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

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OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

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 Answer 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 the Common Fund Doctrine**

COMES NOW the Respondent, Montana State Fund ("State Fund"), and hereby files its Answer 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 the Common Fund Doctrine. For the reasons discussed herein and in its Opening Brief, the State Fund contends that this Court should not apply the decision in *Reesor v. Mont. State Fund,* 2004 MT 370, 325 Mont. 1, 103 P.3d 1019, retroactively. Even if this Court does apply *Reesor* retroactively, the State Fund submits that holding should not create a common fund. If this Court recognizes a common fund, claimants who have not made timely *Reesor*-type challenges must now have their claims barred by laches and statutes of limitations.

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Finally, the State Fund asserts that imposition of a common fund will unconstitutionally violate principles of "freedom of contract" and "takings without just compensation."

I. PROCEDURAL STATUS

On May 5, 2006, the parties simultaneously exchanged Opening Briefs on the issues that this Court, by Order dated March 14, 2006, designated 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?

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?"

Upon simultaneous submission of these Answer Briefs, the six designated issues will be fully briefed and ready for decision.

II. INTRODUCTION

The status of common funds has come a long way since first allowed in Montana in *Murer v. State Compen. Mut. Ins. Fund* (1997), 283 Mont. 210, 942 P.2d 69. The same is true of retroactivity. The rationale and justification for the progression has been, at times, tortured. It appears that the present action typifies, on the one hand, the difficulty in slowing an unwarranted snowball effect and, on the other, a clear basis for rejecting the application of both concepts upon sound and objective reasoning.

Claimant Reesor successfully challenged the application of Montana Code Annotated § 39-71-710, to his permanent partial disability entitlement. In the "old days" he would have taken his substantially increased award, patted his fine counsel on the back, paid his contingency fee and felt the comfort of success and additional compensation. In the present environment, his case proceeds, but in his name only. It moves forward in an effort to create a retroactive entitlement totally contrary to what

was established law, for claimants who did not take the initiative to challenge a clear statute with specific court approval. It seeks to create a retroactive benefit entitlement in the millions of today's dollars paid out of policies whose premium was collected in yesterday's currency at a rate relying on this Court's approval of the application of the statute to the very situation presented by Reesor himself. Finally, and perhaps most importantly, it proceeds in an effort to compensate counsel in an extraordinary fashion and amount.

The *Murer* Court looked to the last century to find the judicial basis to create the common fund in Montana workers' compensation, citing *Trustees v. Greenough*, 105 U.S. 527 (1881). It did not explain why it took over a hundred years of jurisprudence to secure such a new direction in judicial changes to a pure statutory benefit scheme. In the few years since the birth of common funds in this very important area of law and our state economy, the *Murer* progeny has multiplied. It has fostered unnecessary retroactive application of judicial holdings and, perhaps more importantly, the cumulative effect has damaged and will damage the system and requires close scrutiny.

The *Reesor* decision is contrary to specific previous holdings and creates an unnecessary direct and indirect burden on the system if applied retroactively, especially considered in light of similar cases in this new era. There is no proper basis to apply it retroactively under any judicial standard.

The *Reesor* decision did not create any fund whatsoever. It created a right, if applied retroactively, to attempt to formulate a permanent partial disability entitlement by cobbling together dated information and/or attempting to use current medical and vocational data to guess at what a distant award might have been. *Reesor* claimants, as much or more as any before them in common fund cases, cannot determine their retroactive entitlement except on a case by case basis, in a fashion totally contrary to any concept envisioned by the common fund. Nothing in Reesor's initial filing changes this fact.

III. ARGUMENT

In its Opening Brief, the State Fund set forth its positions regarding retroactivity and common fund fees. For the sake of brevity and in accordance with the operative rules of this Court, the State Fund will not repeat its earlier arguments and instead responds only to the new contentions raised by the other parties, and particularly to those contentions of Reesor with which it disagrees.

