



Montana Legislative Services Division  
Legal Services Office

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SS AB Joint Appropriations + Justice

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To: Joint Appropriations Subcommittee on Judicial Branch, Law Enforcement, and Justice  
From: Julie Johnson  
Re: Consumer Protection Settlement Account

### INTRODUCTION

I have been asked to review the materials provided by the Attorney General relative to the Consumer Protection Settlement Account (CPS account), also known as fund 02140, to determine whether the sums therein are restricted. The Department of Justice has provided documentation that the funds in this account are restricted as they are either encumbered pursuant to contract or restricted pursuant to court order.

### LAW/ANALYSIS

Under Montana's Unfair Trade Practices and Consumer Protection Act, fines, costs, and fees collected by the DOJ:

must be deposited into a state special revenue account to the credit of the department and must be used to defray the expenses of the department in discharging its administrative and regulatory powers and duties in relation to this part. Any excess civil fines, costs, or fees must be transferred to the general fund.

Sections 30-14-143 and 30-14-226, MCA.

Despite unsuccessful legislative attempts, there is no statutory definition of what is considered "excess". However, in an August 2011 memo, former Attorney General (AG) Bullock observed that Senate Bill No. 324 (2011), which was vetoed by Governor Schweitzer, provided that the account may not exceed two times the amount of the budget for the current biennium.

Currently, the CPS account is nearly \$9 million. The funds fall into three primary categories. The first category of funds consists of funds obligated to third parties pursuant to contract. The second category of funds consists of those received from settlements with drug companies pursuant to court-ordered consent judgments. The third category of funds consists of the \$3.4 million segregated by AG Bullock in 2011. Recently, Attorney General Tim Fox concluded that of the \$9 million, \$481,004 was "excess" and directed that amount to be transferred to the general fund.

I. Contracts

I have reviewed three contracts currently in effect between the Department of Justice and third parties. Under two of the contracts, the Department has secured counseling services and attorney services for Montana taxpayers related to home foreclosures. The third contract pays a fee to local county clerk and recorders for providing foreclosure notices to the Department of Justice on a regular basis. The contracts are in full force and effect and, absent a material breach by a party, can reasonably be expected to be in force until their expiration date. Accordingly, the following amounts in the CPS account are obligated and cannot be considered as "excess":

1.	Neighborworks	\$2,175,926
2.	Montana Clerks and Records Association	\$42,289
3.	Montana Legal Association	<u>\$765,444</u>
	Total	\$2,983,659

II. Settlement Proceeds

In late 2012, District Court Judge Kathy Seeley issued two consent judgments in cases where the State of Montana sued drug companies for violations of the Montana Unfair Trade Practices and Consumer Protection Act. These judgments required the drug companies to pay over \$2 million to the State of Montana. The first judgment required Glaxosmithline LLC to pay \$1,232,633. The second judgment required Pfizer to pay \$784,133. The Pfizer judgment provides as follows:

Said payment shall be used by the State as attorneys' fees and other costs of investigation and litigation, or to be placed in, or applied to, the consumer protection enforcement fund, including future consumer protection enforcement, consumer education, litigation or local consumer aid fund or revolving funds, used to defray the costs of the inquiry leading hereto, at the discretion of each Signatory Attorney General. Any portion of the payment not used by the Montana Attorney General to fund the Office of Consumer Protection in accordance with the purposes described above shall be used to fund or assist in funding programs related to health care issues affecting Montana consumer, including but not limited to programs directed at conditions for which Zyvox or Lyrica are used to treat, at the sole discretion of the Montana Attorney General. The parties acknowledge that the payment is not a fine, penalty, or payment in lieu thereof.

The Glaxosmithline judgment contains a nearly identical provision. Based on the language cited above, the AG's Office has stated that the monies settlements are restricted and must be used for the purposes set forth in the consent judgments. Accordingly, it is the AG's position that these monies, \$2,016,766, cannot be considered "excess" and are not subject to transfer to the general fund.

I cannot recommend that the Legislature use the settlement monies in a manner inconsistent with

court-ordered consent judgments. Given that the DOJ presently has contracted with third parties to provide services to Montana consumers, it is reasonable to expect that these funds are intended for similar projects tailored to pharmaceutical consumers in Montana. However, in the future, if the Legislature does not want the AG to enter into agreements that restrict the use of settlement proceeds, there should be explicit direction to that effect, perhaps in the form of a bill.

### III. Ending Fund Balance

In 2011, AG Bullock asked the Central Services Division to allow the CPS account to retain \$3.4 million as a restricted ending fund balance, which amounted to two times the amount of the budget for the 2013 biennium. I requested documentation from the DOJ regarding the source of the \$3.4 million. I received three settlement documents<sup>1</sup>, wherein the AG sued various pharmaceutical companies and received settlement proceeds. All three agreements are court-ordered and each contain a provision, similar to the one provided below, restricting the use of settlement monies:

Said payment shall be used by the State for attorneys' fees and other costs of investigation and litigation, or to be placed in, or applied to, the consumer protection enforcement fund, consumer reimbursement, consumer education, litigation or local consumer aid or revolving fund, used to defray the costs of the inquiry leading hereto, or for other uses permitted by state law, at the sole discretion of each Signatory Attorney General.<sup>2</sup>

In total, the settlement monies documented in these three court-ordered settlement agreements appears to exceed \$3.4 million. Therefore, the sums that comprise the ending fund balance of \$3.4 million are similarly restricted, in that they must be used for the purposes set forth in the settlement agreements.

### CONCLUSION

In conclusion, the majority, if not all, of the funds in the CPS account are encumbered or otherwise restricted pursuant to contract or court order. The monies that are subject to court order must be used for the purposes set forth in the court orders.

The question this joint subcommittee may want to consider is to what extent the DOJ should be able to restrict the use of funds the State receives in settlement agreements in the future. In conjunction, legislation that would define "excess" under §§ 30-14-143 and 31-14-226, MCA, would also provide clarity on this issue.

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<sup>1</sup> State v. Pfizer, (BDV 08-957); State v. AstraZeneca et al; State v. Abbott Laboratories

<sup>2</sup> State v. Pfizer, Consent Judgment of October 27, 2008, at ¶34.



**2015 Biennium  
Long-Range Planning Future Operations and Maintenance Recommendations HB 5 and HB 14**

Project	City	Proposed Cost	LRBP	Bonding	Other Funds	Occup Date	Future O&M Costs		State's Responsibility		O&M Costs	
							2015 Bien	2017 Bien	2015 Bien	2017 Bien	2015 Bien	2019 Bien
Department of Commerce Construct Low Side Units, MSP Justice Department	Deer Lodge	\$ 26,000,000	\$ 26,000,000			Jul-16	\$0	\$138,894	\$0	\$138,894	\$281,954	\$281,954
Butte Justice Center****	Butte	\$ 2,800,000		\$ 1,200,000	\$ 1,600,000	Jul-15	\$0	\$216,958	\$0	\$47,165	\$220,212	\$47,872

\* Inflation rate to increase per biennium is 1.5%

\*\*\*\* The new Butte Justice Center building will contain 13,800 sq/ft. Currently O&M for 4,200sq/ft is in the base. The new state portion is 3,000sq/ft. Butte Silver Bow will have a lease agreement to pay for the O&M for the 10,800 of the building.  
Butte Silver Bow will agree to a lease agreement for \$169,793 for the 2017 bien.

Information for the Sec. D Subcommittee: this figure provides estimates of the future operations and maintenance costs for the new facilities included in HB 5 and HB 14 and initially approved by the Long-Range Planning Subcommittee.