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**FILED**

**MAR - 8 2004**

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

THE WORKERS' COMPENSATION COURT IN THE STATE OF MONTANA

DEBRA STAVENJORD,

Petitioner,

v.

MONTANA STATE FUND,

Respondent/Insurer.

WCC No. 2000-0207

**STATE FUND'S OPENING BRIEF  
REGARDING RETROACTIVITY,  
COMMON FUND  
ENTITLEMENT, COMMON  
FUND FEES AND GLOBAL LIEN  
OF STAVENJORD'S COUNSEL**

COMES NOW the Respondent, Montana State Fund ("State Fund"), and hereby files its Opening Brief Regarding Retroactivity, Common Fund Entitlement, Common Fund Fees and Global Lien of Stavenjord's Counsel. For the reasons stated herein, the State Fund asserts that *Stavenjord v. Montana State Fund*, 2003 MT 67, 314 Mont. 466,

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67 P.3d 229, applies prospectively only. The State Fund also contends that this matter is not appropriate for the application of the common fund doctrine, especially since determining PPD benefits requires highly individualistic determinations that cannot be accomplished by a simple mathematical calculation. The State Fund believes that the failure of Stavenjord's counsel to plead an entitlement to common fund attorney fees or class certification prior to the appellate decision bars his post-remand request for common fund fees. Lastly, the State Fund asserts that if the attorney fee lien of Stavenjord'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 April 8, 2003, Stavenjord's counsel filed a Notice of Common Fund Attorney Lien, asserting a lien retroactively against all Plan I, II & III insurers for claimants with injury dates from July 1, 1987 to April 8, 2003. No fees were sought on future claims. (See Notice of Common Fund Attorney Lien.) On April 21, 2003, Stavenjord's counsel filed his motion for application of the common fund doctrine and claimed, for the first time, an entitlement to common fund fees. In response, on April 25, 2003, the State Fund requested this Court stay the retroactive application of *Stavenjord* 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 filed and approved on January 22, 2004. According to the terms of the stipulation, Stavenjord's counsel is claiming retroactive common fund attorney fees of 25% for occupational disease claims with entitlement dates from July 1, 1987 through May 21, 2001.

## ISSUES

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

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

2. Whether the decision in *Stavenjord* 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 *Stavenjord*, 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 20, 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 Compens. 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 Compens. 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). 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. 308, 950 P.2d 748, which clarified a landowner's standard of care regarding natural 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 (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*, *Chaney* and *Porter* are the only three civil cases which have failed to address the *Chevron Oil* test as part of a retroactivity analysis. 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 (citing *State v. Steinmetz*, 1998 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 the *Stavenjord* decision to determine whether it applies retroactively.

## II. THE *CHEVRON OIL* TEST NECESSITATES A CONCLUSION THAT *STAVENJORD* 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, 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, 810 P.2d 1192, 1196 (holding that retroactive application was improper because the decision was not clearly foreshadowed). As set forth below, *Stavenjord* avoids retroactive application because all three *Chevron Oil* factors weigh in favor of prospectivity.

A. *Stavenjord* 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 *Stavenjord* was not foreshadowed. Prior to *Stavenjord*, no occupational disease claimant had ever been awarded benefits under Montana Code Annotated § 39-71-703. On one previous occasion, the Montana Supreme Court analyzed 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 on a claim which was basically identical to the one *Stavenjord* pursued, 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.



