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 HELENA, MONTANA

Northern Insurance Co. of New York  
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 Sentry Insurance Mutual Co.  
 Sentry Select Insurance Company  
 Stillwater Mining Company  
 Truck Insurance Exchange  
 Twin City Fire Insurance Co.  
 Universal Underwriters Group  
 Valiant Insurance Company  
 XL Ins. Co. of New York Inc.  
 XL Reinsurance America  
 XL Specialty Ins. Company  
 United National Casualty Insurance Company  
 Zurich American Insurance Co.  
 Zurich American Insurance Co. of Illinois

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DALE REESOR,

Petitioner,

vs.

MONTANA STATE FUND,

Respondent/Insurer.

WCC No. 2002-0676

**SIMULTANEOUS ANSWER BRIEF  
ON THE EXISTENCE OF A  
COMMON FUND**

Pursuant to this Court's *Amended Order Delineating Issues and Setting Briefing Schedule*, the above listed Insurer Respondents ("Other Insurers") respectfully submit this *Simultaneous Answer Brief On the Existence of a Common Fund*.

The first three issues on which the Court requested briefing are dispositive of Petitioner's common fund claims:

- (1) Does a common fund exist in this case?
- (2) Is there an ascertainable class?
- (3) Is there an ascertainable fund?

If no common fund exists, either because the class or fund is not readily ascertainable, then the Court need not reach issues related to retroactivity, limitations, or constitutional arguments, all of which hinge on the existence of a common fund. To the extent that

the Court finds it necessary to consider such issues, Other Insurers incorporate the arguments presented in their opening brief and in the briefs of the State Fund.

The 23-page novella submitted by Petitioner addresses these first three issues only in conclusory fashion. Petitioner instead devotes the majority of his brief to the purportedly retroactive scope of the common fund that he presumes exists, and to related limitations and laches arguments. Because Petitioner has not meaningfully explained why it is that he believes that a common fund exists, and how a class and fund are readily ascertainable and identifiable, Other Insurers respectfully request an opportunity to submit a reply on any issues or reasoning propounded with Petitioner's Simultaneous Answer Brief. Petitioner should not be permitted to sandbag Respondents on these issues with his Simultaneous Answer Brief.

#### **I. PETITIONER'S OPENING BRIEF CONFIRMS THAT A COMMON FUND IS NOT READILY IDENTIFIABLE.**

Petitioner would have this Court believe that the common fund is *fait accompli* as a result of the Montana Supreme Court's Reesor precedent. Petitioner suggests that in *Schmill v. Liberty Northwest Ins. Corp.*, 2005 MT 144, 327 Mont. 293, 114 P.3d 204, the Montana Supreme Court "answered all of the present issues in favor of the Reesor Claimants."<sup>1</sup> Petitioner's unique and distinct claim was not before the court in *Schmill*, and nothing in that decision affords Petitioner a presumption that a common fund exists without further inquiry. That inquiry shows that Petitioner cannot identify a common fund. Petitioner cannot identify its aggregate value, much less the amount to which any individual "Reesor Claimant" may be entitled. As such, no common fund exists.

Montana law sets forth the first element of the common fund doctrine as follows:

First, a party, styled the active beneficiary, must create, reserve, preserve, or increase an identifiable monetary fund or benefit in which all active and non-participating beneficiaries have an interest.<sup>2</sup>

Furthermore, it is *Petitioner's* burden as the party asserting the existence of a common fund to show that each of the common fund elements are met.

Under the common-fund doctrine ... parties purporting to have brought about a pecuniary benefit to others bear the burden of establishing both its value and the resulting enrichment of others that justifies an equitable award of attorney's fees.<sup>3</sup>

<sup>1</sup> *Petitioner's Brief on Common Fund Issues*, p. 3.

