



Montana Legislative Services Division

Legal Services Office

Recent Court Challenges to State Statutes
Report to Legislative Council
March 13, 2006
by Valencia Lane, Staff Attorney

The following information relating to lawsuits that challenge state statutes is based on information received from state agencies' legal counsels in response to a request for information that was made in February, 2006, to state agency chief legal counsels. The information below represents the responses to date.

DEPARTMENT OF ADMINISTRATION

1. A lawsuit, *Baumgardner v. PER Board* (Cause No. ADV-2002-450, First Judicial District), has been filed challenging the constitutionality of that portion of Chapter 149, laws of Montana 2001 (the GABA -- Guaranteed Annual Benefit Adjustment -- increase legislation) which, in the definition of "actuarial equivalent", substituted "the mortality table and interest rate assumptions adopted by the Board" for "the 1971 Group Annuity Mortality Table, with ages set back 4 years and an interest rate of 8% compounded annually". This amendment was effective March 29, 2001. Subsequent to the legislation, effective July 1, 2001, the Public Employees' Retirement Board adopted new actuarial equivalent option factors based on previously adopted actuarial assumptions, including updated mortality tables (previously used only for valuation purposes). The legal challenge is the use of these new actuarial equivalent option factors in determining the actuarial equivalent benefit payout when a single life benefit is converted to an alternate form of benefit payment. The plaintiff seeks recalculation of benefit payments and attorney's fees. The action was filed by a PERS member, but could affect other systems where members have the option to choose a benefit payment other than for the member's life only.

Three constitutional claims have been made: 1) that the legislation contained more than one subject matter, not properly reflected in the title; 2) that the legislation was an unconstitutional delegation of legislative authority; and 3) that the legislation constituted an unconstitutional impairment of contract. The district court dismissed the first claim; found in favor of the plaintiff on the second claim; and has not ruled on the third claim. The district court's ruling on the second issue was reversed by the Montana Supreme Court (Cause No. 04-861) and the case has been returned to the district court on remittitur. Requested amendments allowing two additional claims (violation of equal protection and noncompliance with the Montana Administrative Procedure Act in the adoption of the new option factors) also have not been ruled on by the district court.

2. *Bean, et al v. Montana and MPERA* (Cause No. ADV-2004-707, First Judicial District) challenges the constitutionality of Chapter 290, laws of Montana 2001 which allowed firefighters hired by the Montana Air National Guard on or after October 1, 2001 to join the Firefighters Unified Retirement System (FURS) rather than the Public Employees' Retirement System (PERS). Plaintiffs, hired before October 1, 2001, claim the law is a violation of equal protection and seek coverage under FURS. A counterclaim seeks proper FURS employee contributions from plaintiffs if they are determined to be covered by FURS. A motion for summary judgment has been filed by the state and MPERA. The chance of plaintiffs prevailing is remote.

3. *Hall v. State of Montana and the Public Employees' Retirement Board* (Cause No. 05-124, Montana Supreme Court) is on appeal from a district court decision dismissing a FURS equal protection claim on a statute of limitation basis. A plaintiff's chance of prevailing on the statute of limitations issue is reasonably possible. However, any plaintiff's chance of prevailing on the equal protection claim is remote.

4. *Houppert v. Public Employees' Retirement Board* (Cause No. CDV-2004-516, First Judicial District) challenged the PER Board interpretation of §19-3-504, MCA concerning the need to return to service after a workers' compensation injury in order for PERS membership service to be granted (generally of concern only for members seeking to be vested after five years of membership service). In finding for the claimant, the District Court incidentally applied a unique view of §19-2-702, MCA concerning receipt of membership service. The District Court order was not appealed. Clarification of the two affected statutes is expected to be included in Board proposed legislation in 2007.