Thus, at the time of the *Stavenjord* litigation, the prevailing law in Montana was that occupational disease claimants were limited to the \$10,000 available under Montana Code Annotated § 39-72-405, were ineligible for benefits under Montana Code Annotated § 39-71-703, and there was a rational basis justifying the difference in the degree of benefits payable to claimants suffering from an occupational disease as opposed to a workplace injury. See *Eastman*, 237 Mont. at 339, 739 P.2d at 866. Although the Court in *Stavenjord* had an opportunity to specifically overrule *Eastman*, it chose not to and instead distinguished it from *Stavenjord*'s situation because *Eastman* was a pro se claimant whose briefing was allegedly inadequate. See *Stavenjord*, ¶¶ 32-33. However, several amici briefed both sides of the *Eastman* argument on rehearing, and *Eastman*'s legal theories were sufficiently developed on appeal.<sup>1</sup> (See State Fund's Motion for Judicial Notice and Memorandum in Support, *Stavenjord v. State Fund*, Montana Supreme Court No. 01-630 (Apr. 2, 2002), a copy of which is attached hereto as Ex. "A"; Order Taking Judicial Notice, *Stavenjord v. State Fund*, Montana Supreme Court 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 to determine entitlement and set rates. The holding in *Stavenjord*, which is being touted as a landmark OD decision, was contrary to the existing law in Montana at the time and was also contrary to the express language of Montana Code Annotated § 39-71-703 and Montana Code Annotated § 39-72-405. Such a drastic change in the rights of claimants and the obligations of insurers was not clearly foreshadowed, a point confirmed by the fact that the Montana Supreme Court's decision was by a 5-2 majority. Common sense dictates that if the result in *Stavenjord* was "clearly" foreshadowed, then the decision would have been a unanimous 7-0. However, Justice Rice wrote a lengthy and well-reasoned dissent in which Chief Justice Gray joined. See *Stavenjord*, ¶¶ 49-64.

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<sup>1</sup> 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.

Based on the foregoing, it is apparent that *Stavenjord* 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 *Stavenjord* improper. Accordingly, this Court should deny the request by Stavenjord's counsel to apply the decision retroactively to July 1, 1987.

B. *Stavenjord* 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*. 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*, ¶ 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*, *Stavenjord* did not involve a "garden variety" statutory interpretation. Instead, like in *Ereth*, *Stavenjord* established a new principle of law, one which was contrary to express statutory language and contrary to the specific holding in *Eastman* on the same issue. Consistent with the reasoning in *Ereth*, retroactive application would not further operation of the *Stavenjord* holding because occupational disease claimants and attorneys are now aware of entitlement to PPD benefits under § 703 of the WCA. Stated differently, it is clear that prospective application will not weaken the policy for allowing OD claimants to receive the same PPD benefits as claimants who suffer workplace injuries because that entitlement now exists for all claims occurring on or after May 22, 2001. *See Stipulation Regarding Prospective Claims* (Jan. 22, 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 *Stavenjord* improper.

C. *Stavenjord* 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 *Stavenjord* is applied retroactively; the focus should not be on the inequities that might result to certain claimants if *Stavenjord* 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 *Stavenjord* retroactively would be inequitable because it will result in a substantial administrative and financial hardship on the State Fund.

If *Stavenjord* is applied retroactively to July 1, 1987, all claimants similarly situated with *Stavenjord* 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 manually reviewing each file to determine what PPD information still needs to be obtained and how best to obtain it. If this process is judicially required, the State Fund will experience substantial hardships in locating files, retrieving files, accessing antiquated computer databases and obtaining missing information from claims files. Further, the State Fund and the Old Fund will suffer a severe financial impact due to the benefit costs, administrative costs and claims-related costs associated with implementing *Stavenjord* 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 *Stavenjord* 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. 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 administrative and claims-related costs and burdens associated with obtaining missing medical and vocational information from the OD claim files in order to determine entitlement under Montana Code Annotated § 39-71-703 impose a substantial hardship on the State Fund.

Retroactively adjusting files to comply with *Stavenjord* would impose significant additional administrative and claims-related costs and burdens on the State Fund. In reviewing some sample claims currently on the State Fund's imaged computer system, the State Fund's adjusters spent 0.5 to 4.0 hours identifying what information was needed to adjust a claim under *Stavenjord*. Files that are stored on paper or microfiche, or a combination thereof, will obviously require more time for adjuster review than the files which are currently on the State Fund's imaged computer system because locating and retrieving those files requires substantial effort, as explained above in Section II(C)(1).

