analysis (or guestimate) of the other employment positions the claimant might have been able to compete for given the past medical condition caused by the industrial injury. In order to determine capacity, retrospectively, medical input, again guessing at prior restrictions would be needed. This might entail a present medical exam or functional capacity testing to attempt to determine, again for years passed, the claimant's restrictions. This process is complicated by the normal aging process, later injury or disease. Once this part of the puzzle is pieced together on each claim a doctor would have to render an opinion whether the claimant, based on the restrictions due to the industrial injury, could do the jobs retrospectively analyzed and written up by a vocational consultant as being within the claimant's residual labor market. Then, research would need to be completed to attempt to attach wage potential to previous time periods for each job suggested as appropriate and medically approved. At the end of the process there is a significant likelihood of disagreement. Common fund counsel would feel compelled or be required to litigate each claim to the maximum. Clearly, from a technical and practical standpoint the process is unworkable, individual and contrary to any proper common fund basis.

The general rule in Montana is that judicial decisions are applied retroactively. *Dempsey v. Allstate Ins. Co.*, 2004 MT 391, ¶ 29, 325 Mont. 207, ¶ 29, 104 P.3d 483, ¶ 29 (citing *Kleinhesselink v. Chevron, U.S.A.* (1996), 277 Mont. 158, 162, 920 P.2d 108, 111). The Montana Supreme Court allows for an exception to this general rule when there exists "a truly compelling case for applying a new rule of law prospectively only." *Dempsey*, ¶ 29. Pursuant to this exception, a decision will not apply retroactively if all three *Chevron* factors are met:

1. Whether the ruling to be applied retroactively establishes a new principle of law "by overruling precedent or by deciding an issue of first impression whose result was not clearly foreshadowed";

2. Whether retroactive application will further or retard the rule's operation; and

3. Whether retroactive application will result in a substantial inequity.

Dempsey, ¶ 30 (citing *Chevron Oil v. Huson*, 404 U.S. 97, 106-107 (1971)).

As set forth below, *Reesor* avoids retroactive application because all three *Chevron* factors weigh in favor of prospectivity.

a. The *Reesor* decision established a new principle of law whose result was not clearly foreshadowed.

A judicial decision will avoid retroactive application if it overrules precedent or establishes a new principle of law by deciding an issue of first impression whose result was not clearly foreshadowed. *Dempsey*, ¶ 30. The result in *Reesor* was not foreshadowed. Prior to *Reesor*, PPD claimants were expressly prohibited by statute from receiving PPD benefits after reaching retirement age. *See* Mont. Code Ann. § 39-71-710. In 2001, in *Black v. MDMC/Benefis Healthcare*, this Court held that Montana Code Annotated § 710's denial of PPD benefits to injured workers who have taken social security retirement benefits, or are eligible to receive social security retirement benefits, did not violate the Equal Protection Clause of the Montana or United States Constitutions. *See Black v. MDMC/Benefis Healthcare*, 2001 MTWCC 47, Findings of Fact, Conclusions of Law & Judgment (Aug. 24, 2001). This Court recognized and relied upon *Black* in reaching its *Reesor* decision, going so far as to attach a copy of

Black to the *Reesor* Order. In other words, at the time of the *Reesor* litigation, the prevailing law in Montana was that workers receiving social security disability benefits were not entitled to continued receipt of PPD benefits.

The Montana Supreme Court's *Reesor* decision fundamentally altered the state of the law regarding payment of PPD benefits to workers receiving (or eligible to receive) Social Security disability benefits. Such a drastic change in the rights of claimants and the obligations of insurers was not "clearly foreshadowed." This point is underscored by the fact that the Montana Supreme Court decided *Reesor* by a narrow 4-3 majority. While Justices Leaphart, Cotter, and Nelson concurred in Justice Regnier's majority opinion, Justice Warner and Chief Justice Gray joined in the lengthy, comprehensive, well-reasoned dissent of Justice Rice. *See Reesor.* One can assume that a "clearly foreshadowed" result would have resulted in a 7-0 decision, or at least one decided by a majority more decisive than 4-3.

Critically, employers and insurers justifiably relied on the prevailing state of the law, governed by this Court's reasoned and well-researched pronouncement in *Black* and Montana Code Annotated § 39-71-710, to determine entitlement and set rates. When the Montana Supreme Court reversed this Court's reasoned judgment in *Reesor*, it fundamentally changed the law governing past entitlement and rates. It is apparent that Reesor established a new principle of law whose result was not clearly foreshadowed. Therefore, the first *Chevron* factor is satisfied.

b. Retroactive application of the rule set forth in *Reesor* will not further the rule's operation.

The second *Chevron* factor inquires into whether retroactive application of a judicial decision will or will not further the rule's operation. *See Dempsey*, ¶ 30. In evaluating the second factor, it is appropriate to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Dempsey*, ¶ 21 (quoting *Chevron*, 404 U.S. at 106-107). The Montana Supreme Court has summarized the issue as "whether the retroactive application of a rule of law will further or retard its operation." *Schmill v. Liberty Nw. Ins. Co.*, 2005 MT 144, ¶ 15, 327 Mont. 293, ¶ 15, 114 P.3d 204, ¶ 15.

The *Schmill* reference to only a portion of Dempsey's direction on this *Chevron* element is unjustifiably restrictive. It invites the simplistic analysis expected from Reesor that it is elemental that every statute found to be unconstitutional must be

applied retroactively or the operation of the holding will be retarded as to some deserving claimants. If that were the rule, all holdings involving constitutional deficiency would be retroactive. Clearly, that is not the case. The *Dempsey* direction, in its breadth, must be considered.

Because the rule prior to *Dempsey* required only the presence of one of the *Chevron* factors to preclude retroactivity there is a paucity of authority on this rather vague and difficult to decipher element, giving rise to the need for thoughtful interpretation and development post *Dempsey.* The rule in that case was a product of a unique interpretive approach. Its implementation deserves no less.

The *Dempsey* articulation requires, by its terms, a case by case review. It is heavily reliant upon a consideration of the history of the rule and, in its essence, whether the new rule will be properly implemented with prospective application.

Here, we have a clear statute and specific interpretation from this very Court, *twice*, that it was properly applied to preclude PPD benefits to those considered retired as a matter of law. The holding was consistent with accepted principles of workers' compensation law. In fact, this Court noted that Larson's treatise, the gold standard for thoughtful analysis of workers' compensation issues and trends, presented a persuasive case for the constitutionality and propriety of § 710's limitation. *Black,* ¶ 38. In finding the statute acceptable from a constitutional and public policy standpoint this Court noted that it was consistent with legitimate state interests, the economic viability of the workers' compensation system and the coordination of benefits protecting our injured and elderly citizens. *Black,* ¶¶ 33-39.

This Court's previous analysis, even though rejected years later in this matter, weighs heavily on the consideration of the history, purpose and effect of the new rule. The entire system (claimants, insurers and their lawyers), justifiably relied upon the thoughtful analysis of this Court in *Black* and the holding supporting the viability of the statute. Significant law and proper policy supported the application of the statute. It need not be stricken retroactively to properly implement the new and unexpected rule. This Court (and three Justices of the Supreme Court) found that the statute was an appropriate legislative direction and reasonably coordinated with other benefits available to retired claimants. It would be inconsistent with the history, and contrary to the *Dempsey* direction, to now state that the only proper avenue of implementation would be to find that the new rule would be diminished absent retroactive application.

In addressing the second factor in a legal malpractice case, the Montana Supreme Court recently stated:

> Second, retroactive application would not further operation of the rule; the announcement of the new rule will still put parties convicted of criminal offenses on notice that they must file any malpractice claims against their attorneys within three years of discovering the act, error or omission.

Ereth v. Cascade County, 2003 MT 328, ¶ 30, 318 Mont. 355, ¶ 30, 81 P.3d 463, ¶ 30. *See also Miller v. Liberty Mut. Fire Ins. Co.*, 2003 MTWCC 6, ¶ 30 (holding that *Broeker* applied retroactively because applying it prospectively only would allow Liberty and other insurers to postpone the effect of a valid, clear statute simply by misinterpreting it).

In this case, as in *Ereth*, retroactive application will retard, rather than further, the rule's operation, by undermining rates carefully determined by the State Fund based on existing law, and thereby undermining the viability of the workers' compensation system. As in *Ereth*, *Reesor* established a new principle of law, one which was contrary to express statutory language and interpretive caselaw. Consistent with the reasoning in *Ereth*, retroactive application would not further operation of the *Reesor* holding because only now are workers' compensation claimants and attorneys aware of entitlement to PPD benefits under § 710 after they reach the age of 65. Further, the collective impact of this and other common fund cases must eventually force legislative action limiting future benefits to future claimants, or risk insolvency of the system.

Prospective application will not weaken the policy for allowing workers' compensation claimants already receiving social security disability benefits to receive PPD benefits because that entitlement now exists for all claims occurring on or after December 22, 2004. *See Reesor.* In fact, prospective application acknowledges the proper consideration and approval of § 710 by this Court and the system's acknowledgement and acceptance of that position from passage to invalidity several years later. Because a prospective application properly considers the history of the new rule, will not weaken it in any respect or retard its operation, the second *Chevron* factor is satisfied.

//

//

c. Retroactive application of the *Reesor* decision will result in substantial inequity.

Under *Chevron* and *Dempsey*, the third factor to be considered is whether retroactive application of a judicial decision will result in a substantial inequity. *See Dempsey*, ¶ 30. In this Court's decision in *Stavenjord v. Montana State Fund*, 2004 MTWCC 62, this Court held that this third *Chevron* factor was met, and that retroactive application of this Court's original *Stavenjord* decision would result in substantial inequity with respect to "claims arising on and after June 30, 1987, and where MMI was reached after June 3, 1999." *Stavenjord*, ¶¶ 36, 45.[4] Similarly, in this case, substantial inequity would result to the State Fund, and this factor weighs against retroactive application of *Reesor*.

