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ATTORNEYS FOR PETITIONER

IN THE WORKERS' COMPENSATION COURT IN THE STATE OF MONTANA
BEFORE THE WORKERS' COMPENSATION JUDGE

Robert Flynn, Petitioner, v. State Compensation Ins. Fund, Respondent.	)	WCC No. 2000-0222 PETITIONER'S BRIEF REGARDING RETROACTIVITY AND COMMON FUND

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Comes now Petitioner, by and through his attorney of record, and submits this brief in response to the State Fund's two separate briefs regarding the retroactive application of *Flynn* and the common fund doctrine.

RETROACTIVITY

The State Fund argues that the December 5, 2002, decision of the Supreme Court in this action should have prospective application only.[1] While it concedes that "[in] general, judicial decisions apply retroactively", the State Fund argues that *Flynn* falls within an exception to the general rule which Montana has adopted from a the federal courts. The specific federal court decision, *Chevron Oil*[2] has since been

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overruled, but the State Fund contends that Montana still utilizes the *Chevron Oil* exception and that *Flynn* satisfies the exception.

This brief will demonstrate that *Chevron Oil* is not a good law in Montana for the same reasons the United States Supreme Court overruled it. Even if Montana did utilize the *Chevron Oil* test, *Flynn* does not satisfy the exception.

CHEVRON OIL IS NOT GOOD LAW IN MONTANA

The United State Supreme Court has explained the error of the *Chevron Oil* analysis in *James Beam* (1991)[3] and *Harper* (1993)[4].

In *James Beam* the United State Supreme Court held in a plurality decision that once a court has applied a rule of law to the litigants in one case, it must do so with respect to all others not barred by procedural requirements or res judicata. Justice Souter reached this result by relying upon principles of equity and stare decisis. In a concurring opinion, Justice White observed that there is no precedent in civil cases for applying a new rule to the parties of the case but not others. Justice Blackman further observed that the nature of judicial review constrains the Court to require retroactive application of each new rule announced. Justice Scalia, also concurring, opined that prospectivity is impermissible because it violates the constitution.

Each of the above reasons defeat the *Chevron Oil* analysis and thereby compel fully retroactive application of *Flynn*. Fully retroactive application of judicial decisions is overwhelmingly the norm and "... reflects the declaratory theory of law... according to which the courts are understood only to find the law, not to make it."[5] Prospectivity "... breaches the principle that litigants in similar situations should be treated the same, a fundamental component of stare decisis and the rule of law generally."[6] In any event, prospective application of a judicial decision is not permissible unless, within the decision, the court reserves ruling as to whether it will

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follow the normal rule of retroactive application.[7]

Justice Souter relied upon the reasoning of Justice Harlan opposing prospectivity as "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases to flow by unaffected by that new rule."[8] Justice Blackman, concurring, argues forcefully that prospectivity violates basic norms of constitutional adjudication. He points out that unlike a legislature, courts do not promulgate new rules to be applied prospectively only, and to do such "... is to warp the role that we, as judges, play in a government of limited powers."[9] "We fulfill our judicial responsibility by requiring retroactive application of each new rule we announce."[10] "Because it forces us to consider the disruption that our new decisional rules cause, retroactivity combines with stare decisis to prevent us from altering the law each time the opportunity presents itself."

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The *Chevron Oil* analysis is not good law in Montana. Applying *Chevron Oil* to limit the application of *Flynn* to other claimants similarly situated is beyond the constitutional power of the Court and would violate the claimants constitutional rights of equal protection under the law. Beyond these basic constitutional violations, *Chevron Oil* invites violation of basic equities and stare decisis, while at the same time upsetting the nature of judicial review. The State Fund invites error when it suggests that this Court should adopt *Chevron Oil* to determine if *Flynn* should apply

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retroactively to similarly situated claimants.