Many of the occupational disease files lack documentation of medical and vocational information which is necessary to perform an analysis under Montana Code

Annotated § 39-71-703. In order to properly analyze a claimant's entitlement to PPD benefits under the WCA, the State Fund would have to obtain after-the-fact impairment ratings, work restrictions and vocational information, all of which would individually and collectively require substantial employee time and impose significant financial burdens on the State Fund in terms of claims-related and administrative expenses.

a. Missing Impairment Ratings and Medical Information

Most of the claims arising before June 3, 1999 – the date of the decision in *Henry* – do not have impairment ratings on file because they were not part of the ODA's benefit scheme. The *Henry* decision established that OD claimants were eligible to receive vocational rehabilitation benefits. *Henry*, ¶¶ 44-45. However, one of the prerequisites to the receipt of vocational rehabilitation benefits is an impairment rating. See Mont. Code Ann. § 39-71-1006(1)(a) and § 39-71-1011(2). Even some claims after *Henry* are missing impairment ratings because certain claimants were able to return to work with the same employer and did not request any vocational rehabilitation benefits. Obtaining impairment ratings in older claim files creates several problems. Physicians will be asked to look back in time and assess what an impairment would have been as of the date of maximum medical improvement. However, the presence of interim injury, disease, or the aging process impacts the level of impairment. The presence of interim injury or disease also impacts the determination of whether the State Fund is liable for paying PPD benefits to some claimants. Unquestionably, when claimants return to work after a compensable event, medical conditions are often aggravated by subsequent injuries, diseases and intervening non-work events. If after-the-fact evidence exists of a second injury, injurious exposure or an independent intervening cause attributable to a claimant that materially or substantially contributes to the claimant's current physical condition, then the State Fund may be relieved of liability for PPD benefits. See generally *Caekaert v. State Compen. Mut. Ins. Fund* (1994), 268 Mont. 105, 112, 885 P.2d 495, 499. Accordingly, a *Caekaert*-type review may be required on a high percentage of the approximately 3,500 occupational disease files which are potentially entitled to *Stavenjord*-type benefits.

Aside from issues connected to interim injuries or diseases, due to the number of potentially affected claimants, consistency in ratings would require the State Fund to identify a pool of physicians who would be willing to assess a retroactive impairment rating by reviewing extensive medical records and older JAMA guides. However, the in-state pool of physicians who would be able and willing to rate a retroactive impairment is

likely to be small, and there may be a lengthy waiting period for the claimants to be rated. Additionally, each version of the JAMA guide creates different impairment ratings, so determining which version of the guide applies and locating physicians with expertise in the older guides will present difficulties. Other problems, like disputes over the ratings and determining who must pay for a second rating, are inherent in the process of attempting to establish an impairment award years after a claimant has reached maximum medical improvement.

For each file on which an impairment rating is requested, a complete medical record may need to be made available to the rating physician. This may require the retrieval, printing and mailing of many files. The total time required per file is likely to be very significant. The current fee schedule amount for a standard impairment rating performed by a treating physician is \$132.34. However, for claimants who have to be evaluated by somebody other than their treating physicians, or for impairment ratings performed by treating or non-treating physicians that are complex in some fashion, the ratings may cost as much as \$850.00. If the rating physician requests an FCE, an additional cost of \$750.00 would be imposed on the State Fund. Identifying out-of-state physicians would probably be out-sourced to a provider such as Corvel or Crawford, with a resultant increase in time and expense.

Adjuster time in identifying an appropriate physician and scheduling an appointment would be approximately 1.0 hour per file, after an initial pool of physicians has been identified. Adjusters will need to spend time in receiving, reviewing, and calculating benefits after an impairment rating is rendered, and the amount of time spent per file will depend on the complexity of the claim. When the medical costs and administrative expenses on each file, including adjuster time, are multiplied by the approximately 3,500 files potentially subject to retroactive application, it becomes apparent that the total financial and administrative impact on the State Fund would constitute a substantial hardship, making retroactive application improper under the *Chevron Oil* test.

b. Missing Work Restrictions and Vocational Information

Much like impairment ratings, occupational disease files may not contain an indication of work restrictions (heavy, medium or light) because they were not necessarily needed in the ODA's benefit scheme. Obtaining accurate work restrictions after-the-fact may be difficult given the presence of subsequent injuries, occupational



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

Although some occupational disease files may contain targeted vocational work-up necessary to perform a *Coles* analysis, the occupational disease files most likely lack a detailed vocational work-up. Calculating wage loss under § 703 requires identified jobs, but it will be difficult to accurately identify jobs that would have been available at the time the claimant reached maximum medical improvement. Further, determining wage supplement benefits for claims arising from July 1, 1987 through June 30, 1991, requires knowledge of a claimant's job and earnings after returning to work. However, this information is not likely to be in the file.