In one of its retroactivity cases, the United States Supreme Court suggested that, in examining the inequitable consequences of a retroactive application, the exclusive focus should be on the persons or entities who would be adversely affected by retroactivity rather than on the persons or entities who would be harmed by non-retroactive application. *See Florida v. Long*, 487 U.S. 223 (1988). Because Montana still recognizes the *Chevron* test originally laid down by the United States Supreme Court, language from *Long* provides helpful guidance.

As *Long* instructs, the analysis under the third factor should focus on the inequity the State Fund will experience if *Reesor* is applied retroactively; the focus should not be on the inequities that might result to certain claimants if *Reesor* is applied prospectively only. This approach makes sense because someone receiving a windfall with retroactive application would always benefit, thereby nullifying the standard.[5] Here, applying *Reesor* retroactively would be inequitable because it would result in substantial administrative and financial hardship to the State Fund and the entire Workers' Compensation system.

If *Reesor* is applied retroactively to July 1, 1987, all claimants similarly situated with Reesor over fourteen of the past nineteen years would be allowed to reopen

---

[4] Petitioner Debra Stavenjord appealed this decision to the Montana Supreme Court and the State Fund cross-appealed. The appeal and cross-appeal have been fully briefed and argued and are currently pending before the Supreme Court.

[5] And, as acknowledged by this Court in *Black*, the statute properly coordinated with other benefit systems to provide society's intended safety net for injured and retired citizens.

portions of their claims. The State Fund would have to identify all of those claimants, locate their files, and then undertake the administrative burden of manually reviewing each file to determine what PPD information still needs to be obtained and how best to obtain it. If this process is judicially required, the State Fund will experience substantial hardships in locating files, retrieving files, accessing antiquated computer databases and obtaining missing information from claims files. Further, the State Fund and the Old Fund will suffer a severe financial impact due to the benefit costs, administrative costs and claims-related costs associated with implementing *Reesor* retroactively. The process will be repeated for each carrier doing business in the State over the years at issue.

2. Locating and retrieving older files imposes a substantial hardship on the State Fund.

Locating files stored on various media types is a labor-intensive, manual process which would pose an enormous administrative burden on the State Fund. Aff. McCoy ¶ 3. A file's media type is determined by what storage system was in place at the time the file was closed. Aff. Kraft ¶ 9. To determine the media type of a claim, the adjuster must make a file request from the State Fund's only records person, who will search the computer system to ascertain when the claim was active and on which media it is likely to be stored. Aff. McCoy ¶ 6.The records person will then check the records for each claim. Aff. McCoy ¶ 6. A simple search may take ten minutes, but a complex search on one file may take three hours or longer. Aff. McCoy ¶ 6.

Files that closed from 1976 through 1994 are stored on microfiche. Aff. Kraft ¶ 9. The state's Records Retention Division maintains the original microfiche. Aff. Kraft ¶ 8. Microfiche may be either copied to other microfiche or may be copied to paper by the State Auditor's Office. Aff. Kraft ¶ 10. After the State Fund personnel manually reviewed the microfiche and located the claim, each page of the claim would have to be printed. With its present staff, the maximum document production by the State Auditor's Office is about 600 pages per day and the average claim file is about 90 to 100 pages. Aff. Kraft ¶ 10. The State Fund also has two machines that allow it to print paper copies from microfiche. Aff. Kraft ¶ 10. With experienced operators and minimal equipment malfunction, it is reasonable to estimate each machine could produce an average of 100 pages per hour from microfiche to paper. Aff. Kraft ¶ 10.

Since July 1, 1995, all incoming fiscal year 1996 claim documents have been imaged, and all files that closed in 1995 or later are stored on optical imaging platters. Aff. Kraft ¶ 11. In 1999, the State Records Retention Committee approved the State

Fund's optical imaging system as its primary means of records retention. Aff. Kraft ¶ 12. Six months after that approval, the State Fund destroyed all of its paper files. Aff. Kraft ¶ 12. Optically imaged documents can be retrieved via the State Fund's computer system. Aff. McCoy ¶ 8. Entire files are printed via a FileNet printer, which can print several claim files per night. Aff. McCoy ¶ 8. Individual pages can be printed at any workstation at about eight pages per minute. Aff. McCoy ¶ 8.

Additionally, the Old Fund unit, which handles claims arising on or before June 30, 1990, stores paper files on site. Aff. McCoy ¶ 7. When these files are closed, the original documents are microfiched and the paper files are destroyed. Aff. McCoy ¶ 7. The adjuster in the Old Fund unit retrieves paper files, which can be disassembled and photocopied. Aff. McCoy ¶ 7. However, open files in the Old Fund unit with claims may be lengthy files consisting of several volumes and thousands of pages, making the location and retrieval process of Old Fund files as cumbersome as locating and retrieval of State Fund files. Aff. McCoy ¶ 7.

Thus, the time required to retrieve files depends on the media type on which the file is stored, the date of the claim, when the claim was active, and how long the claim was active. Because claims which have been closed and re-opened may be stored on multiple or all media types, a *Reesor* review may include a review of a claim file with information stored on all media types. This labor-intensive process of identifying, reviewing, retrieving and printing claims covering nearly fifteen years of claims activity would impose a substantial administrative and logistical hardship on the State Fund, making retroactive application improper under the *Chevron* test.

a. Difficulties in accessing information on the State Fund's antiquated DBO2 computer system, as well as problems with computer coding errors and the transfer of information from one computer system to another, impose a substantial hardship on the State Fund.

Prior to July 1, 1987, and until February of 1997, claim summary information was kept on DBO2, the mainframe. Aff. Ogan ¶ 3. The DBO2 system was used to transfer claim information to the Department of Labor & Industry. Aff. Ogan ¶ 3. In February of 1997, the information on the DBO2 system was transferred to CMS, a system which integrates a database and imaging software and stores claim summary information. Aff. Ogan ¶ 4. However, DBO2 and CMS do not interface, so much of the information that was compacted for transfer from DBO2 could not be disassembled in the CMS system. Aff. Ogan ¶ 4.

In the CMS system, financial information is produced for the user in a template-based format. Aff. Ogan ¶ 5. Unlike the DBO2 system, the CMS system serves as claims-handling software, and the State Fund uses it to assist in adjusting claims. Aff. Ogan ¶ 5. The State Fund has recently developed a new claim management system, Claim Center ("CC"), which it anticipates brining online in March 2006. Aff. Ogan ¶ 5. CMS and CC do not interface, and information compacted for transfer from CMS to CC will not universally be disassembled in CC. Aff. Ogan ¶ 5. Ultimate impacts to information retrieval and functionality cannot be assessed at this point. Aff. Ogan ¶ 5.

Although a single computer run will not locate all the potential *Reesor* claims, they can be substantially identified by using complex computer queries to search the CMS and DB02 systems. Aff. McCoy ¶ 9. A computer run identified 2,971 potential *Reesor* claims. Aff. McCoy ¶ 10. Of these 2,971 claims, the computer search identified 378 claims which were coded as "settled" and 150 claims involving claimants who passed away prior to the date of the *Reesor* decision. Aff. McCoy ¶ 10. The State Fund spent approximately ten hours formulating this particular query and approximately one-and-a-half hours running the query. Aff. McCoy ¶ 10. In conducting the computer search to locate potential *Reesor* claims, the State Fund searched for claims with dates of injury or onset of occupational disease occurring on or after July 1, 1987. Aff. McCoy ¶ 11. However, claims with dates of injury or onset of occupational disease occurring on or after July 1, 1991 through June 30, 1995, were excluded from the computer search as a result of the Montana Supreme Court's decision in *Russette*. Aff. McCoy ¶ 11.

Because of improper coding errors and issues with data transfer, manually reviewing each of the thousands of potential files may be the only reliable means of identifying affected claims. Aff. McCoy ¶ 12. Obviously, a manual review process – especially one involving thousands of potential files – would be time-consuming and would be delayed by the task of obtaining and training additional resources to review and identify particular factors in the claim files. The substantial burdens caused by computer difficulties and a manual review process would impose a substantial administrative hardship on the State Fund, making the third *Chevron* factor weigh against retroactive application of *Reesor*.

//

//

b. The administrative and claims-related costs and burdens associated with obtaining missing information from the claim files in order to determine entitlement under Montana Code Annotated § 39-71-703 impose a substantial hardship on the State Fund.

Retroactively adjusting files to comply with *Reesor* would impose significant additional administrative and claims-related costs and burdens on the State Fund. Aff. McCoy ¶ 21. In reviewing some sample claims currently on the State Fund's imaged computer system, the State Fund's adjusters spent 0.5 to 4.0 hours identifying what information was needed to adjust a claim under *Reesor*. Aff. McCoy ¶ 22. Files that are stored on paper or microfiche, or a combination thereof, will obviously require more time for adjuster review than the files which are currently on the State Fund's imaged computer system because locating and retrieving those files requires substantial effort, as explained above. Aff. McCoy ¶ 23. Once the review is complete, the adjuster would need to set-up and obtain the necessary medical and vocational information on many files, make decisions based on the results, and pay benefits. Aff. McCoy ¶ 24. As discussed above, the effort to go back in time several years to reformulate a PPD entitlement picture is daunting.

