WORKERS' COMPENSATION COURT
STATE OF MONTANA
LEWIS AND CLARK COUNTY
JUDGE MIKE McCARTER

IN RE: the cases of RUHD, RAUSCH, FISCH,   )
And FROST following the SUPREME COURT   )
DECISION in RUHD.   )

2000 - 8274   COPY

TRANSCRIPT OF PROCEEDINGS

Held at the Workers' Compensation Court
1625 Eleventh Avenue
Helena, Montana
October 5, 2004
1:00 p.m.

1   WORKERS' COMPENSATION COURT

                STATE OF MONTANA

2   LEWIS AND CLARK COUNTY

             Judge Mike McCarter

3

4

     IN RE the cases of RUHD, RAUSCH, FISCH,)

5   and FROST following the SUPREME COURT   )

     DECISION in RUHD.   )

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7

8   TRANSCRIPT OF CONFERENCE

9   On the 5th day of October, 2004, beginning at

     1:00 p.m., a conference was held at the Workers' Compensation

10   Court, 1625 Eleventh Avenue, Helena, Montana, before Kimberly

     E. Johnson, Professional Court Reporter and Notary Public.

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 1                    A P P E A R A N C E S:
 2    THE HONORABLE:
              JUDGE McCARTER
 3            Workers' Compensation Court
              1625 Eleventh Avenue
 4            Helena, Montana 59601
 5    ON BEHALF OF LIBERTY NORTHWEST INSURANCE CORPORATION:
              LARRY W. JONES
 6            Attorney at Law
              JONES & GARBER
 7            700 SW Higgins Avenue, Suite 108
              Missoula, Montana 59803
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      ON BEHALF OF PETITIONERS RAUSCH, FISCH, AND FROST:
 9            STEPHEN D. ROBERTS
              Attorney at law
10            1700 West Koch Street, Suite 5
              Bozeman, Montana 59715
11
              LON J. DALE
12            Attorney at Law
              MILODRAGOVICH, DALE, STEINBRENNER & BINNEY, P.C.
13            620 High Park Way
              Missoula, Montana 59806
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              MONTE D. BECK
15            Attorney at Law
              BECK, RICHARDSON & AMSDEN, PLLC
16            1946 Stadium Drive, Suite 1
              Bozeman, Montana 59715
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      ON BEHALF OF RESPONDENT MONTANA STATE FUND:
18            BRADLEY J. LUCK
              Attorney at Law
19            GARLINGTON, LOHN & ROBINSON, PLLP
              199 West Pine
20            Missoula, Montana 59807
21            THOMAS J. HARRINGTON
              Attorney at Law
22            GARLINGTON, LOHN & ROBINSON, PLLP
              199 West Pine
23            Missoula, Montana 59807
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 1     (Appearances, Cont'd)
 2                 GREG E. OVERTURF
                   Attorney at Law
 3                 MONTANA STATE FUND
                   5 South Last Chance Gulch
 4                 Helena, Montana 59601
 5     ON BEHALF OF THE MONTANA DEPT. OF LABOR AND INDUSTRY:
                   MARK ELLIOT CADWALLADER
 6                 Legal Counsel
                   1327 lOCKEY
 7                 Helena, Montana 59624
 8                 DIANA FERRITER
                   Bureau Chief - Claims Assistance Bureau
 9                 EMPLOYMENT RELATIONS DIVISION
                   1805 Prospect Avenue
10                 Helena, Montana 59604
11     Also present:
                   Ms. Carol Gleed, Department of Labor
12                 Ms. Carrie Garber, Attorney at Law
                   Pat Kessner, Clerk of Court
13                 Mr. Doug Roberts
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 1                          I N D E X:

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        (Word index at end of transcript.)

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        Exhibits:   (None.)

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1   The following proceedings were had:
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3
4   JUDGE McCARTER: Let's get started. We are dealing
5   with Fisch, Frost, and Rausch, as well as Ruhd, and it was
6   the Ruhd decision that came back to us and said that we do
7   have a global lien.
8   The first thing I need to know is, where did they
9   come up with just 150 of these claims that we are going to be
10   administering? Justice Warner said it's in the record, but I
11   don't remember it being in the record. I don't have a clue
12   where he got that figure from, and I wonder if the Court
13   considered the 3,500 or 5,000 in these other Common Fund
14   cases that we are probably going to end up doing, too.
15   I'm not sure, but you guys are only involved in
16   this one. Okay. Well, we have to do it, so that's what we
17   are going to do.
18   Where's Pat?
19   MS. KESSNER: I'm right here.
20   JUDGE McCARTER: Okay. Is Jeff going to call in if
21   he wants to, or are we supposed to call him, or what?
22   MS. KESSNER: He said that he would call in if he
23   wanted to because he was doing remediation all day today.
24   JUDGE McCARTER: Okay, so it's his option to do it.
25   We don't have to do anything.