CHEVRON OIL WOULD RESULT IN FULLY RETROACTIVE APPLICATION OF *FLYNN*

The Montana Supreme Court has succinctly summarized the *Chevron Oil* analysis as follows:

> **First**, the ruling to be applied nonretroactively must establish a new principle of law either by overruling precedent or by deciding an issue of first impression whose result was not clearly foreshadowed. **Next**, the new rule must be examined to determine whether retroactive application will further or retard its operation. **Third**, the equity of retroactive application must be considered.[16]

The determinative principle of law in *Flynn* was the common fund doctrine. In reaching its decision, the Court cited express Montana authority, on point, spanning 20 years; *Means* (1981),[17] *Hall* (2001)[18] and *Murer* (1997)[19]. Since the *Chevron Oil* analysis originates with and applies exclusively to decisions which "establish a new principle of law" and since *Flynn* merely applied a principle of law expressly adopted in Montana over 21 years earlier,[20] the *Chevron Oil* analysis has no application to *Flynn*. Consequently, we simply never reach the remaining factors of the *Chevron Oil* analysis. The principle of law controlling the *Flynn* decision was not merely "clearly foreshadowed", it was the long established and well recognized law of Montana.

Notably, the *Flynn* Court did not expressly overrule *Stahl* (1991).[21] Instead, it pointed out that *Stahl* was not dispositive because *Stahl* presented a different

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[16] *Riley v. Warm Springs State Hosp.*, (1987), 229 Mont. 518, 748 P.2d 455. (Emphasis added.)

[17] *Means v. Montana Power Co.*, (1981), 191 Mont. 395, 405, 625 P.2d 32, 38.

[18] *Mountain West Farm Bureau v. Hall*, 2001 MT 314, ¶¶ 15-18, 308 Mont. 29, ¶¶ 15-18, 38 P.3d 825, ¶¶ 15/18.

[19] *Murer v. State Comp. Mut. Ins. Fund*, (1997), 283 Mont. 210, 942 P.2d 69.

[20] *Means*, Supra @ 403. Where the Court refers to the common fund doctrine as "well recognized" even then and notes that it had been "quoted in several Montana cases" dating back to 1933.

[21] *Stahl v. Ramsey Const. Co.*, (1991), 249 Mont. 271, 811 P.2d 546.

theory of relief and failed to argue for application of the common fund doctrine. Put another way, the *Stahl* rational was not incorrect, as far as it went, (i.e. re: consideration of contractual and statutory authority to apportion costs) it simply did not reach the dispositive legal principle.

If the common fund doctrine were a new principle of law, the next step must be to determine whether retroactive application of the doctrine would further or retard its operation. "The basis of the doctrine being rooted in the equitable concepts of quasi-contract, restitution and recapture of unjust enrichment,..."[22] The doctrine arises out of and only applies to prior conduct benefitting non-participating beneficiaries. More specifically, creating, reserving or increasing a common fund. By its nature, the doctrine must apply retroactively or not at all. If *Flynn* is not applied retroactively, the purpose of the rule – avoiding unjust enrichment – will be wholly defeated since the insurer not participating in the cost of obtaining the claimants social security awards for 29 years will retain the full benefit of claimants efforts without sharing in the cost. Nothing could weaken this equitable principle more than to arbitrarily cut off application to totally disabled claimants simply because the costs which ultimately benefitted the insurer resulted in a Social Security Disability award before December 5, 2002. Such an outcome would not further the purpose or operation of the common fund doctrine.

If the common fund doctrine were a new principle of law, the final step must be to consider the equity of retroactive application of the doctrine. This is a simple matter since the common fund doctrine is itself an equitable doctrine. By operation of equitable principles, it authorizes assigning responsibility for fees among those individuals who benefit from the litigation which created the common fund. There is no equitable reason for denying application of this long standing, well recognized, equitable doctrine. Especially so, as here, where the parties called upon to contribute to the cost of claimants obtaining Social Security awards voluntarily undertook the obligation to pay workers' compensation benefits pursuant to Montana law.

