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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CASSANDRA M. SCHMILL, Petitioner, v. LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent.	WCC No. 2001-0300 **STATE FUND'S OPENING BRIEF REGARDING RETROACTIVITY, COMMON FUND ENTITLEMENT, COMMON FUND FEES AND GLOBAL LIEN OF SCHMILL'S COUNSEL**

COMES NOW the Intervenor, Montana State Fund ("State Fund"), and hereby files its Opening Brief Regarding Retroactivity, Common Fund Entitlement, Common Fund Fees and Global Lien of Schmill's Counsel. For the reasons stated herein, the State Fund asserts that *Schmill v. Liberty Nw. Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290, applies prospectively only. The State Fund also contends that the application of the common fund doctrine, as well as the payment of common fund fees, are inappropriate in this case because the economic stakes in the underlying litigation were of a sufficient amount to justify the expense of filing suit and pursuing the matter. Further, the State Fund believes that the failure of Schmill's counsel to plead an entitlement to common fund attorney fees or class certification prior to the appellate decision bars her post-remand request for common fund fees. Lastly, the State Fund asserts that if the attorney fee lien of Schmill's counsel is effective, it should apply with equal force to all insurers and self-insurers in the State of Montana.

INTRODUCTION

The parties and the Court are currently in the process of determining what fees are owed to whom as a result of the Montana Supreme Court's decision in the above-referenced matter. In pursuit thereof, on July 11, 2003, Schmill's counsel filed her notice of attorney fee lien and claimed, for the first time, an entitlement to common fund fees. Her lien was asserted retroactively against all Plan I, II, and III insurers for claimants with injury dates from July 1, 1987 to June 22, 2001. (*See* Notice of Common Fund Attorney Lien.) No fees were sought on future claims. In response, on August 27, 2003, the State Fund requested this Court stay the retroactive application of *Schmill* and further requested guidance in determining an entitlement date to use for purposes of prospective implementation. The stay was never ruled upon by this Court. However, after several conferences with the Court and between the parties, a Stipulation Regarding Respective Claims was approved on February 13, 2004. According to the terms of the stipulation, Schmill's counsel is claiming retroactive common fund attorney fees for occupational disease claims with entitlement dates from July 1, 1987 through June 21, 2001.

ISSUES

Four threshold issues are now before the Court which require immediate briefing:

1. Whether the decision in *Schmill* is retroactive, and if so, whether it is retroactive to the date of the Montana Supreme Court's decision in *Henry v. State Compen. Ins. Fund* , 1999 MT 126, 294 Mont. 449, 982 P.2d 456, or to an earlier date;

2. Whether the decision in *Schmill* creates a common fund, and if so, to what extent;

3. Whether the failure to plead ab initio an entitlement to common fund attorney fees or class certification in the pre-remand proceedings bars a post-remand request for common fund fees; and

4. If common funds are created as a result of the appellate decision in *Schmill*, are common funds limited solely to claimants insured by the State Fund, or do the funds encompass all claimants and all insurers?

STATEMENT OF UNDISPUTED FACTS

For a comprehensive statement of facts applicable to this matter, please see the Joint Statement of Stipulated Facts, filed on February 26, 2004.

ARGUMENT

Courts treat the retroactive application of statutes differently than they treat the retroactive application of judicial decisions. In Montana, statutes affecting substantive rights are applied prospectively, unless the statute expressly provides otherwise. *See* Mont. Code Ann. § 1-2-109 (2001). Statutes which only affect procedural matters are applied retroactively. *See e.g. State Compen. Ins. Fund v. Sky Country, Inc.* (1989), 239 Mont. 376, 780 P.2d 1135. However, judicial decisions are given different treatment.

In general, judicial decisions apply retroactively. *See e.g. Kleinhesselink v. Chevron, USA* (1996), 277 Mont. 158, 920 P.2d 108, 111. However, a United States Supreme Court decision created three exceptions to the general rule that judicial decisions apply retroactively. *See Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), *overruled*, *Harper v. Virginia Dept. of Taxn.*, 509 U.S. 86 (1993). In determining whether a judicial decision has prospective application only, courts must examine three factors:

1. Whether the decision establishes a new principle of law either by overruling established precedent on which litigants have relied 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 after considering the history, purpose and effect of the rule in question; and

3. Whether a substantial inequity will result by applying the judicial decision retroactively.

Chevron Oil, 404 U.S. at 106-107.

The "non-retroactivity test" set forth in *Chevron Oil* was widely adopted in states across the country, including Montana. *See LaRoque v. State* (1978), 178 Mont. 315, 319, 583 P.2d 1059, 1061. However, in the early 1990s, the federal courts abandoned the *Chevron Oil* test and adopted a blanket rule that gave retroactive application to

judicial decisions. *See e.g. Harper*, 509 U.S. at 94-98; *James Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991).

In light of *Harper* and *James Beam*, this Court questioned the validity of the *Chevron Oil* test in Montana. *See Klimek v. State Compen. Ins. Fund*, WCC No. 9602-7492 at 14-15 (Oct. 11, 1996). This Court's concern was heightened by the fact that three cases from the Montana Supreme Court – which were published shortly before the *Klimek* opinion – completely failed to mention the *Chevron Oil* test. However, three recent decisions from the Montana Supreme Court, one of which was published four months ago, verify that Montana still relies on the *Chevron Oil* test to determine if a judicial decision applies retroactively.

I. MONTANA LAW STILL UTILIZES THE TEST SET FORTH IN *CHEVRON OIL* TO DETERMINE WHETHER A JUDICIAL DECISION APPLIES PROSPECTIVELY ONLY

This Court has already acknowledged that the federal court's use of a blanket rule of retroactivity with respect to matters of federal law is not binding on state courts with respect to matters of state law. *See Klimek*, at 15 (citations omitted). In fact, this Court has noted that several states have adhered to *Chevron Oil* as the better rule with respect to retroactivity. *See Klimek*, at 15 (citations omitted). However, this Court opined that the Montana Supreme Court had abandoned the *Chevron Oil* test in favor of a blanket rule of retroactivity because three 1996 cases had addressed retroactivity without discussing *Chevron Oil*. *See Klimek*, at 16 (citing *Kleinhesselink*, 920 P.2d 108; *Chaney v. U.S. Fidelity & Guar.* (1996), 276 Mont. 513, 917 P.2d 912, 914; *Porter v. Galarneau* (1996), 275 Mont. 174, 911 P.2d 1143).[1] Therefore, at the time of the *Klimek* decision, case law seemed to be moving away from the *Chevron Oil* test.

After *Klimek*, the Montana Supreme Court addressed retroactivity in two civil cases. *See Seubert v. Seubert*, 2000 MT 241, 301 Mont. 399, 13 P.3d 365; *Benson v. Heritage Inn, Inc.*, 1998 MT 330, 292 Mont. 268, 971 P.2d 1227. In *Benson*, the Court had to decide whether *Richardson v. Corvallis Pub. Sch. Dist. No. 1* (1997), 286 Mont. 309, 950 P.2d 748, which clarified a landowner's standard of care regarding natural

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[1] Although *Klimek* cited to *Chaney*, the State Fund believes the opinion most likely intended on citing to *Haugen v. Blaine Bank of Mont.* (1996), 279 Mont. 1, 926 P.2d 1364. Like *Chaney*, *Haugen* was a 1996 decision. However, neither the *Chaney* decision, nor its Montana Supreme Court briefs, discuss retroactivity. The *Haugen* decision, on the other hand, does discuss retroactivity.

accumulations of snow and ice, applied retroactively. Before ultimately concluding that *Richardson* applied retroactively, the Court analyzed each factor of *Chevron Oil*. *See Benson*, ¶ 25. In *Seubert*, the Court was asked to address the retroactivity of its previous decision in the same case, which held that Montana Code Annotated §§ 40-5-272 and -273 unconstitutionally violated the separation of powers clause because they allowed the Child Support Enforcement Division to modify a district court child support order. *See Seubert*, ¶ 25. In addressing retroactivity in this civil context, the Supreme Court applied the *Chevron Oil* test and determined that the decision should apply prospectively only because retroactive application would result in increased litigation and cause unjust results. *See* Order Clarifying Decision on Grant of Rehearing, *Seubert*, ¶ 56 (citing *Holmberg v. Holmberg*, 588 N.W.2d 720 (Minn. 1999)). In addition to those two civil cases, Judge Molloy applied the *Chevron Oil* test in a 2003 federal court decision involving an issue of Montana insurance law. *See Burton v. Mountain W. Farm Bureau Mut. Ins. Co.*, 214 F.R.D. 598, 2003 WL 1740461 at *8 (D. Mont. Mar. 31, 2003).