Many of the potential *Reesor* files lack documentation of medical and vocational information which is necessary to perform an analysis under Montana Code Annotated § 39-71-703. Aff. McCoy ¶ 14. Claims with a date of injury/exposure on or after July 1, 1995, require an impairment rating greater than 0% and an actual wage loss as threshold requirements for consideration of compensation for permanent partial disability. Aff. McCoy ¶ 14. Evaluating a claimant's additional PPD entitlement under Montana Code Annotated § 703(5) requires determinations regarding a claimant's age, education, wage loss, and work restrictions. Aff. McCoy ¶ 15. Determining wage loss requires a vocational and medical review. Aff. McCoy ¶ 16. It will be difficult to accurately identify jobs that would have been available at the time the claimant reached maximum medical improvement. Aff. McCoy ¶ 16. Determining wage supplement benefits for claims arising from July 1, 1987 through June 30, 1991, requires knowledge of a claimant's job and earnings after returning to work. Aff. McCoy ¶ 17. This information is not likely to be in the file and gathering it at this late date is, at least, difficult and probably impossible in many instances. Aff. McCoy ¶ 17.

Files relating to potential *Reesor* claims may also lack detailed vocational data. Aff. McCoy ¶ 18. Few files may contain targeted vocational work-up necessary to perform the actual wage loss component of the *Coles* analysis. Aff. McCoy ¶ 18. An

assessment of the physical restrictions and vocational limitations requires analysis and documentation of the time-of-injury job requirements, which probably is not in the file. Aff. McCoy ¶ 19. In some instances, the time-of-injury job (or even the time-of-injury employer) may no longer be available for evaluation. Aff. McCoy ¶ 19. Potential *Reesor* files may not contain an indication of work restrictions (heavy, medium, or light). Aff. McCoy ¶ 20. Obtaining accurate work restrictions after-the-fact will be difficult given the presence of subsequent injuries, diseases, and the natural aging process. Aff. McCoy ¶ 20. In short, the detailed pre and post injury vocational and medical consideration of earnings and earning capacity will necessarily be reconstructed for each claim in retrospect.

i. Costs associated with obtaining additional information.

The State Fund estimates that, for non-complex claims, rehabilitation costs would be $300.00 for a time-of-injury job analysis (which might be hypothetical); $700.00 for a wage loss evaluation and determination of transferable skills, and $250.00 for each alternative job analysis. Aff. McCoy ¶ 25. For complex claims, the State Fund estimates it will have to pay $65.00 per hour for a vocational rehabilitation counselor to prepare and provide the additional vocational information. Aff. McCoy ¶ 25. If secured from the treating physician, physician costs for reviewing each job analysis would be approximately $50.00, and physician costs for obtaining physical restrictions would be approximately $50.00-$75.00. Aff. McCoy ¶ 26. If an IME is necessary to obtain the physical restrictions and review the job analyses, the physician costs will range from $150.00-$1,250.00. Aff. McCoy ¶ 26. If the reviewing physician requests an FCE, an additional cost of $750.00 would be imposed on the State Fund. Aff. McCoy ¶ 27.

Also troubling is that each item not currently available in a file could be the basis for dispute, and the potential for litigation is an issue that can impact the time and cost involved in adjusting a claim. Aff. McCoy ¶ 28. Furthermore, the State Fund believes such claims will need to be mediated. Aff. McCoy ¶ 28.

ii. Miscellaneous administrative costs

Based on its experiences in *Murer*, *Broeker*, and the other common fund cases, the State Fund recognizes that closed and inactive files frequently lack current addresses for the claimants. Aff. McCoy ¶ 29. Locating a claimant often requires several attempts, and each attempt requires a new search. Aff. McCoy ¶ 30. It is anticipated that there will be older claims in which the claimant cannot be located. Aff. McCoy ¶ 30. In *Murer*, the State Fund utilized Internet searches in an attempt to locate

claimants whose contact information had changed. Aff. McCoy ¶ 31. Although MSF's ultimate success was fairly good, simply locating a claimant could require several hours of searching. Aff. McCoy ¶ 31.

A review of potential *Reesor* claims would also require adjusters to recognize and appropriately address the prior attorney liens filed in the pending common fund litigation, including but not limited to *Murer, Schmill, Stavenjord, Rausch*, and *Flynn*. Aff. McCoy ¶ 34.

iii. Benefit costs from *Murer*

At the time of the *Murer* decision and during almost all of the *Murer* implementation process, the State Fund was under a different organizational structure, one which was more conducive to accomplishing special projects. Aff. McCoy ¶ 35. Even with a more flexible structure, completing the implementation process was a strain on the State Fund's business operations. Aff. McCoy ¶ 35. This was so, even though the *Murer* review was limited to a four-year period, July 1, 1987 through June 30, 1991, and only involved the recalculation of the disability rate for those claimants at the maximum rate. Aff. McCoy ¶ 35. Approximately 3,200 claimants were entitled to additional benefits, and the timeframe used for adjusting purposes was July 1, 1987 through June 30, 1991; and, though administrative expenses are unknown, the current benefit costs and fees total approximately $2.0 million. Aff. McCoy ¶ 36.

Compared to *Murer*, a *Reesor* review process would involve a significantly more complex effort to review each claim, the gathering of substantial medical and vocational data and would necessarily involve a substantially longer period of time (both in terms of review and the expected multiple delays on each claim between the arranging for and completion of the many investigative and evaluative efforts required). The internal and external resources needed to accomplish a *Reesor* review, along with attendant costs, would be considerably more than *Murer*.

c. The potentially severe financial impact of the benefit costs associated with a retroactive application of *Reesor* would impose a substantial hardship on the State Fund (and the system).

In addition to the costs and administrative efforts discussed above, the *Reesor* decision will have a cost impact on employers, policyholders, and the State Fund. Aff. Gengler ¶ 22. Workers' compensation ratemaking is prospective, as insurance rates

are developed prior to the transfer of risk. Aff. Gengler ¶ 23. In accordance with Montana Code Annotated § 39-71-2330, the State Fund sets rates in a fashion similar to private carriers and consistent with actuarial principles. Aff. Gengler ¶ 24. Ratemaking in the years prior to *Reesor*, in reliance upon the statute and the *Black* decision, did not take into consideration the potential increase in permanent partial benefits which may be owed to employees receiving social security disability benefits, if *Reesor* is applied retroactively. Aff. Gengler ¶ 26.

The State Fund has estimated the cost of benefits associated with a retroactive application of *Reesor*. Aff. Gengler ¶ 3. For claims arising between July 1, 1990, and December 22, 2004, excluding the *Russette* period from July 1, 1991 through June 30, 1995, the increase in benefit costs for the State Fund is estimated at $2,000,000.00. Aff. Gengler ¶ 3. For claims arising on or after July 1, 1987, through June 30, 1990, the retroactive application of *Reesor* will result in an estimated benefit cost increase of $1,000,000.00 for the Old Fund. Aff. Gengler ¶ 4. Significantly, the prospective application of *Reesor* will result in a 0.2% rate increase for the State Fund's policyholders. Aff. Gengler ¶ 5. Based on annual premiums of approximately $200,000,000.00 this rate increase corresponds to an annual increase of approximately $4,000,000.00 for the State Fund's policyholders. Aff. Gengler ¶ 5.

Notably, this amount does not include the significant administrative costs or the costs of obtaining missing information, as discussed above. Likewise, this amount does not include unquantified soft costs related to adjuster time in locating files, retrieving files, accessing antiquated computer databases, reviewing claim information, arranging appointments or adjusting claims, nor does it include legal costs and fees. The financial impact to the State Fund will be paid out of surplus funds because the costs of retroactive application were not included in the rates for prior years.

Surplus is not excess, unnecessary funds. Although the State Fund's surplus at the end of fiscal year 2005 was $148.3 million, there are many reasons the State Fund has surplus, so that number cannot be viewed in a vacuum as available solely for the payment of common fund fees. *See* Aff. Gengler ¶ 16. Surplus is the amount of money available, over and above liabilities, for an insurer to meet future obligations to its policyholders and injured workers. Aff. Gengler ¶ 8. For a workers' compensation carrier like the State Fund, there are several characteristics that have the potential for a greater volatility of results and require a stronger-than-average surplus. Aff. Gengler ¶ 11. For example, workers' compensation insurance differs from virtually all other insurance in that it is open-ended, does not have a set policy limit and has extremely long-term obligations associated with its claims. Aff. Gengler ¶ 11(a). The State Fund

also provides the guaranteed market and writes only one type of insurance in one state where the courts are constantly changing the workers' compensation laws and benefits, making it difficult to accurately set premiums. Aff. Gengler ¶ 11(b), (c) and (d). Further, unlike a stockholder-owned insurance company, the State Fund cannot access additional capital to cover adverse financial results. Aff. Gengler ¶ 11(e).

The State of Montana experienced the insolvency of the Old Fund in the 1980s, which was caused by inadequate pricing and reserves. Aff. Gengler ¶ 21. During that time, many private sector insurers left Montana. Aff. Gengler ¶ 21. A strong surplus, along with adequate loss reserves, allows the State Fund to continue to operate as a strong and viable insurance carrier. Aff. Gengler ¶ 13. The State Fund is required to maintain a surplus to ensure financial solvency, and the amount of surplus the State Fund needs is based on sound industry standards and conservative accounting practices. Aff. Gengler ¶ 9. The State Fund's long-range target is to have a reserve-to-surplus ratio of 2.0-2.5 to 1. Aff. Gengler ¶ 14. The higher the ratio, the less adequate the reserve. Aff. Gengler ¶ 14. For 2005, the reserve-to-surplus ratio was 3.45 to 1. Aff. Gengler ¶ 14. For 2004, the reserve-to-surplus ratio was 3.55 to 1. Aff. Gengler ¶ 14. For 2003, the reserve-to-surplus ratio was 3.4 to 1. Aff. Gengler ¶ 14. For 2002, the reserve-to-surplus ratio was 2.19 to 1. Aff. Gengler ¶ 14. The State Fund's lowest reserve-to-surplus ratio has been 2.18 to 1. Aff. Gengler ¶ 14.