"It is important to note it is [the State Fund] who must convince this Court that retroactive application would result in substantial inequitable results."[23] The State Fund attempts to meet this burden by characterizing as an "enormous administrative burden" the straightforward process required to identify the claimants and verify the fees incurred to establish Social Security Disability awards from which it calculated

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[22] *Means*, Supra @ 403.

[23] *LaRoque v. State*, (1978), 178 Mont. 315, 320, 583 P.2d 1059.

its offset of biweekly wage loss benefits. The State Fund's argument rings hollow when considering that it has recently implemented a virtually identical task and thereby adjusted the claims of other Social Security recipients back to July 31, 1974.[24] The State Fund tries to bolster its attempt to meet its burden by claiming that the cost of repaying the wrongfully offset benefits would be passed on to current insured in the form of increased premiums. This, in itself, is not inequitable since many, of not all, of the current insureds have benefitted by premium rates established, presumably in part, based on wrongful offsets which failed to account for the costs incurred to obtain Social Security Disability awards. The wrongful offsets, some of which are no doubt ongoing, are in turn, partly responsible for the over $31,000,000 in dividends paid by the State Fund to its insured over the past several years.[25]

In any event, this argument only supports some other cutoff date, rather than July 1, 1974. But, at best, it is only weak support and could never justify defeating the equitable purpose of the common fund doctrine.

The State Fund relies heavily on *Long* (1988),[26] a Federal decision which is limited to facts not applicable here. First, the holding of *Long* is limited to title VII discrimination claims in the pension plan context. Next, retroactive application of the *Long* holding "... would impose financial costs that would threaten the security of both the [retirement] plans and their beneficiaries."[27] Ultimately, fish-one-out-of-the-stream, analysis employed by *Long* merely highlights the inequities and improprieties created by *Chevron Oil* and which the Federal courts now avoid altogether after overruling *Chevron Oil*. In any event, the State Fund has wholly failed to provide any meaningful data suggesting hardship or inequity. It admits that it "does not yet have any figures" but speculates that the number and amount of wrongful Social Security Disability offsets "are both expected to be significant". Whatever the State Fund means by "significant", without proof that it would threaten the security of the State Fund and the claimants, the equities still weigh in favor of the State Fund disgorging prior wrongful Social Security Disability offsets and terminating any such ongoing offsets.

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[24] See Settlement Agreement dated January 31, 2001, re: *Broeker v. State Compensation Mut. Ins. Fund*, (1996), 275 Mont. 502, 914 P.2d 967 (1996), attached as Appendix A.

[25] See State Fund publication "Perspectives" dated Spring 2003 attached as Appendix B.

[26] *Florida v. Long*, 487 U.S. 223, 108 S.Ct 2354, 101 L.Ed.2d 206 (1988).

[27] *Long*, Supra @ 224.

COMMON FUND

The State Fund's brief demonstrates a misunderstanding of the common fund doctrine. It contends that prior to the decision creating the common fund, the non-participating beneficiaries must receive notice that the active beneficiary intends to create a common fund. Such notice is not one of the criteria which must be met for an award of common fund attorney fees.

An award of common fund attorney fees requires three criteria:

1) an active beneficiary must create, reserve or increase a common fund;

2) the active beneficiary must incur legal fees in establishing the common fund; and

3) the common fund must benefit ascertainable, non-participating beneficiaries.[28]

In the Montana Supreme Court, Flynn established the duty of a workers' compensation insurer to contribute, in proportion to the benefits it actually received, to the cost incurred by a claimant to recover a Social Security Disability award. That duty had not been previously established. Thus, the first element is satisfied. In establishing such duty, Flynn incurred attorney fees and thereby satisfied the second element. Finally, as a result of his action, Flynn established a readily identifiable class of beneficiaries entitled to further benefits. When these criteria are met, the entitlement to common fund attorney fees arises by operation of law.