Last year, this Court acknowledged that despite its analysis in *Klimek*, the *Chevron Oil* test may be alive and well in Montana. *See Miller v. Liberty Mut. Fire Ins. Co.*, 2003 MTWCC 6, ¶ 24. That acknowledgment is consistent with the fact that *Kleinhesselink*, *Haugen* and *Porter* appear to be the only three civil cases which have failed to address the *Chevron Oil* test as part of a retroactivity analysis.[2] That acknowledgment is also consistent with the analysis set forth in *Seubert*, *Benson* and *Burton*, as discussed above. However, late last summer, this Court again examined the retroactivity issue and opined that the Montana Supreme Court would likely abandon the *Chevron Oil* test and adopt a blanket rule of retroactivity. *See Flynn v. State Compen. Ins. Fund*, 2003 MTWCC 55, ¶ 22. The Court's conclusion was influenced by a 1998 criminal case in which the Montana Supreme Court stated that it "give[s] retroactive effect to judicial decisions." *Flynn*, ¶ 22 (quoting *State v. Steinmetz*, 1998

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[2] Notably, none of the Supreme Court briefs in *Kleinhesselink*, *Haugen* or *Porter* mention or address the *Chevron Oil* test. *See* Appellants' Brief, Response Brief of Blaine Bank of Montana and William Larsen, Appellants' Reply Brief; *Haugen v. Blaine Bank of Mont.*, Mont. Sup. Ct. No. 95-554; Opening Brief of Appellant, Brief of Respondents, Reply Brief of Appellant; *Kleinhesselink v. Chevron, U.S.A.*, Mont. Sup. Ct. No. 95-524, . Appellants' Brief, Respondent's Brief, Appellants' Reply Brief, Respondent's Brief Regarding Effect of House Bill No. 158; Appellants' Supplemental Brief Regarding Retroactivity Analysis, Memorandum in Reply to Appellants' Supplemental Brief Regarding Retroactivity Analysis, Appellants' Supplemental Reply Brief Regarding Retroactivity Analysis; *Porter v. Galarneau, Mont. Sup. Ct. No. 94-552.*

MT 114, ¶ 10, 288 Mont. 527, ¶ 10, 961 P.2d 95, ¶ 10) (discussing an officer's particularized suspicion and an allegation of coercing the defendant into submitting to a field sobriety test). Importantly, this Court has previously noted that retroactivity is treated differently in civil and criminal cases. As the Montana Supreme Court stated in a 1999 criminal case, "all defendants whose cases are pending on direct review or not yet final are entitled to the retroactive application of a new judicial rule of criminal procedure." *State v. Waters*, 1999 MT 229, ¶ 21, 296 Mont. 101, ¶ 21, 987 P.2d 1142, ¶ 21. Therefore, reliance on *Steinmetz* seems misplaced.

In Montana, civil cases do not follow the retroactivity rule established in criminal cases. Following this Court's decision in *Flynn*, the Montana Supreme Court yet again examined the retroactivity issue in a civil case alleging legal malpractice. *See Ereth v. Cascade County*, 2003 MT 328, 318 Mont. 355, 81 P.3d 463. In *Ereth*, which was decided in December of 2003, the Montana Supreme Court adopted a new rule regarding the accrual of a legal malpractice cause of action for parties convicted of criminal offenses. *See Ereth*, ¶¶ 26-27. After adopting the new rule, the Supreme Court turned to the *Chevron Oil* test to determine if its decision should apply retroactively. *See Ereth*, ¶¶ 28-30. After examining and applying the *Chevron Oil* factors, the Supreme Court decided that the new rule applied prospectively only, except as to Ereth's claim. *See Ereth*, ¶¶ 30-32. Therefore, *Ereth* affirms the validity of the *Chevron Oil* test for determining retroactivity in civil cases. Accordingly, it is necessary to apply *Chevron Oil* to *Schmill* to determine whether it applies retroactively.

II. THE *CHEVRON OIL* TEST NECESSITATES A CONCLUSION THAT *SCHMILL* APPLIES PROSPECTIVELY ONLY

The Montana Supreme Court has repeatedly noted that courts must consider the three factors set forth in *Chevron Oil* in order to determine whether a judicial decision avoids retroactive application:

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.

See e.g. Benson, ¶ 24 (quoting *Riley v. Warm Springs St. Hosp.* (1987), 229 Mont. 518, 521, 748 P.2d 455, 457). Notably, if any of the three factors are satisfied, then

retroactive application of a judicial decision is improper. *See Poppleton v. Rollins, Inc.* (1987), 226 Mont. 267, 271, 735 P.2d 286, 289; *Montana Bank of Roundup, N.A. v. Musselshell County Bd. of Commrs.* (1991), 248 Mont. 199, 205, 810 P.2d 1192, 1196 (holding that retroactive application was improper because the decision was not clearly foreshadowed). As set forth below, *Schmill* avoids retroactive application because all three *Chevron Oil* factors weigh in favor of prospectivity.

A. *Schmill* Should Not Be Applied Retroactively Because The Decision Established A New Principle Of Law Whose Result Was Not Clearly Foreshadowed.

A judicial decision will avoid retroactive application if it establishes a new principle of law by deciding an issue of first impression whose result was not clearly foreshadowed. *See Benson*, ¶ 24. The result in *Schmill* was not foreshadowed. Prior to *Schmill*, the ODA's apportionment statute codified at Montana Code Annotated § 39-72-706 – which was presumptively valid[3] – had never been challenged or found to violate the equal protection clause. The Montana Supreme Court had, however, analyzed a similar equal protection argument concerning the difference in the degree of benefits payable to claimants under the ODA versus the WCA. *See Eastman v. Atlantic Richfield Co.* (1989), 237 Mont. 332, 777 P.2d 862. In *Eastman*, the claimant, a welder for ARCO, was diagnosed with chronic obstructive pulmonary disease, which led to steroid dependency that caused severe physical and emotional problems. Because Eastman suffered from an OD rather than an injury, his partial disability benefits were limited to $10,000 under § 405 of the ODA. However, Eastman claimed an entitlement to benefits under § 703 of the WCA. In denying benefits to Eastman, the Supreme Court concluded:

> We hold that there is a rational basis for the benefits awarded under the Occupational Disease Act and that the claimant has failed to establish a violation under the equal protection clauses of the Montana Constitution and of the Constitution of the United States.

Eastman, 237 Mont. at 339, 739 P.2d at 866.

Nine years after *Eastman*, the Court examined an equal protection argument concerning the availability of rehabilitation benefits to claimants whose benefits were governed by the WCA versus the wholesale denial of those benefits to

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[3] *See generally In re Hayes v. Lame Deer High Sch. Dist.*, 2000 MT 342, ¶ 9, 303 Mont. 204, ¶ 9, 15 P.3d 447, ¶ 9.

claimants whose benefits were governed by the ODA. *See Henry*. In *Henry*, the claimant argued that providing rehabilitation benefits to workers who suffered injuries but not to workers who contracted occupational diseases violated the equal protection clause of the Montana Constitution. *See Henry*, ¶ 26. In addressing the constitutional challenge, the Montana Supreme Court concluded that providing rehabilitation benefits to workers covered by the WCA but denying those benefits to workers covered by the ODA was not rationally related to the legitimate governmental interest of returning workers to work as soon as possible after they have suffered a work-related injury. *Henry*, ¶¶ 44-45.

Like *Eastman*, *Schmill* involves the difference in the degree of benefits payable to workers whose occupational diseases are governed by the ODA as opposed to the WCA. Unlike *Henry*, the apportionment statute does not concern a wholesale denial of a certain type of benefits. The Montana Supreme Court expressly approved the constitutional analysis from *Eastman* in a 1993 case, which underscores the notion that until *Schmill*, the difference in the degree of benefits payable under the ODA was constitutionally permissible under Montana Law. *Stratemeyer v. Lincoln County* (1993), 259 Mont. 147, 154, 855 P.2d 506, 511 (citing to *Eastman*, with approval, on two separate instances when discussing an equal protection argument concerning the rational bases behind the remedies and benefits the legislature made available to claimants). Therefore, at the time of the *Schmill* litigation, the prevailing law in Montana was that the difference in the degree of benefits payable to occupational disease claimants versus workers' compensation claimants was not violative of the equal protection clause. Although the Court in *Schmill* had an opportunity to specifically overrule *Eastman*, it chose not to and instead distinguished it from Schmill's situation because Eastman was a pro se claimant whose briefing was allegedly inadequate. *See Schmill*, ¶ 13. However, several amici briefed both sides of the *Eastman* argument on rehearing, and Eastman's legal theories were sufficiently developed on appeal.[4] (*See* State Fund's Motion for Judicial Notice and Memorandum in Support, *Stavenjord v.*

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[4] Although Eastman appeared pro se, the *Motion for Judicial Notice and Memorandum In Support*, the *Order Taking Judicial Notice* and the *Register of Action* in *Eastman* all establish that amicus counsel argued on Eastman's behalf and fully and competently briefed the appellate issues, including the constitutional one. As those documents indicate, after the *Eastman* decision on May 10, 1989, two amicus curiae briefs were filed on Eastman's behalf in relation to the Motion for Rehearing. Although the Motion for Rehearing was denied on August 31, 1989, it is clear that amicus counsel zealously represented Eastman's interests on appeal.