5. *Farrier v. Teachers' Retirement Board*, 2003 MT 278 and 2005 MT 229, was decided by the Supreme Court in September of 2005. The case involved a challenge to 19-21-202 and dealt with the interplay between the teachers' retirement system and the university system optional retirement program. Farrier argued that the teachers' retirement board had incorrectly interpreted the statute or that if applied correctly, the statute violated his constitutional right to equal protection. This most recent decision was the case's second trip to the Supreme Court. In 2003 TRB received a favorable decision from the Supreme Court reversing the district court's finding that TRB had incorrectly applied the statute to Farrier. The Court remanded on the equal protection issue after determining that it had not been properly presented. On remand, the District Court ruled that the application of 19-21-202 to Farrier violated his equal protection rights. The Supreme Court reversed that ruling on appeal and found 19-21-202 to be constitutional.

6. *City Financial v. Goodwin, et al*, CV-05-76-GFSEH, this is a case against the Commission on Banking filed in federal court challenging 2005 amendments to section 30-5-301, MCA, dealing with consumer loans. Currently the case is in federal district court and a motion to dismiss has been filed but not ruled on. The case is expected to be settled.

7. The following cases involve the state's procurement act:
- * *Spiker Communications v. Dept. of Commerce*, involves unfair sharing of information during procurement process; challenges 18-4-304, MCA; started in 1995 and going to trial in 2006;
 - * *Reier Broadcasting v. MSU*, involves unfair disqualification of proposer during procurement process; challenges 18-4-304 and 18-4-242, MCA, the State Supreme Court ruled in favor of the state in December, 2005;
 - * *Albright v. Dept. of Corrections*, involves unfair cancellation of procurement process, involves 18-4-304 and 18-4-242, MCA, the District Court ruled in favor of the state in 2004; and
 - * *Jernberg v. Dept. of Revenue*, involves alleged unfair cancellation of procurement process; challenges 18-4-304, MCA, in District Court.

**DEPARTMENT OF FISH, WILDLIFE, AND PARKS and
FISH, WILDLIFE, AND PARKS COMMISSION**

State District Court Cases

1. *Bitterroot River Protective Association v. Bitterroot Conservation District*, 21st Judicial District Ct., Ravalli Co., Cause No. DV03-476/1. DFWP is an involuntary plaintiff in the part of the case addressing whether Mitchell Slough is a manmade irrigation ditch or a stream subject to the right of access by the public. This part of the case is now pending a decision by Judge Mizner following a trial July 11-15 and the filing of briefs and proposed findings and conclusions by the parties. The interpretation of what is a stream for stream access purposes is being challenged.

2. *Keane v. Montana Fish, Wildlife & Parks Commission*, 1st Judicial District Ct., Lewis & Clark County, Cause No. BDV-2004-474. Plaintiffs filed suit for a Declaratory Judgment challenging the Commission's decision approving a contract that would allow the International Malting Corporation to lease 16 cfs of spring water from DFWP. The suit also sought to halt the drilling of a pipeline underneath the river to transport that water to the International Malting Corporation's plant. DFWP negotiated a settlement with the Plaintiffs and the suit was dismissed on April 4, 2005. The litigation challenged DFWP's authority to lease water.

3. *Montana Shooting Sports Ass'n v. State of Montana*, 4th Judicial District, Missoula County, Cause No. DV-06-94. A challenge to the constitutionality of the requirement to give a social security number when applying for a hunting, fishing, or trapping license. Plaintiff claims that MCA §§ 87-2-106 and 87-2-202 violate the right of privacy and the hunting heritage provisions of the Montana Constitution.

4. *Royal Tine Ranch v. Montana*, 11th Judicial District Court, Flathead County, Cause No. DV-02-606(C). The plaintiffs claim that I-143 takes their property without just compensation in violation of the U.S. and Montana Constitution. The issue was submitted to the District Court in Flathead County on cross-motions for summary judgment in September of 2004.

5. *Fishing Outfitters Association of Montana v. Montana Fish, Wildlife and Parks*, 18th Judicial District Court, Gallatin County, Cause No. DV-02-12. The District Court ruled in August 2004 on a challenge to the adoption of the Beaverhead and Big Hole recreational rules that: the Commission had a specific grant of statutory authority to adopt recreational use rules on public waters; the Commission met or exceeded procedural and substantive requirements under MAPA; the rules did not violate the Federal Land and Water Conservation Fund Act; and the rules did not violate the Commerce Clause of the U.S. Constitution. FOAM first appealed the decision to the Montana Supreme Court but then withdrew the appeal effective Sept. 22, 2004. The litigation challenged the Commission's authority to regulate the use of rivers and streams based on state and federal constitutional grounds.