<sup>2</sup> *Ruhd v. Liberty Northwest Ins. Corp.*, 2004 MT 236, ¶16, 322 Mont. 478, ¶16, 97 P.3d 561, ¶16. ("There are three elements necessary to establish a common fund. First, a party, styled the active beneficiary, must create, reserve, preserve, or increase an identifiable monetary fund or benefit in which all active and non-participating beneficiaries have an interest. Second, the active beneficiary must incur legal fees in establishing the common fund. Third, the common fund must benefit ascertainable, non-participating beneficiaries.")

<sup>3</sup> 20 Am. Jur. 2d *Costs* § 66 (2005).

With respect to the first element, Petitioner must prove to the Court that he created, preserved, or increased a common fund. "The fund must be an **existing, identifiable monetary fund or benefit** to which all of the beneficiaries maintain an interest."<sup>4</sup>

Reesor ignores the requirement that the purported common fund must be an "existing" and "identifiable" monetary fund or benefit.<sup>5</sup> His reasons for doing so are clear – he is completely unable to identify any existing, monetary fund or benefit. Nowhere in his 23-page brief does he identify an existing, monetary fund or benefit purportedly created. No bank account was created in *Reesor* in which a class of workers' compensation claimants has an interest. Likewise, no funds were deposited with the Court that might comprise a common fund. Thus, if an existing and identifiable fund was created in *Reesor* it must be identified by means other than a convenient account name or number, or as in *Hall*, a specific amount of tendered policy limits. See *Hall*, 2001 MT 314 at ¶15. Not only does Petitioner fail to identify any existing fund or its value, he fails to even propose a means by which such a fund or value could be identified.

#### A. Reesor Cannot Identify the Aggregate Amount of the Common Fund.

At Petitioner's request, this Court summoned 633 Montana workers' compensation insurers. As Petitioner freely concedes, only 293 such insurers have responded.<sup>6</sup> Thus, less than half of those insurers who have potential liability under *Reesor* have even appeared in this action. Accordingly, even if we assume that a common fund can be nothing more than the aggregate liability of Montana insurers to

<sup>4</sup> *Mountain West Farm Bureau Mut. Ins. Co. v. Hall*, 2001 MT 314, ¶ 15, 308 Mont. 29, 38 P.3d 825 (emphasis added).

<sup>5</sup> Rather, it appears that Reesor has intentionally misquoted case law in order to avoid focus on this requirement. Reesor quotes *Hall* as follows:

"First, a party (or multiple parties in the case of a consolidated case) must create, reserve, increase, or preserve a common fund. This party is typically referred to as the active beneficiary. Second, the active beneficiary must incur legal fees in establishing the common fund. Third, the common fund must benefit ascertainable non-participating beneficiaries." (Pet.'s Br. at 15.)

The actual passage reads:

First, one party must create, reserve, or increase a common fund. This party is typically referred to as the active beneficiary. *The fund must be an existing, identifiable monetary fund or benefit* to which all of the beneficiaries maintain an interest.

Second, the active beneficiary must incur legal fees in establishing the common fund.

Third, and finally, the common fund must benefit ascertainable, non-participating beneficiaries.

*Hall*, 2001 MT 314 at ¶¶ 15, 16 & 18 (emphasis added).

<sup>6</sup> *Petitioner's Brief on Common Fund Issues*, p. 2.

*Reesor* type claimants, Petitioner cannot even identify that liability because, absent an appearance by all Montana insurers, not all *Reesor* claimants and their benefits can be identified and added together to compute the aggregate value necessary to identify a common fund.

**B. Reesor Cannot Identify the Individual Common Fund Benefit Owed to "Reesor Claimants."**

Even if all summoned insurers responded and identified all potential *Reesor* claimants, the amount of their individual benefits would vary widely and cannot be presently known to compute an aggregate value of the fund. As the State Fund points out in its brief, unique facts individual to each claimant must be developed (in some cases on a retrospective basis) and assessed in light of the *Reesor* decision and workers' compensation law to determine what amount, if any, a particular individual claimant might receive under the *Reesor* precedent. Such facts include medical and vocational information that will likely lead to disputes as to impairment ratings and medical restrictions. Thus, even in the hypothetical case of perfect knowledge of the identities of all potential *Reesor* claimants, their individual benefits cannot be known without years of research and likely litigation. Absent such knowledge, no aggregate value of a common fund can be computed. Thus, the purported common fund cannot be identified and therefore does not exist.