State Compen. Ins. Fund, Mont. Sup. Ct. No. 01-630 (Apr. 2, 2002), a copy of which is attached hereto as Ex. "A"; Order Taking Judicial Notice, *Stavenjord v. State Fund*, Mont. Sup. Ct. No. 01-630 (Apr. 9, 2002), a copy of which is attached hereto as Ex. "B.")

Employers and insurers justifiably relied on the *Eastman* decision and the presumed validity of Montana Code Annotated § 39-72-706 to determine entitlement and set rates. In fact, the court had accepted § 706's apportionment as appropriate on several prior occasions. *Torres v. State* (1995), 273 Mont. 83, 92, 902 P.2d 999, 1005 (noting that claimants are entitled to recover under § 706 the portion of their disability benefits which arises out of employment); *Hughes v. Department of Lab. & Indus.* (1992), 253 Mont. 499, 504, 833 P.2d 1099, 1102 (§ 706 "limits the insurer's liability to the proportion of the disability caused by an occupational disease"); *Nelson v. Semitool, Inc.* (1992), 252 Mont. 286, 290, 829 P.2d 1, 3 (stating that compensation for an OD is reduced by the portion attributable to other causes); *McMahon v. Anaconda Co.* (1984), 208 Mont. 482, 488, 678 P.2d 661, 664 (discussing apportionment under § 706). Thus, the holding in *Schmill* was contrary to the existing law in Montana at the time and was also contrary to the express language of the apportionment statute.

Because no case had ever disturbed the apportionment provision of the ODA prior to *Schmill,* the decision invalidating § 706 of the ODA was akin to a new rule of law. Such a drastic change in the rights of claimants and the obligations of insurers was not clearly foreshadowed, a point further confirmed by the fact that the Montana Supreme Court's decision was by a 5-1 majority (it appears that Justice Rice had no role in the *Schmill* decision, nor was he replaced by a sitting district court judge). Common sense dictates that if the result in *Schmill* was "clearly" foreshadowed, then the decision would have been a unanimous 6-0. However, for the same reasons stated in her lengthy and well-reasoned dissent in *Stavenjord*, Chief Justice Gray dissented. *See Schmill*, ¶ 24. Based on the foregoing, it is apparent that *Schmill* established a new principle of law whose result was not clearly foreshadowed. Therefore, the first factor of the *Chevron Oil* test is satisfied, making retroactive application of *Schmill* improper. Accordingly, this Court should deny the request by Schmill's counsel to apply the decision retroactively to July 1, 1987.

B. *Schmill* Should Not Be Applied Retroactively Because Retroactive Application Will Not Further The Rule's Operation.

A judicial decision will avoid retroactive application if retroactivity will not further the rule's operation. *See Benson*, ¶ 24. In analyzing retroactivity, it is clear that the first and third factors receive the most scrutiny and the second factor is often overlooked, sometimes completely. *See Montana Bank*, 248 Mont. 199, 810 P.2d 1192. However, in evaluating the second factor, it is appropriate to consider the history, purpose and

effect of the rule in question. *See LaRoque*, 583 P.2d at 1061. 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, ¶ 30. *See also Miller*, ¶¶ 27-30 (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).

Here, unlike in *Miller* and *Broeker*, *Schmill* did not involve a "garden variety" statutory interpretation. Instead, like in *Ereth*, *Schmill* established a new principle of law, one which was contrary to express statutory language and contrary to the specific holding in *Eastman* on a similar issue concerning the difference in the degree of benefits payable under the WCA versus the ODA. Further, *Schmill* was contrary to the implicit approval the Montana Supreme Court had given to § 706 on several prior occasions. Consistent with the reasoning in *Ereth*, retroactive application would not further operation of the *Schmill* holding because occupational disease claimants and attorneys are now aware of the inability to apportion benefits based on non-occupational factors under § 706 of the ODA. Stated differently, it is clear that prospective application will not weaken the policy for disallowing apportionment on OD claims because that prohibition now exists for all claims occurring on or after June 22, 2001. *See* Stipulation Regarding Prospective Claims (Feb. 13, 2004). Because a prospective application will not weaken the rule in any respect or retard its operation, the second factor of the *Chevron Oil* test is satisfied, making retroactive application of *Schmill* improper.

C. *Schmill* Should Not Be Applied Retroactively Because Retroactive Application Will Result In A Substantial Inequity.

A judicial decision will avoid retroactive application if retroactive application will result in a substantial inequity. *See Benson*, ¶ 24. 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 Oil* 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 *Schmill* is applied retroactively; the focus should not be on the inequities that might result to certain claimants if *Schmill* is applied prospectively only. This approach makes sense because someone receiving a windfall with retroactive application would always benefit, thereby nullifying the standard. Here, applying *Schmill* retroactively would be inequitable because it will result in a substantial administrative and financial hardship on the State Fund.

If *Schmill* is applied retroactively to July 1, 1987, all claimants similarly situated with Schmill over the past fourteen years would be allowed to reopen 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 reviewing each file to determine what apportionment was taken and how the apportioned amount was calculated. 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 significant financial impact due to the benefit costs, administrative costs and unquantified soft costs associated with implementing *Schmill* retroactively.

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

Locating files which are stored on various media types is a labor-intensive, manual process which would pose an enormous administrative burden on the State Fund. A file's media type is determined by what storage system was in place at the time the file was closed. 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. The records person will then check the records for each claim. A simple search may take ten minutes, but a complex search on one file may take three hours or longer.

Files that closed from 1976 through 1994 are stored on microfiche. The state's Records Retention Division maintains the original microfiche. Microfiche may be either copied to other microfiche or may be copied to paper by the State Auditor's Office. 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. The State Fund 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.

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. In 1999, the State Records Retention Committee approved the State Fund's optical imaging system as its primary means of records retention. Six months after that approval, the State Fund destroyed all of its paper files. Optically imaged documents can be retrieved via the State Fund's 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.

Additionally, the Old Fund unit, which handles claims arising on or before June 30, 1990, stores paper files on site. When these files are closed, the original documents are microfiched and the paper files are destroyed. The adjuster in the Old Fund unit retrieves paper files, which can be disassembled and photocopied. 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.

Thus, the time required to retrieve files 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. Because claims which have been closed and re-opened may be stored on multiple or all media types, a *Schmill* 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 Oil* test.

2. 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. The DBO2 system was used to transfer claim information to the Department of Labor & Industry. During the interval from 1982 to 1997, claims usually were coded as an injury or an occupational disease on the paper file and this information may have been inputted into the DBO2 system. 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. 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.

Unlike the DBO2 system, the CMS system serves as claims handling software and the State Fund uses it to assist in adjusting claims. Some occupational disease claims may be erroneously coded as injuries – and some injury claims may be erroneously coded as occupational diseases – because the coding of a claim as an occupational disease is not necessary in order to adjust the claim as an occupational disease. However, improper coding of claims is more likely to be an issue on claims filed prior to February of 1997, when the DBO2 system was in place and the paper file was the primary working file.

Under both the DBO2 system and the CMS system, occupational disease claims may not be consistently coded as such, making a computerized "sort and search" function a useful, but not comprehensive, mechanism for identifying affected claims. Although a single computer run will not locate all the occupational disease claims, a complex computer query by the State Fund – which took four hours to formulate and eight hours to run – identified 2,939 claims that were coded as occupational diseases with onset dates occurring on or after July 1, 1987. An additional 586 claims were coded as injuries but the nature of the reported injury may be consistent with an occupational disease, and another 18 claims had a status as an injury but the benefit transaction (i.e., payment) was coded as an occupational disease.

Because of improper coding errors and issues with data transfer, manually reviewing each of the 3,543 potential files may be the only reliable means of identifying affected claims. Claim files will need to be reviewed to determine what apportionment was taken and how the apportioned amount was calculated. Obviously, a manual review process – especially one involving 3,543 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 retroactive application improper under the *Chevron Oil* test.

3. The potentially significant financial impact of the benefit costs associated with a retroactive application of *Schmill* would impose a substantial hardship on the State Fund.

