

WORKERS' COMPENSATION COURT

Hearing No. 3623,
Volume XVIII

CASSANDRA M. SCHMILL,
v.
LIBERTY NORTHWEST INSURANCE CORP.
and
MONTANA STATE FUND
WCC No. 2001-0300

ALEXIS RAUSCH, et al.
v.
MONTANA STATE FUND

and
JEREMY RUHD
v.
LIBERTY NORTHWEST INSURANCE CORP.
WCC No. 9907-8274R1

ROBERT FLYNN and CARL MILLER
v.
MONTANA STATE FUND
and
LIBERTY NORTHWEST INSURANCE CORP.
(Intervenor)
WCC No. 2000-0222

DALE REESOR
v.
MONTANA STATE FUND
WCC No. 2002-0676

Helena, Montana
July 14, 2005 1:00 p.m.

Laurie Wallace

Larry W. Jones

Bradley J. Luck

Lon J. Dale

Thomas E. Martello
Bradley J. Luck
Thomas J. Harrington

Larry W. Jones
Carrie L. Garber

Rex Palmer

Bradley J. Luck
Thomas J. Harrington

Larry W. Jones

Thomas J. Murphy

Bradley J. Luck
Thomas J. Harrington

FILED

JUL 26 2005

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

COPY

Heard before The Honorable Mike McCarter

SHERRON K. WALSTAD, Court Reporter
Lesofski & Walstad Court Reporting 21 North Last Chance Gulch, Suite 201
Helena, Montana 59601 (406) 443-2010

DOCKET ITEM NO. 332

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A P P E A R A N C E S

THE HONORABLE MIKE McCARTER, JUDGE

THE FOLLOWING ATTORNEYS AND/OR PARTIES APPEARED AND PARTICIPATED IN THE CONFERENCE:

Leo S. Ward	David A. Hawkins
Carrie L. Garber	Thomas A. Marra
Rex Palmer	Mark E. Cadwallader
Lon J. Dale	Michael P. Heringer
Larry W. Jones	Thomas E. Martello
Thomas J. Murphy	Bryce R. Floch
Diana Ferriter	Greg E. Overturf
Steven Jennings	Debra Gilcrest
Thomas J. Harrington	Bradley J. Luck
Laurie Wallace	Richard H. Davenport
Nancy Butler	James Hunt
Ron Thuesen	K.D. Feedback
Julie Swingley	Carol Gleed

THE FOLLOWING ATTORNEYS AND/OR PARTIES PARTICIPATED BY TELEPHONE:

Ronald W. Atwood	Sandi Pack
Julie B. Pollack	Gail Burgess
Lloyd Williams	

1 WORKERS' COMPENSATION COURT
2
34 Hearing No. 3623,
5 Volume XVIIIHelena, Montana
July 14, 20056 CASSANDRA M. SCHMILL,
7 v.

Laurie Wallace

8 LIBERTY NORTHWEST INSURANCE CORP.
9 and
10 MONTANA STATE FUND

Larry W. Jones

Bradley J. Luck
WCC No. 2001-030011 -----
12 ALEXIS RAUSCH, et al.
13 v.

Lon J. Dale

14 MONTANA STATE FUND

Thomas E. Martello
Bradley J. Luck
Thomas J. Harrington15 and
16 JEREMY RUHD
17 v.

18 LIBERTY NORTHWEST INSURANCE CORP.

Larry W. Jones
Carrie L. Garber
WCC No. 9907-8274R119 -----
20 ROBERT FLYNN and CARL MILLER
21 v.

Rex Palmer

22 MONTANA STATE FUND

Bradley J. Luck
Thomas J. Harrington23 and
24 LIBERTY NORTHWEST INSURANCE CORP.
25 (Intervenor)Larry W. Jones
WCC No. 2000-022226 -----
27 DALE REESOR

Thomas J. Murphy

28 v.
29 MONTANA STATE FUNDBradley J. Luck
Thomas J. Harrington
WCC No. 2002-067630 -----
31 On the 14th day of July, 2005, beginning at
32 1:00 p.m., the above-entitled matter came before
33 The Honorable Mike McCarter, Judge of the Workers'
34 Compensation Court. The hearing was held at the
35 Workers' Compensation Court offices in Helena, Montana,
and the court reporter was Sherron K. Walstad.

* * * * *

TRANSCRIPT OF PROCEEDINGS

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1 WHEREUPON, the following proceedings were had:

2 * * * * *

3
4 THE COURT: We have Ronald Atwood on,
5 Sandi Pack, Julie Pollack, Gail Burgess, and Lloyd
6 Williams participating by telephone. Can all of you
7 hear me?

8 UNIDENTIFIED PERSON: Yes, Judge.

9 THE COURT: Let me go around the room and
10 have everybody identify themselves for our record; and
11 the rule will be when you speak, just identify yourself
12 before you speak. We'll start with Tom.

13 MR. HARRINGTON: Tom Harrington with the
14 Garlington Law Firm.

15 MR. LUCK: Brad Luck, the Garlington Law
16 Firm for the State Fund.

17 MR. JONES: Larry Jones, Liberty
18 Northwest.

19 MR. PALMER: Rex Palmer, for Petitioners
20 Flynn and Miller.

21 MS. WALLACE: Laurie Wallace, for
22 Schmill.

23 MR. HUNT: Jim Hunt, for Satterly.

24 MR. MURPHY: Tom Murphy, for Stavenjard,
25 Reesor and Satterly.

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1 several insurers.

2 MR. WARD: Leo Ward, with Browning
3 Kaleczyc.

4 MS. SWINGLEY: Julie Swingley, Drake Law
5 Firm.

6 MR. HERINGER: Mike Heringer, Brown Law
7 Firm.

8 MR. MARRA: Tom Marra.

9 MS. GARBER: Carrie Garber, with
10 Liberty.

11 MR. JENNINGS: Steve Jennings, with
12 Crowley, on behalf of several insurers.

13 MS. GILCREST: Debra Gilcrest, of
14 McDonald and Lind, on behalf of Montana Resources.

15 MS. BUTLER: Nancy Butler, Montana State
16 Fund.

17 THE COURT: Did we get everybody?

18 MR. HAWKINS: David Hawkins, State Fund.

19 THE COURT: Okay. We've got a lot to
20 cover today. I'm going to start with some things that
21 pertain to all of the cases. We have one participant
22 who will drop off of the telephone after we've finished
23 those, and I've got four items on that agenda. I'll
24 just go down, because some of them aren't too
25 difficult.

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1 MR. DALE: Lon Dale, appearing for Kevin
2 Rausch and also appearing on behalf of Steve Roberts
3 and Monte Beck in regard to Fisch and Frost.

4 THE COURT: Is Steve in Columbia now?

5 MR. DALE: I believe so, Your Honor. I
6 think he should change his address.

7 MR. CADWALLADER: Mark Cadwallader,
8 Department of Labor and Industry, both on the
9 regulatory side and also with respect to the Uninsured
10 Employers' Fund.

11 MS. GLEED: Carol Gleed, Department of
12 Labor and Industry.

13 MR. MARTELLO: Tom Martello, State Fund.

14 MR. OVERTURF: Greg Overturf, State
15 Fund.

16 MR. HOPKINS: Brian Hopkins, Labor and
17 Industry.

18 MR. DAVENPORT: Rick Davenport, Putman &
19 Associates.

20 MR. FLOCH: Bryce Floch, with Hammer,
21 Hewitt, Sandler and Jacobs, on behalf of multiple
22 insureds.

23 MR. FEEBACK: K. D. Feeback, on behalf of
24 Cominco American.

25 MR. THUESEN: Ron Thuesen, on behalf of

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1 First, I would appreciate if we could get a
2 list from each attorney as to who they represent in
3 each of these cases. We can compile that information.
4 I have a suspicion you're going to know that off the
5 top of your head, and if you can send us that
6 information, maybe e-mail us that information, we will
7 compile that and then we can probably take it from
8 there and track it. Because in a lot of these cases, a
9 number of you represent multiple clients, and it will
10 just make my life easier if I know who all you're
11 representing in each case, and I'll follow that up with
12 an e-mail to everybody to renew that request.

13 The second thing on the comment to all the
14 cases is "confidential information." Sometimes we're
15 getting information that's sort of in the form of a
16 general response but may have some claimant-
17 identifying information on it. We don't want to put
18 that out on the Web because of the privacy concerns of
19 the claimant, so we're not putting it out on the Web.
20 We're having to review every document, and that becomes
21 difficult.

22 I think we will continue to review it, but
23 I'm wondering if what I might request you to do is when
24 you have claimant information and documents, would be
25 to endorse that across the face or at the top of it.

1 Does that make any sense to do that? Is that a good
2 procedure to follow? Does anybody have a better idea
3 or think that it's unnecessary?

4 MR. HAWKINS: Good idea, Judge.

5 MS. WALLACE: Are you talking about in
6 all of our general pleadings?

7 THE COURT: No, just in any document that
8 you file that contains any information pertaining to an
9 identifiable claimant, is on that document, to endorse
10 it up on the top. It would be nice to have a red stamp
11 somewhere up at the top saying "Contains confidential
12 information." And that will alert us immediately that
13 that is not something that we want to go on the
14 Internet, and we won't have to review that. We'll know
15 that from the very beginning.

16 MS. WALLACE: And that is just in common
17 fund cases?

18 THE COURT: Just in common fund cases.
19 When we go to e-filing, we'll have to talk about that
20 too, because we'll probably want to do something
21 similar when we e-file, or we're going to want to
22 redact. But at least for now, we're just talking the
23 common fund cases.

24 And maybe we can come up with some sort of
25 format that we can use. I'm thinking maybe underneath,

1 you know, where you put the title of the document, you
2 know, the response to petition or something like that,
3 you could put in big block letters, "Contains
4 confidential information," or something like that.
5 We'll try to come up with a format for that.

6 Hearing no nay-sayers, I'll request everybody
7 to do that. We'll still review the documents, but we
8 want to be careful about what we're doing.

9 Okay. Let's talk about --

10 MR. HAWKINS: Maybe you can make a part
11 of the official caption for common fund cases
12 "confidential information," "yes," "no," with one box
13 to check. That way, it's uniform, it's simple,
14 everybody does it. It's always there. The attorney
15 has got to address it.

16 THE COURT: I suppose. Do all of you
17 have a common caption that you use, that you just drag
18 down? That might be the way to do it. Then you're
19 sort of forced to check the box or not. I'll probably
20 end up leaving that to you whether you want to do the
21 check-off or do the endorsement. The check-off would
22 make it easy for you to do it, as long as you look at
23 the caption, but, see, I never look at my captions. So
24 it could be a problem, but be thinking about it.

25 MR. CADWALLADER: Clarification, endorse

1 somewhere on the face of the document, not necessarily
2 in the title. In the title, if it's convenient, but
3 somewhere on the face of the document it should say a
4 printout or something, a list of claimants.

5 THE COURT: You mean where you don't have
6 a caption on it?

7 MR. CADWALLADER: Where you don't have a
8 caption on a document.

9 THE COURT: Right. Actually, in that
10 case it would be nice to stamp it "confidential."

11 MR. CADWALLADER: Right. Thank you.

12 THE COURT: In a number of these cases we
13 have a number of insurers that are in liquidation, and
14 I don't -- I think I had a -- For some cases I have a
15 list of some of those, and for other cases I don't.
16 The question is, how are we going to handle those. At
17 least where they go to the Western Guaranty Fund, the
18 Western Guaranty Fund is handling it, but as I
19 understand it, there's a lot of files that are in the
20 possession of liquidators.

21 I guess the question is: Who is responsible
22 for those files and how do we handle those? Has
23 anybody thought about that? Who is representing the
24 Western Guaranty Fund?

25 MR. HARRINGTON: Judge --

1 THE COURT: You are.

2 MR. HARRINGTON: Yeah.

3 THE COURT: You and Kelly?

4 MR. HARRINGTON: We are. And it's my
5 understanding that the files don't get to the Western
6 Guaranty Fund until there's actually an order of
7 liquidation; and while an insurer is in liquidation,
8 claims are made through the liquidator.

9 So the Guaranty Fund doesn't get involved
10 until there's been an order from whatever state that
11 says that this insurance company needs to be
12 liquidated, and it's a long process, from what I
13 understand.

14 THE COURT: Some of these companies have
15 already been liquidated; am I right?

16 MR. HARRINGTON: Yes.

17 THE COURT: Can we develop a list of
18 those companies? Do you know what they are, which ones
19 they are?

20 MR. HARRINGTON: I know of four of them,
21 but I can talk to the Western Guaranty Fund to get a
22 complete list for you, yes.

23 THE COURT: If they are in liquidation,
24 basically the common fund claims are going to go to the
25 Western Guaranty Fund.

1 MR. HARRINGTON: No, Judge, I think they
2 only get to the Western Guaranty Fund after there's an
3 order of liquidation. While they're in a state of
4 liquidation, you have to make the claim. It's like a
5 bankruptcy. You have to make the claim through the
6 liquidator.

7 THE COURT: Right, but for the ones that
8 have been liquidated, that's the word I needed to use,
9 then all of those claims would go through the Western
10 Guaranty Fund?

11 MR. HARRINGTON: That's my understanding.

12 THE COURT: So if we can ascertain those
13 companies that have been liquidated, then we can just
14 refer those all to you and won't have to worry about
15 liquidators or whatever.

16 Let's see, who was the attorney on the phone
17 who had the liquidation going on?

18 MS. BURGESS: Judge, this is Gail
19 Burgess, with Reliance Liquidation.

20 THE COURT: Is it in liquidation or has
21 it been liquidated?

22 MS. BURGESS: Well, I'm not sure I
23 understand the way you're using those terms. We are
24 the subject of a liquidation order that was entered
25 October 3, 2001, so we are in liquidation, and the

1 liquidation is proceeding. As a liquidated company, if
2 someone has a claim they want to present against the
3 estate, they are to file a proof of claim with the
4 estate, and we will evaluate it in the context of a
5 liquidation.

6 If a claim has been made that involves, you
7 know, October 3, 2001 forward, that date of our
8 liquidation forward, then those go to the Guaranty
9 Fund.

10 THE COURT: Okay. So prior to the
11 liquidation order, they go to you. After the
12 liquidation order, they go to the Guaranty Fund?

13 MS. BURGESS: Right. Well, if there was
14 a claim that was with us that was an open claim, it
15 would go to the Guaranty fund. So if you had a claim
16 in which there were ongoing claims to be made, the
17 Guaranty Fund would get, in the first instance,
18 assuming it's a covered claim under their fund, they
19 would handle that. If it were a closed claim at the
20 time of the liquidation, it would not go to them.

21 THE COURT: Where would it go?

22 MS. BURGESS: It would be closed. We
23 handle -- For us to have a claim, someone needs to file
24 a proof of claim saying, "I have a claim to make
25 against the estate," and then we evaluate that issue

1 and notice of determination, and that claimant has the
2 right, under procedures set forth by the Commonwealth
3 Court of Pennsylvania, to file any objections to that
4 notice of determination, and any issues as to it are
5 resolved in the -- liquidation estates are in the
6 Commonwealth Court of Pennsylvania.

7 THE COURT: In your case, in the case of
8 your liquidation with Reliance, are there time
9 parameters or is that still an open-ended process?

10 MS. BURGESS: For concluding a
11 liquidation?

12 THE COURT: Right.

13 MS. BURGESS: No, it's an open-ended
14 process, and it's expected to take a lengthy period of
15 time. So we have notices of determination. Under the
16 court's order of September 9, 2002, the proofs of claim
17 were to have been filed by December 31, 2003, and we're
18 in the process of evaluating them and issuing notices
19 of determination.

20 THE COURT: But there's a deadline on
21 when the proofs of claim are supposed to be filed?

22 MS. BURGESS: There was an initial filing
23 deadline of December 31, 2003, under the court's
24 September 9, 2002 order. Anything filed after that,
25 there needs to be a determination of good cause for

1 filing late, beyond the December 31, 2003 deadline.

2 THE COURT: Do you understand the nature
3 of these proceedings that we're having here in
4 Montana?

5 MS. BURGESS: I'm not entirely sure. We
6 only have notice of two cases, and both of which we
7 filed our position, which is that we're not properly a
8 party to either, and that any claims made against the
9 estate need to be made in the proof-of-claim process.

10 So that any claims as to us pending there
11 should be dismissed or stayed in favor of the
12 proceedings here in the Commonwealth Court of
13 Pennsylvania, and those two claims are Reesor and
14 Flynn. We have filed our response setting forth our
15 position.

16 THE COURT: Right. Do counsel in Reesor
17 and Flynn, or for that matter, any of the other common
18 fund cases for petitioners, have they thought about
19 this and figured out how we're supposed to proceed?

20 MR. PALMER: In Flynn, they have to
21 identify the people for us, so we don't know who are
22 the recipients or who the potential recipients are. So
23 the process she's proposing can't work. The people
24 that are entitled to benefits under the Flynn decision
25 don't know they're entitled, probably, and we don't

1 know who they are. So there has to be this
2 identification process that starts with the insurer.

3 THE COURT: Well, yeah, do you understand
4 what Mr. Palmer is saying? We don't know who the
5 claimants are, and one of our jobs is to find out who
6 they are in order to get them paid.

7 So, in essence, there's almost an
8 investigatory process that's going on, a file-review
9 process or some sort of computerized search of claims
10 to figure out which claimants are entitled to
11 additional benefits under these Montana decisions. I
12 guess the question is: Who has jurisdiction to order
13 that?

14 MR. MURPHY: In the Reesor case, we
15 believe that the Court has the power, Ma'am, to tell
16 you to identify the claimants who may be entitled to
17 Reesor benefits. Many of the insurers in this room
18 have already started that investigation process, and we
19 think that the Reliance companies should do that also.

20 You will not get a proof of claim with the
21 name of a claimant on it because you are the one that's
22 got to determine the claimants that you denied benefits
23 under Section 710.

24 MS. BURGESS: Well, I guess it's the
25 chicken-or-the-egg issue. Our view, as I said in our

1 position filed with the Court, is that jurisdiction
2 properly lies in the Commonwealth Court of
3 Pennsylvania.

4 All I can probably propose at this point is
5 to take this issue back here with the people I would
6 need to discuss it with and explain -- I'm not even
7 sure what's really being proposed, that we would come
8 up with a list of claimants on closed claims that we
9 think these benefits might be implicated for? And I'm
10 not even sure what the burden would be to do that and
11 whether it's possible.

12 THE COURT: We have those questions in
13 all of these cases.

14 MS. BURGESS: And, of course, we have the
15 additional factor, being a liquidated company. So, you
16 know, to expend the assets or resources of the company
17 in such an endeavor, which may be impossible or highly
18 burdensome, may be something the liquidator may well
19 object to.

20 So I guess I'm trying to think of the best
21 way to -- Well, I guess, first of all, maybe internally
22 here is for us to discuss what would be involved in
23 trying to identify the claimants, as you suggest, but
24 we really would require proof of claim. And I guess I
25 hear what you're saying. You don't know on whose

1 behalf to file a proof of claim.