6. *Spoklie v. Montana Department of Fish, Wildlife and Parks*, 15th Judicial District Court, Sheridan County, Cause No. 11013. Plaintiff alleges that I-143 violates their constitutional rights and is a taking of property without just compensation. The case has been certified as a class action. DFWP, represented by the Attorney General, has filed and briefed on November 2002 a motion for partial summary judgment on the violation of constitutional rights issues. No action has been taken by the Court.

7. *Bowman v. Montana Department of Fish, Wildlife and Parks*, 10th Judicial District Court, Fergus County, Cause No. DV 02-115. Plaintiffs allege that I-143 violated their constitutional rights and is a taking of property without just compensation. A motion for a default judgment has been made by DFWP and is pending before the Court. State's motion to dismiss constitutional claims was granted.

Montana Supreme Court Cases

8. *Buhmann and Wallace v. Montana*, Montana Supreme Court, Case No. 05-473. District Court Judge McCarter ruled that I-143 did not result in an uncompensated taking of Buhmann and Wallace's property. They have appealed to the Montana Supreme Court.

9. *Hilston v. State of Montana*, 8th Judicial District, Cascade County, Cause No. DDV-05-1023. The case challenges the application of MCA § 70-16-302 (the Recreational Use Statute) to DFWP's management of a Wildlife Management Area. Mr. Hilston was killed by a grizzly bear while retrieving an elk. The case was dismissed by the state district court. Hilston has appealed the dismissal to the Montana Supreme Court.

10. *Kafka and Bridgewater v. Mt. Dept. of Fish, Wildlife and Parks*, Montana Supreme Court, Case No. 05-146. District Court Judge Rice ruled the enactment and enforcement of I-143 was not an uncompensated taking of Kafka and Bridgewater's property. Both Kafka and Bridgewater have appealed to the Montana Supreme Court

Federal Court Cases

11. *Spoklie and Kafka v. Montana*, U.S. Court of Appeals 9th Circuit, 411 F.3d 1051. The 9th Circuit upheld the U.S. District Court's (District of Mont.) decision that I-143 did not violate any of Spoklie and Kafka's federal constitutional rights. The Court also affirmed the District Court's dismissal of a §1983 claim against Director Hagener.

DEPARTMENT OF LABOR AND INDUSTRY

2003:

1. *R. Brent Kandarian & Lee Wiser v. State of Montana, DLI, and Board of Dentistry*, Montana First Judicial District Court, Lewis & Clark County, Cause No.: BDV 2003-665. Petition for Declaratory Judgment alleging: (1) violation of due process because § 37-29-201, MCA, places the denturists, as a competing profession, under the Board of Dentistry; (2) interpretation of § 20-25-107, MCA; and (3) interpretation of § 37-29-301(2), MCA. District Court granted DLI's and Board's Motion to Dismiss on April 2, 2004.

2. *Montana State Ass'n of Plumbers & Pipefitters v. State of Montana, DLI, and Board of Plumbers*, Montana First Judicial District Court, Lewis & Clark County Cause No.: CDV-2003-673. Petition for Writ of Prohibition involving an interpretation of a portion of § 37-69-304(1)(a), MCA. District Court granted DLI's and the Board's Motion for Summary Judgment on May 10, 2004.

2004:

3. *Montana Society of Anesthesiologists & Michael D. Sterbis, MD vs. Montana Board of Nursing & Montana Association of Nurse Anesthetists*, Montana Supreme Court, Cause No.: 04-479. Challenged the entire Nurse Practice Act (NPA), Title 37, Chapter 8, MCA) on the grounds that it unlawfully delegates sweeping legislative authority to the Board of Nursing without providing standards or guidelines to judge the propriety of the rules adopted pursuant thereto. The Plaintiffs argued that "given the clear absence of any authority granted by the legislature to the Board [to adopt rules relating to scope of practice], the Board exceeded its

authority in amending 8.32.303, ARM.” Case is still pending. Briefs have been filed and awaiting decision.