Petitioner's best effort to identify an existing common fund consists of the unsupported conclusion that he created a common fund because his case led to the *Reesor* precedent. In his words, "*Reesor* satisfies the first criteria, because he litigated and created the precedent that formed the common fund."<sup>7</sup> Thus, Petitioner asserts that the establishment of the *Reesor* precedent is synonymous with the creation of a common fund. However, this Court has ruled that, absent an existing and identifiable fund, *precedent alone is insufficient to find a common fund*:

[T]he common fund doctrine requires more than the establishment of a precedent which may benefit others...<sup>8</sup>

*Reesor* is a decision that may aid individual claimants who choose to pursue additional PPD benefits. But, as explained above and in greater detail by the State Fund in its opening brief, unique facts individual to each claimant must be developed and assessed in light of the *Reesor* decision and workers' compensation benefits law to determine what amount, if any, a particular individual claimant should receive under the *Reesor* precedent. This Court's common fund holding in *Mathews* therefore applies with equal force in this case:

The [Supreme Court's] decision established no more than a precedent which may aid some workers in the pursuit of their individual claims for benefits. Therefore, no common fund has been created.<sup>9</sup>

<sup>7</sup> *Petitioner's Brief on Common Fund Issues*, p. 15.

<sup>8</sup> *Mathews v. Liberty Northwest Ins. Corp.*, 2004 MTWCC 55, ¶ 32, WCC No. 2001-0294.

Absent proof of an existing and identifiable monetary fund or benefit, no common fund exists as a result of the *Reesor* precedent.

**C. Petitioner Cannot Prove an Existing and Identifiable Common Fund Given the Unsettled Scope of *Reesor's* Retroactivity.**

Even if the amount of benefits potentially due to individual claimants could be determined without substantial factual investigation, and even if the aggregate amount of PPD benefits withheld under §39-71-703 (1999) could be calculated, Petitioner still cannot identify the existing value of the common fund purportedly created without knowing how far back to look. Any liability created by *Reesor* would be a function of retroactivity. If the decision is not retroactive, then individual claimants would not be entitled to benefits withheld under §39-71-703 prior to the *Reesor* decision, and thus no common fund could exist. However, even if we assume retroactive application generally, the extent of such application is still unknown because there has been no ruling on the definitions of "closed," "settled," "final," or "inactive" for the purpose of identifying which claimants may be entitled to pursue a claim for withheld or denied PPD benefits. Moreover, any ultimate decision on the scope of *Reesor's* retroactivity by the Montana Supreme Court may be years away.

Accordingly, the individual claimants to whom Montana Insurers might be liable cannot presently be known even if we assume retroactivity. Absent such knowledge, the aggregate value of *Reesor* liability by Montana insurers cannot be known. Accordingly, Petitioner's premise, that the aggregate liability of Montana insurers under *Reesor* amounts to a common fund, fails because such aggregate liability is not identifiable.

**D. Recognizing a Common Fund in this Case Would Be Inconsistent with the Policies Underpinning the Common Fund Doctrine.**

The policy reasons for requiring parties asserting a common fund to prove its existence and identity further warrant a finding that no common fund exists in this case. The common fund doctrine is nothing more than an exception to the American Rule which permits a prevailing litigant his attorneys fees under certain circumstances. If the Court accepts Petitioner's argument that a common fund can exist as a result of nothing more than potential but unknown liability under retroactive decisions, the common fund exception will swallow the American Rule.