2 THE COURT: Right.

3 MS. BURGESS: Well, can I suggest, you
4 know, certainly everyone, I assume, is in agreement
5 that we don't belong there in terms of adjudicating
6 this thing, that that's properly here by proof of
7 claim, and the issue seems to be how to identify the
8 claimants as to which proofs of claim might be made.

9 THE COURT: Let me throw that out. Does
10 everybody agree that, as far as the proof of claims and
11 the order for payments, that has to be made in
12 Pennsylvania, or whatever court has jurisdiction over
13 the liquidation? Has anybody researched that?

14 I don't think anybody's even thought about it
15 very deeply at this point. I think that's one thing we
16 have to figure out is, number one, does this Court have
17 jurisdiction to order Reliance or any of these
18 companies that are in liquidation proceedings to
19 identify these claimants; and number two, assuming that
20 the Court does, the second prong would be, does the
21 Court have the authority to order the payment, or then
22 do we have to go through the proof-of-claim process?

23 I suspect, from looking at my audience here
24 of about 25 attorneys, that no one here has the answer
25 to that off the top of our heads, and you might even be

1 in a better position to help us with that issue than
2 anyone in the room here.

3 MS. BURGESS: Yes. Well, certainly as to
4 number one, I need to discuss that here internally.
5 Certainly we'd argue you don't have the power to order
6 us to do it, but whether it's something we could agree
7 to do or work with you to do is Issue 1, and I need to
8 vent that here.

9 Number two, definitely, our position is the
10 Court does not have the power to compel Reliance, in
11 liquidation, to make payments or to enter any sort of a
12 judgment against the company in liquidation. I'd be
13 happy to -- We articulated that in our papers, and if
14 necessary, I'd be happy to brief that more fully.

15 THE COURT: Do you have some citations in
16 what you filed? I don't have your response here.

17 MS. BURGESS: I think at this point we
18 simply did not put all the citations in. We can do
19 that. It wasn't clear to me what the forum was here
20 and whether we should provide, you know, a full
21 briefing on it or just articulate, by way of response,
22 our position.

23 THE COURT: Maybe what would be helpful
24 is if you have some case laws and citations, just send
25 that, and perhaps by letter or maybe just a short

1 filing with a caption on it, but nothing elaborate. It
2 doesn't have to be elaborate; and then I'll provide it
3 to the attorneys for the petitioners in these matters.
4 Then they can take a look at it and see what they think
5 about it, and I can take a look at it and see what I
6 think about it.

7 Perhaps, meanwhile, you can check to see if
8 the Company would be willing to look for these
9 claimants, at least identify them for us.

10 MS. BURGESS: All right. Let me tackle
11 both of those things.

12 THE COURT: Okay. Does anybody who's
13 here have anything they want to add to the discussion
14 on liquidation? It's obviously something we're going
15 to have to confront in all of these cases, and we need
16 to figure it out. Any other ideas?

17 Okay, Ms. Burgess, I guess we'll close that
18 part of it, so if you want to drop off, that would be
19 fine with us. I do appreciate your helpfulness in this
20 matter. It's something that we have to confront.

21 MS. BURGESS: Thank you very much.

22 THE COURT: Thank you.
23 (Off the record briefly.)

24 THE COURT: Let's talk about another
25 common issue. I had an e-mail from Carrie Garber,

1 I wonder if we need any more elaborate procedure than
2 that, if it's satisfactory just to identify those
3 respondents that come in -- the responses that come in
4 either by letter or by an actual formal response where
5 they indicate the information that I was talking about,
6 that they don't have anybody or they didn't write
7 insurance, and just send those to the claimants'
8 attorneys, have them respond. And if there is an
9 issue, if they think there's an issue, we can take it
10 up at that point. Otherwise, we'll dismiss them. Is
11 everybody happy with that?

12 MR. PALMER: It seems like a good way to
13 go for us, the dismissal without prejudice on the
14 initial showing that these are people that either
15 didn't sell insurance during the applicable time period
16 or they didn't have any permanent or temporary total
17 disability claims, some of those basic things that just
18 exclude them from these categories.

19 Some of them are seeking dismissal with
20 prejudice, and that creates another problem because
21 then we're going to need to receive some kind of
22 affidavit, something that's not just their hunch that
23 they didn't have any obligation here. But that's
24 solved if we just dismiss without prejudice, because if
25 something comes up later, we can bring them back in.

1 which we've distributed. This concerns what we do, how
2 we handle insurers that we've identified as on our
3 list, master list of insurers writing workers'
4 compensation insurance in Montana who have not written
5 workers' compensation insurance at all or have not
6 written workers' compensation during the periods of
7 time in question in the particular cases, or they don't
8 have any claims during the time frame we're talking
9 about, or they've looked and they have very few claims
10 and they can't identify any claims that would qualify
11 and how we handle that.

12 Carrie had some questions about burden of
13 proof and, I think, the elaborate procedure of filing
14 motions and things like that. I guess at this point,
15 the way we're handling them, and we've handled them
16 with Tom Murphy, pretty much, at this point is, when we
17 find those, Tom goes and he's been going through those,
18 and if it appears that there's nothing further to be
19 done with the insurer, we're dismissing them out
20 without prejudice.

21 The only reason for dismissing them without
22 prejudice is in case somebody finds out otherwise. I
23 mean, I don't think we'll probably be bringing anybody
24 else in. That's probably the end of it. But we've
25 been just doing that fairly routinely in that case, and

1 THE COURT: Maybe what we could do is,
2 those that are requesting dismissal with prejudice,
3 basically indicate that we're willing to dismiss them
4 without prejudice; and if they need prejudice, then we
5 may need more information from them.

6 MR. MURPHY: Judge, we view this in
7 tiers. For the insurers that have, either by letter or
8 appearance from counsel, have said, "We never wrote
9 insurance in the state of Montana," we've agreed, as
10 you know, to dismiss them, and we've written you a
11 letter with all of the names of the insurers that we
12 know about so far. So those that did not ever write
13 insurance in Montana, we agree to that.

14 The insurers that wrote insurance in Montana,
15 we feel that we want to at least have the opportunity
16 for some discovery, and we want to see at least an
17 affidavit or some sworn testimony that says that we
18 don't have a claim. So we kind of view them
19 differently. If they had issued insurance in Montana,
20 then we want to be able to look into it a little bit
21 further, and we want to have sworn testimony to get
22 them out.

23 THE COURT: Sounds to me maybe if we
24 request them to at least submit affidavits, that might
25 do the trick, because those would be under oath rather

1 than going through a formal discovery process.

2 MR. MURPHY: Right.

3 THE COURT: Why don't we plan to do that
4 with those insurers, and I can ask you and the other
5 petitioners' attorneys to identify those for us. That
6 would be a great help. You've been doing that real
7 well, Tom.

8 MR. JENNINGS: Your Honor, Carrie brings
9 up a good question with respect to the burden of
10 proof. When we submit a motion requesting a dismissal
11 saying that we either never wrote work comp in Montana
12 or that we did write work comp in Montana but never had
13 any claim, are we going to be waiving that issue,
14 conceding that issue?

15 THE COURT: What do you mean?

16 MR. JENNINGS: Well, if we say: Here is
17 our proof that we never wrote workers' compensation in
18 Montana or that, while we did write workers'
19 compensation, we never had a claim, are we conceding
20 the issue that Carrie -- are we waiving the issue that
21 Carrie brings up about the burden of proof establishing
22 that the insurer, in fact, did write work comp in
23 Montana and did not have claims?

24 THE COURT: You'll get dismissed out, so
25 the burden of proof really doesn't matter, does it?

1 MR. JENNINGS: If we bring it back in on
2 this -- Well, no.

3 THE COURT: You're out, unless somebody
4 finds out something contrary, and if you've filed an
5 affidavit or you've filed something with the Court and
6 it's false, then you're in trouble. So I don't think
7 we really have to worry about the burden of proof.

8 MR. JENNINGS: Okay.

9 THE COURT: You know, if some peculiar
10 situation arises where there's some controversy, that
11 somebody doesn't believe an affidavit or doesn't
12 believe the response that's been filed and they've got
13 other information, you can bring it to my attention and
14 we'll investigate and do whatever we have to do to get
15 to the bottom of it.

16 MR. JENNINGS: Actually, my concern was
17 for the other clients I represent that I don't move to
18 dismiss.

19 THE COURT: Oh, you mean if you discover
20 later on that they didn't write insurance or --

21 MR. JENNINGS: No, I've got a group of
22 clients that did write insurance in Montana and might
23 have claims. I don't want to have waived that
24 burden-of-proof argument by providing proof of no
25 claims for my other clients, but I think you're right.

1 That will just be client-specific.

2 THE COURT: Yeah, it won't affect
3 anything that goes on with the others.

4 MS. GARBER: Your Honor, just so the
5 Court and counsel for the different common fund claims
6 are aware, I just had several phone calls from noncomp
7 attorneys who wanted to know: What do we need to
8 know? What are the rules for the court, and how do we
9 file these motions? And I just wanted the Court to put
10 something on the record so that when they come to the
11 website and view those, they have some direction
12 available to them.

13 THE COURT: I think the answer to that
14 is, if they haven't written insurance or they don't
15 have claims or something like that, we're not going to
16 require them to enter the appearance of an attorney.
17 They can furnish that information. If the information
18 isn't sufficient to get them dismissed, we may require
19 them to have an attorney enter an appearance.

20 But, I mean, my philosophy is to get to the
21 bottom of it, get it done and not put so many formal
22 strictures on it that it makes it difficult for
23 everybody. And I know in some cases some of the
24 insurers have been late and, you know, we'll pick them
25 up. I don't want them to be ignoring us, but if they

1 file a late response, we'll deal with it, obviously.

2 I got the sense from a couple of
3 communications that a lot of people are out there
4 chewing their fingernails down to the quick over these
5 cases trying to figure out, procedurally, what they're
6 supposed to do; and I just reassure them that, you
7 know, procedurally, we're pretty flexible, I think is
8 the good word.

9 Anything else?

10 MR. THUESEN: One thing I was wondering,
11 Your Honor, does the Workers' Comp Court provide a list
12 of the insurers that the Court contends that they've
13 summoned? In a case like where we represent multiple
14 insurers, you know, we want to make sure that we're
15 responding for all of our clients that have been
16 summoned.

17 THE COURT: The answer to that is yes, we
18 actually have some of that. We haven't distributed
19 that, have we? We may have to put this on the Net, the
20 website. I have lists and spreadsheets in Rausch,
21 Flynn and Reesor at this point which indicate who's
22 responded, and also we've compiled a list of who we
23 need to re-serve.

24 And the ones that we need to re-serve, if
25 we've served them by mail and they don't respond, we're

1 going to re-serve them through the Insurance
2 Commissioner. Or if they're self-insured, their
3 registered agent will be served.

4 We're going to effect legal service using the
5 Rules of Civil Procedure if they don't reply to the
6 mail summons. So we're not going to rely on the mail
7 summons as being effective. Most of the insurers are
8 going to reply to that.

9 Most of the insurers are familiar with the
10 Workers' Comp Court, and that's the way we do business
11 and it's not a big deal. For those that aren't, we'll
12 make sure they get legally served. That's one thing
13 I'll take up with counsel in these particular cases is
14 how we're going to do that, who is going to be
15 responsible for doing that.

16 We also have a group where we've had returns
17 of the envelopes with the summons in them, which means
18 they didn't get there, and those insurers and
19 self-insurers will also be served through the Secretary
20 of State if they're self-insureds, and through the
21 Insurance Commissioner if they're insureds.

22 But what I'll do, Ron, is I'll put these
23 lists up on the Internet, and there will be a column
24 here that says "Re-serve," and if it says "No," it's
25 almost always going to correspond to the fact that we

1 have a response, almost in every case. So if we don't
2 have a response, we'll probably be re-serving them.

3 Sometimes we're getting responses where they
4 haven't got service. That's great. It saves us the
5 job of having to do it. That would be indicated on
6 this list. In Rausch we've picked up several insurers
7 we don't know about who have filed responses.

8 So which cases are you concerned with?

9 MR. THUESEN: Well, basically all of
10 them.

11 THE COURT: Okay. We'll get it up on the
12 Internet, and we'll make sure everybody gets a chance.
13 This is a case where you can't default because we've
14 got to affirmatively find out information, so somehow
15 I've got to get everybody in here, by hook or by
16 crook.

17 Are you keeping track of all this for me,
18 Jackie?

19 MS. BOCKMAN: Yes, I am.

20 THE COURT: All right. Let's talk about
21 Schmill. Some of this stuff we've been talking about
22 will probably come up in the context of these next
23 things.

24 Schmill; the Supreme Court decision has come
25 down. They said there's a common fund and that it's

1 global, and it's back in our court. So it appears to
2 me, and I put this in question form, but isn't the next
3 step to serve all of the insurers with the summons in
4 the same fashion we served in Rausch and Ruhd and the
5 other cases?

6 MR. JONES: Your Honor, we have two
7 options. One is to get the whole list and just send it
8 out, or perhaps have ERD do a check to see what
9 carriers have acknowledged OD claims and thereby limit
10 the summonses that are sent out and the responses that
11 are required.

12 THE COURT: Carol, you're here. I'm glad
13 you're here. Can we get that list? Would it be
14 comprehensive?

15 MS. GLEED: What type of list was
16 requested?

17 THE COURT: Larry is asking if we can
18 generate a list of all insurers who have acknowledged
19 occupational disease claims as being filed against
20 them. Is that going to be comprehensive, going back to
21 1987?

22 MS. GLEED: We wouldn't have that
23 information available. Our database didn't distinguish
24 between injuries and ODs.

25 THE COURT: So the answer is, we'll have

1 to serve everybody. Okay.

2 MS. WALLACE: If there's already an
3 acknowledged list of insurers that didn't write comp in
4 Montana, you know, from some of the other cases, I
5 certainly have no objection to simply not even serving
6 them in this instance.

7 THE COURT: We'll have to cull through.
8 Part of the problem is we're not going to know what
9 that list is in totality unless we wait awhile in the
10 other cases, but we certainly can weed out those we
11 know about. That's probably a good idea. So weed out
12 nonwriting insurers, basically.

13 How do you want to go about developing a
14 summons? Do you want to try to draft something up? Do
15 you want me to draft something up and circulate it?
16 How do you want to do it?

17 MS. WALLACE: I don't have a problem
18 doing up a draft and circulating it to everybody.

19 THE COURT: We have some templates that
20 we can follow.

21 MS. GARBER: Your Honor, did the
22 Department of Labor keep track of all insurers who ever
23 had a claim filed with comp through them?

24 THE COURT: Carol?

25 MS. GLEED: Our database does have an

1 effective date of when they began writing work comp
2 insurance.

3 THE COURT: But the question is whether
4 or not you can identify those that actually wrote
5 insurance, or actually had claims, or such that we
6 would be able to rely on that to exclude all our
7 insurers.

8 MS. GLEED: No. Our new system came into
9 effect in 1995.

10 THE COURT: All right. So that won't
11 help us either. Good idea though. We never know.

12 So Laurie will draft it and circulate it, and
13 we'll come up with a summons. The dates to be covered
14 by the summons, the lien says July 1, 1987, through
15 June 22, 2001. Do we have any adjustments to that or
16 is everybody in agreement that those are the lien
17 dates?

18 MS. WALLACE: I agree.

19 MR. THUESSEN: Why are those the lien
20 dates?

21 THE COURT: I think that's because the
22 Schmill decision essentially declares the act, the
23 apportionment, unconstitutional back to 1987. That's
24 really the key date because that's when the Legislature
25 adopted the act, and the rationale was different. The

1 rationale changed. June 22, 2001 was what, the date of
2 my decision?

3 MS. WALLACE: Which was affirmed on
4 appeal.

5 THE COURT: Right. So we'll use those.

6 MR. ATWOOD: By agreeing to those dates,
7 are we waiving any argument in terms of the extent of
8 retroactivity that, in essence, that this does not
9 involve closed claims?

10 THE COURT: No. All we're doing is
11 getting the dates for purposes of the summons, and then
12 the responses can raise any defenses that any of the
13 insurers have.

14 MR. ATWOOD: Okay. Thank you.

15 THE COURT: It's just a date for purposes
16 of the summons, is all.

17 MR. ATWOOD: Yeah.

18 THE COURT: But that's a good question,
19 and that's good to get that on the record.

20 Responsibility for service --

21 MR. DAVENPORT: Is there going to be any
22 other parameters on the summons other than all claims
23 or, I mean, filed between such-and-such a date,
24 occupational disease claims? Are we looking at trying
25 to focus it down a little bit more closely on the

1 summons, or is this something that will happen as you
2 develop the draft as it goes around?

3 THE COURT: We'll focus it as we develop
4 the draft, and my expectation would be that we're only
5 looking for claims in which apportionment has been
6 taken. In all the ones in which apportionment hasn't
7 been taken, we don't have to look at those.

8 Another question, we've got Stavenjord
9 sitting in the Supreme Court still. Do we wait a while
10 and try to dove-tail this with Stavenjord? I don't
11 know when it's coming down. I don't have a pipeline
12 that tells me that. So I don't know whether it's
13 imminent or not, but it's been up there for a while.

14 I would expect that it would be coming down
15 within the near future, or I might at least be able to
16 find out whether or not we can expect it in the near
17 future.

18 MR. LUCK: As far as we know, it hasn't
19 even been classified yet.

20 THE COURT: Oh, really?

21 MR. LUCK: Do you know anything
22 different, Tom?

23 We've checked a few times, and it has not
24 been classified.

25 MR. MURPHY: I don't know. I haven't

1 asked that question.

2 THE COURT: Jackie, would you make a
3 note, and maybe I can find out what the status of it
4 is, whether it's been classified or what's going on
5 with it?

6 Well, if it hasn't been classified, then
7 probably, you know, unless everybody wants to wait, we
8 might be waiting for a while.

9 When Schmill was classified, how long did it
10 take before the decision came down?

11 MR. LUCK: Your Honor, my recollection
12 was it was pretty fast. Schmill was determined pretty
13 quickly, wasn't it?

14 MS. WALLACE: Well, that's a relative
15 term. I don't recall. Must have been about nine
16 months. I don't remember.

17 THE COURT: Well, I think, short of
18 getting information that it's coming shortly, I think
19 probably we'll just go ahead with this summons and do
20 it separately and --

21 MR. LUCK: It was submitted on April 20th
22 and decided on June 7th.

23 THE COURT: So that was pretty quick.

24 MR. HAWKINS: Relatively speaking.

25 MR. PALMER: "Submitted" makes it sound

1 like something the claimants or the parties did, and
2 "submitted" does not mean that.

3 THE COURT: Well, submitted in the case
4 of a Montana Supreme Court case would mean that they
5 classified it as being submitted on briefs.