A. No Common Fund Exists

1. *Reesor* does not create a common fund because there is neither an easily ascertainable class nor an ascertainable fund.

The decision in *Murer* initiated the use of the common fund doctrine in the workers' compensation context. Reesor seeks application of the common fund doctrine under the precedent of that case. Petr.'s Br. on Common Fund Issues 14 (May 5, 2006), ("Petr.'s Br.")

The *Murer* decision and the *Reesor* situation, however, could not be less similar. What justified use of the common fund doctrine in *Murer* is wholly absent in this situation. In *Murer*, the Montana Supreme Court held 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 222-23, 942 P.2d at 76. In *Murer*, imposition of a common fund was justified by the fact that, absent common fund attorney fees, vindication of the claimant's individual rights may not have been economically justifiable:

> 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 222-23, 942 P.2d at 76.

Despite this inescapable language from *Murer*, attorneys such as Reesor's counsel maintain that a common fund exists in their claims so as to justify the receipt of attorney fees from all individuals who eventually benefit from the legal outcome of these claims. Reesor argues that "application of the common fund doctrine is the most expeditious and equitable method available to deliver additional PPD benefits" to all claimants who have heretofore been ineligible due to their receipt of social security disability benefits. Pets. Br. 14.

This, position is taken despite the fact that Reesor's counsel fought and won this battle on behalf of his own client, *not* on behalf of all claimants who may reap the

benefits of his efforts. More importantly, Reesor's counsel already received a fair fee for his efforts on behalf of his client. As discussed in the Montana Supreme Court's *Reesor* decision and the State Fund's Opening Brief, by taking his case to the Montana Supreme Court, Reesor was able to increase his own impairment award ten times. *Reesor*, ¶ 5; State Fund's Opening Br. Regarding Existence Common Fund ("State Fund's Opening Br.") 5, (May 5, 2006). The economic impact of Reesor's individual case was more than enough to be "sufficient from an economic viewpoint to justify the legal expense necessary to challenge that wrong," it is not necessary for Reesor's counsel to reap a windfall to justify his efforts. *See Murer*, 283 Mont. at 222-23, 942 P.2d at 76.

The State Fund, however, reiterates its position that the common fund doctrine has certain parameters attached to it, including economic ones. In cases like this, where the nearly $20,000 economic stake in the outcome of the litigation justified the expense of litigating the claim, application of the common fund doctrine is inappropriate. Further, unlike in *Murer*, determining the amount of increased benefits owed to claimants is not subject to a simple mathematical computation. The relevant class and fund are not easily ascertainable. Establishment of a common fund will not be "expeditious and equitable" as submitted by Reesor when one considers the numerous individual calculations that must be done for benefits to be awarded. *See* State Fund's Opening Br. 6-8, 13-22. It cannot be said enough: stretching concepts and wordsmithing to allow the application of the common fund doctrine in this case is inappropriate. There is no similarity, in fact or law, between *Murer's* simple rate increase creating a specific and workable common fund and *Reesor's* subjective individualistic reformation of partial disability entitlement involving reconstituting and evaluating medical and vocational data with pure hindsight.

2. *Schmill* and *Stavenjord* should not control the present case.

The State Fund respectfully submits that this Court should resist Reesor's invitation to find this case squarely controlled by *Schmill v. Liberty NW. Ins. Co.*, 2005 MT 144, 327 Mont. 293, 114 P.3d 204, and *Stavenjord v. Mont. State Fund,* 2004 MT WCC 62, because this is a distinct case that should be addressed on its merits, because *Schmill* and *Stavenjord* are both questionable as precedent for this case, and because the cumulative effect of all common fund cases makes each new common fund case a significantly more onerous burden to the insurers than the last. *See* Petr.'s Br. 3-5.