Retroactivity is presumed in all judicial decisions and can only be rebutted upon a showing that all three *Chevron* factors exist.<sup>10</sup> Thus, if all that is required to create a common fund is potential retroactive liability, then virtually all Montana cases create a common fund because retroactivity is presumed in all cases. Indeed, in *Dempsey* the Montana Supreme Court noted that since Montana's adoption of *Chevron*, only two

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<sup>9</sup> *Id.*

<sup>10</sup> *Dempsey v. Allstate Ins. Co.*, 2004 MT 391, ¶ 31, 325 Mont. 207, ¶ 31, 104 P.3d 483, ¶ 31.

cases have been held to not apply retroactively.<sup>11</sup> Notably, those cases were decided under the pre-*Dempsey* cases which required that only one *Chevron* factor be met to prevent retroactive application. Clearly, with *Dempsey*'s requirement that all *Chevron* factors be met, it will be the rare case that is not applied retroactively. Thus, the requirement to prove the existence and identity of a common fund functions to protect the American Rule by limiting the common fund doctrine's application to those extraordinary cases in which an existing and identifiable fund is created through litigation that benefits a small number of non-litigants. Accordingly, to keep the common fund doctrine from subsuming the American Rule, this Court must require that Petitioner identify an existing fund and reject the argument that potential and unknown liability under retroactivity can create a common fund.

The bottom line is that Petitioner cannot identify an existing monetary fund. Petitioner ignores that requirement and proceeds on the mistaken premise that the creation of precedent, and the resulting unknown, retroactive liability is sufficient to find a common fund. As explained above, both the letter of the law and the policies underlying the common fund doctrine preclude a finding that a common fund exists in this case – for the simple reason that no such fund can be identified.

## II. A COMMON FUND DOES NOT EXIST BECAUSE THE PURPORTED BENEFICIARIES ARE NOT READILY ASCERTAINABLE.

The third element of the common fund is that the beneficiaries must be readily ascertainable.<sup>12</sup> Indeed, Reesor concedes that the third element requires common fund beneficiaries to be *readily* ascertainable.<sup>13</sup> As already shown, contrary to Reesor's assertions, the "Reesor Claimants" are not ascertainable at all (to say nothing of *readily* ascertainable) because: 1) unique facts individual to each claimant must be developed (in some cases on a retrospective basis) and assessed in light of the *Reesor* decision and workers' compensation law to determine what amount, if any, a particular individual claimant might receive under the *Reesor* precedent; 2) hundreds of insurers who could identify such persons have not even appeared in this action; and 3) the unsettled scope of retroactivity provides no criteria to determine even what claims may potentially qualify for retroactive *Reesor* benefits (assuming *arguendo* that *Reesor* may be retroactive). Indeed, as noted in Other Insurers' opening brief, the unknown effects of retroactivity preclude even a description of the class of "Reesor Claimants." Due to limitations on

<sup>11</sup> *Dempsey*, ¶ 27 ("Chevron has not been very helpful to Montana litigants seeking prospective application. Although we have applied the *Chevron* test numerous times, the test has resulted in a prospective application on only four occasions.").

<sup>12</sup> *Ruhd v. Liberty Northwest Ins. Corp.*, 2004 MT 236, ¶16, 322 Mont. 478, ¶16, 97 P.3d 561, ¶16 ("the common fund must benefit ascertainable, non-participating beneficiaries."); see also *Mathews v. Liberty Northwest Ins. Corp.*, 2004 MTWCC 55, ¶ 32, WCC No. 2001-0294 (refusing to find a common fund because "the Mathews' decision does not establish a direct entitlement to benefits on behalf of other readily ascertainable claimants."); see also *Morganroth & Morganroth v. DeLorean*, 213 F.3d 1301, 1319 (10<sup>th</sup> Cir. 2000) (quoting 10 *Moore's Federal Practice* § 54.171[2][a][iii] at pp. 54-253 to 54-254 (3d ed. 1999) for the rule that common fund beneficiaries must be "readily identifiable.").