4. *Wiser, et al. v. State of Montana, et al.*, Montana Supreme Court, Case No.: 04-587. Continued constitutional challenge to relationship between denturists and Board of Dentistry involving Art. II, Sec. 3 (right to pursue life’s basic necessities); Art. II, Sec. 9 (right to know); Art. II, Sec. 10 (right to privacy); U.S. Constitution, Fourteenth Amendment (due process); and § 30-14-205(2)(c), MCA (restraint of trade). Supreme Court affirmed District Court’s order granting the State’s, et al., Motion for Summary Judgment on January 31, 2006. Matter began as an administrative disciplinary contested case with the filing of a Petition for Judicial Review with the District Court.

5. *R. Brent Kandarian & Lee Wiser v. State of Montana, DLI, and Board of Dentistry*, First Judicial District Court, Lewis & Clark County, Cause No.: CDV- 2004-282. Same challenges as Montana Supreme Court Case No. 04-587. District Court granted DLI’s and Board’s Motion to Dismiss on October 7, 2004. There was no appeal.

6. *Carol Swart v. BOLA*, Montana First Judicial District Court, Lewis & Clark County, Cause No.: BDV-2004-390. Challenged the portion of § 39-51-2306, MCA disqualifying individuals from receiving unemployment insurance benefits if they were also receiving Social Security Disability payments. Judge Sherlock ruled the statute was invalid. The BOLA decision was reversed and remanded.

7. *Patti Hopkins, et al. v. DLI*, Montana Eighth Judicial District Court, Cascade County, Cause No.: DDV-04-1142. Art. II, Sec. 9 (right to know) verses Art. II, Sec. 10 (right to privacy) was challenged regarding investigative reports of the Department of Labor and Industry done at the request of the Board of Dentistry. District Court granted Plaintiffs’ Motion for Summary Judgment on September 1, 2005. The Department did not appeal.

8. *FedEx Ground vs. ICCU*, Workers’ Compensation Court, Cause No.: WCC-2004-0971. Challenged the portion of § 39-71-117(4), MCA alleging that it discriminates against interstate common carriers. Settlement negotiations are in progress.

9. *Janie L. Robinson vs. MSF & DLI*, Workers’ Compensation Court, Cause No.: WCC-2004-1091. Challenged the interpretation of statues governing jurisdiction of the workers’ compensation court: §§ 39-71-2905, MCA; 2-4-506(4), MCA; 39-71-2903, MCA; 39-71-29023-5-302(3), MCA; 27-8-201, MCA; and 3-1-102, MCA. We are addressing the scope of the court’s jurisdiction over facial constitutional challenges. Case is still pending. Briefs have been filed and awaiting decision.

2005:

10. *Donna Wilson and Lynn Schumacher vs. DLI*, Montana Supreme Court, Cause No.: 05-313. Challenged the meaning of the word “complaint” as used in Title 49, Chapter 2, part 5.

See e.g. § 49-2-501, MCA. Specifically the appeal will address the question of whether the word “complaint” as used in the Human Rights Act means that all claims of discrimination filed together then continue to travel through the administrative process together. The Department asserts “complaint” carries essentially the same meaning as the Rules of Civil Procedure while Wilson argues “complaint” means each individual allegation of discrimination, no matter how filed each allegation is filed with the Department. Case is still pending. Briefs have been filed and awaiting decision.

11. *R. Brent Kandarian v. State of Montana, DLI, and Board of Dentistry*, Montana Supreme Court, Case No.: 05-707. Same challenges as Montana Supreme Court Case No.: 04-587. Supreme Court dismissed appeal on stipulation of the parties on February 13, 2006. Matter began as an administrative contested case with the filing of a Petition for Judicial Review with the District Court.

12. *Roberta Drew vs. HRC, Yellowstone County, James Reno & Dwight Vigness*, Montana First Judicial District Court, Lewis & Clark County, Cause No.: BDV-2005-247. *Yellowstone County, James Reno & Dwight Vigness vs. Roberta Drew and HRC*, Montana Thirteenth Judicial District Court, Yellowstone County, Cause No.: DV-05-0512. HRC issued an order affirming the DLI’s Final Agency Decision in this matter. Subsequently both parties petitioned for judicial review in different forums. Charging Party Drew contests the Commission’s application of affirmative relief provisions pursuant to § 49-3-201(1), MCA. Respondent Yellowstone County et al. is currently contesting whether Drew can appropriately file a petition for judicial review in the First Judicial District pursuant to § 2-4-702, MCA. Cases are still pending. Briefing has begun.