The State Fund's surplus levels would be severely impaired as a result of the retroactive application of *Reesor*. Ratemaking in the years prior to *Reesor* did not take into consideration the potential increase in PPD benefits which may be due to affected claimants if *Reesor* applies retroactively. Aff. Gengler ¶ 26. On the heels of many years of large rate increases, the State Fund would be required to increase its rates by a large amount for many years in order to absorb the impact of benefit costs associated with a retroactive application of *Reesor*. In 2001, the State Fund did not increase its rates. In 2002, the State Fund increased its rates by 2.7%. Aff. Gengler ¶ 27. In 2003, the State Fund increased its rates by 2.8%. Aff. Gengler ¶ 27. In 2004, the State Fund increased rates by 11.6%. Aff. Gengler ¶ 27. In 2005, the State Fund increased its rates by 9.5%. Aff. Gengler ¶ 27. For fiscal year 2006 (July 1, 2005, through June 30, 2006), the State Fund increased its rates by 3%. Aff. Gengler ¶ 27. Retroactive application of *Reesor* would undoubtedly force the State Fund to increase rates even further; however, having current policyholders pay for the risk and expense of past claims targets the wrong policyholders.

In addition to the severe adverse financial impact the State Fund would experience if *Reesor* is applied retroactively, the Old Fund would be adversely impacted

by retroactive *Reesor* application. The Old Fund currently has an unfunded liability. Aff. Gengler ¶ 19. At the end of fiscal year 2005, the Old Fund's liabilities exceeded its assets by $15,581,000.00. Aff. Gengler ¶ 19. The financial impact of retroactive application to the Old Fund will be paid out of the General Fund. Aff. Gengler ¶ 19. The General Fund would be further impaired as a result of the estimated $1,000,000.00 impact of retroactive application of *Reesor* to PPD claims. Aff. Gengler ¶ 19. Previously, the Old Fund received funding through a payroll tax, but the tax was terminated in 1998. Aff. Gengler ¶ 19.

Surplus is often confused with dividend payments. However, dividends are paid to policyholders who produced favorable results and, in furtherance of Montana's stated public policy, they provide policyholders with incentives to provide a safe workplace for employees and to return injured workers to employment as soon as possible. *See* Mont. Code Ann. § 39-71-105(2) (2003).[5] All dividends are based on past performance and have no relationship to the forces driving future pricing. The payment of dividends to select policyholders should not be mistaken for the State Fund's financial ability to withstand a retroactive application of *Reesor*.

This Court has previously noted that retroactive application should be avoided if it will cause financial instability or would jeopardize benefits due other claimants. Decision & Order Regarding Retroactivity & Attorney Fees ¶ 37, *Flynn v. Montana State Fund*, 2003 MTWCC 55 (Aug. 5, 2003) (citation omitted). Clearly, the costs of benefits associated with a retroactive application of *Reesor* will have a severe financial impact on the State Fund and the Old Fund. The same detrimental effect will ripple through the system as all other carriers, large or small, deal with the reality (as opposed to the theory) of long term retroactivity. Whether analyzed individually or collectively, the effect of the benefit costs, administrative costs, claims-related costs and the massive administrative efforts required to comply with retroactive application of *Reesor* militates against retroactivity.

---

[6] Montana Code Annotated § 39-71-105(2) states in full:

> A worker's removal from the work force due to a work-related injury or disease has a negative impact on the worker, the worker's family, the employer, and the general public. Therefore, it is an objective of the workers' compensation system to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease.

D. If A *Reesor* Common Fund Is Applied Retroactively, It Does Not Apply To Final Or Settled Cases.

Dempsey also holds that "the retroactive effect of a decision does not apply *ab initio*, that is, it does not apply to cases that became final or were settled prior to a decision's issuance." *Dempsey*, ¶ 31. In *Schmill II*, the court elaborated on its *Dempsey* holding, noting that the *Schmill* retroactivity holding would not affect all *Schmill I* cases, as "many of these claims are settled, closed, or inactive." *Schmill II*, ¶ 19.

However, neither *Dempsey* nor *Schmill II* clarified the meaning of "final," "settled," "closed," or "inactive;" in particular, neither case recognized that these terms carry a more nebulous meaning in the workers' compensation context than they do in the tort context. In tort cases, the definition of "final" and "settled" is clear, because tort cases always reach a discreet endpoint: each case is adjudicated on the merits, decided by motion, settled, or voluntarily dismissed, or, if none of these, runs up against a statute of limitations after three years have passed following the date of the event at issue. In workers' compensation cases, the moment of finality is more difficult to discern. As long as a claimant has timely notified his or her employer of the claimed injury or disease and has timely filed a claim for compensation, there is no statutory time limit for the claimant to seek benefits. *See generally* Mont. Code Ann. §§ 39-72-403, 601, 603.

Despite the lack of a specific statutory endpoint for most workers' compensation claims, strong policies in favor of limiting the retroactive application of judicial decisions militate against applying decisions retroactively to such a large and indefinite class of claims. The Montana Supreme Court noted in *Dempsey* that "[i]n the interests of finality, the line should be drawn between claims that are final and those that are not." *Dempsey*, ¶ 28. In overturning *Chevron*, the United States Supreme Court recognized that retroactivity should apply only to "cases still open on direct review." *Harper v. Virginia Dept. of Taxn.*, 509 U.S. 86, 97 (1993). As early as 1932, Montana recognized the risk inherent in pervasive retroactivity: It would be "manifestly unjust and improper" to penalize a party for relying on a rule of law, even though that rule of law was later judged to have been in error. *Montana Horse Prods. v. Great N. Ry. Co.* (1932), 91 Mont. 194, 7 P.2d 919, 925, *aff'd*, *Great N. Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932); *accord Dempsey*, ¶ 18 (citing *Montana Horse Prods.* with approval). In *Schmill II*, the Montana Supreme Court again reiterated the importance of limiting retroactivity "due to reasons of finality." *Schmill II*, ¶ 17.

Because of these compelling public policies, it is critical to set a line of finality in workers' compensation cases that will limit the retroactive application of judicial decisions. Those claims that have been adjudicated or closed through a court or department-approved settlement or stipulation should be deemed "final" for retroactivity purposes. Claims that have been paid in full (i.e., all indemnity benefits paid to the extent required under the existing state of the law) for a period of at least two years should also be considered "final" for retroactivity purposes. In addition, regardless of where the court chooses to draw the line of "finality," judicial decisions cannot apply retroactively to those claims that are not currently in active litigation.[7]

Under *Dempsey*, and pursuant to the dictates of this Court's forthcoming *Flynn* decision, even if a *Reesor* common fund is imposed retroactively, it cannot apply to cases that were final or settled prior to December 22, 2004, the date *Reesor* was decided.

E. Laches And Statutes Of Limitations Bar Claims Made By Claimants Who Failed To Present Timely Challenges To The Montana Code Annotated.

In the interest of finality, injured workers who have accepted all indemnity payments due and owing to them at the time of final payment, and have raised no dispute by initiating litigation for two years since accepting the final indemnity payment,

---

[7] The meaning of final and settled is briefed more thoroughly in the State Fund's briefing in *Flynn v. Montana State Fund*, WCC No. 2000-222. However, it should be noted that the Montana Supreme Court dismissed the State Fund's argument regarding the third *Chevron* factor in *Schmill II*, remarking that "the State Fund . . . may not have grasped the full impact of *Dempsey*" and citing the exemption of "final" and "settled" cases. *Schmill II*, ¶ 17. The Court stated that "the State Fund . . . raises the specter of the inequities that would result from a retroactive application of *Schmill I*, . . . [but] admits[] many of these claims are settled, closed, or inactive." *Schmill II*, ¶¶ 18-19. Even if this Court adopts the State Fund's proposed parameters for "final" and "settled" cases in *Flynn*, it is not true that a "substantial number" of *Reesor*, *Stavenjord*, or even *Schmill* claims are excluded from consideration. It is still apparent that a retroactive application of any of these cases imposes a substantial hardship on the State Fund. Further, the State Fund feels compelled to comment on the grave inequity that would result from Workers' Compensation Court decisions that both (a) adopt petitioners' arguments in *Flynn* and define *no* workers' compensation claims as "final;" and (b) disregard the inequities that will befall the State Fund for purposes of the third *Chevron* factor, as the Montana Supreme Court did in *Schmill II*.

should not be permitted to benefit from later judicial decisions that would have affected their claims had they timely sought legal redress. The Montana legislature has set a two-year statute of limitations for disputing denied workers' compensation claims, indicating that the legislature views two years as the maximum reasonable period for a workers' compensation claimant to sit on his or her rights without attempting to vindicate them. Mont. Code Ann. § 39-71-2905(2) (1997-present) ("A petition for hearing before the workers' compensation judge must be filed within two years after benefits are denied.").

Similarly, the doctrine of laches dictates that workers' compensation claimants should not be allowed to sit on their rights for an extended period of time and then attempt to take advantage of a newly-decided case. The defense of laches is available when a claimant has demonstrated a lack of diligence which has prejudiced the defendant. *See generally In re Johnson*, 2004 MT 6, ¶ 20, 319 Mont. 188, ¶ 20, 84 P.3d 637, ¶ 20 (citation omitted).

In this Court's *Stavenjord* decision, this Court held that "it would be unfair and inequitable" to give *Stavenjord* unlimited retroactivity. *Stavenjord,* ¶ 34. This Court acknowledged the lack of diligence exhibited by certain claimants, noting that the 1987 amendments to the ODA and *Eastman* [*v. Atlantic Richfield Co.* (1989), 237 Mont. 332, 777 P.2d 862] stood unchallenged for almost a decade and "the very claimants who would benefit from a decision applying *Stavenjord* retroactively sat on their hands and did nothing during that entire decade." *Stavenjord*, ¶ 34. When such claimants sit on their rights for years and then later attempt to take advantage of a newly-decided case, their lack of diligence unreasonably prejudices the State Fund.