The administrative and benefit costs of applying *Schmill* retroactively will have a cost impact on employers, policyholders, and the State Fund. Workers' compensation

ratemaking is prospective, as insurance rates are developed prior to the transfer of risk. 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. Ratemaking in the years prior to *Schmill* did not take into consideration the potential increase in non-apportioned benefits which may be owed to employees with occupational diseases, if *Schmill* is applied retroactively. NCCI, which is a non-profit rating, statistical and data management service, has estimated that the prospective costs associated with *Schmill* will result in a 0.3% rate increase, or $456,000,[5] for the period beginning July 1, 2003.

The State Fund has estimated the cost of benefits associated with a retroactive application of *Schmill*. For claims arising between July 1, 1990 and June 22, 2001, the date of this Court's decision, the increase in gross value benefit costs is estimated at $1.4 to $1.9 million. Notably, this amount does not include the significant administrative costs associated with a retroactive application, like the unquantified soft costs related to adjuster time in locating files, retrieving files, accessing antiquated computer databases, reviewing claim information and calculating non-apportioned entitlement. Additionally, legal costs and fees are not included in this amount. The financial impact of retroactively applying *Schmill* 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 2003 was $121.6 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. Surplus is the amount of money available, over and above liabilities, for an insurer to meet future obligations to its policyholders and injured workers. 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. 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. 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. Further, unlike a stockholder-owned insurance company, the State Fund cannot access additional capital to cover adverse financial results.

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[5] Similarly, the Insurance Service Offices, Inc. ("ISO") estimates that the prospective costs associated with *Schmill* will result in a 0.2% rate increase.

The State of Montana experienced the insolvency of the Old Fund in the 1980s, which was caused by inadequate pricing and reserves. During that time, many private sector insurers left Montana. A strong surplus, along with adequate loss reserves, allows the State Fund to continue to operate as a strong and viable insurance carrier. 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. The State Fund's long-range target is to have a reserve-to-surplus ratio of 1.5-2.0 to 1. The higher the ratio, the less adequate the reserve. For 2003, the reserve-to-surplus ratio was 3.4 to 1.

The State Fund's surplus levels would be impaired as a result of the gross value estimate of $1.4 to $1.9 million in overall retroactivity benefit costs for the State Fund. The State Fund would have to increase its current rates in order to absorb the impact of benefit costs associated with a retroactive application of *Schmill*. Since fiscal year 2002, the State Fund has had to raise its rates by a total of 17.1%, including 11.6% in fiscal year 2004 alone. Increases due to the depletion of surplus funds as a result of *Schmill* would cause rates to increase even more. However, having current policyholders pay for the risk and expense of past claims targets the wrong policyholders. In addition to the significant financial impact the State Fund would experience if *Schmill* is applied retroactively, the Old Fund would be impacted by an estimated $800,000 in gross value benefit costs for claims arising between July 1, 1987 and June 30, 1990. The 2002 special session and the 2003 Legislature transferred more than $26 million from the Old Fund, and it now has the potential to become unfunded. Should the Old Fund be inadequately funded in the future, any amount necessary to pay claims must be transferred to the Old Fund from the State of Montana General Fund, which is used for other state purposes.

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).[6] All dividends, including the ones paid in

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[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

2001, 2002 and 2003, 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 *Schmill* and other common fund cases.

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 and Order Regarding Retroactivity and Attorney Fees ¶ 37, *Flynn v. State Compen. Ins. Fund*, 2003 MTWCC 55 (Aug. 5, 2003) (citation omitted). Clearly, the costs of benefits associated with a retroactive application of *Schmill* will have a significant financial impact on the State Fund and the Old Fund, and it may cause the Old Fund to become unfunded. In addition to the estimated total gross value benefit costs of $2.2 to $2.7 million, the State Fund – on behalf of itself and the Old Fund – would have to absorb significant soft costs, administrative expenses and legal fees to adjust files retroactively. Whether analyzed individually or collectively, the effect of the benefit costs, administrative costs and the massive administrative efforts required to comply with retroactive application of *Schmill* militates against retroactivity.

D. *Schmill* Should Not Be Applied Retroactively Because It Would Constitute An Unconstitutional Impairment Of Contract Between The State Fund And Its Policyholders.

Statutes are presumed to be constitutionally valid and enforceable. *In re Hayes*, ¶ 9. Montana Code Annotated § 39-72-706 was first enacted in 1959 and withstood scrutiny for nearly 50 years, until the 2003 decision in *Schmill*. 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 the payment of apportioned benefits under the ODA.

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. Co. v. Great N. Ry. Co.* (1932), 91 Mont. 194, 7 P.2d 919, 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 v. State Compen. Mut. Ins. Fund* (1997), 283 Mont. 210, 219, 942 P.2d 69, 74 (citation omitted);

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workers' compensation system to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease.

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, 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 (the Court declined to legislate retroactively); *Continental Supply Co. v. Abell* (1933), 95 Mont. 148, 24 P.2d 133, 140 ("'A change in the judicial view of the law by a subsequent decision could not amount to more than a change in the law by legislation, and, of course, could act prospectively only.") (citation omitted).

As discussed above, the *Eastman* decision held that the difference in the degree of benefits payable to ODA claimants versus WCA claimants was constitutionally permissible. The State Fund justifiably relied on prior decisional law and the presumed validity and enforceability of § 706, and the statute became part of the contracts entered into between the State Fund and its policyholders. Therefore, a retroactive application of *Schmill* is impermissible because it would unconstitutionally impair those contracts and produce substantial harm. Further, a retroactive application would require invalidation of apportionments taken under § 706 even in those cases in which the Court approved of the statute's applicability, as mentioned in Section II(A). 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, *Schmill* should not apply retroactively.

E. No Judicial Mandate Exists Which Requires The Automatic Retroactive Application Of A Judicial Decision That Finds A Statute Unconstitutional.

The State Fund anticipates that Schmill will argue that *Schmill* must automatically be given retroactive application because it held that Montana Code Annotated § 39-72-706 unconstitutionally violated the equal protection clause of the Montana Constitution. The State Fund acknowledges *Schmill* held that the apportionment statute violated the equal protection clause. *Schmill*, ¶ 23 ("[W]e conclude that § 39-72-706, MCA, violates the equal protection guarantee found at Article II, Section 4 of the Montana Constitution."). However, no judicial mandate requires the automatic retroactive application of a decision which finds a statute unconstitutional.

In support of her argument for automatic retroactivity, Schmill will presumably rely on *Trusty v. Consolidated Freightways* (1984), 210 Mont. 148, 681 P.2d 1085, a case involving the first version of Montana's offset statute. In *McClanathan v. Smith* (1980), 186 Mont. 56, 606 P.2d 507, the Montana Supreme Court struck down as constitutionally unenforceable the first version of the offset provision codified at 39-71-702(2), which allowed for a 100% offset. As a result, the Court in *Trusty* had to examine the effect of *McClanathan* on Trusty's claim because his injury occurred during the period when the 100% statute was in effect. The insurer wanted to apply the 50% offset statute to Trusty's injury, even though it was enacted after his injury. The Court noted that *McClanathan* concluded the 100% offset statute was constitutionally unenforceable, which meant that § 702's offset provision was void. With no offset remaining in effect, the Court concluded that no offset could apply to Trusty's claim. *See Trusty*, 210 Mont. at 151-152, 681 P.2d at 1087-1088.

Notably, as in *Kleinhesselink*, *Haugen* and *Porter*, *Trusty* contains no in-depth discussion of retroactivity. *Haugen*, 279 Mont. at 8, 926 P.2d at 1368 (in giving retroactive application to a decision which changed a procedural matter under Montana Rules of Civil Procedure 41(e), the Court neglected to apply *Chevron Oil* but instead noted that judicial decisions on procedural matters may be applied retroactively); *Kleinhesselink*, 277 Mont. at 162 , 920 P.2d at 111 (in applying *Stratemeyer* retroactively because it was decided shortly after Kleinhesselink filed his notice of appeal, the Court failed to analyze retroactivity and instead cited to *Porter*, a case which examined the retroactive application of a statute rather than a judicial decision); *Porter*, 275 Mont. at 182-185, 911 P.2d at 1148-1150 (briefly mentioning *Harper* in dicta but the decision addressed the retroactive application of a statutory amendment to Montana's Scaffolding Act rather than the retroactive application of a judicial decision). Although the decision was written twelve years after *Chevron Oil* was published, the test for non-retroactivity was not even mentioned in the decision. Instead, without any analysis, the

Trusty opinion simply states: "To apply this 50% offset statute [which was enacted after Trusty's injury and was not in existence at the time of his claim] would produce retroactive application of the law." *Trusty*, 210 Mont. at 152, 681 P.2d at 1088. Had the Court invoked the *Chevron Oil* test and applied it to the *McClanathan* decision, the ultimate decision in *Trusty* may have been different. Like in *Kleinhesselink*, *Haugen* and *Porter*, the Court's failure to properly analyze retroactivity undermines the applicability of those cases to retroactivity issues. Accordingly, *Trusty* does not mandate the automatic retroactive application of *Schmill*.