6 MR. PALMER: The classification date.

7 THE COURT: Right, it would be
8 classification date.

9 MR. PALMER: And it hasn't been
10 classified yet for Stavenjord; is that right?

11 THE COURT: Apparently, they're not aware
12 if it has.

13 MR. HARRINGTON: Your Honor, as of two
14 weeks ago, it had not been classified.

15 THE COURT: Okay. So anyway, we won't
16 wait. We'll proceed.

17 Next question: Who is responsible for
18 assembling and mailing all of this stuff out? We've
19 been doing it up to this point in time, and it's a
20 fairly significant job on our staff and our resources,
21 and I can tell you that my staff has been scurrying
22 around preparing these spreadsheets, for example, to
23 track who needs to be re-served, for example, who
24 hasn't been served, and tracking who the attorneys are
25 in the case and whether responses have been filed.

1 It's taking a great deal of administrative
2 time; and Jackie, and I think Clara, both, have been
3 putting in extra hours and working some weekends doing
4 it. I'm just wondering if we can't kick that back, and
5 we can certainly do the summons and provide the -- Are
6 we doing envelopes or just doing labels?

7 MS. BOCKMAN: We had to do labels on the
8 last one because it was too big for an envelope.

9 THE COURT: We could provide either
10 envelopes or whatever. Can you absorb that, Laurie, in
11 the case of Schmill?

12 MS. WALLACE: Well, if you tell us we
13 have to, we will.

14 THE COURT: Do you have any big
15 objections to doing it? Are there any particular
16 problems in having you do it as opposed to the Court
17 doing it?

18 MR. MURPHY: If the Court does it,
19 there's no question that it got done. If counsel does
20 it, you might have an insurer that questions whether it
21 was done properly. So we took more confidence in the
22 fact that the Court did it. Maybe we could pay for
23 some of the administrative time to do it. We paid for
24 the mailing in Reesor, and I'm happy to do that. Maybe
25 we should participate in some of the administrative

1 costs.

2 THE COURT: Well, with the way our budget
3 works, that's tough to do. We can pass on the
4 out-of-pocket expenses, but recouping employee-time
5 costs and things like that, it's probably impossible.
6 The way the state budget process operates, I can't
7 imagine even talking about it.

8 MR. FLOCH: Your Honor, the noncomp
9 attorney in here; I mean, in general litigation, I get
10 the summons issued by the Court, and it's my
11 responsibility to send it out if I'm representing a
12 plaintiff or a claimant. I don't know if that bears
13 here. I mean, the Court can certainly issue the
14 summons as it typically does, and it should fall under
15 the responsibility of the claimant's attorney.

16 THE COURT: Well, I mean, it's going to
17 appear that it comes from the Court anyway.

18 MS. SWINGLEY: I just wanted to add, the
19 UEF has been serving uninsured employers with summonses
20 for years since the Court established that rule.
21 During my time at the UEF, there was never any question
22 about whether they were served. So I don't -- I mean,
23 that's a burden that's been on UEF.

24 THE COURT: Those cases, though, are
25 where we're ordering personal service, so there's a

1 sheriff that's going out or --

2 MS. SWINGLEY: Well, I mean, in this case
3 you're not, so it's even less of a burden, it seems to
4 me.

5 THE COURT: If they don't respond by mail
6 to us, we're going to re-serve them anyway. So if they
7 don't respond to the mail summons, they'll get formally
8 re-served anyway. Well, we'll talk about it, but
9 unless we have, you know, some extra time here, we may
10 put that burden back on the claimant's attorneys to
11 have their secretarial staff do the folding and the
12 stuffing of the envelopes and putting the postage on
13 it.

14 One other question we had is in some of these
15 cases, insurers haven't responded to the mail. Have we
16 identified the ones that didn't respond? Well, we
17 have, because at least in some of the cases of Rausch
18 and Flynn -- Have we done it in Flynn yet, re-served
19 them through the Insurance Commissioner?

20 MS. BOCKMAN: I don't have it handy, but
21 we did in Reesor, Rausch and Flynn.

22 THE COURT: In Reesor, Rausch and Flynn
23 we've already served the Secretary of State for the
24 self-insureds who didn't respond to mail and also the
25 Insurance Commissioner for the insureds that didn't

1 respond to mail, and I wonder if we might not just want
2 to go ahead and serve those insurers through the
3 Insurance Commissioner and Secretary of State rather
4 than even wasting the envelope on those. What do you
5 think? Or we can mail them and wait and then do it
6 afterwards too.

7 MR. PALMER: In the Civil Procedure Rules
8 there is a process where you can send service out by
9 mail. If they don't know it, then it shifts the
10 burden to them. If something like that was
11 incorporated right from the Rules of Procedure, it
12 might make them more interested in responding the first
13 time out, as well, since you've gone through another
14 process in the Flynn matter, in Schmill they might be
15 more responsive.

16 But they'd probably be more responsive yet if
17 there was some notice in there that you can either
18 respond to this or get served; but if you get served
19 later, you may have to pay for it yourself, if you
20 don't respond to the mailing.

21 THE COURT: Do the Rules of Civil
22 Procedure provide that if you don't respond, you have
23 to pay for the cost of service? We can certainly add
24 that, although we don't have a similar rule. I wonder
25 if it would hold water.

1 MR. JENNINGS: Your Honor, there are
2 some -- many that I've run across that it wasn't a
3 matter of their decision not to respond. They just
4 never got anything, and I don't know if it's due to bad
5 addresses or what, but some of my people said, I mean,
6 they never got anything.

7 THE COURT: The bad addresses come back
8 to us and then we re-serve.

9 MR. JENNINGS: Okay. So you've
10 identified those.

11 MS. POLLACK: Your Honor, my company has
12 received some summonses in which we were named and did
13 not receive others in which we were named.

14 THE COURT: Oh, that's interesting.

15 MS. POLLACK: We found out about one from
16 a third party, and I don't know about the other ones
17 that we haven't gotten.

18 THE COURT: What happens when we serve
19 the Insurance Commissioner? We have to pay them
20 something; am I right, Jackie?

21 MS. BOCKMAN: They do have a fee, but she
22 actually --

23 THE COURT: Is it waived for us?

24 MS. BOCKMAN: -- waived it for us, but
25 that was with Rausch because there was only 50, you

1 know, a few insurers. When we have a large volume, she
2 didn't know how that was going to work out.

3 THE COURT: Do they pass on any sort of
4 fee to the insurers when they serve it?

5 MS. BOCKMAN: I don't think so. I think
6 that would be our burden.

7 THE COURT: Let's go back to that idea.
8 Should we put in an acknowledgment of service and see
9 if that helps? My fear is they might ignore that, it
10 might give them impetus to ignore it. I don't know why
11 they would do that if they would respond to the summons
12 without having it.

13 MS. POLLACK: Your Honor, I would object
14 to having to pay where we never received it in the
15 first place.

16 THE COURT: Well, yeah, you're not going
17 to have to pay anything if you haven't received it,
18 obviously. And if we mail it out, you don't have to
19 pay anything anyway, as long as you get it and you
20 reply. The only provision in the Rules of Civil
21 Procedure is, if you get it and you can acknowledge and
22 you don't, then there's a rule in Montana that says
23 that if they have to serve you through other means,
24 then you have to pay for the cost of service. So if
25 you don't get it in the first place, I don't think it's

1 a big deal.

2 MS. POLLACK: Okay. We would have the
3 opportunity to put that forward, I understand, then.

4 THE COURT: Yeah, and we've got you on
5 our list at this point for your insurer. We can make
6 sure that you get it. We'll send a copy.

7 That's the other thing we can do, is send
8 copies to anybody who has responded who's got a
9 representative. Why can't we do that as well?

10 MR. HERINGER: They'd have to have the
11 authority to accept that service. Maybe what can help
12 save some time, I mean, as this is moving along,
13 counsel is identifying who they represent, and maybe
14 they can affirmatively say, "I will have authority for
15 these people to," you know, "accept service." That may
16 cut down on some of this. But as I sit here today, I
17 don't have authority from the people that I represent
18 that I can say I can accept service on some of these
19 things.

20 THE COURT: I think we have e-mail
21 addresses for everybody who has appeared or responded,
22 so we can send these out, but we can also send a copy
23 to them with a cover e-mail saying that we're also
24 copying them, that this has been sent by mail to the
25 official address of the insurer, something along that

1 line, and indicate to them if they can basically cut
2 through all of that and respond, it would be helpful.

3 I think maybe that would be the way to do
4 that; and then if you get authority, that's fine. I
5 mean, at least you know it's being served on the client
6 that you have in other cases.

7 MR. HERINGER: Because we've been served
8 on Rausch, K-Mart's been served on Rausch, but not on
9 Flynn. I asked, "Have you received this?" I know
10 they're coming down the pike, but I want to know if
11 they've been done properly or if they've gotten it, and
12 they keep me up to date with what they've got and what
13 they have not received.

14 THE COURT: One thing we might be able to
15 do is to compare the responses in the cases that we've
16 already got going to see if we've got a response by a
17 particular insurer or self-insured in one case and not
18 the other; and then if we do, let the representative in
19 the one case know that we haven't gotten a response and
20 it was served on them, and maybe they can follow up.
21 That might cut through some of that too.

22 So you might want to do that in a case that
23 you -- I think you would have -- I think Flynn was
24 basically universal. That summons was universal,
25 pretty much, so it should have been sent to K-Mart as

1 well.

2 MR. HERINGER: Well, I asked, "Have you
3 got it?" and they said "No."

4 THE COURT: Maybe we could send an e-mail
5 in those cases where we've identified people like you,
6 asking you if you can accept service on their behalf so
7 we don't have to serve them through the Secretary of
8 State -- or through the Insurance -- well, they would
9 be through the Secretary of State.

10 All right, a closed-case issue raised by
11 Liberty. I think the question is if the insurer has
12 unilaterally closed the case for not paying benefits or
13 something like that and sent the file to storage, does
14 that constitute a closed case for the purposes of
15 Schmill and such that we can exclude those cases? I
16 have a feeling I already know the answer to that
17 question, but we're going to need to address it in one
18 of these cases that's been raised.

19 Do we need to address it in this case at this
20 point? It looks to me like it's going to be presented
21 in Rausch; am I right?

22 MR. JONES: Yes, Your Honor.

23 THE COURT: How about if we just resolve
24 that issue in that case?

25 MR. JONES: That's agreeable to me.

1 THE COURT: Okay.

2 MR. OVERTURF: Judge, if we're going to
3 address that issue in the Ruhd-Rausch case, will other
4 counsel have the ability to brief that?

5 THE COURT: Absolutely. Anybody who
6 wants to brief anything in any of these cases, I
7 welcome it.

8 MR. FEEBACK: Your Honor, it occurs to
9 me, having listened to your discussion about the
10 service and the possibility of falling through the
11 cracks, as it were, that some of us may be implicated
12 in some of these other cases and be completely unaware
13 of it.

14 THE COURT: Right.

15 MR. FEEBACK: Is there some way for
16 counsel to find out for the client?

17 THE COURT: Yeah. I mean, what we'll do
18 is we'll post -- at least in the cases where we made
19 service, we'll post the list of responses, and I think
20 it's alphabetical; am I right?

21 MS. BOCKMAN: It is.

22 THE COURT: Is it in Excel?

23 MS. BOCKMAN: Flynn and Reesor are Excel
24 spreadsheets. Rausch is Access program.

25 THE COURT: We can also PDF it too.

1 MS. BOCKMAN: Yeah, but the summonses are
2 on the Web with the names listed.

3 MR. DAVENPORT: I can help them.
4 Technique (phonetic) is one of our clients, so we can
5 help them out with knowing what they've been served on
6 and what they haven't.

7 THE COURT: Okay, but those lists will
8 tell you. If you know who your client is, you can go
9 down the alphabetical list. We'll put the spreadsheets
10 both in Excel and also PDF. So if you don't have
11 Excel, you'll still be able to see the spreadsheet.
12 That should make it pretty easy.

13 MR. ATWOOD: Judge, if you're going to
14 brief the closed-case issue in Rausch, neither of the
15 clients that I represent on these issues have cases, or
16 at least, well, neither of them have been served, and I
17 know at least one of them doesn't have any cases that
18 are applicable there.

19 What's the best way for us to appear if we
20 want to file a brief on that issue? Just file a notice
21 of appearance?

22 THE COURT: I think that would be
23 sufficient, or just file your belief and I'll treat it
24 as a notice of appearance. For the purposes of filing
25 a brief, treat it as an amicus brief.

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1 MR. ATWOOD: Okay. I guess that's
2 probably more proper under the circumstances.
3 MR. FLOCH: Not to raise a more
4 complicating issue, but it appears that some insurers
5 have been appearing just through their president or
6 other corporate designee, and they have not appeared
7 through counsel. I just didn't know if that issue had
8 been addressed. It doesn't necessarily affect anybody
9 that's representing any current insureds, but they
10 can't appear in this proceeding without Montana
11 counsel, can they?

12 THE COURT: If they're going to brief
13 something, you're right. If they're going to raise
14 legal issues, you're right. If they're appearing and
15 basically indicating that they don't have any case, for
16 our purposes of our dismissing them out, I'm not going
17 to force them to get a Montana attorney at this time,
18 because we can deal with that, with the petitioner's
19 attorney, and the Court can deal with that.

20 If they're responding by furnishing the
21 information and complying with the summons which says,
22 "Furnish this information and identify them," they
23 don't need an attorney because it's basically a
24 compliance procedure.

25 If they're going to raise legal issues and

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1 start filing briefs, you're absolutely right, they need
2 an attorney, and we'll request that they do that. Do
3 you think there's a problem in our handling it in that
4 way?

5 MR. FLOCH: The youngest guy in the
6 room? I mean, no, I don't. It is concerning to me
7 that they haven't formally appeared through counsel,
8 and I mean, I've seen some of the letters on the web
9 page. It's very informative. I think I've seen some
10 of them that have been stamped as filed. So is that
11 letter a formal appearance on behalf of the insurer,
12 and if so, then --

13 THE COURT: We're treating them -- We're
14 filing everything that comes in, so we're making it a
15 part of the docket so it's part of the official
16 record.

17 But, you know, for insurers who aren't out
18 there raising legal issues, as to the process, they're
19 either going to comply, or if they're not subject to
20 the process, letting us know that.

21 I don't want to force all of those people to
22 get attorneys and go through all that hassle, you
23 know. If they're going to make a legal appearance and
24 they're going to make legal argument and be involved in
25 some way in that, other than in the compliance forum,

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1 you know, assuming they're not dismissed out, then,
2 yes, they do need an attorney.

3 MR. FLOCH: I agree.

4 THE COURT: I suppose if anybody gets in
5 trouble, it will be me, but I think we're okay.

6 MR. HAWKINS: Your Honor, I don't want to
7 take us too far down this particular path. I've done
8 some research on it, though, and if the attorney is
9 making an appearance in Montana and if that constitutes
10 the unauthorized practice of law, the Court's ruling on
11 the matter is irrelevant.

12 No offense, sir, but the Court can say it's
13 permissible for you to make an appearance, but if it's
14 later deemed to be the practice of law, the Court
15 condoning the activity is irrelevant to the attorney's
16 prosecution. So attorneys appearing from out of state
17 in this forum, they're doing so at their own risk.

18 THE COURT: The question is whether or
19 not we're going to treat them as appearance, and maybe
20 I need an opinion on that.

21 MR. HAWKINS: It's not going to make any
22 difference unless somebody makes a complaint.

23 THE COURT: I'm certainly not treating
24 those as formal appearances of counsel, for sure, of
25 anybody that's replying out of state, and particularly

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1 replying by letter.

2 MR. CADWALLADER: My recollection is that
3 the Montana Bar Association has provided a formal legal
4 opinion that an attorney has an obligation to report
5 the unauthorized practice of law if the attorney
6 becomes aware of an instance.

7 THE COURT: Okay.

8 MS. POLLACH: Your Honor, if you're an
9 attorney, aren't you just appearing pro se?

10 MR. FLOCH: You can't appear pro se if
11 you're a corporation.

12 THE COURT: That's correct, under Montana
13 law.

14 MS. POLLACH: Pro se, but responding as
15 an entity rather than as a practicing attorney.

16 THE COURT: At least in Montana, the rule
17 is a corporation can only appear through counsel. But
18 don't worry about it right now. If anybody is messed
19 up on it, it is I, and I will take the responsibility
20 for it. But I will check and see if there's any
21 problem with the procedure that we're following. I'll
22 have to figure out where to check.

23 MR. HUNT: I'm actually the former
24 chairman of the Commission on Unauthorized Practice,
25 and we've somewhat dealt with this, and you can do a

1 pro hac vice admission. That's generally done with
2 counsel in the same case, but you may be able to
3 fashion something along those lines.

4 THE COURT: Yeah. That won't help with
5 respect to the companies that are replying through
6 corporate officers; but, again, they're just furnishing
7 information. They're just basically complying. I
8 don't know.

9 MR. LUCK: Your Honor, seems like the
10 carriers that this would relate to will end up spending
11 more in attorney fees than they have in terms of
12 benefits. We need to be aware of that. There's so
13 many people that are just hangers-on in terms of these
14 large lists.

15 THE COURT: I absolutely agree with you.
16 That's why I want to handle it. A lot of these people
17 are going to be doing administrative tasks, finding out
18 the claimants for us, in which case it's a
19 nonadversarial proceeding, as far as they're
20 concerned. It's an enforcement proceeding, so it's
21 really no different than somebody having property out
22 there that you're proceeding against the property.

23 And with respect to those that are replying
24 because they represent insurers that aren't involved
25 and haven't written insurance and whatever else, you're

1 right, I mean, they're going to go out, and they're
2 providing us with information that lets us dismiss them
3 out. To make a big deal out of it just doesn't make a
4 lot of sense to me, but I suppose we can cut the sushi
5 pretty thin, in Leo's words.

6 I don't know how thin the Commission on
7 Unauthorized Practice would be on something like that,
8 so I have a feeling I'll go seek some advisory opinion
9 or something to try to keep my nose clean and everybody
10 else's noses clean.

11 MR. LUCK: I'm not speaking out against
12 attorney fees, Your Honor, just unnecessary ones.

13 THE COURT: You're right. I agree.
14 Attorneys have as much work as they need. They don't
15 need the extra hassle. That's why we have these
16 meetings, so new little things can pop up that we can
17 address. That's a legitimate concern, and I appreciate
18 it. I think we ought to cover it and protect
19 everybody. I don't want anybody hanging out there.

20 Okay, "Tracking procedure. See Agenda 8
21 on Reesor." I reorganized this. Tom Murphy has been
22 doing tracking of the responses and has provided us
23 information, and we've sort of used some of that
24 information and done some of our own tracking. The
25 tracking becomes significant because we're dealing with

1 so many insurers in this case, and ultimately we're
2 going to be dealing with a bunch of claimants.

3 We're wondering about how we're going to
4 track this information, and I sort of compiled a quick
5 list of what I thought -- information that we need to
6 be tracking and information that we're going to need at
7 the court level, which included the names of the
8 insurers who can be dismissed, and actually we're
9 tracking that. That ultimately will turn out to be who
10 has been dismissed. Insurers who need to be re-served;
11 and, again, we've got that tracked at this point in the
12 cases that are pending.

13 "The legal defenses raised by each insurer,"
14 although I've tracked that to some extent. Ultimately
15 we'll be tracking claimants who are entitled to
16 benefits, and that's one that I'm thinking that at
17 least the initial responsibility ought to be on the
18 counsel, on counsel for the claimants and counsel for
19 the individual insurers who are involved in that rather
20 than the Court trying to track all of that
21 information.