13. *Parisian, Inc. d/b/a Herberger’s vs. DLI, HRC & Norma Skin Wevers*, Montana First Judicial District Court, Lewis & Clark County, Cause No.: BDV-2005-419. Challenged the Department’s interpretation of when a cause may be remanded to the hearings bureau by the Human Rights Commission under § 49-2-509, MCA versus taken to district court. Case is still pending. We are awaiting a scheduling order to set a briefing schedule.

14. *Indian Health Board of Billings, Inc. Vs. DLI, HRC & Lita Pepion*, Montana First Judicial District Court, Lewis & Clark County, Cause No.: ADV-2005-838. Challenged the Department’s interpretation of § 49-2-509, MCA. Plaintiff contends that since the Department cannot conduct a contested case proceeding inside of 12 months (since the filing of the complaint) the discrimination complaint should be dismissed from the administrative process. Case is still pending. Briefing has begun.

15. *Kevin Kohut-Wiltbank vs. MSF, Workers’ Compensation Court*, Cuase No.: WCC-2005-1245. Challenged the constitutionality of § 39-71-703, MCA regarding compensation for permanent partial disability. Plaintiff was disputing MSF’s denial of benefits. This case is closed by way of signed Stipulation and Judgment with Prejudice by Judge McCarter in 2005.

16. *Auchenbach vs. UEF*, Workers' Compensation Court, WCC Cause No.: 2005-1286. Challenge to the constitutionality of § 39-71-520(2)(a)(b)(c), MCA, Statute of Limitations on UEF matters, on the grounds of violation of equal protection. (Article II, Sec. 4, Montana Constitution; 14th Amendment, U.S. Constitution). Case is still pending. Briefs have been filed and awaiting decision.

17. *Horizon Custom Homes, Inc. vs. UEF*, In re: The Claim of Robert Flink, Workers' Compensation Court, WCC Cause No.: WCC-2005-1467. Challenge to the constitutionality of § 39-71-504(1)(b), MCA that the fund shall collect from an uninsured employer an amount equal to all benefits paid or to be paid from the fund on behalf of an injured employee. Case is still pending. This case is scheduled to go to trial the week of May 1, 2006 in Helena, MT.

18. *Brian McCuin vs. Montana State Fund*, Workers' Compensation Court, Cause No.: WCC-2005-1504. Challenge to the constitutionality of § 39-71-744, MCA regarding benefits not due while claimant is incarcerated, the exceptions. Case is still pending. This case is scheduled to go to trial the week of April 17, 2006 in Billings, MT.

2006:

19. *Billings Police Department vs. Corine Owen, HRB & HRC*, Montana Supreme Court, Cause No.: 04-028, 2006 MT 11. Previously Owens requested documents from DLI. DLI contested the release of the information. The Department's hearings officer ordered the release of records. DLI petitioned the District Court. Judge Barz held that the Department, as an administrative agency, did not have the authority to entertain the constitutional question. On appeal, the Supreme Court reversed the district court's decision and held that the Department had the authority to consider (and balance) competing constitutional interests before releasing (or withholding) information in its position. Article II, Sec. 9, Montana Constitution. [Very new case which is back in district court].

20. *Faye Slice, et al. Vs. Montana Women's Prison (Department of Corrections, In the Matter of HRB Case No.: 0055011294*, Department of Labor and Industry Hearings Bureau, Cause No.: 2006-41. Inmate filed a complaint against the Department of Corrections alleging gender discrimination. The Department of Corrections filed a writ of review in District Court against the Department challenging the Department's application of §§ 49-2-501(2) and 49-2-509(3), MCA. This writ was denied. It is not known if it will ever reach a court on judicial review or appeal.