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1   MS. KESSNER: And I gave him the message that he
2   does not need to participate.
3   JUDGE McCARTER: Let's start out, for Kim's sake,
4   and let's just go around the table and identify everybody.
5   I'm not going to do that because the last time I tried to do
6   that, I forgot my wife's name.
7   Let's start with Steve.
8   MR. ROBERTS: Steven Roberts, attorney for the
9   claimant, Tom Frost, F-r-o-s-t.
10   MR. DALE: My name is Lon Dale. I'm the attorney
11   for Kevin Rausch.
12   MR. BECK: Monte Beck for Fisch.
13   MR. JONES: Larry Jones for Liberty Northwest.
14   JUDGE McCARTER: Go over to Carol.
15   MS. GLEED: Carol Gleed, Department of Labor, at
16   the Court's request.
17   MR. CADWALLADER: Mark Cadwallader, attorney for
18   the Department of Labor and Industry.
19   MS. FERRITER: Diana Ferriter with the Department
20   of Labor and Industry.
21   MR. OVERTURF: Greg Overturf with Montana State
22   Fund.
23   MR. HARRINGTON: Tom Harrington with Montana State
24   Fund.
25   MR. LUCK: Brad Luck with Tom Harrington.

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1   MS. GARBER: I'm Carrie Garber with Larry Jones.
2   JUDGE McCARTER: Brad's now carrying Tom's bag.
3   It's an inside joke.
4   The first quick question that arises is, where did
5   that figure come from, and if it is, if they have been
6   identified, that would be great, but as far as I know, we
7   haven't identified the claimants who would benefit from the
8   decision.
9   MR. BECK: Now, what is the specific question? Do
10   you want to know where the Court -- I haven't read the
11   decision recently, but I think --
12   JUDGE McCARTER: Yeah, the Court had said something
13   to the effect that it won't be all that burdensome to
14   administer because there's only about 150 of these claims.
15   MR. BECK: There's 165 permanently, totally
16   disabled claimants covered by 48 active insurers. Well, that
17   comes from a letter to you, Judge, from Mark. A letter dated
18   April 25, 2003, which says that "the Department provided
19   information to Mr. Beck showing that approximately 165
20   individuals had permanent/total disability status."
21   JUDGE McCARTER: So it's Mark's fault.
22   MR. CADWALLADER: May well be.
23   JUDGE McCARTER: So that information came off of
24   what? Came off the Department's computer system?
25   MS. GLEED: It's based on information provided to

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1   the Department by the carriers.
2   JUDGE McCARTER: Okay.
3   MS. GLEED: So it's only as good as what's been
4   reported.
5   JUDGE McCARTER: Okay. That would be identifying
6   all permanently, totally disabled claimants who have ever
7   been classified as permanently, totally disabled since July 1
8   of 1991. Whatever happened to the 1987 to '91 issue?
9   MR. DALE: It's still there. The Court hasn't
10   ruled on it.
11   JUDGE McCARTER: So that's sitting up there.
12   MR. DALE: Right.
13   MR. CADWALLADER: Judge, the Department recently
14   compiled some information at the request of Monte Beck and we
15   reported permanent/total disability claims since 7-1 of '87
16   for all insurers as a total of 377.
17   JUDGE McCARTER: So that's since '87.
18   MR. CADWALLADER: Correct.
19   JUDGE McCARTER: Does anybody have any idea when
20   the next shoe will drop?
21   MR. ROBERTS: Probably after the election. I don't
22   know.
23   JUDGE McCARTER: That raises a first issue: What
24   do we want to do? Do we want to wait for that decision
25   before we start sending out notices and doing all this other