The alternative to this logic would be, as argued by the State Fund, to require prior notice to each of the potential beneficiaries. Such notice would move away from the ordinary operation of the common fund doctrine and toward the rules applied in class action litigation. Such notice would add an element not required by any common fund case decided in Montana. Non-participating beneficiaries were

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[28] *Flynn v. State Compensation Ins. Fund*, 2002 MT 279, 312 Mont. 410, ¶ 16.

not provided with prior notice in *Murer*,[29] *Broeker*,[30] *Raush*,[31] *Ruhd*,[32] or *Flynn*.[33]

Undisputably, no common fund attorney fee was due or recoverable on *Flynn*'s Social Security Disability award until the award was granted by the Social Security Administration. Only then did the common fund exist which benefitted the State Fund. Likewise, no common fund attorney fee was due or recoverable on an insurers duty to contribute to the cost of recovering a Social Security Disability award until that duty was established in the Supreme Court. Once the duty was established, however, each of the criteria for common fund attorney fees were simultaneously satisfied.

Flynn confirms that for purposes of the common fund doctrine a single insurer is no different than a group of individuals; both must contribute to the costs of benefits they receive from the efforts of another. In specific, the State Fund receives 50% of Flynn's Social Security benefits and must contribute 50% of the fees. In the same way that Flynn's Social Security Disability litigation created a common fund which directly benefitted the State Fund, his litigation in this Court and the Supreme Court established the duty of insurers to contribute to the Social Security Disability costs of similarly situated claimants. Short of a class action on behalf of the similarly situated claimants, Flynn could neither do nor fail to do anything which would raise the bar of res judicata as to any claimant who was not named in the litigation. Applying res judicata as urged by the State Fund would violate the principle element of res judicata, i.e. identify of parties.

The State Fund argues that it will be denied due process of law if the common fund doctrine is applied to the claimants who are non-participating beneficiaries of the *Flynn* decision. The underlying premise of this argument is that it would have made better or different arguments before if it had thought that the decision might affect other claimants. This premise is unfounded. The State Fund is a frequent user of the courts. It cannot reasonably claim that it did not appreciate the risk that a decision favorable to Flynn would have far reaching implications. The State Fund has not suggested any new or different argument which might have conceivably

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[29] *Murer*, Supra.

[30] *Broeker v. State Compensation Mut. Ins. Fund*, (1996), 275 Mont. 502, 914 P.2d 967.

[31] *Raush, Fisch and Frost v. State Compensation Ins. Fund*, (RFF) (2002), 311 Mont. 210, 54 P.3d 25.

[32] *Ruhd v. Liberty Northwest Ins. Corp.*, 2003 MTWCC 38.

[33] *Flynn*, Supra.

altered the Supreme Court's decision. It had the opportunity to make every argument against Flynn's position which it might construct. The State Fund has not been denied due process of law.

Dated this 2nd day of June 2003.

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June 2003, a true and correct copy of the foregoing was served upon the following by U.S. mail, hand-delivery, Federal Express, or facsimile:

Bradley J. Luck
Garlington, Lohn & Robinson
199 W Pine
PO Box 7909
Missoula, MT 59807-7909

Tom Martello
Montana State Fund
PO Box 4759
Helena, MT 59624

{X} U.S. Mail
{ } Hand Delivered
{ } Federal Express
{ } Facsimile

Margaret Mart

SETTLEMENT AGREEMENT

This Settlement Agreement, made and entered into this 31 day of January, 2001, by and between the State Compensation Insurance Fund ("State Fund") and Howard E. Strause and Lawrence A. Anderson ("Strause and Anderson"):

RECITALS

A. An action was commenced and maintained in the Montana Workers' Compensation Court by Strause and Anderson entitled *Broeker v. State Compensation Mutual Insurance Fund*, Cause No. 9211-6631R1. The legal issues in the matter were ultimately decided by the Montana Supreme Court in *Broeker v. State Compensation Mutual Insurance Fund*, 275 Mont. 502, 914 P.2d 967 (1996);