Retroactive application of judicial decisions to claims that have gone unpursued by claimants will require the State Fund to pay increased benefits for which the employer paid no premium, and will result in significant administrative costs and unfunded financial burdens to the State Fund. Financial instability and increased premiums will be detrimental to all in the system and contrary to specific legislative intent. *See* Mont. Code Ann. § 39-71-105(1) ("Wage-loss benefits are not intended to make an injured worker whole; they are intended to assist a worker at a reasonable cost to the employer.").

For the reasons discussed above, two years is the maximum period a claimant should be allowed to sit on his or her rights without attempting to vindicate them and still be able to benefit from a retroactive judicial decision. In accordance with the doctrine of

laches, the Court should hold that claims that have stood formally unchallenged for more than two years should be exempt from any retroactive *Reesor* common fund.

F. Application Of The Common Fund Doctrine Violates Constitutional Guarantees Of Freedom Of Contract And Taking Without Just Compensation.

Statutes are presumed to be constitutionally valid and enforceable. *In re Petition to Transfer Territory from High Sch. Dist. No. 6, Lame Deer, Rosebud County, to High Sch. Dist. No. 1, Hardin, Big Horn County*, 2000 MT 342, ¶ 9, 303 Mont. 204, ¶ 9, 15 P.3d 447, ¶ 9. Montana Code Annotated § 39-71-710 was first enacted in 1981 and withstood scrutiny for nearly 23 years, until the 2004 decision in *Reesor*. During that span, the State Fund justifiably relied on the statute in entering into contracts with its policyholders and determining rates in a manner consistent with the potential exposure for permanent partial disability benefits.

It is well-settled that the construction of a statute becomes part of the contracts entered into by parties in light of the statute. *See generally Montana Horse Prods.*, 7 P.2d at 927. The Montana Constitution prohibits a statute from retroactively impairing contracts, and case law firmly establishes that "any attempt by the Legislature to retroactively change the law in effect at the time of an injury would be an unconstitutional impairment of contract." *Murer*, 942 P.2d at 74 (citation omitted); Mont. Const. art. II, § 31. As stated long ago, the same rationale also applies to the retroactive application of judicial decisions:

> As noted on reference to our decision herein, we simply hold that the shippers and carriers were controlled by the law as declared in the *Doney* Case until reversed or modified by this court. To this doctrine we adhere, as it appears to be reasonable, logical, and in accordance with the authorities. The construction given to a statute, although erroneous, before its reversal or modification, becomes a part of it as much as though written into it; and the change made in construction will affect only contracts made thereafter. . . .
>
> ***The constitutional barrier to legislation impairing the obligation of contracts applies also to decisions altering the law as previously expounded, so as to affect the obligations***

of existing contracts made on the faith of the earlier adjudications.

Montana Horse Prods., 7 P.2d at 927 (citations omitted) (emphasis added). *See also Wilson v. Swanson* (1976), 169 Mont. 328, 334-335, 546 P.2d 990, 994 (declining to legislate retroactively).

In addition, the Montana and United States Constitutions prohibit taking of private property without just compensation. Mont. Const. art. II, § 29; U.S. Const. amend. 5.

The State Fund justifiably relied on Montana Code Annotated § 710's validity and enforceability, and the statute became part of the contracts between the State Fund and its policyholders. The State Fund's policy holders will be deprived of millions of dollars without having been justly compensated by prior premiums. Therefore, a retroactive application of *Reesor* would unconstitutionally impair those contracts and result in unconstitutional taking with just compensation. Further, under the circumstances, equity demands prospective application. *See Salorio v. Glaser*, 461 A.2d 1100, 1109 (N.J. 1983 ("[R]eliance interests weigh heavily in the shaping of an appropriate equitable remedy.") (citation omitted). Accordingly, *Reesor* should not apply retroactively.

V. CONCLUSION

The State Fund submits that there is no common fund created by the *Reesor* decision, particularly because there is neither an ascertainable class nor an ascertainable fund. More importantly, even if a common fund did exist under *Reesor*, this fund must not be applied retroactively. Regardless of whether this Court finds a common fund, any claimants who failed to present timely challenges for PPD benefits despite receipt of social security disability benefits must now be denied the opportunity to present such claims due to the doctrine of laches and the applicable statute of limitations. Finally, imposition of a *Reesor* common fund will violate constitutional guarantees of "freedom of contract" and "taking without just compensation."

//

//

DATED this 5 day of May, 2006.

Attorneys for Respondent/Insurer

GARLINGTON, LOHN & ROBINSON, PLLP
199 W. Pine • P. O. Box 7909
Missoula, MT 59807-7909
Telephone (406) 523-2500
Telefax (406) 523-2595

By _____
Bradley J. Luck

CERTIFICATE OF MAILING

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Respondent/Insurer, hereby certify that on this 5th day of May, 2006, I mailed a copy of the foregoing **STATE FUND'S OPENING BRIEF REGARDING EXISTENCE OF A COMMON FUND, EXISTENCE OF ASCERTAINABLE CLASS AND FUND, RETROACTIVITY, LACHES AND STATUTES OF LIMITATIONS ISSUES, AND CONSTITUTIONALITY OF APPLICATION OF COMMON FUND DOCTRINE**, postage prepaid, to the following persons:

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

Mr. James G. Hunt
Hunt & Molloy Law Firm
P.O. Box 1711
Helena, MT 59624

Mr. Michael P. Heringer
Brown Law Firm, P.C.
P.O. Box 849
Billings, MT 59103-0849

Mr. Bryce R. Floch
P.O. Box 7310
Kalispell, MT 59904-0310

Mr. Larry W. Jones
700 SW Higgins Ave., Suite 108
Missoula, MT 59803-1489

Rhonda Dursma

Bradley J. Luck
GARLINGTON, LOHN & ROBINSON, PLLP
199 West Pine • P. O. Box 7909
Missoula, MT 59807-7909
Telephone (406) 523-2500
Telefax (406) 523-2595

Thomas E. Martello
Montana State Fund
P. O. Box 4759
Helena MT 59604-4759

Attorneys for Respondent/Insurer

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DALE REESOR, Petitioner, v. MONTANA STATE FUND, Respondent.	WCC No. 2002-0676 **AFFIDAVIT OF DANIEL GENGLER**

STATE OF MONTANA)
: ss.
County of Lewis and Clark)

DANIEL GENGLER, being first duly sworn upon his oath, deposes and says:

1. I am currently the Internal Actuary for the Montana State Fund ("MSF"). I

EXHIBIT A

have been employed with MSF since August 21, 1995.

2. As the Internal Actuary, I am responsible for and have personal knowledge of MSF's policies and procedures regarding ratemaking, surplus, and dividends. I also have personal knowledge of MSF's financial condition and am familiar with the financial impact the recent common cases may have on MSF's viability. I am familiar with the pending litigation in the above-referenced matter and the related case of *Satterlee, et al. v. Lumberman's, et al.*, WCC No. 2003-0840. I understand that *Satterlee* and *Reesor* are collectively attempting to invalidate the provisions of Montana Code Annotated § 39-71-710 which allow an insurer to terminate a claimant's Permanent Total Disability ("PTD") benefits when those claimants become eligible to receive retirement benefits. I have analyzed the financial impact of *Satterlee* and *Reesor* on MSF's operations.

3. MSF has estimated the cost of benefits associated with a retroactive application of *Reesor*. MSF's estimate did not include claims with entitlement dates occurring on or after July 1, 1991, through June 30, 1995, because the the Montana Supreme Court's decision in *Russette v. Chippewa Cree Housing Auth.* (1994), 265 Mont. 90, 92, 874 P.2d 1217, makes *Reesor* inapplicable during that timeframe. Excluding the *Russette* timeframe, for claims arising on or after July 1, 1990, through December 22, 2004, the increase in permanent partial disability ("PPD") benefit costs for MSF is estimated at $2,000,000.

4. For claims arising on or after July 1, 1987, through June 30, 1990, the retroactive application of *Reesor* will result in an estimated PPD benefit cost increase of $1,000,000 for the Old Fund.

5. With respect to PPD benefits, the prospective application of *Reesor* resulted in a 0.2% rate increase for MSF's policyholders. Based on annual premiums of approximately $200,000,000, this rate increase corresponds to an annual increase of approximately $400,000 for MSF's policyholders.

6. The common fund attorney fee lien of Reesor's counsel seeks to expand the scope of *Reesor* and apply the holding to PTD claims. The related litigation in *Satterlee* also seeks to invalidate Montana Code Annotated § 39-71-710 as applied to PTD claims. MSF has estimated the cost of benefits associated with a retroactive application of *Reesor* if the decision applies to PTD claims. Excluding claims which are coded as settled, for claims arising on or after October 1, 1981, through June 30, 1990, the increase in benefit costs against the Old Fund is estimated at $93,000,000 to $116,000,000. For non-settled claims arising on or after July 1, 1990, through December 22, 2004, the increase in benefit costs against the MSF is estimated at $135,000,000 to $186,000,000. In total, the benefit costs associated with retroactively

applying *Reesor* to PTD claims is estimated at $228,000,000 to $302,000,000. MSF's estimate is not a "best case/worst case" scenario but instead represents the "highly likely range" from an actuarial standpoint.

7. If *Reesor* invalidates Montana Code Annotated § 39-71-710 as applied to PTD claims, the prospective application of *Reesor* will result in an increase in benefit costs which would require rate increases ranging from 11% to 21% for MSF's policyholders. Based on annual premiums of approximately $200,000,000, this rate increase corresponds to an annual increase of approximately $21,600,000 to $41,400,000 for MSF's policyholders. This rate increase might be offset somewhat by future investment income that is earned pending payment of benefits at retirement age. This offset is known in the industry as "discounting" rates, in consideration of future investment income. The amount of offsetting discount is a business decision contingent upon an assessment of risk and market conditions each time rates are established.