1. The Montana Supreme Court has applied the *Chevron Oil* test to cases in which statutes were found to be unconstitutional.

The Montana Supreme Court has recently applied *Chevron Oil* to determine the potential retroactive application of a decision which found a statute unconstitutional. *See Seubert*, 301 Mont. 399, 13 P.3d 365. As discussed above, the Montana Supreme Court in *Seubert* held that Montana Code Annotated §§ 40-5-272 and -273 unconstitutionally violated the separation of powers clause because they allowed the Child Support Enforcement Division to modify a district court child support order. *See Seubert*, ¶ 25. In addressing the retroactive effect of this decision in the civil context, the Supreme Court applied the *Chevron Oil* test and ultimately determined that the decision should apply prospectively only, with the logical exception that the decision applied with full force to the litigants in the case, Camille and Russell Seubert. *See* Order Clarifying Decision on Grant of Rehearing, *Seubert*, ¶ 56 (citing *Holmberg v. Holmberg*, 588 N.W.2d 720 (Minn. 1999)).

A similar result occurred in *Sheehy v. State* (1991), 205 Mont. 437, 820 P.2d 1257. In that case, the plaintiffs brought a class action suit against the State for refunds of taxes paid from 1983-1988 on the retirement benefits they received under the Federal Employees' Retirement Act. The plaintiffs challenged the constitutionality of Montana Code Annotated § 15-30-111(2)(c)(i) (1989), which allowed the State to collect income tax on FERA benefits in excess of $3,600. The legal basis for the suit was premised upon *Davis v. Michigan Dept. of Treas.*, 489 U.S. 803 (1989), a United States Supreme Court case which held that a similar statute in Michigan was unconstitutional. The parties agreed that Montana Code Annotated § 15-30-111(2)(c)(i) was unconstitutional, and the plaintiffs were essentially seeking to have *Davis*, and its finding that these types of taxation statutes were unconstitutional, applied retroactively. In analyzing the issue, the Court undertook a detailed application of the *Chevron Oil* test to the facts of *Sheehy*. The Montana Supreme Court concluded that even though *Davis* required a finding of an unconstitutional statute, the decision was not clearly foreshadowed, retroactive application would not promote the concept of

intergovernmental tax immunity[7] and retroactivity would be inequitable. Therefore, the court held that *Davis* applied prospectively only and did not entitle the plaintiffs to a refund from the State for any taxes paid under Montana Code Annotated § 15-30-111(2)(c)(i) (1989). *See Sheehy*, 250 Mont. at 441-446, 820 P.2d at 1260-1262.

Although *Sheehy* was later abrogated by the United States Supreme Court decision in *Harper*, it still provides persuasive guidance to the retroactivity analysis in Montana because the *Chevron Oil* test is still used in this State. Accordingly, *Seubert* and *Sheehy* establish that in Montana, decisions which find a statute unconstitutional are not automatically applied retroactively.

2. Other jurisdictions have also applied the *Chevron Oil* test to cases in which statutes were found to be unconstitutional.

The Kansas Supreme Court has noted that the determination of whether a judicial decision which "holds statutory law to be unconstitutional should be applied prospectively or retroactively has been the subject of literally hundreds, if not thousands, of cases." *Sharp v. State*, 827 P.2d 12, 16 (Kan.1992). Obviously, some jurisdictions automatically apply judicial decisions retroactively if there is a finding of an unconstitutional statute. However, Montana's position represents the more modern approach to retroactivity and finds ample support in cases from other jurisdictions. *See generally Salorio* (noting that the traditional view is that an unconstitutional act is void from its inception and everything done under it must be undone, whereas the modern and better-reasoned rule is that the invalidation of a statute does not automatically invalidate all prior transactions made in justifiable reliance upon the statute). In *Salorio*, the New Jersey Supreme Court concluded that a statute levying an emergency transportation tax on New York residents who commuted to New Jersey was unconstitutional. However, the court held that its decision and invalidation of the emergency transportation tax statute would only apply prospectively. *See Salorio*, 461 A.2d 1100. Cases from other jurisdictions follow the same line of reasoning as Montana and New Jersey. *See e.g. Simmers v. Packer*, 680 A.2d 904, 906-907 (Pa. 1996) (holding that a prior decision, which declared unconstitutional a statute permitting courts to order parents bound by child support obligations to provide equitably for their children's educational costs, applied prospectively only); *Lovell v. Lovell*, 378 S.2d 418 (La. 1979) (finding an alimony statute unconstitutional as violative of equal protection

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[7] In *Davis*, the United States Supreme Court held that the doctrine of inter-governmental tax immunity prohibited a state from imposing taxes on the retirement income of federal employees but not state employees.

but holding that the decision would not be applied retroactively); *John E. v. Doe*, 164 A.D.2d at 388) ("Accordingly, when a statute is declared unconstitutional, there is room to withhold retroactive application where there has been good faith reliance on the statute, coupled with a demonstrably inequitable result"); *Vaughn v. Murray*, 521 P.2d 262, 270 (Kan. 1974) ("It has been said that an all inclusive statement of a principle of absolute retroactive invalidity [when a statute is found to be unconstitutional] cannot be justified") (citation omitted).

Based on *Sheehy* and *Seubert*, and consistent with the judicial approaches taken in other jurisdictions, no judicial mandate exists which requires courts to automatically apply a decision retroactively if the decision finds a statute unconstitutional. To the contrary, the more modern and better-reasoned approach is to continue to evaluate the potential retroactive application of *Schmill* under the *Chevron Oil* test. Accordingly, Schmill's anticipated argument for an automatic retroactive application should be disregarded. For all the reasons stated in Section II, *Schmill* should be applied prospectively only.

3. The payment of benefits to Schmill herself does not entitle other claimants to also receive retroactive payment of *Schmill*-type benefits.

The State Fund also anticipates that Schmill will argue that *Schmill* has already been applied retroactively because she received increased benefits as a result of the decision. However, new decisions often operate retroactively upon the parties to the overruling case itself but prospectively as to all other parties. This approach provides incentive for litigants to continue pursuing lawsuits which attempt to have outdated or unjust rules overturned. As noted above, this is exactly what the Supreme Court did in *Seubert*, when it held that the decision would have prospective application except as to the Seuberts. *See* Order Clarifying Decision on Grant of Rehearing, *Seubert*, ¶ 56 (citing *Holmberg*). *See e.g. Lyons v. Westinghouse Elec. Corp.*, 235 F. Supp. 526 (S.D.N.Y. 1964) (although the overruling decision was retroactively applicable to the parties to the overruling case, it did not follow that the decision should be given general retroactive effect to other cases). Accordingly, applying a decision retroactively to the litigants involved in the case which establishes a new rule of law, but denying general retroactive application to other claimants, finds support in Montana law and law from other jurisdictions and is consistent with the policy of encouraging litigants to challenge laws they feel are unconstitutional or outdated. Accordingly, the payment of any benefits to Schmill does not require retroactive application of the *Schmill* decision to all other similarly situated claimants.

III. IF *SCHMILL* APPLIES RETROACTIVELY, ITS RETROACTIVITY SHOULD BE LIMITED TO CLAIMS ARISING ON OR AFTER JUNE 3, 1999, THE DATE OF THE MONTANA SUPREME COURT'S DECISION IN *HENRY V. STATE FUND*

As discussed above in Section II(A), a judicial decision avoids retroactive application if its result was not clearly foreshadowed. The State Fund has already explained why *Schmill* was not clearly foreshadowed, especially in light of *Eastman*. If this Court disagrees and finds that the *Schmill* result was clearly foreshadowed, then the State Fund alternatively asserts that the retroactive application of *Schmill* should be limited to June 3, 1999, the date of the Montana Supreme Court's decision in *Henry*.

As previously explained, the legal issue in *Eastman* was similar to the issue in *Schmill* because both involved the difference in the degree of benefits payable to an occupational disease claimant as opposed to a workers' compensation claimant. On the other hand, *Henry* involved a wholesale denial of benefits (rehabilitation benefits) to occupational disease claimants. In *Henry*, the claimant alleged that providing rehabilitation benefits to workers who suffered injuries but not to workers who contracted occupational diseases violated the equal protection clause of the Montana Constitution. *See Henry*, ¶ 26. In addressing the constitutional challenge, the Montana Supreme Court stated:

> In sum, we can see no rational basis for treating workers who are injured over one work shift differently from workers who are injured over two work shifts. . . .
>
> We conclude that providing rehabilitation benefits to workers covered by the WCA, but not to workers covered by the ODA, is not rationally related to the legitimate governmental interest of returning workers to work as soon as possible after they have suffered a work-related injury. We hold that the ODA violates the equal protection clause of the Montana Constitution to the extent that it fails to provide vocational rehabilitation benefits.