In *Schmill*, the Montana Supreme Court used the *Chevron* (*Chevron Oil v. Huson,* 404 U.S. 97 (1971)) test to determine whether *Schmill* should apply

retroactively, but considered only one *Chevron* factor, the second. As discussed at length in the State Fund's Opening Brief, the second *Chevron* factor is not satisfied in this case: Retroactive application of *Reesor* will not further the rule's operation. State Fund's Opening Br. 10-12. Because *Schmill* found the second factor was satisfied in *Schmill*, the *Schmill* court did not consider the other two factors. Because the second factor is not satisfied here, this Court must consider the other two retroactivity factors.

Stavenjord, likewise, should not control the present case. As this Court is aware, *Stavenjord* is pending on appeal and cross-appeal before the Montana Supreme Court. The State Fund maintains that, in *Stavenjord*, all three *Chevron* factors are met, and therefore retroactive application of *Stavenjord* is inappropriate. Without the benefit of the Montana Supreme Court's *Stavenjord* decision, this Court should not rely upon its own *Stavenjord* decision to find the first and second retroactivity factors unsatisfied. This is particularly true in light of the fact that this Court's reasoning regarding the third *Chevron* factor in *Stavenjord* is equally persuasive as to the first *Chevron* factor.[1]

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[1] This Court found the *Stavenjord* decision clearly foreshadowed by *Eastman v. A. Richfield Co.* (1989), 237 Mont. 332, 77 P.2d 862, and *Henry v. State Compen. Ins. Fund*, 1999 MT 126, 294 Mont. 449, 982 P.2d 456. However, considering the third factor, this Court wrote:

> [T]he *Eastman* decision stood unchallenged for a decade following the 1987 amendments to the ODA, thus giving comfort to insurers that the 1987 amendments to the ODA did not affect the constitutionality of the benefit provisions under the ODA. . . . [N]othing in *Eastman* hints that the Court might reach a different result under the 1987 amendments. During the decade following the adoption of the 1987 amendments and the decision in *Eastman*, any claimant could have prosecuted a petition challenging the constitutionality of the 1987 ODA, as Henry and, later, Stavenjord and Schmill, ultimately did. During those years, there were upwards of 3,000 permanently partially disabled OD claimants, many of whom were surely represented by attorneys conversant in workers' compensation law. Yet, not one claimant prosecuted any equal protection challenge to the 1987 benefit provisions until *Henry*.
>
> The failure to challenge the constitutionality of the 1987 ODA is compounded by the fact that once a claim is filed there is no statute of limitations with respect to benefits. . . .

Finally, if nothing else, this Court must begin to recognize the cumulative effect of all the common fund cases. This case presents a unique situation, at least in part, because the economic impact to the insurers becomes increasingly crushing. *Murer*, though it presented a financial burden, presented less of a burden than *Murer* plus *Schmill* plus *Stavenjord* and so on. If for no other reason, *Reesor* is distinct from *Schmill*, *Stavenjord*, and other common fund cases because it was preceded by *Murer*, *Broeker v. Great Falls Coca-Cola Bottling Co.* (1996), 275 Mont. 502, 914 P.2d 967, *Rausch, Fisch, Frost v. State Fund*, 2002 MT 203, 311 Mont. 210, 54 P.3d 25, *Flynn v. State Compen. Ins. Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397, *Schmill* and *Stavenjord*. The collective impact of these cases cannot be continually ignored.

3. Whether deceased claimants are entitled to *Reesor* benefits is an implementation issue, and is not part of the immediate briefing process.

Reesor's brief devotes significant time to arguing that the estates of deceased claimants should be entitled to increased *Reesor* benefits. Petr.'s Br. 13-14. This is a non-threshold implementation issue that is not part of the immediate briefing schedule. Instead, those issues will be addressed subsequent to this Court's decision, if and only if this Court decides that *Reesor* created a common fund which applies retroactively.