A. Depletion of Surplus Funds

8. An insurance company's equity is known as "surplus" in the industry, that is, money available in excess of liabilities. Surplus is not excess, unnecessary funds. Because insurance liabilities are uncertain, surplus is a prudent measure of contingency against the financial failure of an insurance company. Reasonable surplus provides assurance that the insurance company's financial obligations to its policyholders will be met. MSF is required by statute to maintain at least a minimal surplus to ensure financial solvency.

9. The amount of surplus that an insurance company needs is based on industry standards developed to provide reasonable but not certain assurance against financial failure. MSF is statutorily required by Montana Code Annotated § 39-71-2330(2) to maintain a minimum surplus of 25% of its annual earned premium. MSF is also statutorily required by Montana Code Annotated § 39-71-2311 to be self-supporting. Our analysis concludes that while the statutory minimums provide some protection against financial failure, it is at a level at which the MSF would be unacceptably vulnerable to financial failure.

10. Workers' compensation insurance differs from virtually all other insurance in that it is open-ended and does not have a set policy limit.

11. For a workers' compensation carrier like MSF, there are several characteristics that have the potential for a greater volatility of results than the norm in the property casualty industry and therefore require a stronger than average surplus to address these issues, including the following:

a. Extremely long-term obligations associated with claims in which actual costs are not known with certainty for decades;

b. MSF writes only one type of insurance in one state;

c. Courts are constantly changing the workers' compensation laws and benefits, making it difficult for MSF to accurately set premiums;

d. MSF provides the guaranteed market; and

e. Unlike a stockholder-owned insurance company, MSF cannot access additional capital to cover adverse financial results.

12. Ultimately, surplus is intended to assure that MSF will be able to fulfill its obligations to policyholders and injured employees.

13. A strong surplus, along with adequate loss reserves, protects injured employees, policyholders, and allows MSF to continue to operate as a strong and viable insurance carrier.

14. MSF's long-range target is to have a reserve-to-surplus ratio of 2.0-2.5 to 1. The higher the ratio, the less adequate the reserve. For 2005, the reserve-to-surplus ratio was 3.45 to 1. For 2004, the reserve-to-surplus ratio was 3.55 to 1. For 2003, the reserve-to-surplus ratio was 3.4 to 1. For 2002, the reserve-to-surplus ratio was 2.19 to 1. MSF's lowest reserve-to-surplus ratio has been 2.18 to 1.

15. The financial impact of retroactive application of *Reesor* to MSF was not included in the rates for prior years and therefore such costs are not included in current reserves. If *Reesor* applies to PTD claims, the financial impact of retroactive application of *Reesor* would reduce or eliminate current surplus. If the financial impact exceeds current surplus, liabilities would exceed assets and the MSF would be deemed financially insolvent.

16. MSF's surplus at the end of fiscal year 2005 was $148,354,000. As of March 24, 2006, MSF management presented its projected surplus to the MSF board of directors for the end of fiscal year 2006, projecting $175,390,000 but with the caveat that recent information would lead to a reduction in that estimate of about $10,000,000.

17. Assuming the midpoint of cost estimates, MSF's surplus would be eliminated as a result of the benefit costs associated with retroactively applying *Reesor*

to PTD claims. The elimination of MSF's surplus would result in a significant rate increase over many years in an attempt to restore surplus to target levels. The significant rate increase to restore surplus would, of course, be added to the other rate increases required as a result of prospectively applying *Reesor* to PTD claims.

18. MSF would be severely crippled or insolvent if *Reesor* applied retroactively to PTD claims. After analyzing the impact associated with retroactively applying *Reesor* to PTD claims, MSF arrived at the following conclusions:

a. A change in Montana's statutory benefits to pay lifetime benefits to injured employees with permanent total disability is estimated to cost Montana employers insured by MSF 15% more for their workers' compensation coverage, possibly offset by up to seven percentage points in consideration of future investment income. We anticipate that other carriers and self-insured pools would see similar rate increases. Statewide, Montana employers would pay approximately $60,000,000 more for their workers' compensation insurance each year;

b. The 15% estimate is a mid-range estimate. It is highly likely that actual results will vary. Slight variations in assumptions can swing the estimate by material amounts. One source of uncertainty is anticipating the incidence of PTD claims. Lifetime PTD benefits will likely change the dynamics by which injured workers seek PTD status. Another source of uncertainty is life expectancy. Life expectancy among this population is not well understood in the industry. In any event, given the relatively small numbers of PTD claims, actual average life spans are subject to considerable variability. COLAs are another source of uncertainty. The number and amount of COLAs are unlimited under current law and therefore have a highly leveraged effect on cost estimates. By slightly varying our assumptions regarding the numbers of PTD claims, life expectancies, and average annual COLAs, we derive indications of rate increases ranging from 11% to 21%;

c. The National Council on Compensation Insurance ("NCCI") has provided a preliminary estimate of the rate impact of lifetime PTD benefits, tentatively concluding an increase in rates of between 5% to 11% as a result of prospectively applying the related *Satterlee* case, which is seeking the same

relief as *Reesor.* A copy of NCCI's estimate is attached hereto as Ex. "A." NCCI's estimate assumes that carriers will offset the increase in benefit costs in consideration of future investment income (discounting). But for the assumption of discounting, the MSF and NCCI estimates are consistent with one another.

d. Retroactive application of lifetime PTD benefits from October 1, 1981, to June 30, 1990, is estimated to cost the Old Fund approximately $105,000,000. By varying our assumptions slightly, we derive indications ranging from $93,000,000 to $116,000,000. The Old Fund is an obligation of the State's General Fund. Therefore, any cost impact to the Old Fund would not affect MSF rates;

e. Retroactive application of lifetime PTD benefits from July 1, 1990, to June 30, 2005, is estimated to cost MSF approximately $161,000,000. By varying our assumptions slightly, we derive indications ranging from $135,000,000 to $186,000,000. The MSF would very likely be insolvent, or at a minimum, its financial position severely crippled. Unlike private carriers who can access capital markets to raise additional funds, the MSF is solely reliant on premiums charged to employers for its capital needs. MSF would need to rebuild its equity by more aggressive pricing than would otherwise be the case. It is difficult to say precisely how much higher rates would be because of the many complex variables involved in pricing decisions. Such variables include competitive pressures in the market, adverse or favorable development on prior year claims, investment income, etc. However, absent another source of capital, it is certain that MSF rates would be higher than they otherwise would be for a very long time, perhaps decades;

f. While we might apply best available methods to best available data, any cost estimate of a benefit change of this magnitude is highly uncertain. Given the level of uncertainty in the cost estimates, it would only be prudent for MSF to consider adding a contingency provision in its rate structure, to protect against the risk that the 15% estimate is too low until sufficient loss experience is incurred to gain greater certainty of losses. A

rough characterization is that, market conditions allowing, the MSF might look to maintain an additional five percentage points of rate increase over and above the 15% estimate in consideration of the uncertainty of the true costs of this benefit change; and

g. The MSF would need to add additional margin to its rates to restore prudent levels of financial equity. At a minimum, MSF would need to rebuild its surplus to the statutory minimum as quickly as possible. A one-year recovery of the statutory minimum surplus would require an additional rate increase of about 60%. Such a rate increase is probably not sustainable as the MSF would likely lose a significant portion of its current market share. A three-year recovery of surplus to the statutory minimum would require an additional rate increase of about 16%. The recovery period would be longer to the extent that the MSF loses market share due to the additional rate increase. In any event, because the statutory minimum represents a weak financial position, the MSF would need to maintain some additional margin in its rates for much longer, in order to rebuild to surplus levels that represent financial strength.

19. The Old Fund currently has an unfunded liability. At the end of fiscal year 2005, the Old Fund's liabilities exceeded its assets by $15,581,000. The financial impact of retroactive application to the Old Fund will be paid out of the General Fund. The General Fund would be further impaired as a result of: (1) the estimated $1,000,000 impact of retroactively applying *Reesor* to PPD claims; and (2) the estimated $93,000,000 to $116,000,000 impact of retroactively applying *Reesor* to PTD claims. Previously, the Old Fund received funding through a payroll tax, but the tax was terminated in 1998.

20. If the Old Fund is not adequately funded, any amount necessary to pay and administer claims must be transferred from the State of Montana General Fund to the Old Fund. An article addressing the Old Fund's 2003 financial condition and the interplay between the Old Fund and the General Fund is attached hereto as Ex. "B."

21. The insolvency of the Old Fund in the 1980s was the result of inadequate pricing and reserves and rate suppression. During that time, many private sector insurers left Montana.

22. In addition to the benefit costs and administrative efforts discussed above, the *Reesor* decision will have a cost impact on policyholders and the MSF.

23. Workers' compensation ratemaking is prospective, as insurance rates are developed prior to the transfer of risk.

24. In accordance with Montana Code Annotated § 39-71-2330, MSF sets rates in a fashion similar to private carriers and consistent with actuarial principles.

25. Actuarial principles for determining property casualty insurance (inclusive of workers' compensation) establish this prospective approach for workers' compensation. *See* Statement of Principles Regarding Property and Casualty Insurance Ratemaking, attached as Ex. "C" and located at <http://www.casact.org/standards/princip/sppcrate.pdf>.

26. Ratemaking in the years prior to *Reesor* did not take into consideration (1) the potential increase in PPD benefits which may be due to affected claimants if *Reesor* applies retroactively, or (2) the potential increase in PTD benefits which may be due to affected claimants if *Reesor* applies retroactively to PTD claims.

27. In fiscal year 2001, MSF increased its rates by 0.0%. In fiscal year 2002, MSF increased its rates by 2.7%. In fiscal year 2003, MSF increased its rates by 2.8%. In fiscal year 2004, MSF increased rates by 11.6%. In fiscal year 2005, MSF increased its rates by 9.5%. For fiscal year 2006 (July 1, 2005 through June 30, 2006), MSF increased its rates by 3.0%.