22 Historically we've gotten the lists -- we've
23 ultimately gotten the list, the State Fund, in Muir
24 and in Broeker, and I think even in Rausch, it's
25 provided the list of who's been paid, which we've

1 maintained in case there were any questions about it.
2 But I certainly don't go through that and look at it
3 and double-check it, and hopefully I won't have to do
4 it in these cases.

5 So my question is sort of a general one.
6 Maybe Tom can tell everybody what he's doing as far as
7 tracking and what he anticipates, and also maybe Lon
8 can tell us what they're doing in Rausch, and I have
9 questions about Rausch, too, specifically.

10 Tom, what are you doing? How are you
11 handling it?

12 MR. MURPHY: We have an Excel spreadsheet
13 which we track the number of cases where there was an
14 appearance by an insurance company representative,
15 whether it be an attorney or president or some other
16 person that had the ability to say whether they had
17 issued insurance in Montana. For those that said that
18 they didn't, we agreed to dismiss without prejudice, as
19 we already covered.

20 For those that appeared with counsel, we
21 have -- there's 196 of them, by the way, that we've
22 tracked so far. We listed that, when they appeared,
23 and whether they filed any motions. We haven't paid
24 too much attention to what their defenses are, maybe
25 because claimant's counsel is too cynical, you know,

1 they defend on too many defenses.
2 So we've just tracked who their attorney was,
3 when he or she appeared, and obviously we're going to
4 start another list as to each insurance company when we
5 start identifying claimants under that company's
6 umbrella. So that's our plan.

7 We sent that to the Court. We can e-mail
8 that to anybody that wants it, although I understand
9 the Court is now going to post it on the website, so
10 that's great.

11 THE COURT: Right, we've got actually --

12 MR. MURPHY: I have 264 appearances. How
13 many are on the summons? That's what I've been trying
14 to ask.

15 THE COURT: 650.

16 MR. MURPHY: Is there 650? I thought we
17 counted that once, but I have not sat down and --

18 THE COURT: Which one is this? Reesor?

19 MR. MURPHY: Reesor.

20 THE COURT: We had 276 responses out of
21 637 as of July 12th of 2005.

22 MR. MURPHY: So you have 12 more than I
23 did, that I haven't seen. That's something we're going
24 to have to figure out too.

25 THE COURT: Well, I think maybe in these

1 individual cases I'm going to be dealing with a lot of
2 the same counsel, and we can coordinate in some fashion
3 and try to reduce as much duplication of effort as we
4 possibly can. Once we've got this going, this will be
5 a little bit easier to maintain, now that we've got
6 it.

7 At least as far as the insurer information
8 and responses, it looks like we're going to be pretty
9 much up to speed. There may be some duplication, but
10 to the extent that you can track it, especially the
11 responses where we're going to be dismissing people
12 out, that's going to help.

13 Does anybody else want to talk about tracking
14 at all? Anything else?

15 Anybody want to talk about anything else on
16 Schmill? Is there anything else on Schmill that we
17 have to do at this point? Clara?

18 MS. WILSON: Just to let you know,
19 Stavenjard was briefed as of April 25th, but it has not
20 been classified.

21 THE COURT: So it's still sitting up
22 there. So that probably reaffirms what we thought in
23 the first place. We ought to just go ahead. Anything
24 else on Schmill?

25 MR. HARRINGTON: Your Honor, how does the

1 Court want the insurers to proceed with Schmill-type
2 demands that they're receiving now that the Schmill II
3 decision has been issued?

4 THE COURT: Elaborate. What kind of
5 demands are you receiving?

6 MR. HARRINGTON: For payment of benefits
7 that were apportioned. They want their Schmill
8 benefits paid, and there hasn't been a summons issued
9 yet. How do you want us to handle those?

10 THE COURT: As to the insurers that you
11 represent, how should they handle them?

12 MR. HARRINGTON: Do we want to have a
13 stay issued until the summons goes out and all the
14 insurers come in and we go through the process of
15 identifying the claimants?

16 THE COURT: My suggestion would be that
17 if you look at it and they're entitled to the benefits
18 and there aren't any legal defenses that you want to
19 raise to it, would be to go ahead and pay them, but
20 withhold the lien. I would authorize that rather than
21 making them wait. I mean, once they've identified
22 themselves, and you can identify them as being persons
23 entitled to the benefits, unless you have -- I mean, if
24 you have legal defenses, then we'll have to sort them
25 out in the Schmill case, although I'm not sure how much

1 is left of legal defenses in Schmill in light of that
2 Supreme Court decision. I don't think there's a whole
3 heck of a lot left there.

4 So my suggestion would be, unless you have a
5 bona fide, serious, legal defense and you know that the
6 benefits are due, would be to pay them. And if you
7 want an order from me to authorize the withholding,
8 draft one up and we'll do it. I could do a blanket one
9 for that.

10 MR. OVERTURF: Would you suggest
11 withholding 20 percent for the attorney fee, given that
12 we haven't had any kind of attorney-fee hearing yet?

13 THE COURT: What's the lien claim?

14 MS. WALLACE: It's 25.

15 THE COURT: I'll authorize you to
16 withhold 25 percent.

17 MR. DAVENPORT: I suppose that Larry --
18 or Rex has got the cases, the attorney who is demanding
19 payment of the benefits. So there's two attorneys
20 involved, presumably Larry and Rex. I just go ahead
21 and deduct 25 percent and pay the remainder to Rex? I
22 mean, this is a, you know. . .

23 THE COURT: Oh, assuming it's Rex's
24 client?

25 MR. DAVENPORT: Right.

1 THE COURT: I think that's right.
2 MR. DAVENPORT: No matter how loud Rex
3 yells.

4 THE COURT: No matter how loud Rex yells,
5 but he won't yell, because he knows these things.

6 MR. DAVENPORT: A theoretical question,
7 of course.

8 THE COURT: So I need to issue a standing
9 order on this. Tom, do you want to try to draft
10 something up for me?

11 MR. HARRINGTON: Absolutely. Should I
12 include in there that 25 percent is outrageous?

13 THE COURT: You can if you like, but I'm
14 not sure it will get in the order.

15 MR. HARRINGTON: As long as the record
16 reflects there was some sarcasm in that comment, it
17 will be okay.

18 THE COURT: Anybody who reads a
19 transcript of these proceedings and thinks that
20 everything we say is serious needs to come to one of
21 these.

22 Let's move on to Reesor. The first question
23 is really the question we had before, I raised before,
24 whether or not we should put the onus on the
25 petitioner's attorney for reservice.

1 I wonder, this is where we're going to have
2 to re-serve the Insurance Commissioner. We've sort of
3 got that set up, don't we?

4 MS. BOCKMAN: Yes. We've only re-served
5 the ones that the envelopes were returned in Reesor as
6 undeliverable. We have not sent them off. Oh, no, we
7 did send them. That's right, we sent them over to the
8 Insurance Commissioner and we haven't heard back from
9 them, so Reesor is underway.

10 THE COURT: So we've taken care of the
11 ones that have been served that haven't replied and
12 also the ones we had return mail, all of those have
13 gone to the Insurance Commissioner?

14 MS. BOCKMAN: Actually, I think it's just
15 the return mail. We'll have to go through the list
16 again to see if they haven't responded and get another
17 list. I misspoke.

18 THE COURT: Is there going to be any big
19 benefit to us as far as the ones that have been served
20 that haven't replied, shipping that over and having the
21 claimants' attorneys doing that instead of us doing
22 it? What can we have them do that will help us?

23 MS. JACKIE: In Reesor I don't know that
24 it's going to help us that much. I don't think that
25 that list will be that long. We can probably do Reesor

1 here, the reservice.

2 THE COURT: We'll plan on doing Reesor
3 unless we think we need help. We'll try to develop
4 that list.

5 MR. HARRINGTON: Your Honor, while you're
6 talking about reservice of Reesor, we saw that Skaggs
7 was listed as one of the companies that hasn't
8 responded. They're part of the Albertson's group, and
9 if they were left out of our response to summons, that
10 was a mistake. I'll double-check that, but we are
11 representing them as part of the Albertson's group, so
12 you won't need to re-serve them.

13 THE COURT: Okay. Got that?

14 MS. BOCKMAN: Uh-huh.

15 THE COURT: Here's a biggy for
16 everybody: What do we do with insurers who we do get
17 properly served and they still don't respond? Has
18 anybody thought about that, or maybe that's something
19 that you want to go home and think about. I don't know
20 the answer to that. I mean, the Court has all sorts of
21 powers, but we're going to have to figure out some sort
22 of plan to proceed as to those insurers who just ignore
23 us.

24 MR. HUNT: You can give a liquidated
25 damages penalty of 100 claimants or something like

1 that.

2 THE COURT: How would that work?

3 Okay, I suspect nobody is prepared to address
4 it, but put that in your notes and think about that,
5 because I think we're going to have to cross that
6 bridge.

7 MR. MURPHY: I think, Judge, that we
8 should make sure we get service, which you are
9 ensuring. Once we do have proper service, if a party
10 doesn't appear, then I think that we've done everything
11 we can for now. You might have to address sanctions
12 against that company later, but it doesn't, you know,
13 there's no time limit on when you can do that. We
14 could get on with the case and then address those
15 issues as we're doing the case itself, but we're going
16 to be speaking about your sanction power.

17 THE COURT: Which I always am reluctant
18 to use. I'd rather have compliance than be issuing
19 sanctions. Yeah, I agree, there's no reason to hold up
20 anything else. We can pick them up along the way.
21 It's something I think we need to be thinking about.
22 Once we've got all these summonses re-served and we see
23 there are a bunch of insurers out there that still
24 haven't replied, we'll have to deal with it in some
25 fashion.

1 MR. MURPHY: Right.

2 THE COURT: No. 3 on Reesor, I think
3 we've already discussed. No. 4 is, "What issues remain
4 for resolution in Reesor in light of Schmill II?" I
5 had the pleasure of using our Internet site with all
6 our docket on it and going through the responses to try
7 to identify all of the issues that have been raised,
8 and I'm through "T." What is that, about 20 of them?

9 I guess when I look at some of these, I
10 suspect that some of these really aren't very serious,
11 and what I want to try to do is, number one, find out
12 if there are any other issues out there in Reesor, and
13 I'll also want to do the same thing in these other
14 cases once we get going on them.

15 Are there any other issues out there? Then I
16 think what we want to do is what we've done in other
17 cases, and that is brief the issues, but I want to
18 initially sort the chaff out from the real issues. I'm
19 not sure how to do that.

20 I thought about maybe requiring a statement
21 from all attorneys who raised issues saying, "We really
22 mean to assert these issues. These are the issues we
23 really mean to assert and we want to brief them," or we
24 could just set a briefing schedule and they can set out
25 the issues; and the ones that they brief, we'll

1 consider. The ones they don't brief we can consider
2 abandoned.

3 Anyway, those are the thoughts going through
4 my mind at this point in time, is whether or not we
5 should try to reduce the issues and then order the
6 issues that are serious ones, or that counsel believe
7 are serious ones, develop that list and then order
8 briefing, or just order briefs and whatever issues are
9 raised in those briefs are responded to and then I
10 decide it. I mean, there are two different ways of
11 handling it; and there might be a third way, I don't
12 know.

13 MR. LUCK: My first question is whether
14 we want to do that, narrow anything or make any
15 decisions in relation to issues until you finalize
16 service. That's one of the other numbers there. I
17 know that's one of the things you wanted to talk about.
18 But if you're still in the process of getting the word
19 to all the insurers to make an appearance, is it
20 premature to limit issues or to initiate the briefing?

21 THE COURT: Well, I think we can start
22 that process, because I think that process -- by the
23 time that process is completed, the time for formal
24 responding will be at an end, and if they haven't
25 formally responded, that's their tough luck, as long as

1 we've got service on them.

2 So my thought would be that if we establish
3 it, it would be far enough in advance that they could
4 respond and still meet whatever deadlines we put on
5 doing this process rather than -- I mean, we can wait.
6 The other option would be just to wait until that date
7 is expired, have another conference or do something
8 else, but I'd rather resolve it here rather than
9 organizing another conference to discuss it. I think
10 we ought to figure out a strategy for this now, but
11 make it long enough in advance that they get served and
12 have an opportunity to respond. Does that make sense?

13 MR. MURPHY: Judge, I think that the
14 parties could use your agenda here that you've put out
15 and this list from (a) to (t) as the issues
16 identified. I think the Court could allow parties an
17 additional five days to identify additional defenses
18 that need briefing, and then I think that the Court
19 could instruct the parties as to which issues the Court
20 wants briefing on, because you have decided many, if
21 not most of these defenses raised, like the contract
22 issue, the question about whether the failure to plead
23 common fund fees. That's now been briefed at the
24 Supreme Court and decided in the Schmill II case.

25 So I think that a good way to do it would be

1 if the Court just told the parties what issues you want
2 briefing on.

3 THE COURT: Yeah, but then I may get in
4 an argument about whether or not issues that I've
5 foreclosed briefing on or not asked briefing on should
6 in fact be briefed.

7 I'd sort of rather have counsel tell me which
8 ones they're willing to give up at this point. If they
9 want to brief them, I'm sort of hesitant to cut them
10 off and say they can't brief them, even though I think
11 I may know the answer, and I think the answers are
12 clear from the Supreme Court decisions.

13 MR. MARTELLO: Judge, I think that the
14 parties should be able to brief those issues that they
15 think are important, and you're not going to get
16 agreement, likely, from all the defendants as to which
17 issues should be dropped and which issues should be
18 briefed. And I think for those that you have already
19 made your determination, you can just go through and
20 address and indicate in your decision that this has
21 already been determined and cite the appropriate
22 authority for.

23 But I think that necessarily each defendant
24 has to have the ability to raise the issues they think
25 are germane to the case, and for those issues that they

1 don't want to raise, then they've abandoned them. I
2 don't know that you can get a list. Otherwise, you'll
3 get a list that's going to be, I think, incredibly long
4 in order to make sure that every possible contingency
5 is covered.

6 THE COURT: It seems to me that whatever
7 is raised needs to be raised in the response in the
8 first instance, so the responses are going to set it
9 out, unless I mean, we can add to that up to a certain
10 point. So maybe what I need to do is issue a deadline
11 for identifying any other issues not already contained
12 in the responses. I think that would be the way to do
13 it, and do that -- issue that deadline, which would be
14 beyond the deadline for the responses once we get the
15 new service, so why don't I do that.

16 Then after that, this would be basically the
17 master list, again, subject to my being human and maybe
18 misstating the defenses in there or missing some,
19 because I didn't look at every single answer. I
20 figured if Brad filed an answer in one case, his answer
21 in the next case was going to contain the same
22 defenses. I think that's a pretty safe assumption, but
23 it's not a perfect assumption.

24 So I think we could develop that list and
25 have that provided to everyone so everybody would have

1 an opportunity, including the attorneys who want to
2 appear amici in any particular case, to brief the
3 issues, the common issues.

4 But also if there's something in one of the
5 responses or one of the additional -- well, it would be
6 in one of the responses that's raised that I didn't
7 particularly pick up, they could still put that in
8 their brief. So set a briefing deadline, issue that
9 list of cases, being understood that if there are other
10 issues out there or responses, that they can be
11 briefed; and also make it clear that if they don't
12 brief it, it's deemed abandoned, and set a deadline, a
13 schedule for that.

14 MS. WALLACE: Does that mean, Your Honor,
15 that the defendants can pick and choose and brief a
16 couple of the issues, and then the claimants' attorneys
17 have to respond to every single one of them?

18 THE COURT: No. What I'm saying is since
19 these are defenses, they would brief the issues that
20 they thought had merit, and if they don't brief it, I'm
21 going to deem it abandoned, and I'll issue an order to
22 that effect.

23 Does that give any of the insurers' attorneys
24 heartburn? I assume that if you think it's a serious
25 defense, you'll brief it.

1 MS. WALLACE: But that doesn't answer my
2 question. Once they brief them, then the claimant's
3 attorney has to respond to all of them?

4 THE COURT: Well, to the extent you think
5 it's necessary, to the ones that they've briefed.

6 MS. WALLACE: Right.

7 THE COURT: To the extent you think is
8 necessary.

9 MR. MURPHY: Judge, could claimants'
10 counsel file one master response to these issues so
11 that we are not writing 240 briefs on the same --

12 THE COURT: Absolutely.

13 MR. MURPHY: I think that's what Laurie
14 is maybe getting at there.

15 THE COURT: Oh, absolutely. You can just
16 file a single brief responsive, as long as you've
17 covered the issues that are raised in the other
18 briefs.

19 Same thing for the insurers. Each insurer
20 that you represent doesn't have to file a separate
21 brief. You can file a consolidated brief.

22 MS. GILCREST: Your Honor, if one
23 insurer's attorney files a brief on five of those
24 subjects, five of those defenses, then they essentially
25 preserve those defenses for each of their clients; but

1 if another counsel for a different insurer does not
2 file a brief on those defenses, then they're, in
3 effect, waiving those defenses for their client?

4 THE COURT: I think whatever defenses are
5 waived, whatever I rule on that is going to be for the
6 whole kit and caboodle. It will be applicable to
7 everything that goes on in the case.

8 MS. GILCREST: So if you rule in Brad
9 Luck's favor on one of these particular defenses, that
10 would be applicable to every response?

11 THE COURT: Yes.

12 MR. HERINGER: What if somebody has
13 already responded to the summons, but there's these
14 defenses out there? I mean, have we waived it? And
15 that goes along with what she's saying. What I've
16 done in other cases is Brad has filed a brief, I
17 incorporate, by reference, anything he says, and it's
18 about a one-page brief for me.

19 Of course, Brad does such good work, that's
20 what you do all the time, you know. But I also have
21 clients that have already sent in information in
22 response to summonses, and they waived all those
23 defenses.

24 THE COURT: Some insurers aren't going to
25 get involved in the legal hassle. They'll produce the

1 information and pay the claimants. Essentially they're
2 not going to do those defenses. If they're going down
3 that road, then they're going down that road.

4 So, you know, if that's the way you respond
5 and you haven't responded by defending, I'm going to
6 hold you to that. It may make sense to do that for
7 many insurers. It may be more costly and
8 time-consuming and more aggravating to try to raise
9 legal defenses, even if you think you have them. Or
10 you may evaluate it and think you don't have legal
11 defenses and not want to do it.

12 My reply to that is, if the response is in,
13 we're going to identify the claimants and pay them. I
14 plan to hold you to that unless you want to move to
15 amend and try to raise additional defenses, and then
16 you'll have to make a motion.

17 MR. HERINGER: I'd like to first answer
18 what you said, if you rule in favor of a defense, it
19 applies to everybody. I think if you go to the second
20 way you said, everybody is going to start filing a lot
21 of motions because they're -- they don't want them
22 deemed waived, you know, like. . .

23 THE COURT: It's going to apply to -- I
24 think, the way I'm envisioning it, it will apply to
25 everyone who is defending on legal grounds against the

1 application of the common fund, but those who have not
2 defended on legal grounds, who have basically responded
3 that, "Here are our claimants and we will pay them,"
4 they're in a different situation. They're different
5 from those that are trying to defend against the
6 application. So that's how I envision it.