21. *Montana Board of Pharmacy vs. Tel-Drug*, Department of Labor and Industry Hearings Bureau, Cause No.: 2006-1643. Challenged § 37-1-316(7), MCA that it does not give authority to the board to discipline a Montana licensed mail service pharmacy on account of discipline having been imposed against the Licensee by a board of pharmacy in another state arising from acts or omissions which occurred in the other jurisdiction that did not involve Montana or its residents. This is a new matter. It is not known if it will ever reach a court on

judicial review or appeal.

DEPARTMENT OF NATURAL RESOURCES

1. *Montrust v. Darkenwald*, 328 Mont. 105, 119 P.3d 27 (2005). Montrust challenged the constitutionality of Mont. Code Ann. § 17-6-340, which incorporated a portion of the financial transactions described by SB 495. On August 9, 2005, the Montana Supreme Court upheld the statute.

2. *Friends of the Wild Swan v. DNRC*, 330 Mont. 186, 127 P.3d 394 (2005). A nonprofit environmental group brought an action against the State Board of Land Commissioners and DNRC challenging the methodology used in evaluating timber sale transactions on school trust lands. The case involved the manner in which a statute, Mont. Code Ann. § 77-1-202, was applied. On December 29, 2005, the Montana Supreme Court upheld the DNRC's interpretation and implementation of the statute.

3. *Gollaher v. DNRC & Pribyl*, Cause No. CDV-05-770, 8th Judicial District (Complaint filed July 23, 2005). This action challenges the constitutionality of Mont. Code Ann. § 85-2-306, the stock pit exception in the Water Use Act. This case is still in litigation.

4. *Diamond Cross Properties, LLC, v. State of Montana, DEQ, Board of Oil and Gas, DNRC, et al.*, Cause No. DV-05-27, 22nd Judicial District (Amended Complaint filed in 2005). This case challenges the constitutionality of Mont. Code Ann. § 82-11-175 relating to the production of coal bed methane. The case is still in litigation, and the appeal of the denial of Diamond Cross Properties' request for injunctive relief is pending before the Montana Supreme Court, Cause No. 05-596.

5. *Diamond Cross Properties, LLC, et al. v. State of Montana, DEQ, Board of Oil and Gas, DNRC, et al.*, Cause No. DV-2-2005-70, 22nd Judicial District (Amended Complaint filed January 30, 2006). This case challenges the constitutionality of two statutes, Mont. Code Ann. §§ 82-11-175 and 85-2-505, relating to the production of coal bed methane. The case is still in litigation.

6. *Montana Trout Unlimited, et al. v. DNRC*, Cause No. ADV-2003-444, 1st Judicial District (Complaint filed July 8, 2003), challenging the DNRC's interpretation and implementation of the phrase "immediately or directly connected to surface water" as found in Mont. Code Ann. § 85-2-342 in the Upper Missouri River Basin Closure. The case is still in litigation. The district court's granting of summary judgment in DNRC's favor is pending on appeal to the Montana Supreme Court, *en banc*, submitted on briefs, Cause No. 05-069.

DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES

1. *Terry Blanton vs. DPHHS*, Cause No. DV-06-37, District Court for Lake County-- just filed. Challenges the constitutionality of the State's Medicaid lien on third party settlements pursuant to Sec. 53-2-612, MCA. The Department has not filed its answer yet. It was filed as a class action on behalf of all persons against whom the Department has enforced Sec. 53-2-612 liens since 1999, but they have not yet filed a motion to certify the class. Nothing has been filed other than the complaint.

2. *Brad Bauder vs. DPHHS*, Cause No. CDV-05-478, District Court for Lewis and Clark County, which also challenges the constitutionality of 53-2-612, MCA, was filed in 2005. Plaintiff has filed a motion for summary judgment, and the Department has until March 22 to file its response and cross-motion for summary judgment.