<sup>13</sup> *Petitioner's Brief on Common Fund Issues*, p. 2 (asserting that he satisfies this third element because "the non-participating Reesor Claimants are easily ascertainable."); see also p. 15 ("these common fund beneficiaries are readily ascertainable").

"closed," "settled," "final" and "inactive" claims (however those terms are ultimately defined), not all persons who had PPD benefits terminated upon retirement are eligible to claim *Reesor* benefits. However, even if it is assumed that some herculean efforts might reveal the identities of all "Reesor Claimants," such efforts are not required because the common fund exception to the American Rule is only permitted when beneficiaries are *readily* ascertainable.

The party asserting the existence of a common fund has the burden to prove all elements. Reesor may not invert that burden by requiring Other Insurers to prove a negative -- that they have no "Reesor Claimants." Likewise, he may not conscript Other Insurers to do his factual investigation for him. Although Reesor repeatedly asserts that "Reesor Claimants" are readily ascertainable, the glaring hole in this assertion is that he fails to name them - or even one of them. Reesor's failure to name even one "Reesor Claimant" is evidence of the significant difficulty involved in identifying such persons. Of course, this difficulty is the precise reason that he wishes to impose this burden upon Other Insurers.

While it is not Other Insurers' burden to prove a negative -- that "Reesor Claimants" are not readily ascertainable -- they have provided evidence establishing that fact. Other Insurers and the State Fund have provided extensive factual evidence demonstrating the enormous burden placed upon them to identify individuals with potential claims under the *Reesor* precedent. In the case of Farmers Insurance Company, the cost to conduct the search would be approximately \$32,000.<sup>14</sup> In *AIG's* case it would likely cost \$48,000 at a minimum.<sup>15</sup> While State Fund does not provide an estimated total figure to conduct the search, it is clear that the costs of locating potential "Reesor Claimants," and adjusting their claims years after the fact, would be enormous.<sup>16</sup> Reesor does not (and cannot) dispute these facts. Of course, given these costs and difficulties in identifying the alleged non-participating beneficiaries to the alleged *Reesor* common fund, there can be no finding that such persons are "readily" ascertainable.

Anticipating that Other Insurers would be able to produce such evidence, Reesor misstates facts and case law to argue that Other Insurers can easily identify "Reesor Claimants" because of their vast experience in identifying common fund claimants in other cases. Specifically, Reesor argues that:

Most Workers' Compensation Insurers in Montana have extensive experience with common fund cases. Therefore, this Court should not allow the Insurers to escape coverage, because they have questions involving identification and payment of retroactive benefits. For Instance, in Stavenjord II, the State Fund conceded that they processed approximately 3,200 Murer claimants. In addition, the State Fund agreed

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<sup>14</sup> *Brief Re: Existence of Common Fund*, 5/1/06, p. 8.

<sup>15</sup> *Id.*

<sup>16</sup> *State Fund's Brief*, pp. 14 - 19 (demonstrating the costs associated with identifying "Reesor Claimants.").



that it also handled large numbers of claimants in other common fund cases. With this kind of extensive experience, the Insurers should be able to pay Reesor benefits.<sup>17</sup>

This statement contains a host of factual inaccuracies. Most Workers' Compensation Insurers in Montana do not have extensive experience with common fund cases. As pointed out in Other Insurers' opening brief, they were only summoned and joined as Respondents in this action several months after Reesor's claim had been decided by the Montana Supreme Court. While State Fund and Liberty may have substantial experience due to their vast Montana market shares, Other Insurers do not have such experience. They were only advised of their potential retroactive liability in the common fund cases last year when the Court sent out a slew of summonses in *Flynn*, *Reesor*, *Schmill* and *Satterlee*.<sup>18</sup> Thus, Reesor cannot attribute State Fund's experience in identifying common fund claimants to Other Insurers for the purpose of arguing that Other Insurers' experience makes "Reesor Claimants" readily ascertainable.