B. If A Common Fund Exists, It Is Not Retroactive.

1. Under *Dempsey*, *Chevron* still applies.

As discussed in the State Fund's opening brief, and as acknowledged by Reesor, whether a decision applies retroactively is controlled by the rule announced in *Dempsey*

> Even though the decisions in *Henry* and *Stavenjord* suggest that the results in those cases were clearly foreshadowed, it is also clear that the foreshadowing was not evident to either insurers or to the claimants' bar. Thus, for ten years, claims were adjusted under the assumption, and without significant challenge, that *Eastman* was good law and that lesser benefits provided under the ODA were constitutional. To now reach back and apply *Stavenjord* to claims arising more than twelve years prior to the filing of *Stavenjord* is unfair, i.e., it is inequitable.

Stavenjord, ¶¶ 19-20, 22.

v. Allstate Ins. Co., 2004 MT 391, 325 Mont. 207, 104 P.3d 483; *see* Petr.'s Br. 4-9. Under *Dempsey*, judicial decisions are applied retroactively except where there exists "a truly compelling case for applying a new rule of law prospectively only." *Dempsey*, ¶ 29. As the Montana Supreme Court explained in *Dempsey*, the "truly compelling case" is identified by employing the *Chevron* test:

> The *Chevron* test is still viable as an exception to the rule of retroactivity. However, given that we wish prospective applications to be the exception, we will only invoke the *Chevron* exception when a party has satisfied *all three* of the *Chevron* factors.

Dempsey, ¶ 30.

Contrary to Petitioner's argument, unrelated, non-precedential statements from the anomalous case of *Porter v. Galarneau* (1996), 275 Mont. 174, 911 P.2d 1143, are not relevant to the present case. Reesor asserts that, in *Porter*, the Montana Supreme Court "apparently abandoned the *Chevron* exception." Petr.'s. Br. 6. Reesor cites *Porter* for the proposition that "while *statutes* may not always be given retroactive effect, *judicial decisions* construing statutes should always be given retroactive effect." Petr.'s Br. 6. Reesor then asserts that the "fundamental principle buttressing" *Porter* should be applied to the present case, and cites two additional cases that apparently followed *Porter*. *Kleinhesselink v. Chevron, U.S.A.* (1996) 277 Mont. 158, 920 P.2d 108; *Haugen v. Blaine Bank of Mont.* (1996), 279 Mont. 1, 926 P.2d 1364. Petr.'s Br. 7.

The truth about *Porter*, however, is borne out by the Montana Supreme Court's discussion in *Dempsey*:

> Then, in [*Porter*], and without analyzing *Harper*, we strayed from our reliance on *Chevron*. Although *Porter* involved statutory retroactivity, we remarked in dicta that "[w]e will continue to give retroactive effect to judicial decisions, which is in accord with the U.S. Supreme Court's holding in *Harper*."

Dempsey, ¶ 13. *Dempsey* recognizes that *Porter* and its progeny appeared to be the anomalous cases that simply ignored *Chevron*, while numerous Montana Supreme Court cases both before and after *Porter*, *Kleinhesselink*, and *Haugen*, applied the *Chevron* test. *See Dempsey*, ¶¶ 12-15 (citing *Poppleton v. Rollins, Inc.* (1987), 226 Mont. 267, 271, 735 P.2d 286, 289; *Nehring v. LeCounte* (1986), 219 Mont. 462, 471, 712 P.2d 1329, 1335; *Jansen v. State Dept of Labor & Indus.* (1984), 213 Mont. 84, 88,

689 P.2d 1231, 1233; *Ereth v. Cascade County,* 2003 MT 328. 318, 355, 81 P.3d 463; *Seubert v. Seubert,* 2000 MT 241, 301, 382, 13 P.3d 365; *Benson v. Heritage Inn, Inc.,* 1998 MT 330, 292 Mont. 268, 971 P.2d 1227).