Based on its experience, the State Fund believes that at current pricing, rehabilitation costs would be \$300.00 for a time-of-injury job analysis (which might be hypothetical), \$700.00 for a wage loss evaluation and determination of transferable skills, and \$250.00 for each alternative job analysis. These charges do not reflect the time, hourly expense or travel for the vocational rehabilitation counselors. Physician costs for reviewing each job analysis would be approximately \$50.00. Further, each item not currently available in a file could be the basis for dispute, which the State Fund believes will need to be mediated, and the potential for litigation is an issue that can impact the time and the cost involved in adjusting a claim. Further, as *Seubert* noted, the increase in litigation is a concern that weighs in favor of prospective application. Thus, when the administrative expenses and the conservative vocational costs of \$1,300.00 per file are multiplied by the approximately 3,500 files potentially subject to a retroactive application, the total financial and administrative impact on the State Fund to obtain missing vocational information becomes so substantial that it would be inequitable to apply *Stavenjord* retroactively.

4. The potentially severe financial impact of the benefit costs associated with a retroactive application of *Stavenjord* would impose a substantial hardship on the State Fund.

In addition to the costs and administrative efforts discussed above, the *Stavenjord* decision 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 *Stavenjord* did not take into consideration the potential increase in permanent partial benefits which may be owed to employees with occupational diseases, if *Stavenjord* is applied retroactively. NCCI, which is a non-profit rating, statistical and data management service, has estimated that the prospective costs associated with *Stavenjord* will result in a 1.1% rate increase, or \$1.9 million,<sup>2</sup> for the period beginning July 1, 2003.

The State Fund has estimated the cost of benefits associated with a retroactive application of *Stavenjord*. For claims arising between July 1, 1990 and May 22, 2001, the date of this Court's decision, the increase in gross value benefit costs is estimated at \$14 to \$19 million. Notably, this amount does not include the significant administrative costs or the costs of obtaining missing medical and vocational information, as discussed above. Hard costs for obtaining missing medical information on approximately 3,500 non-complex files may exceed \$3 million. Hard costs for obtaining missing vocational information on approximately 3,500 files may exceed \$4.5 million. Of course, this does not include unquantified soft costs related to adjuster time in locating files, retrieving files, accessing antiquated computer databases, reviewing claim information, arranging appointments or adjusting claims, nor does it include legal costs and fees. The financial impact to the State Fund will be paid out of surplus funds because the costs of retroactive application were not included in the rates for prior years.

Surplus is not excess, unnecessary funds. Although the State Fund's surplus at the end of fiscal year 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

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<sup>2</sup> See Joint Statement of Stipulated Facts, Ex. C at Ex. V-A.

company, the State Fund cannot access additional capital to cover adverse financial results.

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 \$14 to \$19 million in overall retroactivity benefit costs for the Montana State Fund. It is estimated that the State Fund would have to increase its current rates by 3-5%, or at least \$3.53-\$5.89 million,<sup>3</sup> for many years in order to absorb the impact of benefit costs associated with a retroactive application of *Stavenjord*. However, having current policyholders pay for the risk and expense of past claims targets the wrong policyholders. In addition to the severe adverse financial impact the State Fund would experience if *Stavenjord* is applied retroactively, the Old Fund would be impacted by an estimated \$5 to \$7 million 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

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<sup>3</sup> The State Fund requests this Court take judicial notice of its 2003 Annual Report, which was approved by the board in December of 2003 and is being filed as a public document pursuant to Montana Code Annotated § 39-71-2363. The 2003 Annual Report indicates that the net value of premiums paid to the State Fund in fiscal year 2003 was \$117,776,580. Therefore, a 3-5% rate increase equates to approximately \$3.53-\$5.89 million. However, rate increases are based on the gross value of premiums paid, not the net value. Further, the State Fund increased its rates by 11.6% for fiscal year 2004, which is not represented in the 2003 Annual Report. Accordingly, a rate increase of \$3.53-\$5.89 million is a conservative figure.