7 So, for example, if you filed and said, "No,
8 we don't owe anything because we have legal defenses,"
9 and you've got two legal defenses raised, there's two
10 ways I can handle that. Number one is just limit you
11 to those legal defenses. Brad has raised two other
12 legal defenses. If I rule in his favor on those, they
13 don't apply to you. So I could say, "You're Stuck."
14 That would be one way to handle it. "You don't get the
15 benefit of Brad's defenses," or I can say, "We'll look
16 at these defenses jointly," to anybody who is arguing
17 they don't have to pay Schmill benefits, they don't
18 have to pay benefits to those claimants who have been
19 apportioned, they don't have to pick those benefits
20 up. Anybody who has said, "We don't have to do that
21 because we have legal defenses," just basically pool
22 all the defenses and decide them all jointly and have
23 it apply to everybody who has raised defenses, but not
24 to the insurers who have replied. We're going to
25 identify them and we're not going to resist

1 compliance.

2 MR. OVERTURE: Aren't we looking for one
3 rule of law that applies to everybody here? I mean, if
4 you rule that there is a certain defense in a case,
5 that precludes payment to some or all of the claimants,
6 doesn't that apply to everybody?

7 THE COURT: No, not necessarily.
8 Basically, you can waive it. I mean, for example, in
9 Flynn, the State Fund entered into an agreement to go
10 ahead and pay the Flynn benefits, and that didn't go to
11 the Supreme Court, but it came back, and now we may
12 have some defenses in Flynn where they're arguing that
13 it doesn't create a common fund.

14 So basically you've agreed to waive those
15 defenses and proceed to pay them. Individual insurers
16 can decide to do that, and it may be a better route
17 than defending against it. But then there's a bunch of
18 these others out here who are going to resist it. So I
19 don't think all insurers are in the same boat.

20 MR. MURPHY: Judge, I agree with you. We
21 fully expect to see a number of small insurers with one
22 or two claims come to us and say, "We only have one
23 claim. We'd like to resolve the matter and be out of
24 this case," and we're expecting to be contacted by a
25 number of insureds' companies in that regard. Then

1 they're out and they don't have to pay these expenses.

2 THE COURT: Well, the other thing is the
3 legal analysis on behalf of particular insurers may be
4 different. I mean, some insurers may conclude that
5 there isn't -- that resistance is futile, and others
6 may think that it's not.

7 MR. FLOCH: I mean, that's a concern that
8 I raised with respect to insurers who are, I guess,
9 complying with what you said is a nonadversarial
10 process. If they're simply saying, "We're going to go
11 look at our records and see if we do have any of these
12 types of claims under a variety of these different
13 common fund cases," is that a tacit admission that
14 they're willing to pay those claims, and are they
15 waiving legal defenses down the road?

16 THE COURT: Well, I think they are unless
17 they're filing a response raising a legal defense.
18 That's the way that I would treat them, unless I'm in
19 error in doing that. And I think if they want to raise
20 those, they need to file something -- then they need an
21 attorney and they need to be filing something.

22 MR. FLOCH: Well, I guess that's the
23 concern I have, that when you phrase it like this, that
24 it's a nonadversarial compliance process, that there
25 may be no understanding or a meeting of the minds that

1 we're going to pay these claims or we've waived our
2 defenses. I mean, it's just an issue, and I don't mean
3 to complicate it.

4 THE COURT: Well, I think an insurer who
5 gets a notice and a summons like this who wants to
6 raise a legal defense to doing it would do so rather
7 than providing the information and go forward on that
8 basis. I'm treating those as indicating they're in
9 compliance. If they don't intend that, then it's -- if
10 it's not a compliance process to them, it becomes
11 adversarial, but they need to make it adversarial by
12 filing some sort of response in which they raise those
13 defenses.

14 MR. FEEBACK: What, procedurally, would
15 be the way that you go about that?

16 THE COURT: File an answer in which you
17 raise defenses.

18 MR. FEEBACK: When I responded on behalf
19 of Cominco, my understanding at that time was this was
20 being delayed until, I can't remember the date, but in
21 my case, I think it was sometime in August, for the
22 company to figure out just exactly where they sat with
23 respect to the allegations in the complaint.

24 THE COURT: So you've got an extension of
25 time.

1 MR. FEEBACK: That was our understanding.

2 THE COURT: If you have an extension of
3 time, then if you have legal defenses, you can put
4 those in your response when you file it.

5 MR. FEEBACK: Very well.

6 THE COURT: We're not cutting those off,
7 but I see a difference between the insurers who are not
8 defending and who are essentially indicating, "We are
9 going to identify these claimants and pay them." To
10 them, it becomes a compliance issue, and that's why I
11 basically treated those differently, and that's where
12 we got the attorney question coming in: Do they have
13 to be represented by an attorney?

14 Brad wants to say something. Go ahead.

15 MR. LUCK: Your Honor, it's a little
16 ironic in this setting where we have these cases that
17 were decided against single insurers that evolved into
18 common funds, and then evolved into global common funds
19 binding the industry for, in some cases, back, you
20 know, a couple of decades, that we're saying that
21 unless you appear and raise issues, that you're going
22 to be bound by them, when the turnabout should --
23 They're bound by the decision, and then they should be
24 bound by the single rule of law absent a settlement.

25 I think the example of the Flynn case is a

1 good example. That case was settled and resolved on
2 terms that were worked out between the parties, and it
3 seems like the better rule would be absent a
4 settlement, any carrier is only responsible to follow
5 the single rule of law as finally determined by the
6 Court, whether they come in and it's economically sound
7 for them to defend or not. Ultimately there's one rule
8 of law.

9 THE COURT: I know, and the problem is,
10 they said there's a common fund, and I suspect a lot of
11 these defenses are not going to go very far. I read
12 these common fund cases where they see a common fund as
13 being pretty darned clear, and I look at this list of
14 20-some-odd defenses here, and I don't think most of
15 those defenses are going to go anywhere, because I
16 think you're absolutely right, there is one rule of
17 law. The Supreme Court has adopted that rule of law,
18 and it's going to apply to everybody.

19 So the question is, is there something they
20 didn't decide which may prevent us from moving forward
21 with this common fund? If there isn't, then it's going
22 to go forward and everybody is going to be bound.

23 MR. LUCK: I was only speaking to the
24 question of whether you're effectively defaulting
25 people for not raising particular issues as opposed to

1 waiting to see what that single issue of law is and
2 being bound by it.

3 Absent a settlement, I think that even though
4 people don't hire counsel and come in and raise
5 specific issues, that they should be in no different
6 position than the bigger carriers who have more at risk
7 that are litigating the issues waiting for the final
8 rule of law.

9 That's the only question I was speaking to,
10 whether you're effectively defaulting people for not
11 raising the issues and appearing.

12 THE COURT: I'm not defaulting them. I
13 mean, they've been served and they can come in and
14 resist it; but if they don't and they indicate that
15 they're complying, they're basically indicating what
16 you guys did in the Flynn case, which is, "We're going
17 to comply. We're going to treat this as a common fund
18 and we're going to pay it." Then I don't have anything
19 to decide with respect to those insurers.

20 MR. LUCK: Actually, Your Honor, we
21 negotiated a resolution that might be different than
22 what other people negotiated, so we had an actual
23 settlement, and there were terms and conditions to that
24 settlement, and there was give and take.

25 I think that's very different than not coming

1 in and actively defending and waiting to see what the
2 Court, ultimately the Supreme Court, is going to
3 determine is the rule of law that emanates from these
4 cases.

5 It is true that maybe as to some of these
6 issues, the writing is on the wall, but there are other
7 legitimate issues that these carriers shouldn't have to
8 maintain if they don't have several cases at issue and
9 wait to see what the final determination is.

10 THE COURT: The problem is, they've been
11 joined and served with a summons, and they have a
12 choice. I mean, they can proceed and pay these claims,
13 identify and pay the claims and agree, or they can
14 resist. I mean, I can't -- I mean, how would you treat
15 them? What would you do?

16 MR. JONES: Your Honor, let me use a
17 hypothetical and see if I understand what Brad is
18 saying.

19 Let's say I defend on Schmill II on that
20 concept of what is closed or final. Let's assume the
21 State Fund does not raise that defense. Let's say I
22 prevail on that defense in a way so as to limit the
23 scope, the number of cases, that fall under Schmill.

24 Now, the State Fund, under my hypothetical,
25 has not participated. They haven't raised the same

1 be laches.

2 THE COURT: I know.

3 MR. JONES: Under my hypothetical, are
4 you prepared to give us an answer? If the State Fund
5 doesn't participate and I get a rule of law that
6 diminishes my liability, the State Fund would get the
7 benefit of that rule of law.

8 THE COURT: Well, are you raising laches
9 as going back to a particular period of time or are you
10 raising laches as defeating anything before --

11 MR. JONES: Your Honor, the scope of the
12 application is not an issue. It's whether the State
13 Fund, by not participating in the defense I've raised,
14 foregoes the benefit of that defense if I prevail on
15 it.

16 THE COURT: Well, I could apply that
17 rule, and maybe I should. I mean, that's the
18 question.

19 Well, firstly, you've got two different
20 issues. You've got implementation issues and you've
21 got defense issues, the defense issues being that this
22 can't go forward because it is barred by something that
23 hasn't been addressed by the Supreme Court. If it's
24 been addressed by the Supreme Court, you're dead in the
25 water and not going anywhere.

1 defense or argued it, but will they get the benefit of
2 that rule of law that limits, in my hypothetical, the
3 number of cases that fall under Schmill? Is that the
4 point?

5 THE COURT: Well, some of these issues
6 become enforcement issues, and we may have to
7 distinguish between -- or not enforcement issues, but
8 implementation issues. It's not a question of whether
9 or not there is a common fund. It becomes a question
10 of who is within that common fund specifically.

11 So those become a little bit different, and
12 those issues, I would think, would be common to all of
13 the insurers. Resolving that issue would affect all of
14 the insurers, no matter how they reply. Even if they
15 agree that there is a common fund and come in, I think
16 those issues would, there's resolution of those
17 issues. Where you're arguing that there is no common
18 fund, it's barred by laches and those sorts of things,
19 those are legal defenses that defeat the whole thing,
20 and that's a different matter.

21 MR. JONES: Your Honor, if I could expand
22 on my hypothetical by way of anticipation, earlier you
23 kept laches alive in one of my cases, the Miller case,
24 which has since gone. In my hypothetical, I was
25 anticipating one of the defenses under Schmill II could

1 If it hasn't been and you think there's
2 something that would distinguish it that would allow
3 you to get back up there and make an argument against
4 the common fund, that's one thing. Those are the
5 absolute defenses.

6 Then you have implementation issues like the
7 settlement issues, whether the -- the closed-case
8 issues. I don't know, laches is sort of in between
9 there. If you're arguing that you can only go back to
10 1995, you can't go past -- before 1995 or something
11 like that, that may be an implementation issue. If
12 you're arguing that laches basically bars all of the
13 common fund claims, that's an absolute-defense type of
14 issue.

15 As I see implementation issues, where you're
16 just trying to sort out which of these claimants are
17 entitled, the answers that I'm going to give as we go
18 along and try to implement are going to apply to all of
19 the insurers, whether or not they've abandoned legal
20 defenses, you know, the absolute legal defenses or
21 not.

22 But the other issues, the absolute defense
23 issues I'm treating as being raised by those who have
24 filed responses and raised the legal defense issues.
25 Do you understand what I'm saying?

1 MR. JONES: That does answer my question,
2 Your Honor.

3 THE COURT: We can go back here, and I
4 could, I mean, one of the things I can do is basically
5 say, whatever issues that you raise in response, you're
6 going to be limited to, and you've abandoned the
7 others. So even if Mike wins on his two issues and
8 Brad hasn't raised those, Mike gets the benefit of the
9 issues that he raises; but, Brad, you're stuck. You
10 don't get the benefit.

11 MR. JONES: Unless they're implementation
12 issues, correct?

13 THE COURT: Unless they're implementation
14 issues.

15 MR. MARRA: Why wouldn't every insurer
16 just say, "I'm joining in every issue raised by every
17 insurer"?

18 THE COURT: Well, that's what I was
19 basically throwing out, would be to take all of the
20 absolute defenses and basically make them applicable
21 across the board.

22 MR. DAVENPORT: I guess what I'm
23 concerned about at this point is that I don't want to
24 waive any rights that I may have to assert in an
25 affirmative defense, while at the same time wanting to

1 agree with you. Each company should raise their own
2 defenses.

3 As to Tom Marra's question, I think that goes
4 to what I said to the Court earlier, which is, I
5 wouldn't mind if we had a list of the real defenses
6 that we could brief. But, of course, that, you know,
7 if somebody still wants to take another shot as to
8 whether a common fund exists or whether failure to
9 plead is a good defense, after we've now had several
10 court decisions on that, then I guess I can't talk them
11 out of it. But we would like to have a definite time
12 when the briefs are done, and then move on from there.

13 THE COURT: Okay. But we've still got a
14 little bit of an issue. I'm not sure I'm clear that
15 you've addressed what my dilemma is.

16 With regard to implementation issues, I'm not
17 treating those as being things that have to be raised
18 as affirmative defenses. That's just in the
19 implementation phase of identifying who is entitled, so
20 things like closed files comes up. I don't think that
21 is an affirmative defense that necessarily has to be
22 raised in the answer.

23 MR. MURPHY: But you could have it raised
24 if you wanted just by listing them for us and saying:
25 "Okay, Counsel, let's brief these issues."

1 move forward in identifying potential claimants as we
2 go through this, while over here, there are these
3 issues that haven't been resolved completely.

4 But as Tom mentioned, if I have a client
5 that's got one case that's affected by the Stavenjord,
6 I can't, in good conscience, make that client continue
7 to pay large amounts when I can settle for two grand,
8 or whatever the case may be.

9 I want to be able to pick and choose without
10 violating any rights that any of our clients may have.

11 THE COURT: I think you can do that on an
12 insurer-by-insurer basis.

13 Let me ask Larry and Tom and Rex, you sort of
14 heard the way that I'm laying this out. Do you
15 disagree with my treatment of implementation issues
16 versus absolute defense issues?

17 MR. MURPHY: No, Judge, I wouldn't split
18 it even. I would say affirmative defenses have to be
19 raised in their response of plea, which you've said.

20 These are insurance companies. They're not
21 unknowledgeable about how we proceed in court. They
22 know that they have to raise their affirmative
23 defenses, and if they haven't done so, then they should
24 not be availed of the benefit of any other ruling in
25 any other insurance company's pleadings, so I agree. I

1 THE COURT: We're going to do that in
2 Rausch, so that's going to be an implementation issue
3 that will be addressed in Rausch.

4 But as to the true affirmative defenses which
5 would defeat the common fund entirely in these cases,
6 the question I have is, assuming I've got these issues
7 and Brad joins in five of these issues and Mike
8 Heringer joins in a different five and somebody else
9 does that, when I resolve these issues, do all of the
10 insurers who have raised any defense get the benefit of
11 it, or do I strictly apply the decision only to those
12 that raised that particular defense? If they didn't
13 raise it, they still have to pay even though the other
14 guys get out.

15 MR. MURPHY: If it's a defense, it has to
16 be raised by the party.

17 THE COURT: By the response.

18 MR. MURPHY: That's correct.

19 THE COURT: Okay. You don't pool it.

20 MR. JENNINGS: Your Honor, if we do that,
21 I have a feeling a bunch of folks are going to run home
22 and do motions to amend saying, "Me too."

23 THE COURT: Well, except you've got to
24 look at these issues and make sure, in good faith, you
25 want to assert them. I think some of these issues are

1 borderline, to be honest with you.

2 MR. ATWOOD: We're talking about common
3 fund claims, and I think we're also talking about
4 common fund defenses, and I think if you rule as a
5 matter of law on any one of those defenses, that they
6 ought to apply to all the defendants.

7 THE COURT: Well, that's the issue. I
8 mean, you can have -- What do you do in civil
9 litigation if you've got multiple defendants, and one
10 comes in and asserts the statute of limitations,
11 another fails to assert the statute of limitations,
12 even though it applies to them as well. Isn't the one
13 that failed to assert the statute of limitations on the
14 hook because it's an affirmative defense?

15 MR. ATWOOD: Well, the way I look at
16 this, you're talking about rules of law as opposed to
17 affirmative defenses. So I think the distinction is a
18 little bit different.

19 THE COURT: Well, that's an interesting
20 question that we may want to even brief.

21 MR. LUCK: I agree wholeheartedly.
22 That's not the same at all. We're talking about a rule
23 of law here. Secondly, it's a little illogical for
24 counsel for Mr. Reesor, who is the only one that
25 brought up that issue to get it decided, and it applies

1 to everybody, to say that the carriers aren't in the
2 same boat.

3 Tom created, through his efforts, and Jim, a
4 rule of law from the Reesor decision. It applies
5 across the board; and what we're trying to do here is
6 make some sort of logical process to ferret out how it
7 applies and what the rules of law are.

8 MR. ATWOOD: I really don't think that
9 you want us to have every single defendant have to
10 brief every single issue in order to preserve it. I
11 think that you're going to create so much paperwork for
12 all of us to read that it's going to, at some point,
13 break down. I think we have to use some
14 practicalities, and there are some people who are going
15 to feel stronger about some than others.

16 But if the rule of law is "X," whatever it
17 happens to be, then all parties ought to be able to
18 take advantage of it, just like we're going to be
19 paying for all claims, you know, brought by a single
20 individual that now applies to multiple individuals.

21 MR. HUNT: You know, I look at these
22 issues. I think a lot of them, as you said, are
23 moot --

24 THE COURT: I'm just about to run through
25 some of them.

1 MR. HUNT: -- but some of them can be
2 combined. I'm trying to count them. There are about
3 five or six issues that seem to break down between the
4 20. It seems, to me, that the Court could make a
5 statement or categorize each of the issues; attorney
6 fees, and then if you want to add some language onto
7 it. Then everybody has a shot at briefing that issue
8 and that category, so the briefs, at least, make some
9 semblance of order. And then put a miscellaneous one
10 in for those who feel like the categories don't have
11 the issues.

12 That seems to me to be -- That would make it
13 much easier to respond to and then reply back and for
14 the Court to read all those briefs, rather than have --
15 If you brief each of these 20 issues, you're going to
16 be pulling over here and over here and over here, and
17 it's not going to make any sense.

18 So the more specific you can be with an
19 issue, and I'm not sure you can do that, but I think
20 the more time is going to be saved, and then have the
21 miscellaneous category if people don't feel like it
22 fits.

23 THE COURT: One thing I can do is sort
24 out new benefits by this after the fact too. Depending
25 on how I answer, it may be unnecessary to do that.

1 In looking down at this first note, I mean,
2 the first one, just looking at these, you know, no
3 common fund exists. Well, the Supreme Court says
4 there's a common fund, and they've also said it's
5 global, so I don't know where we go with that.