All of this, of course, undermines Reesor's assertion that "Montana law subsequently became clouded by a few mistaken references to the *Chevron* test in a few errant cases." Petr.'s Br. 7. There is no "*Porter/Harper*" general rule, as Reesor alleges. Petr.'s Br. 7. Nor did "*Porter* establish[] an unambiguous mandate, which requires the retroactive application of *Reesor* to all open PPD claims." Petr.'s Br. 7. The general rule prevailing in Montana is that described in *Dempsey*, no more, no less.

2. Under *Chevron*, *Reesor* should apply prospectively only.

Under *Dempsey*, a judicial decision escapes retroactive application when all three *Chevron* factors are met. *Chevron* asks:

1. Whether the ruling to be applied retroactively establishes a new principle of law "by overruling clear past precedent . . . or by deciding an issue of first impression whose resolution 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*, 404 U.S. at 97, 106-07).

a. *Reesor* Was Not Clearly Foreshadowed.

As discussed in the State Fund's Opening Brief, *Reesor* was not clearly foreshadowed. If anything, the law clearly foreshadowed a contrary result. Since 1987, Montana Code Annotated § 39-71-710 expressly prohibited distribution of PPD benefits to those who had reached retirement age. In 2001, this Court decided *Black v. MDMC/Benefis Healthcare*, conclusively holding that § 39-71-710's denial of PPD benefits to those claimants who are eligible to receive social security retirement benefits did not violate constitutional guarantees of equal protection. *Black v. MDMC/Benefis Healthcare*, 2001 MTWCC 47, WCC No. 2000-0216, Findings of Fact, Conclusions of Law & Judm. (Aug. 24, 2001). Recognizing this, this Court relied on *Black* in its *Reesor*

decision, and even attached *Black* to the *Reesor* decision and judgment. *See Reesor*, ¶ 9 ("I have previously addressed the constitutionality of section 39-71-710, MCA, [and] . . . upheld the constitutionality of . . . section 39-71-710, MCA."). Likewise, the Montana Supreme Court did not view the *Reesor* decision as clearly foreshadowed, evidenced by the fact that *Reesor* was a 4-3 decision.

Reesor, however, asserts that the *Reesor* result was clearly foreshadowed by a 1985 Workers' Compensation Court case and a 1986 Montana Supreme Court case, both of which address the inequality of the pre-1987 version of § 39-71-710. Critically, the "unequal treatment" these cases addressed was the pre-1987 statute's inclusion of total disability claimants but exclusion of permanent partial disability claimants. *See Hunter v. Gibson Prods. of Billings Heights, Inc.* (1986), 224 Mont. 481, 484-85, 730 P.2d 1139, 1141, *superseded by statute as stated in Otteson v. Mont. State Fund*, 2005 MT 198, 328 Mont. 174, 119 P.3d 118 (citing *Johnson v. Peter Kiewit & Sons, Inc.*, WCC No. 8411-2704 (1985) (both holding that the pre-1987 version of § 39-71-710, allowed for payment of permanent partial disability benefits to a permanently totally disabled claimant who has reached the age of 65).

Indeed, the pre-1987 statute did provide a strange distinction between total and partial disability claimants. As quoted in *Hunter*, § 39-71-710 then provided:

> If a claimant is receiving total disability compensation benefits and the claimant receives retirement social security benefits or disability social security benefits paid to the claimant are converted by law to retirement benefits, the claimant is considered to be retired and no longer in the open labor market. When the claimant is considered retired, the liability of the insurer is ended for payment of such compensation benefits. *This section does not apply to permanent partial disability benefits.*

Hunter, 224 Mont. at 483, 730 P.2d at 1140-41 (quoting Mont. Code Ann. § 39-71-710 (1985)) (emphasis added).