Reesor similarly asserts that *Reesor* beneficiaries are readily ascertainable because all *Murer* beneficiaries were ascertained:

In the Murer case, the State Fund began the claimant identification process after the Supreme Court rulings in 1994 (Murer II), and 1997 (Murer III). Thus, the State Fund began developing identification and payment methods in workers' compensation cases between nine and twelve years ago. In the present appeal, the Reesor Claimants anticipate that the insurers will offer many excuses about their inability to identify Reesor Claimants, but this court should seriously question why Reesor is any different from Murer.<sup>19</sup>

Once again, Mr. Reesor takes great liberties with the facts. First, the State Fund was not ordered to identify *Murer* claimants in that case. Rather, the State Fund volunteered to do so and thus, waived any argument that such claimants were obligated to contact the State Fund to assert their *Murer* claims.<sup>20</sup> Accordingly, *Murer III* does not provide any authority for the proposition that the common fund doctrine requires insurers to identify claimants irrespective of the burden involved. That issue was never addressed or decided in *Murer*. Moreover, in *Murer III*, the State Fund had identified all claimants and calculated their benefits with mathematical certainty *before* a common fund was found. Indeed, the *Murer III* Court specifically relied on this *prior* identification to find a common fund.

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<sup>17</sup> *Petitioner's Brief on Common Fund Issues*, p. 12 (citations omitted).

<sup>18</sup> See *Summons* in *Flynn* dated 5/4/05; *Summons* in *Reesor* dated 4/22/05; *Summons* in *Schmill* dated 12/7/05; and *Notice of Opportunity to Appear and Intervene* in *Satterlee* dated 4/19/05.

<sup>19</sup> *Petitioner's Brief on Common Fund Issues*, p. 12.

<sup>20</sup> *Murer v. State Compensation Mut. Ins. Fund* (1997), 283 Mont. 210, 215, 942 P.2d 69, 72 ("The State Fund, however, agreed to contact and pay all absent claimants, without requiring further action on their behalf.").

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. Accordingly, as a direct result of claimants' litigation efforts, a substantial number of absent claimants have received direct monetary benefits payments, even though they were not required to intervene, file suit, risk expense, or hire an attorney.<sup>21</sup>

Thus, the answer to Reesor's question as to why this case should be any different from *Murer III* is that in *Murer III*, the party asserting the common fund met its burden to prove that non-participating beneficiaries were readily ascertainable. By the time the Court was faced with the common fund question, the *Murer* claimants had already been ascertained.

Unlike the Petitioner in *Murer III*, Reesor cannot meet his burden to identify any "Reesor Claimants." Moreover, he cannot meet his burden to prove that such claimants are readily ascertainable. Thus, no common fund can be found in this case.

**III. NO COMMON FUND CAN EXIST IN THIS CASE BECAUSE THE IMPOSITION OF COMMON FUND LIABILITY UPON OTHER INSURERS AS A CLASS OF RESPONDENTS WOULD VIOLATE OTHER INSURERS' DUE PROCESS RIGHTS.**

As explained in Other Insurers' opening brief, the *ex post facto* imposition of liability upon them, as part of a class of Respondents, violates their rights to due process. Specifically, Other Insurers were never given notice and opportunity to be heard in *Reesor* because they were summoned almost six months after that case had been decided. Moreover, Other Insurers were denied the due process required in representative actions. The Court held no hearing to determine whether all Respondents, or for that matter potential claimants, are similarly situated. Other Insurers had absolutely no opportunity to assert or present individual defenses.