6 MR. HUNT: My thought on that is, if
7 somebody wants to brief that -- If you think that's
8 been decided, you can put that under the miscellaneous
9 category, and you set out what you think are the real
10 issues.

11 THE COURT: Some of these are, I mean,
12 some of these are absolute defenses and we probably
13 could identify these, like "No common fund exists."
14 That's an absolute defense. "Identify claimants
15 benefitted by Reesor as an undue burden on insurers."
16 I don't know what the legal defense is. Somebody is
17 going to have to tell me what the legal defense is,
18 and, you know, what if it's a burden for one of the
19 insurers and not for the other? What the heck do I do
20 with that? I don't know.

21 "Only original claimants are liable for
22 attorney fees." Boy, I think the Supreme Court has
23 spoken on that one.

24 "Failure to plead common fund fees." I think
25 they've spoken on that one.

1 "Reesor applies prospectively only." You can
2 argue that, but the latest decision -- I saw in one of
3 them it says, in somebody's response they said that it
4 applies prospectively only because not all of the three
5 Chevron criteria are met. But I think that's a
6 complete misreading of Chevron and of Dempsey. If one
7 of them is met, it has to be applied retroactively.
8 You don't have to meet all three to apply it
9 respectively. You just have to have one that isn't
10 met, and it's applied retroactively. So I'm not sure
11 whoever drafted that really understood what the rule
12 is.

13 "Legislative prohibition on common fund fees
14 after 4/21/2003." I don't think that's probably an
15 issue. I think that's fairly clear as a matter of
16 law. It's in the statute.

17 MR. MURPHY: We're going to challenge
18 that, Judge. We'd like to brief that; not on
19 constitutional grounds, just on the straight reading of
20 that statute.

21 THE COURT: Oh, okay. All right. So
22 maybe it is.

23 "Settled and adjudicated files should be
24 excluded." That seems to be purely an implementation
25 issue, and that's already been addressed in other

1 cases, and we can spring for that. We've got Muir
2 talking about that, one of the Muir cases.

3 "Files for deceased claimants should be
4 excluded." That seems to me to be an implementation
5 issue, which I don't think we need to brief that
6 initially. We can get over that hurdle at some point.

7 "Laches or statute of limitations applies."
8 Brad raised a statute of limitations defense. I'm not
9 sure what his statute of limitations is. He didn't
10 identify the statute of limitations that he wants to
11 invoke in that.

12 But in any event, those would be absolute
13 defenses to specific categories of claims, so I suppose
14 that could be an absolute defense or it could be an
15 implementation defense, because it wouldn't necessarily
16 -- those two defenses might throw out some claims but
17 not others, so I think we probably could address that
18 up front.

19 "Petitioners' counsel should bear
20 administrative and claims-related costs associated with
21 obtaining sufficient medical and vocational
22 information." What medical and -- When I read that
23 response, I don't know what they're talking about,
24 because we're talking about apportionment. We're not
25 talking about impairment award. So I'm not sure where

1 that defense goes. We've got a reservation of
2 additional possible defense which may be identified in
3 the implementation process. That really is not a
4 defense, but there could be issues arising in the
5 implementation process which I don't think we want to
6 close off.

7 "Common fund application would constitute
8 impairment of contract." We can brief that. I know a
9 lot about that particular area of law.

10 "No application to injuries occurring between
11 7/1/91 and 7/30/95 because of Russette." Now that's
12 not -- Which case are we dealing with? Oh, we're
13 talking about Reesor here. Reesor is our permanent
14 partial disability thing, isn't it?

15 See, I'm on another page. I'm thinking
16 Schmill and we're dealing with Reesor. See, I'm
17 getting confused now.

18 Anyway, I think that one on (m), that
19 Russette, is probably accurate. I think they were
20 supposed to be paying based on Russette. That's the
21 Supreme Court case that said that I can't write things
22 into statutes that aren't there. So I don't know if we
23 have an issue about any of these cases between 7/1/91
24 and 7/30/95. Maybe, Tom, have you thought about that?

25 MR. MURPHY: If the company asserted some

1 sort of 710 defense, I haven't looked at it lately, but
2 I'd like the opportunity to brief the issue.

3 THE COURT: Okay. Well, the problem is
4 that the Supreme Court said that -- they've interpreted
5 710 as not applying to that period of time.

6 MR. MURPHY: I agree. I understand. I
7 reread Russette when they raised this.

8 THE COURT: "Final and closed claims
9 should be excluded." We're going to deal with that in
10 Ruhd.

11 MR. MURPHY: Rausch.

12 THE COURT: Yeah, Ruhd-Rausch. Sometimes
13 I call it "Ruhd," sometimes I call it "Rausch." It's
14 the Ruhd-Rausch case.

15 "Application of the common fund would violate
16 insurers' due process right." I suppose we can brief
17 that. We're going to have to give notice to the AG, by
18 the way, I think.

19 "Claimants, not insurers, should be liable
20 for attorney fees." I don't understand where that's
21 coming from, because it's coming out of the benefits
22 payable to the claimant. So I don't remember who
23 raised that one, but I don't know why it's in there.

24 MR. PALMER: I think that for early
25 cases, pre-'86, there's a good argument, especially '79

1 and before. Simply succeeding created an obligation
2 for the insurer to pay the attorney fees associated.
3 So I think that there is an argument, and I think
4 that's where it comes from.

5 THE COURT: Except Reesor only goes back
6 to '87.

7 MR. PALMER: Right. Reesor it wouldn't
8 apply to.

9 THE COURT: Right. Plus, okay, that's a
10 new twist on that one. I hadn't even thought about
11 that one.

12 "The lien interferes with rights of claimants
13 to contract with attorneys of their choosing." I'm not
14 sure where that's coming from, because the lien is on
15 the pool of money that's created, not the claimants.
16 So it's a lien on a particular fund. So I'm not sure
17 where that's coming from.

18 "The common fund is a disguise for a class
19 action rule, and the Workers' Compensation Court has no
20 class action rule." The Workers' Compensation Court
21 doesn't have a class action rule, but the Supreme Court
22 said there's a common fund, and in Muir I basically
23 said the Court can borrow from the Rules of Civil
24 Procedure for class actions anyway. So I don't know
25 where that one is going.

1 "Other means not traditionally used should be
2 used to identify benefitted claimants." That was Bill
3 Bronson's defense, but that's not really a defense.
4 It's a question on how we identify these claimants, and
5 we've always been flexible in doing that. I don't know
6 why we have to address that here.

7 "Application of the common fund would violate
8 constitutional guarantees of freedom of contract and
9 taking without just compensation."

10 So there's about a handful of constitutional
11 defenses which basically would overturn the common fund
12 rule in its entirety, and I suppose we need to brief
13 those issues, but I think we probably can break them
14 down. But, you know, some of these I don't even know
15 why they're here.

16 MR. PALMER: I think that leads to a
17 thought that I've had. We've been talking about some
18 of these defenses as though they're all beneficial to
19 the parties that might sit back and just say, "Me
20 too." But there are consequences that go along with
21 that. The parties that want to distance themselves
22 from what appear to claimants' counsel as being
23 frivolous may be doing a very wise thing.

24 They may not want to be saddled with those.
25 I think the Court's inclination to not, shall we say,

1 benefit them by every defense that they choose not to
2 participate in is perhaps also helping not to saddle
3 them with a claim that might go along with bad faith
4 issues that would arise out of raising defenses that
5 have been decided long ago and might only be involved
6 for purposes of delay, or at least as claimants'
7 counsel might view it.

8 THE COURT: Well, has anybody got -- Has
9 a lightbulb gone off in anybody's head about how we
10 handle this?

11 MR. MURPHY: Judge, I want to pitch that
12 thing that I said at the start again. I think you've
13 identified a handful of issues you'd like briefed.
14 And, obviously, Tom Martello's statement that, you
15 know, people should be allowed to brief additional
16 issues, but you could list for us those issues that you
17 think might need briefing, and then we can add in other
18 ones if we want to. But that might get us started.

19 THE COURT: What if I do this, what if I
20 try to consolidate these issues. Or maybe what I can
21 do is set aside the issues and basically say, "Are you
22 really serious about asserting this issue?" like the
23 failure to plead common fund fees.

24 MR. HUNT: Your Honor, I think that's
25 going to result in more delay.

1 THE COURT: Well, we're going to have to
2 delay until we get the other insurers in anyway.

3 MR. HUNT: Right, but I think you can, as
4 Tom said, set out four or five issues, phrase them the
5 way you want and then have a miscellaneous category.
6 If someone wants to argue about whether a common fund
7 is constitutional or exists, then that satisfies Tom's
8 concern that people can argue whatever they want. But
9 I think you know the issues that you want briefed, and
10 if people choose to not address those issues and
11 address them somewhere else, then that's up to them.
12 But I think if you're going to get 30 or 40 briefs, or
13 however many it may be, for you to try to tie them
14 together without some common thread running through
15 them is going to be a pretty hard thing to do, and it's
16 also going to be a pretty hard thing for anybody else
17 to get their hands on to try to respond to.

18 MR. LUCK: Your Honor, I think we're
19 talking about two separate things. Certainly the Court
20 can organize the manner in which we brief, outline
21 issues you think need to be briefed and allow people to
22 raise what other issues they want to. I think the
23 process is going to cut down the number of issues that
24 are briefed in the final process.

25 I think that's a good idea from an

1 organizational standpoint. But we were also talking
2 before about waiver of rights and single rule of law.
3 I think what ought to go along with that is, we should
4 organize how we're going to brief it, allow people the
5 opportunity to then brief whatever they want, but it
6 seems to me that certainly at least for those
7 participating in filing responses and briefing, and I
8 think for everybody that hasn't settled, but at least
9 for those people participating, whatever ends up being
10 the rule of law, whether you've brief it or not, should
11 be applicable to your claims.

12 So there's two questions. One is this waiver
13 issue that we've been talking about, and the other is
14 organizational. I like the idea of organizing and
15 allowing us to have a miscellaneous section. But
16 whatever finally is determined on all of the issues
17 ought to be applicable to every insurer.

18 THE COURT: Well, yeah, and the question
19 is, do we brief that now or do we sort it out after I
20 issue a ruling? The thing about these cases is, I
21 think the Supreme Court has spoken fairly clearly in
22 the Dempsey case and also in the Schmill and the Ruhd
23 case, and I don't see a lot of wiggle room. I know
24 some of the insurance attorneys see a lot of wiggle
25 room, but I don't see a lot of wiggle room in these

1 cases.

2 And the constitutional issues would basically
3 completely overturn the Common Fund Doctrine. You'd
4 have to prove that beyond a reasonable doubt, and
5 that's always an uphill fight. So it may well be that
6 resolution of those issues moots the other issues, in
7 any event.

8 So I agree with you on the organizational
9 thing. I think what I'm hearing from both you and Tom
10 is for me to try to give some organization to the
11 issues and then throw those out, and then brief those
12 within the framework of that organization. And then if
13 there are other issues that are raised that you don't
14 think is within that framework that's within the
15 responses that have been filed in that, you can go
16 ahead and add those on and then resolve those issues,
17 and then go on from there. Would that make you happy?

18 MR. LUCK: Your Honor, if you directed
19 it, it would really please me.

20 I'm not sure what you meant other than the
21 organizational part, though, in relation to being
22 binding on everybody; and is that taking into account
23 that you are going to give some additional time for
24 some additional defenses that you might not think are
25 spurious? For instance, I think we would add to the

1 list res adjudicata.

2 THE COURT: For what? Res adjudicata for
3 what?

4 MR. LUCK: The application of the Supreme
5 Court decision in the Fisher versus State Farm case,
6 where if issues aren't raised in other litigation that
7 could have been raised and that case is resolved, you
8 can't raise it for another claim.

9 THE COURT: Yeah, except you've read the
10 decisions I've issued on that particular thing. I
11 mean, basically in workers' compensation, that rule
12 doesn't really apply except in a very narrow context.
13 I mean, you can raise that but -- And, actually, you
14 know, you can raise any issues you want, and you can
15 litigate them and you can take them up with the Supreme
16 Court.

17 One of the questions is, we've got this
18 process, and if I say this goes forward or it goes
19 forward on a, you know, maybe limit the way it goes
20 forward, or it goes forward in full, you know, and
21 somebody wants to go to the Supreme Court, we're going
22 to have to figure out what we do then, because that's
23 really not a final judgment. It may be an
24 interlocutory judgment. We're going to have to figure
25 out what to do then.

1 MR. LUCK: Your Honor, the supposition
2 here from the claimants is that there's going to be
3 some sort of irresponsible briefing and maintenance of
4 issues that shouldn't be maintained. The fact that
5 virtually all of the issues that could be mentioned
6 were mentioned in these responses as requested in order
7 to make a procedural filing is a lot different than
8 what people would decide to brief.

9 THE COURT: Well, and I agree with you,
10 and that's why I raised the original question about
11 sorting the chaff out of the rest of them, is how we do
12 that.

13 MR. HUNT: I don't think you're going to
14 do that today, and I certainly would never think that
15 an insurance company or defense lawyer would
16 intentionally delay anything, but if you allow the
17 miscellaneous category, then if Brad wants to put that
18 res adjudicata argument in that category, then that's
19 fine. Or you've got other time limitations in here.
20 If he wants to put it there, that's fine too.

21 But I think you just need to make a decision
22 and move forward with it rather than having people
23 start staying: "Okay, we want to have this defense,"
24 or "We want to have that defense," and give us time to
25 amend the petitions.

1 THE COURT: Well, yeah, I mean, you've
2 put your finger on one of my concerns, and that is, we
3 could go through this process where everybody moves to
4 amend their responses to add defenses or raise new
5 defenses and things like that.

6 My honest-to-God feeling about that is we
7 ought to just have a date that says, you know, here is
8 the list of the stuff that I want briefed, and organize
9 it. Probably if I say that, I'm probably going to
10 throw out some; and if anybody wants to put back in
11 that the failure to plead the common fund fees is an
12 extension to that, they're welcome to do that and stand
13 up before me and argue that with a straight face.

14 But, I mean, if I make that list, probably
15 that's one of them that's going to go out. But maybe
16 make that list, and then if you think there's something
17 on there that should be included that isn't included,
18 have everybody respond to that; and if there are
19 additional issues, allow them to do that. I'd rather
20 have that done than having all sorts of motions to
21 amend. I'd rather get it wrapped up in one and get the
22 whole thing in.

23 MR. MURPHY: I agree. I also, I really
24 don't see a need to wait for additional insurers to
25 come in.

1 THE COURT: Well, we can start the
2 process, but the process has to give them time to get
3 involved and make their pitch.

4 MR. MURPHY: But the briefing schedule
5 for the parties that have appeared, what's the purpose
6 of delaying that? Let's get it started.

7 THE COURT: Probably what I'll do, we're
8 going to get those additional summonses out, but we'll
9 put dates so that there are deadlines that are beyond
10 that. It's going to take us some time to do that
11 anyway, so I don't think it's going to be a big deal.
12 So if they want to respond, they'll see that. In fact,
13 we could even send out the notice with the summonses so
14 that they know what the schedule is.

15 MR. MURPHY: That would be great. Thank
16 you.

17 MS. GILCREST: So if an insurer appeared
18 and made one defense and there are potentially 30
19 raised, they've essentially preserved all 30 of those.
20 But if an insurer appeared and gave information or
21 said, "We have four claimants," and made no defense,
22 they've essentially waived all 30 defenses; is that
23 correct?

24 THE COURT: Well, the way I'm viewing it
25 right now, if they're providing information, they're

1 not raising any legal defenses. They're not contesting
2 their liability, and they're not contesting paying the
3 claimants and these attorneys getting common fund
4 fees.

5 Now, if they make that payment, I suppose the
6 claimant could come in when we set the attorney fees
7 and argue they're not entitled to attorney fees because
8 it was never due. I can't foreclose that because we
9 haven't -- I can't set the attorney fees until the
10 point that we've got the claims paid. So, yes, I think
11 essentially what you've stated is correct.

12 MR. DAVENPORT: Point of clarification.
13 Are we talking about this one particular case that
14 we're going to be doing, or is it all common fund
15 cases?

16 THE COURT: Well, whatever we do in this
17 case is going to apply to -- basically I'll be setting
18 -- I'll be disposing of the issues for the other cases,
19 just like the one case -- the one issue that we're
20 going to put over to Rausch-Ruhd, the closed-files
21 claim, that's going to set the precedent for all of
22 them.

23 That's why I say, anybody who wants to brief
24 any of those issues is welcome to do so. File a brief,
25 and I'll just treat them as an amici brief.

1 Okay. Does anybody else want to say anything
2 more about that? All right. I'll try to draft up a
3 list and get it circulated and then throw the monkey
4 back. I'll try to develop the issues. On the
5 constitutional issues, I'll give notice to the Attorney
6 General, who has never appeared in any case in which
7 I've issued constitutional notice; but anyway, we'll
8 get that going, because I think they have 20 or 30 days
9 to respond. So I'll put that in the thing, and I'll
10 probably group those together.

11 MR. LUCK: Your Honor, just as part of
12 that organization, in the Stavenjor briefing, you
13 indicated that you were having two phases, I mean,
14 formally advocating or documenting two phases; one, the
15 entitlement issues, and then the implementation
16 issues.

17 So what you're talking about, this
18 organization of issues all are going to be entitlement
19 issues reserving implementation issues for a later
20 date.

21 THE COURT: I'll separate those out, if
22 somebody thinks some of those should be entitlement
23 issues versus implementation issues.

24 Why don't we take a break.

25 (A recess was taken.)

1 THE COURT: Okay. I think actually we've
2 probably confronted the most difficult area that we're
3 probably going to deal with. If there's anything more
4 difficult, I think we should all go home, because I
5 don't know as we'll be able to do it.

6 Looking at the rest of Reesor, it looks to
7 me -- Is there anything else? Briefing schedule, we'll
8 work on that. Tracking, we already talked about
9 tracking. We talked about insurers not properly
10 served. I guess, in Reesor, is there anything else we
11 need to talk about?

12 MR. MURPHY: Yes, Judge, I'd like to
13 raise the issue of the joint statement of stipulated
14 facts that was proposed by the State Fund.

15 I think everybody knows that the facts that
16 they're putting in here are their own facts. We're not
17 doing any discovery to verify these things. I've asked
18 Brad to just prepare this and present it to the Court
19 as an affidavit, rather than make us sign off on it
20 like we've got something to say about it or like we've
21 investigated any of these things we've been telling
22 you.

23 I would like it if you could actually abandon
24 any attempt to try to force the Reesor common fund
25 claimants to sign off on a joint statement of

1 Ruhd. "Closed case." I don't know as we need to
2 discuss that. We just need to set a briefing schedule
3 on that. The only thing that's going to come up and be
4 an issue is going to be what you mean by "closed case"
5 and how a closed case comes about.

6 I think you need -- I suppose you can put
7 that in your brief. I guess the question is, does
8 there need to be any factual basis for it? I think
9 maybe if you can just give me the possibilities, I can
10 address each of the possibilities. What do you think,
11 Lon?

12 MR. DALE: That's probably the way we'll
13 have to deal with it, because there are factual issues
14 as to what that would be considered. Larry, I think,
15 has his definition he would consider.