B. Pending Common Fund Litigation

28. If *Stavenjord* applies retroactively, MSF has estimated that the overall retroactivity benefit costs will amount to $14,000,000 to $19,000,000, with an additional benefit cost to the Old Fund of $5,000,000 to $7,000,000. MSF has estimated that for *Schmill* the overall retroactivity benefit costs will amount to $1,400,000 to $1,900,000, with an additional benefit cost to the Old Fund of $800,000. If *Reesor* applies retroactively to PPD claims, MSF has estimated[1] that the overall retroactivity benefit costs will amount to approximately $2,000,000, with an additional benefit cost to the Old Fund of approximately $1,000,000. If *Reesor* and/or *Satterlee* invalidates Montana Code Annotated § 39-71-710 and applies retroactively to 1981, MSF has estimated that

[1] As noted above, MSF's estimate did not include claims with entitlement dates occurring on or after July 1, 1991 through June 30, 1995 because *Reesor* is inapplicable during that timeframe pursuant to *Russette*.

the overall retroactivity benefit costs will amount to $135,000,000 to $186,000,000, with an additional benefit cost to the Old Fund of $93,000,000 to $116,000,000. Therefore, the cumulative benefit cost impact on MSF of retroactively applying *Reesor*, *Satterlee*, *Stavenjord* and *Schmill* ranges from $152,000,000 to $209,000,000, with an additional benefit cost to the Old Fund of $100,000,000 to $125,000,000. Further, retroactively implementing each decision involves significant claims-related and administrative expenses.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 11th day of April, 2006.

DANIEL GENGLER

STATE OF MONTANA)
: ss.
County of Lewis & Clark)

Subscribed to and sworn to before me on the 11th day of April, 2006, by DANIEL GENGLER.

Kathleen G Gowen
(Type or print name) Kathleen G Gowen
NOTARY PUBLIC FOR THE STATE OF MONTANA
residing at Helena Montana, Montana
My commission expires: April 1, 2010

KATHLEEN G. GOWEN NOTARIAL SEAL STATE OF MONTANA
KATHLEEN G. GOWEN
NOTARY PUBLIC for the
State of Montana
Residing at Helena, Montana
My Commission Expires
April 1, 2010

Bradley J. Luck
GARLINGTON, LOHN & ROBINSON, PLLP
199 West Pine • P. O. Box 7909
Missoula, MT 59807-7909
Telephone (406) 523-2500
Telefax (406) 523-2595

Thomas E. Martello
Montana State Fund
P. O. Box 4759
Helena MT 59604-4759

Attorneys for Respondent/Insurer

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DALE REESOR, Petitioner, v. MONTANA STATE FUND, Respondent.	WCC No. 2002-0676 **AFFIDAVIT OF MARVIN KRAFT**

STATE OF MONTANA)
: ss.
County of Lewis and Clark)

MARVIN KRAFT, being first duly sworn upon his oath, deposes and says:

1. I am currently a Support Services Leader for the Montana State Fund

EXHIBIT B

("MSF"). I have been employed with MSF since 1984.

2. As a Support Services Leader, I am responsible for and have personal knowledge of MSF's records retention policy and procedure.

3. MSF maintains a records retention protocol and retains records in accordance with State Records Retention Policy.

4. Depending on the date of a claim, records are retained in one of four media types: (1) paper; (2) microfilm, which are rolls of film containing photos of documents; (3) microfiche, which are sheets of film with photos of documents that are much smaller than film; and (4) optical imaging platters, which utilize technology similar to compact disks to store documents as digital images on glass platters that assign a document number and claim number to each image.

5. From inception until 1976, all open files were maintained on paper and closed files were copied to microfilm. Beginning in 1976, open files were still maintained on paper but closed files were copied to microfiche instead of microfilm.

6. In July of 1995, MSF began using optical imaging platters in addition to paper files. Except for active files with the Old Fund unit, the use of paper files on active claims was gradually phased out and all paper files were destroyed by the summer of 2001. As noted, the only paper files remaining are active files with the Old Fund unit, which handles claims arising on or before June 30, 1990.

7. Documents presently received at MSF are imaged to disk and made available via the computer system. Each original document is electronically date-stamped upon receipt and stored in "batches," which are groups of documents imaged at the same time. The batches are placed in boxes which are marked by date and batch number. Approximately once per month, MSF notes which boxes are more than six months old and requests permission to destroy those boxes from the State Records Retention Committee. When permission is received, which usually takes four to six weeks, the boxes are destroyed by MSF.

8. MSF stores the different types of media in various locations. Optical imaging platters are stored on site at MSF and copies are stored in a secure vault offsite. Microfilm and microfiche files are stored with the State Auditor's Office in their records retention center. The Old Fund unit stores paper files on site for active claims arising on or before June 30, 1990. When these files are closed, the original documents are microfiched and the paper files are destroyed.

9. A file's media type is determined by what storage system was in place at the time the file was closed. For files that closed before 1976, the files are stored on microfilm. For files that closed from 1976 through 1994, the files are stored on microfiche. For files with claims that occurred before July 1, 1995 but remained open after that date, the file before July 1, 1995, is microfiched and the remainder after July 1, 1995, is stored on optical imaging platters. For files with claims that occurred on or after July 1, 1995, the files are stored on optical imaging platters.

10. Microfiche may be either copied to other microfiche or may be copied to paper by the State Auditor's Office. With its present staff, the maximum document production by the State Auditor's Office is about 600 pages per day and the average claim file is about 90 to 100 pages. MSF also has two machines that allow it to print paper copies from microfiche. With experienced operators and minimal equipment malfunction, it is reasonable to estimate each machine could produce an average of 100 pages per hour from microfiche to paper.

11. Since July 1, 1995, all incoming fiscal year 1996 claim documents have been imaged. All incoming claim documents have been imaged since February of 1997.

12. In 1999, the State Records Retention Committee approved MSF's optical imaging system as its primary means of records retention. Six months after that approval, MSF destroyed all of its paper files.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

//

//

//

//

DATED this 11 day of April, 2006.

MARVIN KRAFT

STATE OF MONTANA)
: ss.
County of Lewis & Clark)

Subscribed to and sworn to before me on the 11th day of April, 2006, by MARVIN KRAFT.

KATHLEEN G. GOWEN
NOTARY PUBLIC for the
State of Montana
Residing at Helena, Montana
My Commission Expires
April 1, 2010

Kathleen G. Gowen
(Type or print name) Kathleen G. Gowen
NOTARY PUBLIC FOR THE STATE OF MONTANA
residing at Helena, Montana
My commission expires: April 1, 2010

Bradley J. Luck
GARLINGTON, LOHN & ROBINSON, PLLP
199 West Pine • P. O. Box 7909
Missoula, MT 59807-7909
Telephone (406) 523-2500
Telefax (406) 523-2595

Thomas E. Martello
Montana State Fund
P. O. Box 4759
Helena MT 59604-4759

Attorneys for Respondent/Insurer

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DALE REESOR, Petitioner, v. MONTANA STATE FUND, Respondent.	WCC No. 2002-0676 **AFFIDAVIT OF CRISTINE E. MCCCOY**

STATE OF MONTANA)
: ss.
County of Lewis and Clark)

CRISTINE E. MCCOY, being first duly sworn upon her oath, deposes and says:

1. I am currently a Project Specialist with the Montana State Fund ("MSF")

EXHIBIT C

and have previously worked as a Claims Supervisor and Claims Examiner with MSF. I have been employed with MSF since June 1, 1987.

2. As a Project Specialist and as a result of my prior employment with MSF, I have personal knowledge of the process by which files and data are stored and retrieved at MSF. I am also familiar with Montana's workers' compensation laws and the type of information a claims examiner needs to obtain in order to evaluate and adjust a file. Further, I am familiar with and have personal knowledge of the common fund cases that have been litigated in Montana's Workers' Compensation Court and the Montana Supreme Court. I have assisted with the implementation process in each of the common fund cases, including the seminal case of *Murer v. Montana State Fund*, WCC No. 95-542.

3. Locating files on various media types is a labor-intensive, manual process, and several different procedures are employed to retrieve the stored media.

4. Retrieval time depends on what media type the file is stored, the date of the claim, when the claim was active, and how long the claim was active.

5. A claim may be closed and re-opened. If a claim has been closed and re-opened, it may be stored on multiple or all media types. A *Reesor* review may include a review of a claim file with information stored on all media types.

6. To determine the media type of a claim, the adjuster must make a file request from MSF's only records person, who will search the computer system to ascertain when the claim was active and on which media it is likely to be stored. The records person will then check the records for each claim. A simple search may take ten minutes. A complex search may take three hours or longer.

7. Open files in the Old Fund unit with claims arising on or before June 30, 1990, may be lengthy files consisting of several volumes and thousands of pages. The adjuster in the Old Fund unit retrieves paper files, which can be disassembled and photocopied.

8. Optically imaged documents can be retrieved via the MSF computer system. Entire files are printed via a FileNet printer, which can print several claim files per night. Individual pages can be printed at any workstation at about eight pages per minute.

9. If *Reesor* applies retroactively, MSF will have to identify claimants who may be affected by the decision. Although a single computer run will not locate all the

potential *Reesor* claims, they can be substantially identified by using complex computer queries to search the CMS, Claim Center and DBO2 systems.

10. A computer run identified 2,971 potential *Reesor* claims. Of these 2,971 claims, the computer search identified 378 claims which were coded as settled and 150 claims involve claimants who passed away prior to the date of *Reesor*. MSF spent approximately ten hours formulating this particular query and spent approximately one-and-a-half hours running the query.