B. As a result of the *Broeker* decision other workers' compensation claimants situated similarly with Mr. Broeker may have become entitled to additional biweekly benefits *(Broeker* benefits). A process was undertaken by the parties hereto to identify the State Fund claimants possibly entitled to *Broeker* benefits and to calculate potential past due compensation;

C. Several issues have arisen in relation to the entitlement for and calculation of *Broeker* benefits. The parties have reached an agreement in relation thereto which they believe addresses such issues. The purpose of this Settlement Agreement is to set forth the terms and conditions under which the State Fund will identify and pay *Broeker* benefits.

NOW THEREFORE, in consideration of the mutual promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby expressly acknowledged, the parties agree as follows:

1. **Handling of Claims Arising Between July 1, 1974 and June 30, 1982.**

The potential entitlement for *Broeker* benefits for State Fund claimants injured between July 1, 1974 and June 30, 1982, shall be considered as follows: The State Fund shall publish and pay for a notice in the major newspapers primarily serving Kalispell, Missoula, Helena, Butte, Bozeman, Great Falls and Billings on three consecutive Sundays. The notice size will be at least two columns wide and five inches high. The notice will not be in the legal section and, subject to the advertising standards of each newspaper, will be on page locations approved by Strause and Anderson.

The published notice will be directed to injured workers with injury dates between July 1, 1974 and June 30, 1982, who received workers' compensation total disability benefits through the State Fund while also receiving Social Security disability benefits as a result of their injuries who have not settled their claims. The notice will instruct such individuals to submit a request for *Broeker* benefits in writing to the State Fund along with proper documentation. Proper documentation shall include the workers' compensation claim number and written verification from the Social Security Administration of receipt of Social Security benefits.

The form and content of the newspaper notice shall be approved by the parties and the Workers' Compensation Court. A copy of the notice is attached hereto as Exhibit 1.

A claim for *Broeker* benefits will only be considered by the State Fund if it is received within 120 days of the last publication of the notice, is in writing and is accompanied by the claim number and the required written verification of the receipt of Social Security benefits. A failure of a claimant to meet any of the noted requirements

within the time specified will result in the claim not being reviewed for entitlement to *Broeker* benefits and a forfeiture of such entitlement. Phone calls will not be considered as proper claims or in lieu of the above procedure and filing requirements.

Claims made as required in this paragraph shall be reviewed by the State Fund and any *Broeker* benefits due shall be paid in the manner directed herein.

2. **Handling of Claims Arising Between July 1, 1982 and February 2, 1997.**

The potential entitlement for *Broeker* benefits for State Fund claimants injured between July 1, 1982 and February 2, 1997, shall be considered as follows: Claims with potential entitlement to *Broeker* benefits during such period have been identified on a computer run (with approximately 6,667 claimants identified). All individuals listed on the computer run will be sent a letter at the address identified on the computer run advising each claimant of a potential entitlement to *Broeker* benefits and advising of the need to submit proper documentation within 120 days of the date of the letter for consideration of actual entitlement to such benefits. Proper documentation shall include a written request for review accompanied by the State Fund claim number (or, in the alternative, the claimant's Social Security number) and written verification from the Social Security Administration of the receipt of Social Security benefits. Claimants will be advised that settled claims are closed and will not be considered for *Broeker* benefits.

Letters that are returned as undeliverable to the State Fund will not require follow up by it. Such letters will be provided by State Fund to Strause and Anderson within fourteen (14) days who may, at their own expense, attempt to identify current addresses and notify potential claimants.

No claim for *Broeker* benefits will be accepted more than 120 days after the mailing of the required notice. Claims without all of the proper documentation specified will not be processed.