16 MR. FLOCH: For the purposes of those of
17 us that are just getting into this, are we talking
18 about "closed" as it was defined in Schmill II? Is
19 that sort of --

20 THE COURT: Well, we're trying to define
21 what the Supreme Court meant by "closed" in Schmill II.

22 MR. FLOCH: Because I don't think they
23 ever used the word "closed." They said "final" or
24 "settled."

25 THE COURT: Right.

1 stipulated facts.

2 THE COURT: What are we doing the joint
3 statement of stipulated facts for?

4 MR. LUCK: Your Honor, we agreed to and
5 were directed by the Court to follow the process that
6 we followed, I believe, in Stavenjord, where we worked
7 on a stipulation together and outlined the facts and
8 then briefed the issues with those stipulated facts.

9 We started the same process here, went
10 through that process, gave it to Mr. Murphy, and he
11 wanted us to do it by way of affidavit because he
12 didn't want to sign off on any sort of a stipulation,
13 and we're prepared to do that.

14 THE COURT: So this will be in
15 conjunction with the defenses we were talking about
16 earlier.

17 MR. MURPHY: It's the briefing, Judge.
18 When this started in Stavenjord, that's when they were
19 raising the Chevron Oil defense. As we know now in
20 Dempsey, it's not so viable. I don't know what we need
21 this group of facts for, but if they want to present
22 it, I think the best way would be in affidavit form.

23 THE COURT: I'll just take it that way.

24 Let's go to -- Anything else on Reesor?

25 Let's go to Ruhd and Rausch, or Rausch and

1 MR. FLOCH: So are those -- Just so I'm
2 on the same page, those are the issues, whether it's
3 final or settled?

4 THE COURT: That's true, but I think what
5 Larry is going to argue is if they close the file and
6 stamp it, it's closed, that that constitutes final and
7 settled.

8 MR. FLOCH: Or settled.

9 THE COURT: Well, it won't be settled,
10 but final. I think he's going to argue that.

11 MR. FLOCH: I just wanted to be clear on
12 what the issue was.

13 THE COURT: I guess the question is, is
14 this another one -- Well, I suppose I should open it up
15 for briefing.

16 Larry, can you write a short statement as to
17 what you contend constitutes final and settled, from
18 your point of view, from the closed-file point of view,
19 and provide that to us so that I can provide it to all
20 counsel, and then we'll just set a briefing schedule on
21 it?

22 MR. JONES: Your Honor, yes.

23 THE COURT: Okay. Brad?

24 MR. LUCK: Your Honor, I was only going
25 to respond. The Court did, in Schmill II, refer to the

1 Dempsey language of final or settled. It was also in
2 the context of settled, closed or inactive. That has
3 created some concern, and I think that's the basis of
4 the genesis of Larry's concern, and I think it's all
5 part of the package.

6 THE COURT: Yeah, I probably ought to see
7 your brief and see what you raised, because they said
8 they weren't going to make those sorts of
9 determinations. I don't think they were indicating
10 anything in that other than the fact that they were
11 going to put it back in this ball court as opposed to
12 theirs in the first instance. What was your argument
13 in that case?

14 MR. LUCK: Your Honor, I think the
15 context was trying to get some underscoring of the fact
16 that workers' compensation cases and claims are
17 different and handled differently in the Montana legal
18 system than regular tort claims, and trying to get a
19 Dempsey focus on the particular circumstances and
20 proceedings involved in workers' compensation claims to
21 determine what that finality that they talked about in
22 Dempsey really meant in terms of comp claims. So we
23 actually were trying to get some resolution of that
24 issue.

25 THE COURT: What they meant by "finality"

1 THE COURT: That would. Do you want to
2 collaborate with Larry before he files it, or do you
3 want to see what he files and then get a chance to add
4 to it?

5 MR. LUCK: We'll collaborate with him,
6 Your Honor, and if we need to file something
7 separately, we will. We don't need to wait to see what
8 his filing will be.

9 THE COURT: Why don't I put a week
10 deadline on it. If you can't do it within a week, just
11 let me know and I'll give you more time.

12 Then I'll set a briefing schedule. Anybody
13 have any feelings for how long it will take to brief
14 it? It will be primarily Brad and Larry who are going
15 to be the primary briefers. How long do you think it
16 will take you to put together something to argue it?

17 MR. HARRINGTON: Judge, with the other
18 briefing we have in some of the other cases, I'd prefer
19 to maybe get until mid-August.

20 THE COURT: Okay. We can go forward on
21 Ruhd and Rausch by doing that. Okay.

22 MR. HARRINGTON: If that's too far,
23 Judge, obviously, we can shuffle some things around.

24 THE COURT: We're already mid-July.
25 We forgot about Mr. Atwood. I just looked at

1 in Dempsey?

2 MR. LUCK: Yeah. And because of the
3 particular nature of the comp claims and comp system in
4 Montana, what that meant.

5 THE COURT: I've read Dempsey, and I
6 think I know what they were trying to do. I'm not sure
7 that it was clear, but I have some ideas about that.
8 I'll have to see what your ideas are.

9 Larry, why don't you set it out. Can you do
10 that in a week?

11 MR. JONES: Yes, Your Honor.

12 THE COURT: Brad, are you going -- Do you
13 want to go down that road? Do you want to say
14 something about it, as well, what you're contending?

15 MR. LUCK: Your Honor, our client would
16 like us to participate in the briefing on that.

17 THE COURT: Would you tell me what your
18 contentions are as far as what constitutes finality for
19 purposes of retroactivity?

20 MR. LUCK: In terms of a filing?

21 THE COURT: Yes.

22 MR. LUCK: Yeah. I think maybe the best
23 thing for us to do is we'll see what Larry puts
24 together and then see what, if anything, we want to add
25 to that, join in or not. Would that be acceptable?

1 the telephone and realized it. We need to get Ron on
2 the phone and tell him we didn't intentionally forget
3 him.

4 (Off the record.)

5 THE COURT: Ron, this is Judge McCarter.
6 I forgot about you and we started out, so just to catch
7 you up, we went through the rest of the Reesor agenda.
8 There wasn't anything really there. We basically
9 decided there wasn't much to discuss other than a joint
10 statement of facts, and it's between the State Fund and
11 the Reesor attorneys, and that's going to come in by
12 way of affidavit, and that just pertains to the issues
13 that we're ultimately going to brief.

14 Then on Ruhd-Rausch, we're down to
15 Ruhd-Rausch, and we're talking about closed-case
16 issues. Larry Jones and Brad Luck are going to supply
17 a statement summarizing what they contend constitute
18 closed cases, or in the language of Dempsey, what cases
19 have finality for purposes of retroactivity, the
20 retroactivity rule.

21 So they're going to provide that statement,
22 and then we're going to establish a briefing schedule,
23 and I think we're going to shoot for mid-August for the
24 opening briefs.

25 I wonder if we can't just have simultaneous

1 briefs, and anybody who wants to address the issue,
2 just file it simultaneously. Is there any reason not
3 to do that? Then we can have anybody who wants to file
4 a reply to anybody else's brief.

5 MR. DALE: So, first, he'd have a week to
6 give us what his definition is, and then we have
7 simultaneous briefing on it?

8 THE COURT: Right, so about the middle of
9 August. If for some reason that one week slides, we'll
10 let the other date slide too. Then I'll just pick out
11 a couple of weeks after that to file response briefs.

12 Is that something everybody wants to orally
13 argue? Larry always likes to orally argue these. Do
14 you want to orally argue it or do you want me to just
15 sit down and grind it out?

16 MR. JONES: Your Honor, oral argument
17 won't be necessary.

18 THE COURT: Okay. That brings up the
19 continued review of the Liberty file. I think at least
20 pending the decision on what constitutes finality and
21 closed files and what that means, or within that, what
22 I want to do is just proceed under the same lines we're
23 proceeding, whatever files you've identified under the
24 criteria, just proceed in that fashion. I mean,
25 there's no harm in that.

1 If some of those end up being not payable
2 because they're deemed closed or whatever, you know,
3 you just don't have to pay them, that's all. So I
4 would go forward on that basis.

5 What's the status with the review of Liberty
6 files?

7 MS. GARBER: Your Honor, I'm about
8 halfway through the cases that did not settle, wherein
9 either they had a zero percent impairment rating or
10 they had perm partial benefits that were paid out
11 biweekly. I have about 40 more to look at in that
12 category. The rest were cases that either settled
13 before or after the date of the decision; and in our
14 informal discussions, FFR attorneys are not overly
15 interested in looking at some of those cases that were
16 represented by attorneys. They only are interested in
17 ones that were not represented by attorneys, but we'll
18 try to get those files available.

19 THE COURT: Do I need to do anything at
20 this point? Are there any disputes out there that I
21 need to talk to you about?

22 MS. GARBER: I think the only issue that
23 I'm aware of that Lon brought up was sort of a tiered
24 approach to getting their payments made.

25 THE COURT: Oh, yeah, that's on my list

1 too.

2 MR. DALE: That's an agenda item.

3 THE COURT: Well, we'll talk about that.
4 That's agenda Item No. 6. We're talking about interim
5 payments. In any of the cases, in Broeker or Muir --
6 Did Greg leave, or Tom? Did they leave?

7 MR. HAWKINS: Yes.

8 THE COURT: Did Nancy leave too?

9 MR. HAWKINS: Yes.

10 THE COURT: Oh, gosh. Maybe Brad knows.

11 MR. HAWKINS: What am I, Your Honor,
12 chopped liver?

13 THE COURT: You weren't involved in
14 any of that.

15 MR. HAWKINS: Greg Overturf here, for the
16 record.

17 THE COURT: You weren't involved in
18 either of those cases.

19 MR. HAWKINS: No. Ask Brad.

20 THE COURT: I know Brad was involved with
21 that because I still remember the Broeker meaning in
22 which I thought the dam was going to break and all hell
23 was going to break loose, and it was all Brad's fault.

24 MR. LUCK: Just before it got settled,
25 you mean.

1 THE COURT: Right, just before it got
2 settled. I now know that "storm clouds" doesn't
3 necessarily mean rain.

4 I don't recall entering an order for payment
5 of attorney fees in either of those cases. Am I wrong,
6 or were there any?

7 MR. LUCK: Your Honor, I recall that we
8 had -- In Muir?

9 THE COURT: Right.

10 MR. LUCK: We had a hearing and you
11 entered the order after a public hearing. I don't
12 think there was any kind of interim order of any kind.
13 We had a large public hearing, and then you issued an
14 order after that, is what I recall.

15 MR. CADWALLADER: Your Honor, that's my
16 recollection as well. Since the Department is watching
17 and somewhat monitoring those Muir cases, especially
18 with respect to attorney fees, I believe that there was
19 no distribution until after a hearing, and there was an
20 opportunity for claimants, whether represented or
21 otherwise, to make their objections. I recall that
22 there were a couple of objections, and that in certain
23 cases the attorneys may have waived fees under Muir.

24 MR. LUCK: Your Honor, I recall also that
25 there were some lump sums paid after that time that

1 ended up creating some problems, because when
2 individual files were reviewed, some of them were paid
3 again and we had an overpayment problem because of
4 that. But I do think that -- I think we waited totally
5 on attorney fees until we had an approval order.

6 THE COURT: Well, I can't fix attorney
7 fees until we hold the hearing, and I can't hold the
8 hearing until we're done. We talked about this briefly
9 on the telephone, Lon, and I think I suggested that you
10 think about, you know, if we were to do it, how would
11 we do it and what would we use to measure it.

12 MR. DALE: I think we have a different
13 situation than we had in Muir because, first of all, we
14 have identified certain permanent totals that have
15 impairments. So, I mean, they're identified, they're
16 clearly there.

17 So the idea would be to simply give notice to
18 those claimants and advise them as to what fees we
19 would be assessing and give them the opportunity to
20 object, because there's no reason to just wait, which
21 may be months now under this latest round of briefing
22 schedules and things, when we have, clearly, claimants
23 for whom fees have been assessed and there's no
24 dispute, I think; am I right on that, Larry?

25 MR. JONES: Your Honor, Liberty is the

1 "Okay, you're authorized to take 25 percent from them
2 because they didn't object," and then have somebody
3 come in and object and set a different fee. I'm not
4 sure I can do that.

5 MR. PALMER: Your Honor, I understand
6 that there have been Muir attorney fees paid, and it's
7 not at the end. They're, in fact, still paying out
8 some claims. So I wasn't quite clear. What do we
9 expect to happen? Wait several years to the very end
10 or will there be a hearing this fall or what's going to
11 happen?

12 THE COURT: Well, we have to identify the
13 claimants first, and all the claimants were identified
14 in that particular case and given notice. There were
15 still some outstanding ones, not very many, in file
16 review, and I think they're basically settled-case
17 questions, as to whether or not they come within some
18 sort of an exception. Those took some additional time,
19 and I think those claimants were given notice, and we
20 had a public hearing on it.

21 So we essentially had identified all the
22 claimants before we had that hearing, and then gave
23 them notice of the attorney fees, allowed them to show
24 up and object.

25 We did the same thing in Broeker. We did the

1 banker on this thing.

2 THE COURT: You don't care.

3 MR. JONES: Well, only to the extent that
4 if some of the files Lon believes require payment might
5 fall under the issue of settled, closed or inactive.
6 If they don't fall under that, under our own analysis,
7 then we just want a directive from the Court on how to
8 proceed.

9 THE COURT: The problem I have is that
10 under the Common Fund Fee Doctrine, I'm supposed to fix
11 the amount of a fee, and we could end up in a situation
12 if you're contacting these claimants individually, you
13 could work out different agreements with different
14 claimants, or you might charge the full 25 percent and
15 they might agree to that, and I might end up saying
16 only 15 percent or 20 percent or 22 percent or
17 something like that.

18 I think in Muir there was an agreement for
19 15 percent, and in one of the other cases I think I saw
20 15 percent.

21 MR. DALE: A State Fund case.

22 THE COURT: Okay, so I don't know --
23 Since the Court has to fix the fee, I don't know how we
24 could do that in advance without fixing it for
25 everybody. I don't know as I can fix a fee and say:

1 same thing in that. We held a hearing in that before
2 we disbursed any attorney fees, and I fixed the
3 attorney fees in both of those cases. I have to fix
4 the fee, and I'm not sure, I think I'd be advocating
5 that responsibility if essentially I authorized any of
6 the claimants' attorneys here to contact the individual
7 claimants and negotiate an agreement for a fee, which
8 sounds like what we're doing.

9 MR. DALE: That isn't what we
10 contemplated, Your Honor. First of all, we have
11 already assessed fees pursuant to the agreement,
12 pursuant to notice, to claimants with the State Fund.
13 So, you know, we've kind of gone down that road; and
14 what we've proposed here would be to kind of treat it
15 more on a per-insurer basis, and that's what we're
16 looking at with Liberty.

17 In other words, this is a Liberty issue, and
18 so we would look at the Liberty claimants that are
19 clearly identified, just as we did with the State
20 Fund. I mean, if you follow the State Fund
21 determination, you look at that, we looked at the
22 agreement, the claimants were given notice, they had
23 their opportunity to object.

24 And quite frankly, it appears as if we're not
25 going to charge the maximum fee, based upon my

1 discussion with Steve and Monte, so there's a reduction
2 involved.

3 THE COURT: Right, but two things here;
4 number one, you had identified the claimants, and they
5 were given notice and an opportunity to object, which
6 we don't have in this case. Firstly, we'd have to go
7 through that process with Liberty and identify all of
8 them, and perhaps we could identify them and separate
9 them out. That's the first difference.

10 The second difference is the agreement in
11 that case occurred before the Ruhd case came down.

12 MR. DALE: That's correct.

13 THE COURT: So we were basically working
14 with a single insurer, and now we're working with a
15 universe that consists of everybody.

16 Theoretically, we could end up with different
17 attorney fees for different insurers, depending on
18 whether or not the individual claimants that were
19 notified objected or not, and depending on what I
20 determine. You know, if there was an objection, I'd
21 have to adjudicate that for each insurer, wouldn't I?

22 MR. DALE: I think the objection would be
23 adjudicated per claimant. I mean, it's the claimant's
24 objection. It's the individual claimant's objection;
25 and as long as they're given due process and they have

1 And another question is, in the fee
2 proceeding, do I set fees just for those persons who
3 appear and object? I don't think that's the way it
4 works, and maybe I'm wrong about that.

5 The other problem is, if they disburse and
6 you disburse the 25 percent and I hold a hearing,
7 whether as to other Liberty claimants or to the
8 universe, and decide it's only going to be 17 percent,
9 then what do we do, because you're going to have been
10 overpaid for those? Or, again, do you get to collect a
11 bigger fee from some than from others?

12 Has anybody looked to see if there are any
13 cases on setting common fund fees? I mean, virtually I
14 got no objections as to the rate of the fees in either
15 the Muir case or the Broeker case, and I didn't have to
16 address that issue, and also the fees were pretty
17 reasonable in that particular case. But I don't recall
18 seeing any law on how I fix those fees and what I
19 consider. I know there's cases in the class action
20 area, but I don't know of any in the common fund.
21 Steve Jennings?

22 MR. JENNINGS: You answered my question,
23 sir.

24 MR. DALE: I think it's the Court's
25 discretion.

1 the opportunity to appear and object to the fee, I
2 don't think you have to have every single claimant at
3 the same time.

4 I guess that's our position, and we basically
5 have identified certain claimants that there is no
6 dispute, that there would be benefits received that the
7 common fund applies to.

8 MS. GARBER: Your Honor, just to
9 clarify, those claimants have been paid 75 percent
10 of the benefits; 25 percent was withheld. So what
11 they're asking for is a disbursement of some portion of
12 that.

13 MR. DALE: That's a benefit to the
14 claimant, as Carrie pointed out, too, Your Honor,
15 because we anticipate that we're not going to charge
16 the full fee, so they would actually receive a benefit
17 that is currently being withheld. So it's to their
18 benefit to proceed as timely as we can, as
19 expeditiously as we can too.

20 THE COURT: But there's a couple of
21 issues here, and that is, indeed, if I have the
22 authority and the responsibility of fixing the attorney
23 fees, can I allow you to basically have a different fee
24 for different claimants depending on whether or not
25 they specifically object?

1 THE COURT: Right, but in the class
2 actions, there's all sorts of things. I know there's a
3 load-start theory and load-start considerations and
4 stuff like that. I don't know, I'm not going to rule
5 on it right now.

6 My suggestion would be -- Tom Harrington?

7 MR. HARRINGTON: Your Honor, in Rausch
8 when we had the hearing on fees with the State Fund
9 here in the Court, Lon and Monte and Steve had the
10 sliding scale of attorney fees, where certain claimants
11 had less taken out of their entitlement than others,
12 and there were also two gentlemen who appeared at that
13 hearing and objected, and Steve waived the fee as to
14 those two claimants. I don't know if that gives you
15 any precedent, but --

16 THE COURT: It probably doesn't. The
17 sliding scale, though, was based on some sort of
18 criteria, wasn't it?

19 MR. HARRINGTON: It was based on age at
20 the time.

21 THE COURT: Right, because they didn't
22 get as big a benefit because they weren't getting it
23 many years in advance. That's reasonable. I mean, I
24 agree, that's reasonable. Can you go look for some
25 cases and see if there's anything out there?