11. In conducting the computer search to locate potential *Reesor* claims, the MSF searched for claims with dates of injury or onset of occupational disease occurring on or after July 1, 1987. However, claims with dates of injury or onset of occupational disease occurring on or after July 1, 1991, through June 30, 1995, were excluded from the computer search as a result of the Montana Supreme Court's decision in *Russette v. Chippewa Cree Housing Auth.* (1994), 265 Mont. 90, 92-93, 874 P.2d 1217, 1218. In *Russette*, the Court held that the language of § 710 (1991) did not provide for termination of partial disability benefits upon the receipt of Social Security retirement benefits. Although the *Russette* decision was overturned by statute in 1995, PPD benefits were paid after retirement age under the 1991 and 1993 versions of the WCA.

12. Because of the intentional over-inclusive parameters of the *Reesor* query, manually reviewing each of the 2,971 potential files may be the only reliable means of identifying affected claims.

13. A manual review process would be time-consuming.

A. Missing Information From the Claims Files

14. Many of the potential *Reesor* files lack documentation of medical and vocational information which is necessary to perform an analysis under Montana Code Annotated § 39-71-703. Claims with a date of injury/exposure on or after July 1, 1995, require an impairment rating greater than 0% and an actual wage loss as threshold requirements for consideration of compensation for permanent partial disability.

15. Evaluating a claimant's additional PPD entitlement under § 703(5) requires determinations regarding a claimant's age, education, wage loss, and work restrictions.

16. Determining wage loss requires identified jobs. It will be difficult to accurately identify jobs that would have been available at the time the claimant reached maximum medical improvement.

17. Determining wage supplement benefits for claims arising from July 1, 1987, through June 30, 1991, requires knowledge of a claimant's job and earnings after returning to work. This information is not likely to be in the file.

18. Potential *Reesor* files may lack detailed vocational work-up. Few files may contain targeted vocational work-up necessary to perform a *Coles* analysis.

19. An assessment of the physical restrictions and vocational limitations requires analysis and documentation of the time-of-injury job requirements, which may not be in the file. In some instances, the time-of-injury job may no longer be available for evaluation.

20. Potential *Reesor* files may not contain an indication of work restrictions (heavy, medium or light). Obtaining accurate work restrictions after-the-fact may be difficult given the presence of subsequent injuries, occupational diseases, and the natural aging process.

21. Retroactively adjusting files to comply with *Reesor* imposes additional costs and burdens on MSF.

22. In reviewing some sample claims currently on MSF's imaged computer system, MSF's adjusters spent 0.5 to 4.0 hours identifying what information was needed to adjust a claim under *Reesor*.

23. Files that are stored on paper or microfiche, or a combination thereof, will require more time for adjuster review than the files which are currently on MSF's imaged computer system.

24. Once the review is complete, the adjuster would need to set-up and obtain the necessary medical and vocational information on many files, make decisions based on the results, and pay benefits.

B. Costs Associated with Obtaining Additional Information

25. Based on MSF's current contractual flat rate prices for non-complex claims, rehabilitation costs would be $300 for a time-of-injury job analysis (which might be hypothetical); $700 for a wage loss evaluation and determination of transferable skills, and $250 for each alternative job analysis. For complex claims, MSF will have to pay $65 per hour for a vocational rehabilitation counselor to prepare and provide the additional vocational information.

26. If secured from the treating physician, physician costs for reviewing each job analysis would be approximately $50, and physician costs for obtaining physical restrictions would be approximately $50-$75. If an IME is necessary to obtain the physical restrictions and review the job analyses, the physician costs will range from $150-$1,250.

27. If the reviewing physician requests an FCE, an additional cost of $750 would be imposed on MSF.

28. Each item not currently available in a file could be the basis for dispute, and the potential for litigation is an issue that can impact the time and cost involved in adjusting a claim. Furthermore, MSF believes such claims will need to be mediated.

C. Miscellaneous Administrative Costs

29. Given MSF's experiences in *Murer*, *Broeker* and the other common fund cases, closed and inactive files frequently lack current addresses for the claimants.

30. Locating a claimant often requires several attempts, and each attempt requires a new search. It is anticipated that there will be older claims in which the claimant cannot be located.

31. In *Murer*, MSF utilized Internet searches in an attempt to locate claimants whose contact information had changed. Although MSF's ultimate success was fairly good, simply locating a claimant could require several hours of searching.

32. Some claimants have died in the intervening years since claim closure which, as to those claims, compounds the problems discussed above in determining any benefits that may be due.

33. If it is ultimately determined claimant's entitlement to additional permanent partial disability benefits survive their demise, additional time and resources would be required to attempt to locate potential heirs and a personal representative for the estate.

34. A review of potential *Reesor* claims would also require adjusters to recognize and appropriately address the prior attorney liens filed in the pending common fund litigation, including but not limited to *Murer, Schmill, Stavenjord, Rausch,* and *Flynn*.

//

//

D. Benefit Costs from *Murer*

35. At the time of the *Murer* decision and during almost all of the *Murer* implementation process, the State Fund was under a different organizational structure, one which was more conducive to accomplishing special projects. Even with a more flexible structure, completing the implementation process was a strain on the State Fund's business operations. This was so even though the *Murer* review was limited to a four-year period, July 1, 1987, through June 30, 1991, and only involved the recalculation of the disability rate for those claimants at the maximum rate. Compared to *Murer*, a *Reesor* review process would involve a more complex review of each claim and cover a substantially longer period of time. The internal and external resources needed to accomplish a *Reesor* review, along with attendant costs, would be considerably more than *Murer*.

36. In *Murer*, approximately 3,200 claimants were entitled to additional benefits, and the timeframe used for adjusting purposes was July 1, 1987, through June 30, 1991. Although the administrative expenses are presently unknown, the current benefit costs and fees in *Murer* total approximately $2.0 million.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 12th day of April, 2006.

Cristine McCoy
Cristine E. McCoy

STATE OF MONTANA)
: ss.
County of Lewis & Clark)

Subscribed to and sworn to before me on the 12th day of April, 2006, by Cristine E. McCoy.

KATHLEEN G. GOWEN
NOTARY PUBLIC for the
State of Montana
Residing at Helena, Montana
My Commission Expires
April 1, 2010

Kathleen G. Gowen
(Type or print name) Kathleen G. Gowen
NOTARY PUBLIC FOR THE STATE OF MONTANA
Residing at Helena, Montana
My commission expires: April 1, 2010

Bradley J. Luck
GARLINGTON, LOHN & ROBINSON, PLLP
199 West Pine • P. O. Box 7909
Missoula, MT 59807-7909
Telephone (406) 523-2500
Telefax (406) 523-2595

Thomas E. Martello
Montana State Fund
P. O. Box 4759
Helena MT 59604-4759

Attorneys for Respondent/Insurer

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DALE REESOR, Petitioner, v. MONTANA STATE FUND, Respondent.	WCC No. 2002-0676 **AFFIDAVIT OF DAVID OGAN**

STATE OF MONTANA)
: ss.
County of Lewis and Clark)

DAVID OGAN, being first duly sworn upon his oath, deposes and says:

1. I am currently a Software Engineer with the Montana State Fund ("MSF"). I

EXHIBIT D

have been employed with MSF since February of 1992.

2. As a Software Engineer with MSF, I have personal knowledge of the various computer systems used by MSF to store and retrieve data. I also have personal knowledge of the transfer and coding problems that exist with respect to the different computer systems MSF has used over the years.

3. Prior to July 1, 1987, and until February of 1997, claim summary information was kept on DBO2, the mainframe. The DBO2 system was used to transfer claim information to the Department of Labor & Industry.

4. In February of 1997, the information on the DBO2 system was transferred to CMS, a system which integrates a database and imaging software and stores claim summary information. DBO2 and CMS do not interface. Some of the information that was compacted for transfer from DBO2 could not be disassembled in the CMS system.

5. In the CMS system, financial information is produced for the user in a template-based format. Unlike the DBO2 system, the CMS system serves as claims handling software and MSF uses it to assist in adjusting claims. MSF is in the process of developing a new claim management system, Claim Center ("CC"), and currently anticipates bringing this system online in March 2006. CMS and CC will not interface, and information compacted for transfer from CMS to CC will not universally be disassembled in CC. Ultimate impacts to information retrieval and functionality cannot be assessed at this point.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

//

//

//

//

DATED this 12th day of April, 2006.

DAVID OGAN

STATE OF MONTANA)
: ss.
County of Lewis & Clark)

Subscribed to and sworn to before me on the 12th day of April, 2006, by DAVID OGAN.

KATHLEEN G. GOWEN
NOTARY PUBLIC for the
State of Montana
Residing at Helena, Montana
My Commission Expires
April 1, 2010

(Type or print name) Kathleen G. Gowen
NOTARY PUBLIC FOR THE STATE OF MONTANA
residing at Helena, Montana
My commission expires: April 1, 2010

garlington|lohn|robinson

glr
199 West Pine Street
P.O. Box 7909
Missoula, Montana 59807-7909
(406) 523-2500
Fax (406) 523-2595
www.garlington.com

May 5, 2006

VIA TELEFAX 406-444-7798

Ms. Patricia Kessner, Clerk of Court
Workers' Compensation Court
P.O. Box 537
Helena, MT 59624-0537

RE: Recsor v. Montana State Fund
WCC No. 2002-0676

Dear Pat:

Attached for fax filing is State Fund's Opening Brief Regarding Existence of a Common Fund, et al, in the above-mentioned matter. The original will be put in today's mail. Thank you for your assisistance. If you have any questions, please feel free to call

Very truly yours,

GARLINGTON, LOHN & ROBINSON, PLLP

Bradley J. Luck

BJL:rad
Attachment
c: Mr. Thomas J. Murphy (w/copy)
Mr. Larry Jones (w/copy)
Mr. James G. Hunt (w/copy)
Mr. Michael P. Heringer (w/copy)
Mr. Bryce R. Floch (w/copy)