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1 work, or some of the work we may be able to do, but wait
2 until that other case comes down?
3 MR. ROBERTS: Is there any reason why we couldn't
4 get started on the '91 forward?
5 JUDGE McCARTER: Probably not, other than the fact
6 that we may end up doing some things twice.
7 MR. ROBERTS: I think the sooner the better, Judge,
8 on the ones we can get started on because it --
9 MR. BECK: In addition to this, I agree with Steve,
10 that the sooner the better, but we know from State Fund that
11 you have already compiled that. You know how many claimants
12 there are from '87 to '91, as you gave that information to
13 us.
14 MR. LUCK: Did we?
15 MR. BECK: You were estimating what the potential
16 impairment figure was. You were extrapolating --
17 MR. LUCK: I don't recall that issue in this court,
18 if we got what all the numbers were, but I don't know, we
19 might have estimated it, but I don't recall doing formal ones
20 on that.
21 MR. OVERTURF: We can figure out the '87 to '91.
22 JUDGE McCARTER: Fisch, Frost, and Rausch, as far
23 as the State Fund is concerned, that's been implemented, am I
24 right?
25 MR. ROBERTS: Between '91 up.

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1 MR. LUCK: We thought we were going to be able to
2 give a final report today, but there's one payment that still
3 needs to be made, and so we'll be doing a final report within
4 the next few days.
5 JUDGE McCARTER: But that covers from '91 forward,
6 so we don't need to worry about the State Fund.
7 How many of the permanently, totally disabled
8 claimants in the pool of 300-some-odd are State Fund people?
9 MR. CADWALLADER: 167.
10 JUDGE McCARTER: So we have about another couple
11 hundred that are insured by others, including Liberty.
12 MR. CADWALLADER: Yes.
13 JUDGE McCARTER: Liberty had nine, or something
14 like that.
15 MR. JONES: Liberty Northwest had 10, but nine from
16 the Ruhd case. That's not an issue.
17 MR. ROBERTS: We waived our fees in Ruhd, so...
18 MR. DALE: Okay, yeah.
19 JUDGE McCARTER: That was what tipped the decision
20 in favor, you know.
21 MR. ROBERTS: You never know, Judge.
22 MR. BECK: Mr. Angel doesn't think so. I didn't
23 even know he did it. He had no clue, and he goes, "And I
24 would have gotten that, anyway," and that can be on the
25 record.

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1 JUDGE McCARTER: Sorry.
2 MR. BECK: I do have a question, though, for you,
3 if we are just going to talk globally. How many permanently,
4 total people does the Liberty Group have.
5 MR. JONES: We don't know that. Right now, our
6 best representation of Liberty Northwest would be the nine,
7 and they are in various states. I found out that some of the
8 impairment awards have been paid in some cases, but not in
9 others, and others had been partially paid with the attorney
10 fee amount withheld, and then we have Liberty Mutual.
11 And on the Lee Miller case, Judge, remember that
12 with Larry Anderson, it finally went away, but we were trying
13 to identify broker-type cases so we have some work done on
14 that, and Carrie Garber will be assisting me on the Mutual
15 side to try to identify what we can do, whether through
16 restitutional memory or query our computer system to see what
17 PTD cases we can identify.
18 And on the Liberty Mutual Group, I'm going to have
19 to get some guidance on what other company may fall under
20 that umbrella, and it might include Wausau, so I hope that
21 answers...
22 MR. BECK: I'm just trying to get a flavor if you
23 know how many. I know that Liberty Northwest is just one of
24 several insurance companies controlled by Liberty in Montana
25 that have claimants, and we were trying to get a handle on,

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1 number one, how many other entities are there under the
2 Liberty Group plan; and number two, of those entities, how
3 many permanent/total claimants do you have within each
4 entity.
5 MR. JONES: That's part of the purpose of the
6 hearing today is to set our ground rules, what we look at and
7 how we do it, so pursuant to the Court's instruction, we'll
8 be giving that information.
9 JUDGE McCARTER: Well, one question I have
10 immediately is, what are we going to spring off of? Are we
11 just going to spring off of the list that the Department can
12 query their computer and generate?
13 MR. DALE: Would we be concerned about that to some
14 degree because, I mean, I think one of the complications is
15 classification in some ways is discretionary with the insurer
16 between temporary/total, and if you have -- I mean, there's
17 obviously, for unrepresented claimants, there's some -- we
18 know that a lot of insurers just leave people on
19 temporary/total.
20 The payment's the same as permanent, but then they
21 don't have to pay the total benefits, and so there's a
22 built-in incentive for insurers to classify certain people as
23 temporary/total, and there may be a lot of temporary/total
24 people that actually are permanent/total, and so we have a
25 classification issue that I think also has to be dealt with,