1 MR. DALE: Sure. What we propose is,
2 Larry and I and Carrie can all get together and
3 probably present a proposal for you on what we have in
4 mind, and then give you some cases on it too.

5 THE COURT: That would be helpful.

6 MR. DALE: What we have in mind, Your
7 Honor, is not charging a full fee on this, similar to
8 what Tom brought up with the State Fund. We probably
9 would use that kind of as a template, if you will, as
10 to where we may go here, although we probably will have
11 a larger percentage, but yet less than what we would be
12 entitled to.

13 So I think that there's a benefit to the
14 claimant to have these things adjudicated as they arise
15 under those scenarios.

16 THE COURT: Larry, did you have a
17 mediation at 4:00? Did I mess you up?

18 MR. JONES: Your Honor, thank you. I
19 meant to tell you during the break I got that taken
20 care of.

21 THE COURT: Thanks. I thought maybe I
22 just messed you up.

23 Let me ask this to attorneys for other
24 insurers. Do you have any views on what we do in
25 this situation, whether we can authorize interim

1 would like a fee might fall under our argument of
2 settled, closed or inactive. Otherwise, we'll be
3 glad to work with Lon, but we want the Court's
4 protection.

5 THE COURT: All right. Work something
6 out. David?

7 MR. HAWKINS: As to the State Fund, not
8 really on this case, but as to other cases as this
9 stuff applies going forward, we've got a certain
10 administrative burden in processing the fees out of the
11 claim and to the attorneys. And in the case where
12 we've got several thousand claimants, we're going to
13 be -- it's going to be a significant burden to us
14 simply to get payments out.

15 So it's not without cost to the insurers, so
16 the fewer times we have to pay attorney fees --

17 THE COURT: You're telling me you might
18 take a little different position than Larry on it? You
19 might be more interested in what goes on?

20 MR. HAWKINS: Yes.

21 THE COURT: Well, I just have to deal
22 with Larry. The only thing is it may set some sort of
23 precedent, but I'd like to get some law on it if there
24 is any. I don't know whether there is or not. Let's
25 look for it, and present me a proposal and present me

1 payments or whether we can do it on an
2 insurer-by-insurer basis or anything along those
3 lines? Anybody thought about it?

4 MR. MARRA: Carrie mentioned it, and it
5 seemed logical to me, does the insurer really have a
6 position to take in those instances since it's really
7 the claimants' fees? It's not really the insurers'
8 fees. It seems like, what kind of standing does the
9 insurer have to come in and say, "Well, no, you can
10 only have this percentage"?

11 THE COURT: Fiduciary duty to protect the
12 claimant. No, you know, I see your position. I mean,
13 it's basically like Larry, they don't have the stake in
14 it, so the burden falls back on the Court. And I guess
15 what I'm asking for is for input and ideas, if anybody
16 has any.

17 MR. JONES: Your Honor, my client's
18 position is it only wants to pay once, and that's why
19 we need an order from the Court to protect us.

20 THE COURT: Right. I don't think anybody
21 is going to dispute you on that.

22 MR. JONES: As far as Lon's proposal, to
23 respond to Lon, we're not taking a position, and what
24 he's proposing is something we're prepared to
25 participate in, again, as long as a case that they

1 some cases and I'll look at it.

2 Let's back up here. Lon, this is a question
3 for you. I was wondering, what's the status of your
4 analysis of information as provided by non-Liberty
5 insurers, insurers other than Liberty? Is there any
6 progress in looking at that information?

7 MR. DALE: We're working on it, Your
8 Honor.

9 THE COURT: How do you anticipate
10 proceeding? How do you want to handle it?

11 If anybody who needs to leave has something
12 they need to talk about that's on the agenda, let me
13 know and I'll take it up immediately if you have to do
14 that.

15 MR. HERINGER: I handled mine at the
16 break with Lon, and Brad will handle the Satterly
17 issues.

18 THE COURT: Sorry for the length. Go
19 ahead, Lon, I'm sorry.

20 MR. DALE: We're in the process of doing
21 our review of the data that we have. Now, you're not
22 talking about the -- When you say Liberty affiliates,
23 you're talking about all Plan 1s and 2s?

24 THE COURT: Right.

25 MR. DALE: We've kind of been focusing

1 with Liberty and we haven't probably done everything
2 that we should there, but we're working on the
3 electronic information, and Jackie gave us some more,
4 so we're proceeding.

5 THE COURT: Okay. When you get to the
6 point where you think you know how we should proceed
7 with those, let me know.

8 MR. DALE: Okay. We'll keep you posted.

9 THE COURT: Anything else on Rausch and
10 Ruhd?

11 MR. ATWOOD: Your Honor, I just want to
12 let you know I'm still here. I'm not sleeping.

13 THE COURT: Okay.

14 MR. ATWOOD: In terms of as you send out
15 your briefing schedule, are you just going to send that
16 out to everybody that's appeared or is there a separate
17 list for Rausch-Ruhd people that you have a circulation
18 on? And the reason I ask is that neither of my clients
19 have been served in that case. So if you have a
20 separate, I'm going to have to appear, in a sense, as
21 an amicus.

22 THE COURT: You're talking about briefing
23 of the closed-cases issue?

24 MR. ATWOOD: Yes.

25 THE COURT: I'll be inviting briefs

1 MR. LUCK: Good point.

2 THE COURT: All right, Flynn: (1), I
3 think we've talked about; (2), we've talked about; (3)
4 and (4) we've talked about. I guess, Rex, we'll get
5 back to you a little bit more on following up on any
6 service that we need and also any tracking, and you
7 were part of that.

8 Then (5) is: "What legal issues remain in
9 light of Schmill II?" Let's see, we've gotten a whole
10 bunch of responses in Flynn. Let me take a look here.
11 We've got 283 that replied out of 671 that responded in
12 some fashion.

13 Now, this is a case where the Supreme Court
14 hasn't said that there is a global common fund or even
15 a common fund other than the common fund on the -- This
16 is the common fund on the common fund case. So there
17 may be some issues we need to address in this case that
18 maybe we don't need to address in some of the other
19 cases, I don't know. But I haven't looked at the
20 responses.

21 I'm assuming, looking down here, there's a
22 whole bunch of "yeses" on legal issues, and I haven't
23 looked at those.

24 Has anybody looked at those legal issues?

25 Are we talking about the same sort of legal issues that

1 from everyone on that, so we will notify the global
2 list.

3 MR. ATWOOD: Okay. Thank you.

4 MR. LUCK: Your Honor, would this be a
5 good time to talk about the reverse common fund
6 consideration from the Ruhd decision in the '87 to '91
7 benefits.

8 THE COURT: I suppose.

9 MR. LUCK: How we quantify the fees and
10 the benefit for not having to pay those benefits from
11 '87 to '91? That's just a little common fund humor
12 for you. Apparently, very little.

13 THE COURT: You mean, you want them to
14 pay fees because they lost.

15 MR. LUCK: Because we didn't have to pay
16 out all that money.

17 THE COURT: Unfortunately, it doesn't
18 work that way.

19 MR. CADWALLADER: Was that from the
20 insureds that you were seeking those fees as regular
21 defense costs?

22 MR. LUCK: In terms of justice, anybody
23 that would be willing to pay them.

24 MR. DALE: If the statute hasn't been
25 changed, Brad, you'd probably have a chance at it.

1 are raised in Reesor, basically?

2 MR. PALMER: Very similar.

3 THE COURT: We have to do some reservice
4 in that case, so we have the same situation we do in
5 Reesor. Do we want to consolidate briefing of those
6 issues since they probably are pretty much the same
7 issues? Do we want to consolidate the briefing of
8 those issues with the briefing in Reesor?

9 MR. PALMER: I'm not sure where we draw
10 the line on efficiency here, because on the one hand we
11 want everybody served so we don't have to redo
12 anything. By the same token, we want to get the ball
13 rolling, because once the decisions are made, then
14 they're final, at least as to those people, and the
15 major players involved have responded.

16 THE COURT: Well, here's another
17 question: Do we need to consolidate? Because if we
18 answer these questions in Reesor, they're obviously
19 going to be answered in Flynn if the same defenses have
20 been raised. So do we need to do anything or shall we
21 just leave it alone and proceed with the service in
22 Flynn and get along with Reesor, and then find out
23 where we're at after I decide the Reesor issues?

24 MR. PALMER: I think if we let Reesor
25 take its course and we go through the process of

1 finalizing service and then put some deadlines in, just
2 for raising the legal issues, perhaps a lot of them
3 will have fallen away by virtue of the rulings in
4 Reesor, maybe all of them.

5 MR. MURPHY: The parties in Flynn
6 probably are the same parties as in Reesor, so
7 those parties will be appearing and making their
8 argument.

9 THE COURT: In Reesor?

10 MR. MURPHY: Yeah.

11 THE COURT: Okay. Let's not burden
12 ourselves with additional schedules and stuff like
13 that. We'll just, you know, anybody who is appearing
14 in Flynn who wants to file a brief in Reesor can do it,
15 and we'll be done with it. There might be some unique
16 issues in Flynn. I don't know. There could be.

17 MR. DAVENPORT: Is it not feasible that
18 when it comes to the question, for example, I was
19 sharing the question as to whether or not there is a
20 certifiable class in Flynn might have a different
21 answer than it would in Reesor?

22 THE COURT: Yeah, it could in Flynn,
23 that's right. It could, perhaps, in any of the cases
24 we haven't ultimately resolved it. That's potentially
25 possible, yeah.

1 MR. DAVENPORT: I mean, all of the other
2 issues that I would see would probably dove-tail, but
3 the issue of a certifiable class in, like, Hyatt and
4 Flynn are, in my opinion, quite different than some of
5 the others.

6 THE COURT: Yeah, the most difficult one
7 is in Hyatt.

8 Let's see here, liquidation, uninsured --
9 We lost the uninsureds. Oh, Mark, are you going to
10 talk about it? Brian was here for a while. I didn't
11 realize he was going to leave.

12 MR. CADWALLADER: Yes, Your Honor. He
13 car-pools to Great Falls.

14 THE COURT: Let me talk about one other
15 thing, and then I'm going to let everybody go except
16 for some of you. We're going to talk about asbestos
17 cases, and before that, we'll talk about UEF cases
18 briefly. Well, except that we need the petitioners'
19 attorneys to talk about the UEF issues.

20 In Satterly, there's an agreed extension
21 of time for the briefing and everything; is that
22 correct?

23 MR. LUCK: Yes, Your Honor. We've agreed
24 with claimants' counsel that we will extend the filing
25 deadline for our brief from, is it the 25th, for ten

1 days; and at that time, Your Honor, we're going to file
2 our briefs and some affidavits with some factual
3 information we'd like to put into the record.

4 We anticipate that that does not affect the
5 August 22nd hearing date, understanding that counsel
6 for Mr. Satterly needs to have time to respond, and I
7 think they felt like they could get something in very
8 late, before the hearing.

9 THE COURT: Like the Thursday before the
10 hearing?

11 MR. HUNT: That's correct, Your Honor.
12 Could we set a date for their brief on ten days so we
13 don't get into this three days for mailing and two days
14 for weekends, and it ends up being 18 days?

15 MR. LUCK: It will be ten calendar days
16 from the 25th it will be filed.

17 MR. HUNT: August 25th?

18 THE COURT: No, that doesn't work out.
19 Hold on. I've got a calendar here. Okay, it's
20 originally due what date?

21 MR. LUCK: I believe the 25th, Your
22 Honor.

23 THE COURT: Of July.

24 MR. LUCK: Yes, sir.

25 THE COURT: That's a Monday, so the 8th.

1 It will be due August the 8th. So August 8th, and when
2 you serve that, e-mail them a copy so he gets it the
3 same day; and then the same thing the Thursday before
4 August 22nd, which would be the 18th, and send him an
5 electronic copy as well.

6 MR. HUNT: August 8th is my birthday, so
7 could you send me a birthday present also?

8 MR. LUCK: Certainly, right at midnight
9 when we send it to you electronically.

10 THE COURT: Make sure it's one minute
11 before midnight though.

12 The only remaining things I have to discuss
13 are things particular to the Uninsured Funds, and then
14 the asbestos litigation. Any of the insurers are free
15 to leave unless they're interested in the UEF or
16 asbestos litigation.

17 MR. ATWOOD: Judge, I'm going to bow out
18 then.

19 (Off the record briefly.)

20 THE COURT: Back on the record. Mark,
21 did you see Brian's memo?

22 MR. CADWALLADER: I did.

23 THE COURT: Here's my thoughts on that.
24 I think that the UEF, probably we ought to have you
25 file a response; and in Flynn-Miller, you've got stuff

1 back to '74, and I know for a period you were
2 insolvent. You've also got some other problems for
3 other people here. There may be some current solvency
4 problems as far as UEF is concerned. I've been alerted
5 to the fact that there may be some sort of declaratory
6 judgment action coming in as to how we pay, because
7 they've got a case that's going to break the bank, as I
8 understand it.

9 MR. CADWALLADER: There's at least one
10 case that may break the UEF's bank, because the UEF is
11 funded only through collections from uninsured
12 employers. We are getting more and bigger claims than
13 we have money to pay off.

14 THE COURT: So, you know, if I were you,
15 what I would request you to do or request Brian to do
16 is file a response outlining your situation and
17 outlining what he said in here. I mean, if there are
18 other defenses in there, go ahead and put them in.

19 On the Hyatt and Satterly decisions, does
20 everybody have a copy of this memo?

21 MR. JONES: No.

22 THE COURT: Do you want to see it?

23 MR. JONES: No.

24 THE COURT: Does anybody want to see it?

25 MR. MURPHY: Is it posted?

1 THE COURT: No.

2 (Off the record briefly.)

3 THE COURT: On the Satterly and -- what
4 was the other case?

5 MR. MURPHY: Hyatt.

6 THE COURT: -- Hyatt, you don't need to
7 be trying to collect information on that anyway, so
8 you're okay. I think if you want to appear in those
9 cases, go ahead and do it. Those were the ones, well,
10 Hyatt we've got service. We have a briefing schedule
11 on that, don't we? Do we have a briefing schedule on
12 Hyatt? Anybody remember?

13 MR. JONES: Yes, Your Honor, insurers'
14 reply briefs, final briefs, are due the 15th, tomorrow.

15 THE COURT: Really? Is that going to be
16 submitted before I go on vacation in September?

17 MR. JONES: Well, I believe it's
18 submitted, Your Honor, on submission of those briefs
19 tomorrow.

20 THE COURT: Oh, gosh. Okay. Add that to
21 my submitted list.

22 MS. WALLACE: Your Honor, is there a
23 decision by the Court that says that UEF's liability
24 for claims is based on whether they were solvent the
25 year that the claim arose or is there -- As I

1 understand this memo and some of the things that I've
2 seen the UEF responding to these common fund cases,
3 their position is: Well, if the claim is a 1987 claim
4 and we were insolvent in '87, then we don't have to pay
5 on that claim. Is that what I'm hearing from UEF,
6 Mark?

7 MR. CADWALLADER: Yes. The short answer
8 is yes, if it's prior to June 30th of 1987, the UEF was
9 not paying out on any claim because of the statutory
10 language about keeping proper reserves and surpluses;
11 and there was about a six-year period where we
12 basically -- where the UEF said, "We don't have any
13 money to pay out new claims, and we're sorry, but
14 that's how it is."

15 There was subsequent legislation that
16 refunded -- put more funds back into the UEF, but that
17 has been the historical position, and there have been
18 some cases where people have challenged that, but it's
19 not -- I don't believe that there's been a direct
20 frontal assault on that.

21 THE COURT: We've got some special
22 problems with the UEF. Firstly, the question of
23 whether or not they have any assets to pay it with and
24 pay their current liabilities. Secondly, there was
25 that insolvent period that goes back to '87; and third,

1 there may be funding issues as far as some of the
2 administrative costs, because that has to be a
3 legislative appropriation. If they don't have the
4 manpower to do it, I mean, there's some practical
5 problems there.

6 In any event, we need to get whatever
7 information we need from the UEF into the case and then
8 we can deal with those questions and those problems.
9 But we need, you know, I request you to go ahead and
10 file a response and lay it out.

11 And then, let's see --

12 MR. CADWALLADER: Your Honor, the UEF is
13 working on gathering that information. We've got one
14 person, Bernadette Rice, to do that, as well as handle
15 the claims list that we do have.

16 THE COURT: I won't give you a deadline,
17 but try to do it in the near future.

18 All right, the Rausch case, let's see here.
19 Reesor, you know, you need to file a response. You
20 indicated that -- or Brian indicated that there aren't
21 any cases that Reesor applies to, so get a response on
22 that and let us know that.

23 And then in the Rausch case, I don't remember
24 what's going on in there, but apparently we don't know
25 how many PTD and PPD cases are lumped together. Maybe

1 you can give us more information on what you're dealing
2 with in that as well. File something on that and let
3 us know what you're dealing with.

4 MR. CADWALLADER: We'll pull the
5 information together the best we can and as promptly as
6 possible, Your Honor.

7 THE COURT: And, you know, in all of
8 these cases, you may want to set out your situation as
9 far as your solvency is concerned. Is there going to
10 be a petition filed with the Court on the solvency
11 issue?

12 MR. CADWALLADER: Your Honor, it's my
13 understanding that the matters are working their way
14 through mediation and that the UEF will eventually be
15 in front of the Court and, amongst other issues,
16 saying: We have a solvency problem and we're not sure
17 how to deal with this.

18 THE COURT: Okay. What fun. I'll add
19 that to my list. I don't think -- Does anybody have
20 any other things they want to talk about with regard to
21 the UEF, any of the petitioners' attorneys?

22 Anybody have any other ideas as far as
23 dealing with it until we at least get some sort of
24 formal response?

25 Okay, Mark, we'll let you go.

1 MR. JONES: Judge, any reason to stay on
2 the record on asbestos?

3 THE COURT: Does anybody want a record on
4 this? Can we let Sherron go on the asbestos issue?
5 We'll let you go. Thank you.

6 (The portion of the hearing
7 conducted on the record was
8 concluded at 4:45 p.m.)
9 *****
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1 CERTIFICATE
2 STATE OF MONTANA)

3 COUNTY OF LEWIS AND CLARK)
4 I, SHERRON K. WALSTAD, Professional Court
5 Reporter, Notary Public in and for the County of Lewis
6 and Clark, State of Montana, do hereby certify:

7 That the foregoing hearing proceedings were taken
8 before me at the time and place herein named, that the
9 proceedings were reported and transcribed by me with a
10 computer-aided transcription system, and that the
11 foregoing pages contain a true record of the
12 proceedings to the best of my ability.

13 IN WITNESS WHEREOF, I have hereunto set my
14 hand and affixed my notarial seal this _____ day
15 of _____, 2005.
16
17
18
19

20 _____
21 SHERRON K. WALSTAD
22 Court Reporter-Notary Public
23 My Commission Expires 11/1/06
24
25

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