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).<sup>4</sup> All dividends, including the ones paid in 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 *Stavenjord*.

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. Montana State Fund*, 2003 MTWCC 55 (Aug. 5, 2003) (citation omitted). Clearly, the costs of benefits associated with a retroactive application of *Stavenjord* will have a severe financial impact on the State Fund and the Old Fund, and it will likely cause the Old Fund to become unfunded. In addition to the estimated gross value benefit costs of \$19 to \$26 million, the State Fund would have to absorb significant expenses, both administrative and claims-related, to adjust files retroactively. Whether analyzed individually or collectively, the effect of the benefit costs, administrative costs, claims-related costs and the massive administrative efforts required to comply with retroactive application of *Stavenjord* militates against retroactivity.

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<sup>4</sup> Montana Code Annotated § 39-71-105(2) states in full:

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

- D. Stavenjord 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 Petition to Transfer Territory from High Sch. Dist. No. 6, Lame Deer, Rosebud County, to High Sch. Dist. No. 1, Hardin, Big Horn County*, 2000 MT 342, ¶ 9, 303 Mont. 204, ¶ 9, 15 P.3d 447, ¶ 9. Montana Code Annotated § 39-72-405 was first enacted in 1959 and withstood scrutiny for nearly 50 years, until the 2003 decision in *Stavenjord*. 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 partial disability benefits payable 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); 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*, 91 Mont. at 194, 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).

As discussed below in Section III, the *Loss v. Lumbermens Mut. Cas. Co.* decision in 1997 upheld the plain language of § 405 of the ODA and concluded that claimants suffering from occupational diseases were not statutorily entitled to receive benefits under § 703 of the WCA. More importantly, the *Eastman* decision reached a conclusion which was almost the exact opposite of the holding in *Stavenjord*. The State Fund justifiably relied on § 405's validity and enforceability, and the statute became part of the contracts between the State Fund and its policyholders. Therefore, a retroactive application of *Stavenjord* is impermissible because it would unconstitutionally impair those contracts and produce substantial harm. Further, under the circumstances, equity demands prospective application. See *Salorio v. Glaser*, 461 A.2d 1100, 1109 (N.J. 1983) ("[R]eliance interests weigh heavily in the shaping of an appropriate equitable remedy") (citation omitted). Accordingly, *Stavenjord* should not apply retroactively.

**III. IF STAVENJORD 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 *Stavenjord* was not clearly foreshadowed, especially in light of *Eastman*. If this Court disagrees and finds that the *Stavenjord* result was clearly foreshadowed, then the State Fund alternatively asserts that the retroactive application of *Stavenjord* 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, if not identical, to the issue in *Stavenjord*. Both cases involved the degree of benefits payable to claimants whose entitlement was governed by the ODA versus the WCA, and both cases challenged the \$10,000 limitation under Montana Code Annotated § 39-72-405. Unlike *Stavenjord* and *Eastman*, *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. *Stavenjord* relied on this quotation, concluded that *Henry* was equally applicable to *Stavenjord*'s situation, and determined that *Henry* compelled a holding that *Stavenjord* was entitled to PPD benefits under Montana Code Annotated § 39-71-703. *Stavenjord*, ¶¶ 43-44.

Prior to *Henry*, no case had disturbed the differences in the amount of benefits payable under the ODA versus the WCA. In fact, in 1997, the Montana Supreme Court had even held that rehabilitation benefits were not statutorily available to workers proceeding under the ODA. See *Loss v. Lumbermens Mut. Cas. Co.* (1997), 282 Mont. 80, 936 P.2d 313. Although *Henry* questioned the validity of *Eastman* due to the 1987 amendments to the ODA and WCA, the 1987 amendments did not alter the case law definitions of injury and occupational disease, a point driven home by the dissent in *Stavenjord*. See *Henry*, ¶ 43; *Stavenjord*, ¶¶ 53-58.

Given *Eastman*, the *Stavenjord* decision was not "clearly" foreshadowed. However, if this Court determines that the *Stavenjord* 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 *Stavenjord* to June 3, 1999, the date of *Henry*, because that was the first time the Montana Supreme Court had held 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 to May 21, 2001.