Justice Weber, in the *Hunter* dissent which Reesor quotes at length, suggested the Montana Legislature remedy this "unequal treatment to those who are totally disabled and those who are partially disabled." *Hunter*, 224 Mont. at 486, 730 P.2d at 1142. Justice Weber did not, however, allege any inequality between those who are pre-retirement and those who are old enough to receive retirement social security

benefits, much less, as Reesor claims, a "denial of 'equal treatment' (and Equal Protection) for elderly claimants." Petr.'s. Br. 10.

As *Reesor* concedes, "because of Justice Weber's dissent in *Hunter*, the Legislature amended § 39-71-710 MCA to disallow both PTD and PPD." Petr.'s. Br. 11. And so it has been ever since. Since the Montana Legislature amended the statute to eliminate the inequality cautioned of by Justice Weber, § 39-71-710 has disallowed payment of both PTD and PPD benefits to post-retirement workers, and this version of the statute has withstood scrutiny – including constitutional scrutiny, in *Black* – until *Reesor.*

Johnson and *Harper v. Va. Dept. of Taxation*, 509 U.S. 86 (1993), did not discuss, and so did not foreshadow, the issue in *Reesor*, which relates to the difference between PPD claimants younger than 65 and PPD claimants 65 or older. That the judiciary and Legislature once wrestled with one distinction in § 39-71-710 does not foreshadow the holding, twenty years later, that the statute possesses another, completely different, distinction. *Reesor* was not foreshadowed, and the first *Chevron* factor is satisfied.

b. Prospective Application will not Retard the Holding of *Reesor.*

Reesor cites *Miller v. Liberty Mut. Fire Ins. Co.*, 2003 MT WCC6, WCC no. 2000-0174, Or. Mots. ¶ 27 (Feb. 7, 2003) ("*Miller*"), for the proposition that "[t]o deny retroactive application would reward those insurers for their misinterpretation." The State Fund, however, maintains that it did not "misinterpret" § 39-71-710, but rather relied upon the statute's longevity and the fact that it withstood constitutional scrutiny in *Black* to set rates. *Reesor* changed the legal landscape surrounding § 39-71-710 that had withstood judicial scrutiny for years. Based on the long-standing statute and *Black*, insurers set rates consistent with the benefits they expected to pay under § 39-71-710. Imposing retroactive benefits will not further the new and unexpected *Reesor* rule. The rule will still be in effect for all claims occurring on or after December 22, 2004, but will not threaten the solvency of the system and the benefits of all workers' compensation claimants.

The second *Chevron* factor, like the first and third, demonstrates that this is the "truly compelling case for applying a new rule of law prospectively only." *See Dempsey*, ¶ 29.

c. Retroactive Application is Improper Because it will Result in a Substantial Inequity.

As discussed in the State Fund's Opening Brief, the focus of an inequality inquiry in a retroactivity analysis should be on the persons or entities who would be adversely affected by retroactivity – here, the insurers – rather than on the persons or entities who would be affected by non-retroactive application – here, Reesor and similarly situated workers' compensation claimants. *See* State Fund's Opening Br. 13-14.

Reesor attempts to assert that no hardship would result from a retroactive application of *Reesor*, characterizing the State Fund's record evidence regarding the immense financial impact of *Reesor* and the other common fund cases as "scary exposure numbers." Petr.'s Br. 13. Reesor's legal position under the hardship prong is based on the notion that he and the "claimants deserve [this] money more than the insurance companies deserve to keep it." Petr.'s Br. 12. Obviously, the legal and factual landscape is significantly more complex than Reesor suggests. Because the State Fund has already fully explained why retroactivity is improper, it will only respond to the specific hardship arguments raised by Reesor.

Reesor's argument rests on the principle that the cumulative effect of the mounting common fund cases have given to the insurers, not an enormous collective burden in both time and money required for implementation, but rather the experience needed to process *Reesor* claims. Reesor claims that the State Fund should have no problem implementing *Reesor* on a retroactive basis because it already had to re-adjust over 3,200 files as a result of the *Murer* decision.[2] Petr.'s Br. 12. If the State Fund could handle 3,200 files in *Murer*, the argument goes, then the State Fund should be able to handle all *Reesor* and other common fund claimants. According to Reesor, the hardships claimed by the State Fund are nothing more than unjustified "excuses" that should be ignored.