Petitioner's brief reveals that he is attempting to substitute the common fund doctrine for a new type of class action, on behalf of a class of previously un-named plaintiffs, upon a class of previously un-named defendants, after the case has been decided, and without the troublesome due process protections afforded to class members under the inquiry demanded by the class action rules. Petitioner's brief contains repeated assertions of his purported status as class representative for a class of "Reesor Claimants":

The Reesor Claimants are proceeding with this case as a common fund action.<sup>22</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> *Petitioner's Brief on Common Fund Issues*, p. 2.

[T]he Reesor Claimants meet the three-element test required for common fund applicability.<sup>23</sup>

[T]he Reesor Claimants were timely in their request for common fund application.<sup>24</sup>

[T]he Reesor Claimants presented the common fund claim immediately upon remand...<sup>25</sup>

The Reesor Claimants submit that they also should receive additional PPD as a result of the Reesor precedent.<sup>26</sup>

The Reesor Claimants submit that none of the Chevron factors support non-retroactivity.<sup>27</sup>

As to the second Chevron factor, whether retroactive application will further or retard the ruling, the Reesor Claimants submit that the answer is obvious.<sup>28</sup>

In the present appeal, the Reesor Claimants anticipate that the insurers will offer many excuses...<sup>29</sup>

These [Reesor C]laimants need the additional benefit; because...<sup>30</sup>

This Court should require the insurers to pay additional PPD benefits to deserving Reesor Claimants...<sup>31</sup>

[T]he Reesor claimants submit that a common benefit was created...<sup>32</sup>

The Reesor Claimants submit that Breen is still controlling law...<sup>33</sup>

The Reesor Claimants acknowledge that...<sup>34</sup>

In addition, Petitioner specifically requests relief in the name of the "Reesor Claimants":

<sup>23</sup> *Id.*

<sup>24</sup> *Petitioner's Brief on Common Fund Issues*, p. 3.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Petitioner's Brief on Common Fund Issues*, p. 8.

<sup>28</sup> *Petitioner's Brief on Common Fund Issues*, p. 11.

<sup>29</sup> *Petitioner's Brief on Common Fund Issues*, p. 12.

<sup>30</sup> *Id.*

<sup>31</sup> *Petitioner's Brief on Common Fund Issues*, p. 13.

<sup>32</sup> *Id.*

<sup>33</sup> *Petitioner's Brief on Common Fund Issues*, p. 14.

<sup>34</sup> *Petitioner's Brief on Common Fund Issues*, p. 17.

[T]he Reesor Claimants respectfully ask this Court for the same PPD benefit that is granted to elderly PPD claimants...<sup>35</sup>

Here, the Reesor Claimants ask the Court to apply Reesor to all open cases.<sup>36</sup>

[T]he Reesor Claimants ask this Court to find that the Reesor Common Fund may pursue Reesor benefits in all open PPD claims...<sup>37</sup>

The common fund doctrine simply permits an award of attorney fees to litigants who can prove that, through litigation, they created a common fund that benefits non-participating parties. Neither the common fund doctrine nor retroactivity permit the imposition of liability upon a class of un-named defendants absent class certification.

Moreover, neither the common fund doctrine nor retroactivity permit a litigant to proceed as a class representative in the absence of a class certification. In addition to denying due process for the reasons previously discussed, permitting Reesor to proceed as a representative of all "Reesor Claimants" would further deny due process by permitting him to assert facts that cannot be investigated by Other Insurers. As stated by the Montana Supreme Court, the denial of discovery is a violation of the due process clause found at Article II, Section 17, of the Montana Constitution.

In [deciding the merits of a case during a hearing on a temporary restraining order], the court negated Nancy's burden of proving her allegations concerning acquisition and ownership by a preponderance of the evidence, and, without notice, effectively precluded discovery, deprived Blackwell and the Sheriff of their opportunity to disprove Nancy's allegations concerning her acquisition and ownership of the property and, thus, denied their right to procedural due process in violation of Article II, Section 17 of Montana's Constitution.<sup>38</sup>

As shown above, in unilaterally naming himself as a representative of the "Reesor Claimants," Petitioner makes numerous assertions of fact on behalf of the class that cannot be investigated by Other Insurers because neither the class nor the individual members have been identified. Absent identification of the purported "Reesor Claimants," Other Insurers cannot gauge whether such absent claimants are similarly situated. Nor can the Court.