MONTANA STATE FUND

Three lawsuits related to workers' compensation claims could cost the general fund between \$99 and \$124 million. The Montana State Fund provides Montana employers with an option for workers' compensation and occupational disease insurance. Prior to 1990 workers' compensation experienced significant liabilities. The legislature separated state fund liabilities between claims occurring before July 1, 1990 and claims occurring on or after that date. Funds relating to claims prior to July 1, 1990 are referred to as "Old Fund" and those on or after as "New Fund". Statutes require that in any fiscal year claims for injuries from accidents occurring before July 1, 1990 are not adequately funded, the funds must be transferred from the general fund. Currently there is estimated to be a shortfall in the Old Fund reserves of between \$14 and \$16 million. Eventually, general fund may need to offset this shortfall. Three court cases brought against the Montana State Fund may increase the shortfall in the Old Fund by up to \$124 million. (Note: this paragraph is taken from Kris Wilkinson's March 3, 2006, report for the Legislative Finance Committee.)

1. *Stavenjord v. State Compensation Insurance Fund*, addresses the issue of whether the failure of the Occupational Disease Act (ODA) to provide permanent partial disability (PPD) benefits (for occupational diseases) that are equivalent to the benefits provided in the Montana Workers' Compensation Act (for injuries) violates the claimant's right to equal protection of the law. In 2001, the Workers' Compensation Court held that section 39-72-405, MCA, is unconstitutional as applied in the plaintiff's case. The Montana Supreme Court upheld the lower court's decision in 2003. In 2004, the Workers' Compensation Court held that the case is retroactive to June 3, 1999 (the date of a prior Supreme Court case it was based on). The decision on retroactivity has been appealed to the Montana Supreme Court. If the Supreme Court

upholds the retroactive holding to 1987, the cost is estimated at \$14 to \$19 million dollars for the Montana State Fund (New Fund - for claims on or after July 1, 1990) and to the Old Fund of \$5 to \$7 million. This case is currently on appeal to the Supreme Court on the questions of retroactivity and common fund status.

2. *Reesor v. Montana State Fund*, 2004 MT 370, in this case, section 39-71-710, MCA, was challenged. That statute provides that a person who is receiving social security retirement benefits, or is eligible for full social security benefits, and who suffers an industrial accident, is entitled to an impairment award but not other permanent partial disability benefits. The Workers' Compensation Court found the statute constitutional. However, on appeal, the Montana Supreme Court held that the statute violates the Equal Protection Clause of the Montana Constitution. The case is pending on decision of the Workers' Compensation Court regarding establishment of a common fund and retroactivity. Montana State Fund staff estimate a potential estimated benefit cost increase of \$1 million to the Old Fund if the decision is held to apply retroactively and \$2 million to MSF.

3. *Satterlee v. Lumberman's Mutual Casualty Company, et al.*, WCC No. 2003-0840, challenges the constitutionality of terminating permanent total disability and rehabilitation benefits when a claimant receives or becomes eligible to receive full Social Security retirement benefits or an alternative to that plan (section 39-71-710, MCA, enacted in 1981). A Montana Workers' Compensation Court judge ruled in favor of the respondents/insurers (including Montana State Fund) in December. A request for reconsideration of the case is pending in the Montana Workers' Compensation Court and a ruling is expected shortly. If the request for reconsideration is denied, the legal counsel for the Montana State Fund anticipates the case will be appealed to the Montana State Supreme Court. A decision by the court could be expected in mid to late 2007, after the end of the 2007 session but prior to the beginning of the 2009 biennium. The potential estimated benefit costs for non-settled permanent total disability claims, if the statute is ultimately held to be unconstitutional and to apply retroactively, is between \$93 and \$116 million for the Old Fund [from Kris Wilkinson's March 3, 2006, report for the Legislative Finance Committee].

SECRETARY OF STATE

1. *Montana PIRG v. Johnson*, CV 03-183-M-DWM (D. Mont.), federal district court held that Constitutional Amendments 37 and 38 were unconstitutional. The Attorney General, in 51 A. G. Op. 2 (2005), held that the court decision that invalidated the county distribution requirements for signatures to qualify an initiative petition for the ballot, as approved in CI 37 and CI 38 and enacted in their implementing legislation, restores the language of the constitution and statutes as they existed before the approval of the invalid amendments.

The following agencies reported that they are not defending any statutory constitutional challenges: Public Service Commission, Dept. of Commerce, Dept. of Agriculture, Dept. of Revenue, and Dept. of Transportation.

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