The State Fund's "excuses," however, are the same type of "excuses" that led to the insolvency of the Old Fund in the 1980s. As the Court can appreciate, *Murer* simply involved the simple recalculation of rates over a four-year time frame (and implementation has still not been completed). This situation is fundamentally different; *Reesor* would require the retrieval of fourteen years worth of older files, the location or current arrangement for vast amounts of missing medical and vocational information,

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[2] Reesor also mentions *Broeker* and *Flynn*, which the State Fund notes included significantly fewer claimants. Petr.'s Br. 12. *Broeker* only involved about 322 claimants and *Flynn* involved only 204.

and adjustments to files based on the either dated information or current data that must be considered in light of previous years. Further, as in *Stavenjord*, *Murer* is not instructive as to the State Fund's ability to retroactively implement *Reesor*. *Murer* involved a different State Fund organizational structure than does *Reesor*. Aff. Cristine McCoy ¶ 35 (Apr. 12, 2006). However, even *Murer* created an enormous strain on the State Fund's business operation. Aff. McCoy ¶ 35. *Reesor* is incredibly more complex and individualized than is *Murer*. Aff. McCoy ¶ 35. Both the time and cost of *Reesor* implementation would be significantly more than *Murer*.

The State Fund also notes that it is inequitable to apply retroactively a decision that no one – including claimants, courts, and insurers – saw coming. This Court recognized in *Stavenjord* that the foreshadowing of that decision "was not evident to either insurers or to the claimants bar," and that, for that reason, pervasive retroactivity of *Stavenjord* "to claims arising more than twelve years prior to the filing of *Stavenjord* is unfair, i.e., it is inequitable." *Stavenjord*, ¶ 22. Also helpful in this regard is the recognition in *Montana Horse Products Company v. Great Northern Railway Company* that 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." *Mont. Horse Prods. Co. 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 *Mont. Horse Prods.* with approval).

Justice O'Connor also questioned the propriety of a general retroactivity rule in her well-reasoned dissent in *Harper*, where she referred to the rule from that case as "crushing and unnecessary." *Harper*, 509 U.S. at 113. Justice O'Connor recognized the precedent is properly considered to have been relied upon if it was sufficiently debatable, that the failure to challenge a law for years bears strongly on the question of foreshadowing, and, critically, that litigants who act in good faith on unchallenged statutes should not be burdened by retroactive application, as the remedy is disproportionate to the offense. *See generally Harper*, 509 U.S. at 113-136. Justice O'Connor quoted Justice Frankfurter, and his wisdom bears repeating here:

> We should not indulge in the fiction that the law now announced has always been the law . . . . It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law.

Harper, 509 U.S. at 116-17 (quoting *Griffin v. Ill.*, 351 U.S. 12, 26 (1956) (opinion concurring in judgment)).

For all the administrative, claims-related, and financial hardships addressed in the State Fund's Opening Brief, and because the possibility of the statute's elimination was not recognized by claimants, courts, or insurers, the third prong of the *Chevron* test weighs in favor of prospective application of the *Reesor* decision. Therefore, Reesor's argument that any *Reesor* common fund should apply retroactively should be rejected.

C. LACHES AND STATUTES OF LIMITATIONS APPLY TO CLAIMS WHICH FAILED TO TIMELY PRESENT A CHALLENGE TO MONTANA CODE ANNOTATED.