Timely written claims accompanied by the proper documentation will be reviewed and any *Broeker* benefits due shall be paid in the manner directed herein.

The form and content of the letters required hereby shall be approved by the parties and the Workers' Compensation Court. A copy of the letter approved by the parties is attached as Exhibit 2.

3. **Claims Identified on the CMS System.**

All claims on the State Fund's CMS system on the date of this Agreement that have a completed Social Security screen will be reviewed to determine eligibility for *Broeker* benefits. Any other CMS claims (claims open and active on February 3, 1997 or thereafter, approximately 422 claims) identified in the review process which might have an entitlement to *Broeker* benefits will be reviewed. The State Fund will make reasonable efforts to identify claimants who may have an entitlement to *Broeker* benefits.

All claims with an entitlement to *Broeker* benefits shall be paid in the manner directed herein.

4. **Payment of *Broeker* Benefits and Attorneys' Fees.**

Payment of *Broeker* benefits on claims with injury dates on or after July 1, 1974, that were open and active (i.e., in which total disability benefits were being paid with a Social Security offset) between July 1, 1974 and April 18, 1985, will be paid to the claimants at 100% (i.e., full *Broeker* entitlement with no reduction for common fund attorneys' fees) for

that time period only. Benefits paid for the period April 19, 1985 through July 5, 1996, on such claims, will be paid to the claimants at a percentage of total benefits, with common fund attorneys' fees paid to Strause and Anderson out of the claimant's entitlement.

Claimants with dates of injury between April 19, 1985 through July 5, 1996, will be paid their *Broeker* benefits at a percentage of the total benefits, with common fund attorneys' fees paid to Strause and Anderson out of their entitlement.

Other claimants who were paid total disability benefits with a social security offset during the period from April 19, 1985 through July 5, 1996, will be paid their *Broeker* benefits at a percentage of the total benefits, with common fund attorneys' fees paid to Strause and Anderson out of their entitlement.

All claims, regardless of the date of injury, with an entitlement to *Broeker* benefits during the period on or after July 6, 1996, will be paid at 100% (i.e., full *Broeker* entitlement paid to the claimant with no reduction for common fund attorneys' fees). (For example, a 1987 claim open in 1996 will receive *Broeker* benefits subject to a reduction for common fund fees from 1987 through July 5, 1996, and full benefits, not reduced for common fund fees, thereafter.)

The Workers' Compensation Court will set the percentage attorneys' fee for those periods in which a common fund fee is paid. The State Fund will not object to a contingency fee of 25% or less.

5. **Settlements.**

All settlements approved by the Department of Labor or the Workers' Compensation Court, and all settlements approved as stipulated judgments in the Workers' Compensation

Court will remain closed and are not subject to any review for or entitlement to *Broeker* benefits. Letters required by Paragraph 2 hereof will not be sent to claimants on claims known to have been settled.

6. **Additional Attorneys' Fees.**

The State Fund will pay Strause and Anderson an additional attorneys' fee of $120,000, upon the approval of this agreement. The payment under this paragraph is in addition to common fund fees approved by the Workers' Compensation Court consistent with this agreement.

7. **Deceased Claimants.**

Claimants who died prior to April 5, 1996, will not be entitled to *Broeker* benefits. Claimants who died on or after April 6, 1996, will have their claims reviewed for a possible entitlement to *Broeker* benefits if a written claim providing the proper documentation set forth in Paragraphs 1 and 2 is timely presented (within 120 days of the publishing of notice under Paragraph 1 or within 120 days of the mailing of the written notice under Paragraph 2) by an acting and duly appointed Personal Representative.

8. **Overpayments.**

If an entitlement to *Broeker* benefits is identified on a claim in which a benefit overpayment exists, the State Fund may reduce the overpayment by taking credit for the *Broeker* benefits. However, common fund fees, if due on the claim, will be paid to Strause and Anderson before any credit is calculated.