Moreover, Petitioner's purported representative status may also trample absent claimant's rights. Absent "Reesor Claimants" have received no notice that Petitioner's counsel is purporting to represent their interests in any benefits under the *Reesor* precedent. Absent "Reesor Claimants" have also not been given any opportunity to opt-

<sup>35</sup> *Petitioner's Brief on Common Fund Issues*, p. 5.

<sup>36</sup> *Petitioner's Brief on Common Fund Issues*, p. 22.

<sup>37</sup> *Id.*

<sup>38</sup> *Lurie v. Sheriff of Gallatin County* (1997), 284 Mont. 207, 215, 949 P.2d 1163, 1167.

out -- a cornerstone due process right in class actions seeking monetary damages. For example, Petitioner asserts on behalf of the "Reesor Claimants" that "[t]he Reesor Claimants are proceeding with this case as a common fund action."<sup>39</sup> Is that really their intention? Are they aware that in proceeding as a common fund action as prosecuted by Reesor they will lose 25% of any benefits awarded due to Reesor's attorneys fee lien? Are they represented by other counsel? Would they choose to be? Do they wish to bring their own claim and dispute the 25% lien asserted by Reesor's counsel as over and above that required by the common fund doctrine?

Of course, if there were a means of notice to absent "Reesor Claimants," it might be revealed that some "Reesor Claimants" would prefer to bring their own claim through their own counsel. In which case such claimants would not be subject to the common fund because they would incur their own legal fees in obtaining benefits.<sup>40</sup>

Class action procedures exist to prevent these very types of injustice and denials of due process. Reesor may not employ the common fund doctrine as a substitute for a class action to impose liability after-the-fact. A common fund simply cannot coexist consistent with Other Insurers' and absent "Reesor Claimants" due process rights.

#### IV. CONCLUSION.

Petitioner cannot meet his burden to prove that an identifiable monetary fund presently exists. Likewise, he cannot identify the beneficiaries of any such fund or that they are readily ascertainable. Accordingly, no common fund exists in this case. Moreover, due process prevents the common fund doctrine from being used as an ad-hoc, after-the-fact, quasi-class action means of imposing liability upon a class of previously un-named defendants. Accordingly, this Court cannot impose such liability under the common fund doctrine consistent with due process. Other Insurers respectfully request that the Court enter an order declaring that no common fund exists and dismissing them with prejudice from this action.

Dated this 26<sup>th</sup> day of May, 2006.

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

By:   
STEVEN W. JENNINGS  
Attorneys for Insurer Respondents


<sup>39</sup> *Petitioner's Brief on Common Fund Issues*, p. 2.

<sup>40</sup> *Estate of Korthe*, 9 Cal.App.3d 572, 88 Cal.Rptr. 465 (Cal. Ct. App. 1970) (refusing to award attorneys fees under common fund doctrine because other beneficiaries were represented by counsel and thus paid their own legal fees).

**CERTIFICATE OF SERVICE**

I, STEVEN W. JENNINGS, one of the attorneys for the law firm of Crowley, Haughey, Hanson, Toole & Dietrich P.L.L.P., hereby certify that on the 26<sup>th</sup> day of May, 2006, I mailed a true and correct copy of the foregoing document, postage prepaid, to the following:

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May 26, 2006

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

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

Dear Clerk:

On behalf of our clients, please file the enclosed Simultaneous Answer Brief on the Existence of a Common Fund. Please date stamp the enclosed copy of the cover page and return in the envelope provided.

Thank you in advance for your assistance.

Sincerely yours,

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

*Mymna Henschel, PLS*

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

mlh  
Enclosures