The doctrine of laches and the two-year statute of limitations in Montana Code Annotated § 39-71-2905(2) both weigh against unlimited application of retroactive judicial decisions to claimants who have made no effort to pursue their legal rights. Again, the State Fund will rest on the arguments presented in its Opening Brief and will respond only to those arguments raised by Reesor. However, the State Fund feels compelled to reiterate its position that, for the reasons underlying the workers' compensation statute of limitations, claimants who fail to dispute their claims two years after acceptance of their final indemnity payment should not be permitted to benefit from later judicial decisions. *See* Mont. Code Ann. § 39-71-2905(2) (1997-present) ("A petition for hearing before the workers' compensation judge must be filed within 2 years after benefits are denied."). Laches, likewise, dictates that workers' compensation claimants who failed to make a like challenge to § 39-71-710, and whose lack of diligence has therefore prejudiced the State Fund by permitting reliance on the legality of § 39-71-710, should not now be allowed to benefit from *Reesor*. *See generally In re Johnson*, 2004 MT 6, ¶ 20, 319 Mont. 188, ¶ 20, 84 P.3d 637, ¶ 20.

In arguing the inapplicability of the doctrine of laches, Reesor attempts to rely on the 2003 Workers' Compensation Court decision in *Miller*. Petr.'s Br. at 19-20. *Miller*, however, offers no support for Reesor's position. In *Miller*, this Court considered the applicability of the doctrine of laches only to Miller himself; he, of course, being the claimant in court asserting his rights. *Miller*, ¶ 33. As to the absent claimants, however, this Court recognized in *Miller* that "[i]t may turn out that some cut-off date is necessary." *Miller*, ¶ 31. The Court explained that "[t]he doctrine of laches may well apply to some claimants who cannot be readily identified. However, which claims are barred by the doctrine involves facts which require greater exploration." *Miller*, ¶ 31. More importantly, the laches analysis in *Miller* related only to the prejudice the insurer would face if Miller's claim were asserted, not to the potential prejudice of all claimants who had rested on the rights.

This point is critical. Laches is an equitable doctrine designed to protect those who rely on the inactivity of others. The insurers in the present case relied on both the long-standing legal viability of § 39-71-710 and the failure of workers' compensation claimants to challenge that statute to set rates and pay dividends. While it is equitable to allow Reesor and the few claimants who have not allowed their rights to lay dormant for more than two years to benefit from the *Reesor* decision, it is patently unfair to the insurers to allow an unlimited number of claimants who made no effort to contest the legality of the statute to come forth now and argue their rights have been subverted.

This Court recognized the potential inequity in unlimited retroactive application of judicial decisions to those who chose not to challenge the critical statute: "To now reach back and apply *Stavenjord* to claims arising more than twelve years prior to the filing of *Stavenjord* is unfair, i.e., it is inequitable." *Stavenjord,* ¶ 22.

This Court must recognize these precedents, and the patent unfairness of punishing the insurers for failing to recognize the unconstitutionality of a twenty-year statute, when claimants likewise failed to recognize it. To now punish the insurers for setting rates based upon this well-established law is inequitable. The doctrine of laches must prevent inactive claimants from now attempting to take advantage of the *Reesor* decision. Statutes of limitations and laches should bar untimely challenges to the Montana Code Annotated.

D. APPLICATION OF THE COMMON FUND DOCTRINE WOULD VIOLATE CONSTITUTIONAL GUARANTEES OF "FREEDOM OF CONTRACT" AND "TAKING WITHOUT JUST COMPENSATION."

For nearly 23 years, the State Fund relied on Montana Code Annotated § 39-71-710 in determining rates and entering into contracts with policyholders. Never, during that time period, did the State Fund have an inkling that the statute would eventually be held unconstitutional, calling 23 years of contracts into question.

As discussed in the State Fund's Opening Brief, 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. The construction of a statute is a part of the contracts dependent upon that statute. *Mont. Horse Prods.*, 7 P.2d at 927. Most importantly, retroactive changes in the law in effect at the time of an injury result in unconstitutional impairment of contracts. Mont. Const. art. II, § 31; *Murer*, 283 Mont. at 218, 942 P.2d at 74.