Henry, ¶¶ 44-45. *Schmill* relied on this language and determined that *Henry* compelled a holding that Schmill was entitled to receive non-apportioned benefits. *Schmill*, ¶¶ 17-23.

Prior to *Henry*, no case had disturbed the differences in the amount of benefits payable under the ODA versus the WCA. Although *Henry* questioned the validity of *Eastman*, it did not overrule it. Given *Eastman* and its holding that the difference in the degree of benefits payable under the ODA versus the WCA was constitutionally

permissible, the *Schmill* decision was not "clearly" foreshadowed. However, if this Court determines that the *Schmill* result was foreshadowed, it was foreshadowed only by the holding of an equal protection violation in *Henry* and the statement that there was no rational basis for treating workers who are injured over one shift differently from workers who are injured over two work shifts. Therefore, this Court should limit the retroactive application of *Schmill* to June 3, 1999, the date of *Henry*, because that was the first time the Montana Supreme Court alluded that the difference in benefits payable under the two acts violated the Equal Protection Clause. Accordingly, at a maximum, the only claims subject to retroactive application should be claims with entitlement dates from June 3, 1999 through June 21, 2001.

IV. THE COMMON FUND DOCTRINE IS NOT APPLICABLE TO *SCHMILL*

The often-quoted language from the Montana Supreme Court's decision in *Murer* explains part of the rationale behind the common fund doctrine:

> [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.

Although the above language from *Murer* has formed the basis for the recent flood of common fund litigation, equally important language from *Murer*, which underscores the purpose of the doctrine, has been completely overlooked during the common fund onslaught. However, adherence to the forgotten *Murer* guidelines places 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 analogous to *Murer*, attorneys like Schmill's counsel 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*, Schmill's economic stake in her litigation was significant because her apportionment claim involved several thousand dollars, which justified the legal expense necessary to challenge the disparate treatment. Further, Schmill made a demand for *Stavenjord*-type benefits, which served as an additional economic justification for pursuing her claim. Therefore, the State Fund asserts the common fund doctrine is inapplicable to the *Schmill* decision.

V. THE FAILURE OF SCHMILL'S COUNSEL TO PLEAD AB INITIO AN ENTITLEMENT TO COMMON FUND ATTORNEY FEES OR CLASS CERTIFICATION IN THE PRE-REMAND PROCEEDINGS BARS HER POST-REMAND REQUEST FOR COMMON FUND ATTORNEY FEES

As previously noted in Section IV, common fund fees were recognized and awarded in *Murer*, the seminal case addressing such an award in a workers' compensation setting. *See Murer*. Three years after *Murer*, at a time when Schmill's counsel had actual and constructive notice of the potential availability of common fund fees, she specifically chose not to seek common fund fees or class certification in the pre-remand proceedings. Instead, she waited until July 11, 2003 – which was over three months after the Montana Supreme Court's decision in this matter and nearly two years after the Petition for Hearing was filed – to plead an entitlement to common fund attorney fees. (*See* Notice of Attorney Fee Lien (July 11, 2003).)

A. Schmill's Counsel Has Waived Her Claim For Common Fund Attorney Fees By Failing To Plead An Entitlement To Those Fees In The Pre-Remand Proceedings.

Parties waive their right to attorney fees if they fail to initially plead them. *See* Admin. R. Mont. 24.5.301(3). Here, it is undisputed that Schmill's counsel made no claim for common fund attorney fees until after the Montana Supreme Court's decision in *Schmill*. In *Flynn*, this Court stated that the failure to initially plead an entitlement to common fund attorney fees does not bar a later claim for those fees because state courts have allowed after-the-fact attorney fee claims. *See Flynn*, ¶¶ 8-14. However, the cases discussed in *Flynn* either contained a catchall prayer for relief which

encompassed a general claim for attorney fees, or the award of attorney fees was authorized by a governing statute. Here, no catchall phrase appears in Schmill's Petition for Hearing,[8] and the award of common fund attorney fees is not authorized by any specific statute. Further, based on the *Murer* decision, Schmill's counsel had notice of her potential entitlement to common fund fees, and the State Fund asserts that the failure of Schmill's counsel to initially plead an entitlement to common fund fees constitutes a waiver of that claim.[9]

B. The Doctrine Of Res Judicata Prohibits Schmill's Counsel From Claiming An Entitlement To Common Fund Attorney Fees For The First Time In Post-Remand Proceedings.

In addition to waiver, the doctrine of res judicata prohibits Schmill's counsel from claiming an after-the-fact entitlement to common fund attorney fees. The doctrine of res judicata bars a party from re-litigating matters the party already had the opportunity to litigate. *Glickman v. Whitefish Credit Union Assn.* (1998), 287 Mont. 161, 166, 951 P.2d 1388, 1391; *Balyeat Law, P.C. v. Hatch* (1997), 284 Mont. 1, 942 P.2d 716, 717. The

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[8] Schmill's prayer for relief states in full:

> WHEREFORE, the Claimant respectfully prays that this Petition be set for hearing in Missoula, Montana; that the Claimant be allowed to introduce evidence in support of this Petition; and that the Court rule in favor of the Claimant on the issues outlined above by finding and ordering that:
>
> 1. The Claimant is entitled to impairment award benefits as a result of the aforementioned occupational disease.
>
> 2. In accordance with section 39-71-611 or 612, MCA, the Respondent shall pay reasonable costs and attorney fees established by the Court.

Pet. For Hrg. (Mar. 9, 2001).

[9] As argued in *Flynn*, the State Fund also contends that Schmill's counsel is estopped from claiming an entitlement to common fund fees because such a claim is inconsistent with her initial position in the WCC, i.e., that she was not seeking common fund attorney fees at all.

Court examines the following four criteria to determine if a prior claim is res judicata as to a subsequent claim:

1. the parties are the same;

2. the subject matter is the same;

3. the issues are the same and relate to the same subject matter; and

4. the capacities of the parties are the same in reference to the subject matter and issues.

Fisher v. State Farm Gen. Ins. Co., 1999 MT 308, ¶ 10, 297 Mont. 201, ¶ 10, 991 P.2d 452, ¶ 10 (citations omitted).

Here, all four elements are met because the post-remand litigation involves the same parties and capacities as well as the same subject matter. The only difference is that the State Fund has a status of an intervenor. As previously noted, Schmill's counsel had an opportunity to raise and argue an entitlement to common fund fees in the pre-remand proceedings. Because she failed to do so, the doctrine of res judicata prohibits her from raising the issue on remand.

In *Flynn*, this Court stated that the doctrine of res judicata was inapplicable because the doctrine only applied to claims which could have been litigated in another lawsuit, not in the same action. *See Flynn*, ¶ 18. However, res judicata bars claims in a subsequent proceeding based on the same cause of action, whereas the related doctrine of collateral estoppel bars the reopening of an issue in a second cause of action that has been litigated and determined in a prior lawsuit. *See generally Rausch v. Hogan*, 2001 MT 123, ¶¶ 14-15, 305 Mont. 382, ¶¶ 14-15, 28 P.3d 460, ¶¶ 14-15 (citation omitted). Accordingly, res judicata should serve to prohibit Schmill's counsel from claiming an entitlement to common fund attorney fees in the subsequent post-remand proceedings. Therefore, her claim for common fund attorney fees should be denied.

VI. IF COMMON FUND FEES ARE APPROPRIATE AND *SCHMILL* APPLIES RETROACTIVELY, THEN THE STATE FUND ASSERTS THAT THE GLOBAL LIEN OF SCHMILL'S COUNSEL SHOULD APPLY WITH EQUAL FORCE TO ALL INSURERS AND SELF-INSURERS IN THE STATE OF MONTANA

This Court has asked the parties to address the potential global effect of the

common fund attorney fee lien filed by Schmill's counsel. The State Fund addressed the issue of global attorney fees in its amicus brief in *Ruhd v. Liberty Nw. Ins. Corp.*, Montana Supreme Court No. 03-504. Oral argument in *Ruhd* occurred on March 24, 2004, and the decision in *Ruhd* will likely determine whether the lien of Schmill's counsel applies to just Liberty and the State Fund or to all insurers and self-insurers in Montana.