**IV. STAVENJORD DOES NOT CREATE A COMMON FUND, ESPECIALLY SINCE DETERMINING BENEFITS UNDER § 703 WOULD REQUIRE HIGHLY INDIVIDUALISTIC DETERMINATIONS THAT CANNOT BE CALCULATED BY A SIMPLE MATHEMATICAL COMPUTATION.**

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 akin to *Murer*, attorneys like Stavenjord'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*, Stavenjord's economic stake in her litigation was significant, and it justified the legal expense necessary to challenge the disparate treatment, because she received PPD benefits of nearly \$30,000. Therefore, the State Fund asserts the common fund doctrine is inapplicable to the *Stavenjord* decision.

Further, in the previous common fund cases, including *Murer*; *Broeker v. Great Falls Coca Cola Bottling Co.* (1996), 275 Mont. 502, 914 P.2d 967; *Rausch v. Hogan*, 2001 MT 123, 305 Mont. 382, 28 P.3d 460; and *Flynn*, the common fund claimants were more readily identifiable and their increased entitlement could be determined by a simple mathematical calculation. Although § 703 of the WCA provides a formula for determining PPD entitlement, the formula cannot be utilized until all the necessary medical and vocational information is gathered on each claimant. As explained above in Section II, obtaining this information will be burdensome, time-consuming, and expensive, with hard costs potentially exceeding \$7.5 in addition to a substantial amount of unquantified soft costs. Disputes over impairment ratings or vocational restrictions will likely lead to mediation and eventual litigation, and determining entitlement under § 703 may require mini-trials in a vast majority of cases. In *Murer*, the ability to determine, with certainty, the amount of money a non-participating beneficiary was entitled to receive influenced the Montana Supreme Court's decision to apply the common fund doctrine. See *Murer*, 283 Mont. at 223, 942 P.2d at 77 ("The State Fund, therefore, has been able to determine, with certainty, the number of absent claimants involved and the amount of money to which each individual claimant is entitled."). In recognition of that *Murer* requirement, this Court has reiterated in the pending common fund cases that the lack of an ability to mathematically calculate an absent claimant's increased entitlement eliminates the appropriateness of a common fund:

If when I go through these cases – The easiest case, for example, was the *Murer* case, because all that required, once you identified them and you identified the dates, it was simply a mathematical computation. So it was

what we would call, I think, in the law a ministerial act to determine what those claimants were owed.

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

Here, as already discussed, determining entitlement will take more than a ministerial act and a simple mathematical computation because obtaining the missing information in each claim file will require substantial effort. For example, missing medical information and impairment ratings are going to take time to gather, and disputes over impairment ratings and the effect of subsequent injuries or diseases on the State Fund’s liability will need to be litigated before PPD entitlement can be properly calculated. Likewise, missing vocational information will take time to gather, and disputes over restrictions and wage loss will need to be litigated before PPD entitlement can be properly calculated. Similar to the approach taken in class action cases, the State Fund urges this Court take the position that claims which require “highly individualistic determinations,” or which require the Court to conduct a series of mini-trials for resolution, are inappropriate for the application of the common fund doctrine. See generally *Ostrof v. State Farm Mut. Automobile Ins. Co.*, 200 F.R.D. 521, 531-532 (D. Md. 2001) (discussing the concept as applied to class action claims). Because computing § 703 entitlement would involve “highly individualistic determinations” and would require a series of mini-trials for resolution, the State Fund asserts that no common fund exists as a result of the *Stavenjord* decision.

**V. THE FAILURE OF STAVENJORD’S COUNSEL TO PLEAD *AB INITIO* AN ENTITLEMENT TO COMMON FUND ATTORNEY FEES OR CLASS CERTIFICATION IN THE PRE-REMAND PROCEEDINGS BARS HIS 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 Stavenjord’s counsel had actual and constructive notice of the potential availability of common fund fees, he specifically chose not to seek common fund fees or class certification in the pre-remand proceedings. Instead, he waited until April 21, 2003 – which was three weeks

after the Montana Supreme Court's decision in this matter and nearly three years after the Petition for Hearing was filed – to plead an entitlement to common fund attorney fees. (See Petr.'s Mot. For App. of Common Fund Doctrine (Apr. 21, 2003).)