9. **Waiver of Defenses.**

Upon approval of this agreement by the Court, State Fund agrees to drop all defenses

to this action such as statute of limitations, latches, estoppel and waiver. State Fund will waive the defense that post July 1, 1987 claims are not subject to the *Broeker* decision and thus do not have an entitlement.

10. **Court Action.**

This document will be presented to the Workers' Compensation Court for its approval. Upon approval, the Workers' Compensation Court shall enter a consent judgment incorporating the terms of this agreement. However, the Court shall retain jurisdiction in the action to implement and oversee this settlement. The parties shall execute such other documents as are necessary to give full effect to the terms, conditions and spirit of this settlement.

Common fund attorneys' fees shall be awarded by the Court subject to a procedure adopted by it. The parties hereto shall cooperate in the process of considering and awarding common fund fees. The State Fund will not object to a common fund contingency fee of 25% or less.

11. **Scope of Release.**

This settlement shall be submitted to the Workers' Compensation Court for consideration and approval. Upon the approval of this settlement by the Workers' Compensation Court, all claims between the parties based on the adjustment or handling of this matter, including any collateral claims and other claims or issues that could have been raised before the Workers' Compensation Court or any other court of competent jurisdiction including but not limited to claims under §§ 33-18-201 and 242, MCA, and any other Montana statute or regulations and all claims for fraud, misrepresentation, breach of the

covenant of good faith and fair dealing and any other common law claim in favor of any party shall be fully and finally settled and resolved with prejudice.

Upon approval of this settlement and entry of the Consent Judgment all benefit entitlement and other issues raised in or arising as a result of the *Broeker* case and decision will be considered fully and finally settled upon their merits.

12. **Further Actions.**

The State Fund will cooperate in the establishment of reasonable deadlines, with Court involvement, for the completion of identification, review of claims, and payment of claims with a possible entitlement to *Broeker* benefits. Reasonable deadlines will take into consideration logistical issues relating to computer programming, file retrieval, file review and man power.

DATED this 31 day of January, 2001.

STATE COMPENSATION MUTUAL INSURANCE FUND

By Nancy Butler

Approved by:

STATE COMPENSATION INSURANCE FUND
5 South Last Chance Gulch
Helena, MT 59604

By Tom Martello
Tom Martello, Legal Counsel

LAWRENCE A. ANDERSON
HOWARD F. STRAUSE
Attorneys at Law
P.O. Box 2608
Great Falls, MT 59403

By

NOTICE OF WORKERS' COMPENSATION COURT
TO WORKERS WITH CLAIMS FOR INDUSTRIAL INJURIES
OCCURRING BETWEEN 1974 AND 1982

If you were injured on the job between July 1, 1974 and June 30, 1982, you **may** be entitled to receive additional workers' compensation benefits if you meet **all** of the following criteria:

1. You received total disability workers' compensation benefits from the Montana State Fund as a result of the injury; and

2. You also received Social Security disability benefits during at least part of this time; and

3. You have **not settled** your workers' compensation claim; and

4. You submit written verification to the Workers' Compensation Court of receipt of Social Security disability benefits and your workers' compensation claim number by _____.

If you fail to submit this information to the Workers' Compensation Court by such date, your claim will not be reviewed.

You must send your verification to the Workers' Compensation Court, P.O. Box 537, Helena, Montana 59624-0537.

DO NOT CALL THE WORKERS' COMPENSATION COURT OR STATE FUND BY TELEPHONE

NOTICE TO WORKERS WITH CLAIMS FOR INDUSTRIAL INJURIES OCCURRING BETWEEN 1982 AND 1997

Dear: _____:

Records indicate that you received workers' compensation benefits for a period of time between July 1, 1982 and February 2, 1997, from the Montana State Fund. You **may** be entitled to receive additional workers' compensation benefits if you meet **all** of the following criteria:

1. You received total disability workers' compensation benefits from the Montana State Fund sometime during the period of July 1, 1982 to February 2, 1997; and

2. You also received Social Security disability benefits during at least part of this time; and

3. You have **not settled** your workers' compensation claim; and

4. You submit written verification to the Workers' Compensation Court of receipt of Social Security disability benefits and your workers' compensation claim number or Social Security number by _____. If you fail to submit this information by such date, your claim will not be reviewed.