As the State Fund noted in its amicus brief, occupational disease and workers' compensation benefits in Montana are determined by the statutes in effect on the date of a claimant's injury. *Buckman v. Montana Deaconess Hosp.* (1986), 224 Mont. 318, 730 P.2d 380. However, by limiting common fund attorney fees to the named insurer in the precedent-setting litigation, the amount of non-apportioned benefits payable to OD claimants will impermissibly depend on which insurer is responsible for paying those benefits. If separate lawsuits and separate liens are required against each insurer, then § 706 benefits will vary according to the attorney fee percentage set forth in each respective lien. Obviously, such an approach will create inconsistencies in the non-apportioned amount of § 706 benefits paid to OD claimants. Precedent from this Court and from the Montana Supreme Court should apply equally to all claimants and all insurers. Therefore, to ensure that this Court's decisions are applied consistently to all claimants and insurers, common fund fees should lie, where appropriate, with the precedent-setting claim and no others.

Further, as *Rausch* indicates, the common fund doctrine rewards attorneys who initiate litigation and create law which benefits an ascertainable class of non-participating beneficiaries. *See Rausch*, ¶¶ 34-36. Schmill's counsel initiated the precedent-setting litigation, and the *Schmill* decision may potentially entitle non-participating OD beneficiaries to receive additional funds via non-apportioned benefits. Limiting the attorney fee lien to claimants of Liberty, the insurer named in the precedent-setting litigation, and to claimants of the State Fund, the intervenor in this case, would only create a "race to the courthouse," cause a flood of unnecessary litigation, and allow attorneys to file common fund actions based on precedent which has already been established by Schmill's counsel. Such a rule of law will only encourage the rapidly-expanding misuse of the common fund doctrine. Therefore, if *Schmill* applies retroactively and common fund attorney fees are appropriate, the State Fund requests this Court to hold that the common fund attorney fee lien of Schmill's counsel applies equally to all insurers and self-insurers in the State of Montana.

CONCLUSION

Although the federal courts have abandoned the *Chevron Oil* test in favor of a blanket rule of retroactivity, many states – including Montana – continue to analyze

retroactivity pursuant to the three factors set forth in *Chevron Oil*. In order for a judicial decision to operate prospectively only, one of the three factors of the *Chevron Oil* test must be met. Here, all three factors are met. The first factor is satisfied because *Schmill* established a new principle of law whose decision was not clearly foreshadowed. Alternatively, if *Schmill* was somehow foreshadowed, it was foreshadowed by *Henry*, so retroactive application should only extend back to the date of the *Henry* decision. The second factor is satisfied because a prospective application will not weaken the rule of *Schmill*, nor will it retard the rule's operation. The third factor is satisfied because a retroactive application would impose administrative and benefit costs and burdens on the State Fund which would be so significant that they would constitute a substantial inequity. In addition, retroactive application is impermissible because it would unconstitutionally impair the contracts between the State Fund and its policyholders. Accordingly, *Schmill* applies prospectively only and this Court should deny the attempt by Schmill's counsel to retroactively assert her lien against all claims occurring on or after July 1, 1987.

A common fund treatment should be denied here. The doctrine was never intended to open the floodgates every time a decision of the Montana Supreme Court granted benefits which are contrary to legislative direction. Application of the concepts may be appropriate where an individual claimant, with minimal benefits at issue, takes on a case for the masses. That did not occur in this case. The Court may appropriately draw a line here, and consider implementation and possibly remediation issues, without allowing common fund treatment.

In addition, the failure of Schmill's counsel to plead an entitlement to common fund attorney fees or class certification prior to the appellate decision bars her post-remand request for common fund fees. Application of the common fund doctrine, and the payment of common fund fees, is inappropriate in this case because the economic stakes in the litigation were of a sufficient amount to justify the expense of filing suit and pursuing the matter. However, if this Court concludes that common fund fees are appropriate and that retroactivity is proper, then the attorney fee lien of Schmill's counsel should apply with equal force to all insurers and self-insurers in the State of Montana to ensure that *Schmill* is consistently applied to all claimants and against all insurers.

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DATED this 26 day of March, 2004.

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By _____
Bradley J. Luck

CERTIFICATE OF MAILING

The undersigned, a representative of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Intervenors, hereby certifies that on this 26th day of March, 2004, she mailed a copy of the foregoing *State Fund's Opening Brief Regarding Retroactivity, Common Fund Entitlement, Common Fund Fees And Global Lien of Schmill's Counsel*, postage prepaid, to the following persons:

Laurie Wallace, Esq.
Bothe & Lauridsen
P.O. Box 2020
Columbia Falls, MT 59912

Larry Jones, Esq.
Liberty Northwest Insurance Corp.
700 S.W. Higgins Ave., Suite 250
Missoula, MT 59803

_____

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 01-630

DEBRA STAVENJORD,

Petitioner/Respondent,

v.

MONTANA STATE FUND,

Respondent/Insurer for

PRAIRIE NEST RANCH,

Employer/Appellant.

MOTION FOR JUDICIAL NOTICE AND MEMORANDUM IN SUPPORT

COMES NOW the Appellant, Montana State Fund ("State Fund"), pursuant to Rule 22, Mont. R. App. P., and moves the Court to take judicial notice of the Court's Register of Action in Case No. 88452, *Eastman v. Atlantic Richfield Co.* (1989), 273 Mont. 332, 777 P.2d 862 (reh'g den. Aug. 31, 1989), as well as the entire file of such cause, including the two *amicus curiae* briefs filed on behalf of Mr. Eastman relative to the Motion for Rehearing. (A copy of the Register of Action is attached as Ex. 1.) Counsel for the Respondent was contacted to determine whether he objects to the present motion but was out of the office and not able to be reached for several days.

GROUNDS FOR MOTION

Rule 22 requires the grounds for any motion shall be specified with particularity. The grounds for this motion are as follows:

At oral argument, a new issue was raised concerning the viability of the *Eastman* decision. In questioning from the Court, it appeared that the precedent may be discounted as a result of the fact that Mr. Eastman appeared *pro se,* notwithstanding the fact that the decision appears to have properly classified the parties subject to state action and applied accepted constitutional principles in its decision. It was not clear from the report of the

Eastman decision nor was it clear during oral argument that a Petition for Rehearing was filed and that *amicus* briefs were prepared on behalf of Mr. Eastman's challenge to the constitutionality of the Occupational Disease Act's ("ODA") benefit scheme. A review of the briefing on rehearing by Eastman *amicus* indicates that the constitutional issues were presented to that Court fully and most competently. It appears that the Court was fully apprised of the constitutional arguments in favor or Mr. Eastman's position by qualified *amicus* counsel whose practices specialized in this area of the law.

Although it is true that Mr. Eastman appeared *pro se*, it is equally clear that *amicus* counsel argued on his behalf. It is submitted that the *Eastman* records plainly show that this Court was fully apprised of the constitutional issues by *amicus* counsel, that they were fully briefed and considered before a final decision in *Eastman* occurred and that there is no reason to discount this precedent.

The *Eastman* action considered the identical issue presented in this matter, i.e., whether § 39-72-405, MCA, violates the Equal Protection Clauses of the Montana and United States Constitutions. The *Eastman* court held:

> We recognize the fairness of an argument for equal compensation for similar disabilities. However, the equal protection clause does not require that all aspects of occupational disease and occupational injury be dealt with in the same manner. (Citing *Williamson v. Lee Optical Co.* (1955), 348 U. S. 483, 75 S. Ct. 461, 99 L. Ed. 563.)

Eastman, 777 P.2d at 866.

In *Henry v. State Compensation Ins. Fund*, 1999 MT 126, 294 Mont. 449, 982 P.2d 456, this Court properly distinguished the *Eastman* holding from the issue in that action since *Eastman* "addressed the degree of benefits awarded to claimants under the WCA [Workers' Compensation Act] and the ODA [Occupational Disease Act], while this case deals with . . . the wholesale denial . . ." of benefits in one Act compared to the other. *Henry*, ¶ 42. Nevertheless, the lower court in this matter ignored the precedent of *Eastman* and relied exclusively on *Henry* in support of its determination that the ODA's benefit scheme was unconstitutional.

Although it was not germane to the particular issue under consideration, the *Henry* decision went on to question the continued vitality of *Eastman* as precedent since:

> Eastman filed his claim for compensation benefits in 1985, prior to the 1987 amendments to the WCA and the ODA. As pointed out earlier, after the 1987 amendments to the WCA and the ODA, the definitions of "injury" and "occupational disease" no longer focus on the nature of the medical condition, but rather focus on the number of work shifts over which the worker incurs an injury. Thus the historical justification for treating workers differently under the WCA and the ODA no longer exists. Indeed, the entire underpinnings of *Eastman* have evaporated, rendering its continued validity questionable.

Henry, ¶ 43.