- A. Stavenjord's counsel has waived his 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 Stavenjord's counsel made no claim for attorney fees in his initial action, and he made no claim for common fund attorney fees until after the Montana Supreme Court's decision in *Stavenjord*. 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 Stavenjord's Petition for Hearing,<sup>5</sup> and the award of common fund attorney fees is not authorized by any specific statute. Further, based on the *Murer* decision, Stavenjord's counsel had notice of his potential entitlement to common fund fees, and the State Fund asserts that the failure of Stavenjord's counsel to initially plead an entitlement to common fund fees constitutes a waiver of that claim.<sup>6</sup>

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<sup>5</sup> Stavenjord's prayer for relief states in full:

WHEREFORE, petitioner respectfully prays that this petition be set for hearing and that the following relief be granted:

1. That Petitioner is entitled to the same PPD benefits as allowed under § 39-71-703, MCA (1997).
2. That Petitioner is entitled to rehabilitation benefits.
3. That Petitioner is entitled to her costs in this action.

Pet. for Hrg. (Oct. 19, 2000).

<sup>6</sup> As argued in *Flynn*, the State Fund also contends that Stavenjord's counsel is estopped from claiming an entitlement to common fund fees because such a claim is

- B. The doctrine of res judicata prohibits Stavenjord'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 Stavenjord'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 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. As previously noted, Stavenjord's counsel had an opportunity to raise and argue an entitlement to common fund fees in the pre-remand proceedings. Because he failed to do so, the doctrine of res judicata prohibits him 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

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inconsistent with his initial position in the WCC, i.e., that he was not seeking common fund attorney fees at all.

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*, 305 Mont. at 385, 28 P.3d at 463 (citation omitted). Accordingly, res judicata should serve to prohibit Stavenjord's counsel from claiming an entitlement to common fund attorney fees in the subsequent post-remand proceedings. Therefore, his claim for common fund attorney fees should be denied.

**VI. IF COMMON FUND FEES ARE APPROPRIATE AND STAVENJORD APPLIES RETROACTIVELY, THEN THE STATE FUND ASSERTS THAT THE GLOBAL LIEN OF STAVENJORD'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 Stavenjord'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* is set for March 24, 2004, and the decision in *Ruhd* will likely determine whether the lien of Stavenjord's counsel applies to just 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 PPD 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 § 703 benefits will vary according to the attorney fee percentage set forth in each respective lien. Obviously, such an approach will create inconsistencies in the amount of § 703 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*, ¶¶ 44-46. Stavenjord's counsel initiated the precedent-setting

litigation, and the *Stavenjord* decision may potentially entitle non-participating OD beneficiaries to receive additional PPD benefits. Limiting the attorney fee lien to claimants of the State Fund, the insurer named in the precedent-setting litigation, 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 *Stavenjord*'s counsel. Such a rule of law will only encourage the rapidly-expanding misuse of the common fund doctrine. Therefore, if *Stavenjord* 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 *Stavenjord*'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 *Stavenjord* established a new principle of law whose decision was not clearly foreshadowed. Alternatively, if *Stavenjord* 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 *Stavenjord*, nor will it retard the rule's operation. The third factor is satisfied because a retroactive application would impose administrative, claims-related and benefit costs and burdens on the State Fund which would be so severe 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, *Stavenjord* applies prospectively only and this Court should deny the attempt by *Stavenjord*'s counsel to retroactively assert his 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

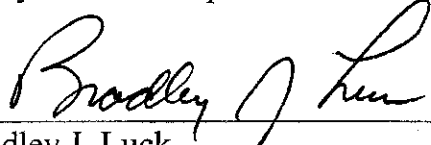
a line here, and consider implementation and possibly remediation issues, without allowing common fund treatment.

In addition, the failure of Stavenjord's counsel to plead an entitlement to common fund attorney fees or class certification prior to the appellate decision bars his post-remand request for common fund fees. Common fund fees are inappropriate in this case, especially since the process of determining PPD entitlement under § 703 requires highly individualistic determinations that cannot be accomplished by a simple mathematical calculation. However, if this Court concludes that common fund fees are appropriate and that retroactivity is proper, then the attorney fee lien of Stavenjord's counsel should apply with equal force to all insurers and self-insurers in the State of Montana to ensure that *Stavenjord* is consistently applied to all claimants and against all insurers.