You must send your verification to the Workers' Compensation Court, P.O. Box 537, Helena, MT 59624-0537.

DO NOT CALL THE WORKERS' COMPENSATION COURT OR STATE FUND BY TELEPHONE

APP.

A

APP. B

PERSPECTIVES

A NEWSLETTER FOR POLICYHOLDERS & MEDICAL PROVIDERS | SPRING 2003

MONTANA STATE FUND

800-332-6102
406-444-6500 • 406-444-7796 FAX
WWW.MONTANASTATEFUND.COM

MSF Board declares 5th consecutive Dividend

At its March 28 meeting, the Montana State Fund (MSF) Board of Directors authorized a $3 million dividend payment to eligible policyholders with superior safety records. This is the fifth consecutive year that MSF has been able to reward organizations that make workplace safety a priority. Approximately 16,000 policyholders of record for the period covering July 1, 2000-June 30, 2001 are qualified to receive a dividend payment. Herbert Leuprecht, Chairman of the Board of Directors stated, "We are pleased to once again approve a dividend payment to safety-conscious employers. The MSF team has focused on helping businesses reduce workplace injuries, and the results are of benefit to all."

"As a financially sound organization, we are able to return any surplus beyond what is needed for prudent business operations in the form of dividends to qualifying policyholders," said Laurence Hubbard, Interim President/CEO of Montana State Fund. He went on to say "while balance sheets call it a surplus, we view it as an obligation to injured employees and policyholders who have put their trust in our company. Our goal is to continue to slowly strengthen our financial condition, allowing us to operate as a strong and long-term viable insurance carrier, committed to the businesses in Montana."

Since 1999, over $31 million in dividends have been paid to policyholders. While dividends are dependent on results and cannot be guaranteed, MSF anticipates that our strong financial condition will allow us to support the continuation of this program in the future. As discussed in the last issue of *Perspectives*, rates are expected to increase in FY04. Some have suggested that instead of declaring a dividend, MSF should simply lower rates. It is the philosophy of the MSF Board that when a policyholder has favorable results and our financial situation allows, they are deserving of a dividend for that year. Dividends are based on past performance and have no direct relationship to the forces driving future pricing. Rates are based on the next year's anticipated losses and financial goals. The anticipated increase in rates is based on rapidly escalating medical costs, decreasing investment income, legislative changes and ongoing structural impacts on the insurance system due to the events of 9/11.

Policyholders who meet the criteria for a dividend will be notified by mail in late April/early May. Funds will be distributed by the middle of June.

IN THIS ISSUE :

At Montana State Fund, we believe there's numbers in safety.

$31,000,000

Since 1999

ATTORNEYS INC., P.C.
A Professional Corporation
REX PALMER
ROBERT STUTZ
301 W Spruce • Missoula, MT 59802
(406) 728-4514 • Fax (406) 728-5601 • attorneysinc@montana.com • www.montana.com/attorney

June 2, 2003

Patricia J. Kessner, Clerk of Court
Workers' Compensation Court
PO Box 537
Helena, MT 59624-0537

Re: *Flynn v. State Fund*
WCC #2000-0222

Dear Ms. Kessner:

Enclosed please find the original PETITIONER'S BRIEF REGARDING RETROACTIVITY AND COMMON FUND dated June 2, 2003, and a copy of our letter to Thomas Harrington dated June 2, 2003.

If you have any questions or concerns, please do not hesitate to contact this office.

Sincerely,
ATTORNEYS INC., P.C.

Rex Palmer/mm
Rex Palmer

RP:mm
Enclosure