Since an application of the holding in *Eastman* would summarily dispose of the issues in this matter in favor of the State Fund, a focus of Appellant's briefing and argument became the continued applicability of that decision from a *stare decisis* standpoint. Based upon a critical analysis of past decisions of this Court, it was shown that the Court's comments in the *Henry dicta* were not historically accurate. As a result, there would be no basis to decline to find *Eastman* controlling here and dispositive of the issues on appeal.

On the basis of the above, it is respectfully submitted that the record of this action should be supplemented with judicial notice taken of the Register of Action in *Eastman* as well as the Court's complete file in that cause.

DATED this 2 day of April, 2002.

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Telephone: (406) 523-2500
Attorneys for Appellant

By _____
Bradley J. Luck

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CERTIFICATE OF MAILING

The undersigned, a representative of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for the Defendant, hereby certifies that on this 2 day of April, 2002, a true copy of the foregoing MOTION FOR JUDICIAL NOTICE AND MEMORANDUM IN SUPPORT, was mailed, postage prepaid, to the following:

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SUPREME COURT

REGISTER OF ACTION

IN THE SUPREME COURT OF THE STATE OF MONTANA

1. CASE NUMBER: 88452

APPELLANT	RESPONDENT
PAUL B. EASTMAN, Claimant and Appellant,	ATLANTIC RICHFIELD COMPANY, Employer, and ATLANTIC RICHFIELD COMPANY, Defendant and Respondent

ATTORNEYS (APPELLANTS)	ATTORNEYS (RESPONDENTS)
Paul B.Eastman, Pro Se 540 E. Cottonwood Dr. Kalispell, MT 59901-3743 AMICUS: (LaVonne Doyle) Richard J. Martin; Alexander, Baucus & Linnell, P.O. Box 2629, Great Falls, MT 59403-2629 -Bradley J. Luck, Garlington, Lohn & Robinson, (Repr. firms listed in 6/20 case note) P.O. Box 7909, Missoula, MT 59807-7909	~~James E. Vidal~~ ~~Murray, Kaufman, Vidal & Gordon, P.C.~~ ~~P.O. Box 728~~ ~~Kalispell, MT 59903-0728~~ Andrew J. Utick; Utick & Grosfield, P.O. Box 512, Helena, MT 59624-0512 AMICUS: Thomas C. Bulman; (for) Bulman Law Assoc., P.O. Box 8202, Missoula, MT 59807-8202 (supporting appellant)

2. DT. APPEAL NOTICE FILED	3. DT. JDGMT/ORDER	4. COUNTY NAME	5. DT. DIST. CT. REC. FILED	6. DT. TRANSCRIPT FILED
8-26-88	6-27-88	W.C.	8-29-88	8-29-88
7. DIST. CT. CASE NUMBER	**8. DIST. COURT JUDGE**	**9. DT. APLNT. BRIEF FILED**	**10. DT. RSPNT. BRIEF FILED**	**11. DT. REPLY BRIEF FILED**
8608-3830	Reardon	9/28/88	11-14-88	11-29-88
12. S.C. JUDGE ASSIGNED	**13. DT. ASSIGNED**	**14. TYPE OF APPEAL**		
file to cl	11-29-88	Amicus Doyle 6/7/89 Amicus - Luck 7/14/89 Workers' Compensation Amicus Bulman 7/17/89		
15. DT. ORAL ARGUMENT	**16. ORAL ARGUMENT PRESENTED BY**			
S.O.B. 3/9/89 eb	APPELLANT	RESPONDENT		
17. DT. OPINION/ORDER	**18. COURT ACTION, AUTHOR, CONCURRING/DISSENTING**			
5/10/89	Justice Weber, affirmed; Turnage; Gulbrandson and McDonough concur. Justices Hunt; Harrison & Sheehy dissent.			
19. DT. REHEARING PET. FILED	**20. DT. OBJECTIONS FILED**	**21. DT. REHEARING ACTION**	**22. REHEARING ACTION**	
5/17/89	5/24/89	8/31/89	Denied	
23. FEE PAID/DUE	**DT PAID/DUE**	**BY WHOM**		
[illegible]	[illegible]	[illegible]		

EXHIBIT 1

DATE	CASE NOTES
8-29-88	Notice of Appeal contain in Workers' Comp. Record
10-11-88	Motion to Disqualify Counsel by Eastman. Orig. to Court.
10/21/88	Substitution of Counsel for Defendant/Respondent. Andrew Utick in place of James Vidal.
10-31-88	ORDER: Respondent granted to November 14, 1988 to file brief.
3/9/89	Order classifying cause S.O.B. to entire seven-Justice court sitting en banc. Copies to counsel.
5/24/89	Order that LaVonne Doyle has until June 7, 1989, to file an amicus brief in support of the petition for rehearing. copies to counsel.
6/7/89	Amicus brief of LaVonne Doyle. Copies to Court.
6/16/89	ORDER: Respondent has 30 days from this date to file a written respons to Amicus Brief (July 16, 1989). Copies to Pro Se and Counsel.
6/20/89	Order granting Champion International Corp., Stone Container Corp., Golden Sunlight Mines Corp., Plum Creek Timber Co., F.H. Stoltze Land & Lumber Co., ST Comp. Ins. Fund, Cyprus Industrial Minerals Co. and Industrial Indemnity Insurance Co. leave to file amicus brief bef 7/15/89. Copies to counsel.
7/14/89	Brief of Respondent in response to Amicus Curiae Brief of Doyle. copies to Court.
7/17/89	Motion for leave to file amicus brief. Motion, proposed order and orig. of brief sent to Court.
7/17/89	Order that motion for leave to file amicus brief is granted. Brief of Amicus Curiae (Thomas C. Bulman) filed.
8/31/89	~~Order; Petition for rehearing is DENIED. copies to counsel.~~ REMITTITUR ISSUED. W.C. COURT FILE TO BE PICKED UP BY WC CLERK'S OFFI
	X CLOSED

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 01-630

DEBRA STAVENJORD,

Petitioner and Respondent,

v.

MONTANA STATE FUND,

Respondent, Appellant and Insurer for

PRAIRIE NEST RANCH,

Employer.

ORDER

Appellant, Montana State Fund, has moved the Court pursuant to Rule 22, M.R.App.P., to take judicial notice of the Court's Register of Action in Cause No. 88-452, *Eastman v. Atlantic Richfield Company* (1989), 273 Mont. 332, 777 P.2d 862 (rehearing denied August 31, 1989), as well as the two amici curiae briefs filed on behalf of Mr. Eastman relative to the motion for rehearing.

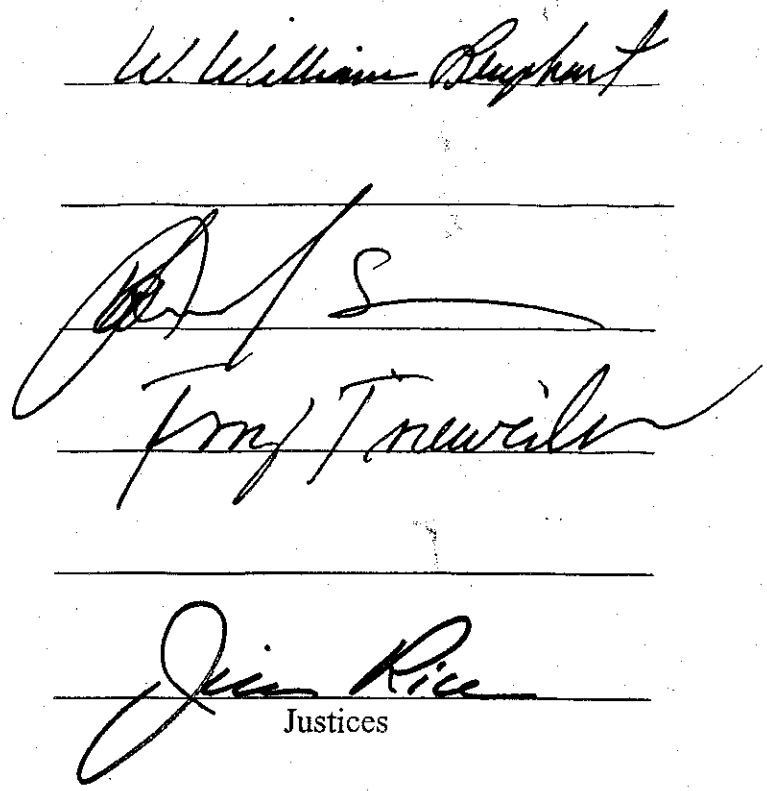
Good cause appearing therefor,

IT IS HEREBY ORDERED that the motion of Appellant to take judicial notice pursuant to Rule 22, M.R.App.P., is hereby GRANTED.

The Clerk is directed to mail copies hereof to counsel of record for the respective parties.

DATED this 9th day of April, 2002.

Karla M. Gray
Chief Justice



Justices