DATED this 5 day of March, 2004.

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By   
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## CERTIFICATE OF MAILING

The undersigned, a representative of the law firm of Garlington, Lohn & Robinson, PLLP, hereby certifies that on the 5<sup>th</sup> day of March, 2004, she mailed a true and correct copy of the foregoing *State Fund's Opening Brief Regarding Retroactivity, Common Fund Entitlement, Common Fund Fees and Global Lien of Stavenjord's Counsel*, postage prepaid, to the following:

Thomas J. Murphy  
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Exhibit

A

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.

**GROUND 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 of 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.

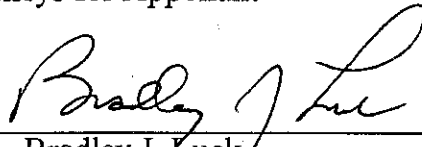
*Henry*, ¶ 43.

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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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 ACT N

1. CASE NUMBER

IN THE SUPREME COURT OF THE STATE OF MONTANA

88452

APPELLANT

RESPONDENT

PAUL B. EASTMAN,  
Claimant and Appellant,

ATLANTIC RICHFIELD COMPANY, Employer,  
and  
ATLANTIC RICHFIELD COMPANY,  
Defendant and Respondent

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AMICUS:  
(for)  
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(supporting appellant)

2. DT. DIST. CT. REC. FILED 8-26-88	3. DT. JGSM/ORDER 6-27-88	4. COUNTY NAME W.C.	5. DT. DIST. CT. REC. FILED 8-29-88	6. DT. TRANSCRIPT FILED 8-29-88
7. DIST. CT. CASE NUMBER 8608-3830	8. DIST. COURT JUDGE Reardon	9. DT. APLNT BRIEF FILED 9/28/88	10. DT. RSPNT. BRIEF FILED 11-11-88	11. DT. REPLY BRIEF FILED 11-29-88
12. S.C. JUDGE ASSIGNED file to cl	13. DT. ASSIGNED 11-29-88	14. TYPE OF APPEAL Amicus - Luck 6/17/89 Amicus - Bulman 7/14/89 Workers' Compensation 7/17/89		
15. DT. ORAL ARGUMENT 5.0.B. 3/9/89 ab	16. ORAL ARGUMENT PRESENTED BY APPELLANT			
17. DT. OPINION/ORDER 5/10/89		18. COURT ACTION, AUTHOR, CONCURRING/DISSENTING Justice Weber; affirmed; Turnage; Gulbrandson and McDonough concur. Justices Hunt; Harrison & Sheehy dissent.		
19. DT. REHEARING PET. FILED 5/17/89	20. DT. OBJECTIONS FILED 5/24/89	21. DT. REHEARING ACTION 8/31/89	22. REHEARING ACTION Denied	
1. FEE PAID/DUE	DT PAID/DUE	BY WHOM		

EXHIBIT

1

X CLOSED

# Exhibit B



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

FILED

APR 09 2002

Ed Smith  
CLERK OF SUPREME COURT  
STATE OF MONTANA

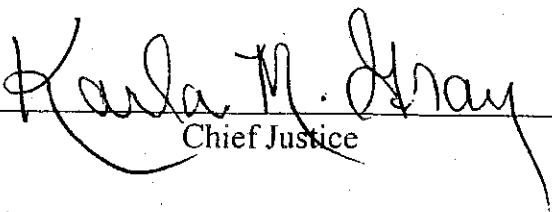
Appellant, Montana State Fund, has moved the Court pursuant to Rule 22, M.R.App.P., to take judicial notice of the Court's Register of Action in Cause No. 88-452, *Eastman v. Atlantic Richfield Company* (1989), 273 Mont. 332, 777 P.2d 862 (rehearing denied August 31, 1989), as well as the two amici curiae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

  
Chief Justice

W. William Rughart

P. S.  
Froy Trowell

Jim Rice  
Justices

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