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1   and I'm not exactly sure how to do that, other than to
2   scrutinize temporary/totals, especially ones that have been
3   around for a long time, you know. So there might be a time
4   period there that we can get some reporting on someone that
5   has been temporary/total for an extended period of time that
6   would indicate that there may be a good chance that it be
7   permanent, because I know, in my own case, I have a couple,
8   and I don't do a volume practice, but I do have a couple of
9   claimants that have been temporary/total for an extended
10   period of time.
11   JUDGE McCARTER: Yes, and --
12   MR. DALE: One of them is Larry's Byron Oliver, in
13   Oliver versus Stimson, and so he is on temporary.
14   MR. BECK: Well, just to chime in, if we are going
15   to talk about this issue, can I address it for a second?
16   The temporary/total issue is something that State
17   Fund agreed to look at for us, and we trusted that when Greg
18   and Tom and Brad went through the files, that they would
19   classify those that were on temp/total, and if they really
20   were looking medically like perm/total, could they put them
21   on it. And there were -- I don't know how many you guys put
22   on after looking through the files. I don't know who was in
23   charge of doing that.
24   MR. OVERTURF: I think some team people got put on
25   that.

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1   JUDGE McCARTER: What criteria did you use to look
2   at them because, I mean, thousands of people are on
3   temporary/total, probably, or have been on temporary/total,
4   so you can't look at all those files and assume you can look
5   at thousands of people, so you must have used some criteria
6   to establish which ones you were going to look at. What was
7   the criteria?
8   MR. OVERTURF: What the State Fund first did is
9   they went through and they were able to identify people who
10   have been on temp/total for more than a year, and those
11   files, I think a little over 300 of them, they were
12   individually looked at by the adjusters to see, look at what
13   the basic permanent/total criteria is. Did they appear that
14   they were employable, is there a reason why they would be on
15   PTD for more than a year. Maybe they had a surgery that
16   extended and then they were employed then unemployed.
17   And of those, of all those files that were looked
18   at by the adjuster who had the files, evaluated whether they
19   thought they should appropriately be permanent/total, and of
20   those, 17 were declared permanent/total. Actually, I think
21   there was more than that. There was more, but 17 were within
22   the criteria to get benefits. Some of the other ones were
23   excluded for other reasons, you know. They --
24   MR. LUCK: -- Settled or answered or other things,
25   and I think those statistics are outlined, the process is

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1   outlined, in a couple of our status reports, too, because
2   this was a subject of the last hearing that we had that we
3   participated in.
4   JUDGE McCARTER: And you picked up the COLAs, too,
5   for those people who would be.
6   MR. OVERTURF: When they were transferred, they
7   were perm/total, and some of those were made permanent/total
8   retroactive at a time period when it looked appropriate.
9   JUDGE McCARTER: Okay, but one of my concerns here
10   is whether we are sort of expanding the issues by going back
11   and trying to reclassify people who have been improperly
12   classified. The flip side of that, though, is if we don't do
13   it now, there's going to be a client out there who's going to
14   come to one of you attorneys, and we are going to have
15   another suit where we're going to end up doing it anyway, so
16   I think I'm sympathetic with what you did with the State
17   Fund, but I think we are probably going to end up doing it
18   anyway.
19   On the other hand, it does, I think, in some
20   fashion, represent some sort of extension, and we don't have
21   all these insurers that we're going to be snaring in here, in
22   our net, so I don't know what they are going to argue about
23   it.
24   One of the questions I have, number one, is: In
25   the first instance, are insurers reporting, comprehensively

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1   reporting the permanent/total disability status to the
2   Department, or is this a hit-and-miss type of deal?
3   MS. FERRITER: The requirement is that they report
4   any payments made on indemnity claims, meaning if it'S PTD,
5   TTD, permanent/total, they are required to report to us every
6   six months from the date of injury.
7   JUDGE McCARTER: For each claim?
8   MS. FERRITER: Yes, for as long as that claim is
9   open.
10   JUDGE McCARTER: And they have to report what the
11   payment is, as well.
12   MS. FERRITER: Yes, they have a code that tells the
13   payment type, so we have a code that identifies
14   permanent/total payments, and then they report the cumulative
15   amount of that permanent/total payment to date, the date they
16   give us.
17   JUDGE McCARTER: Does the Department's computer
18   system have the capability of spitting out all
19   temporary/total disability payments where the claimant has
20   been on temporary/total disability for more than a year, so
21   that we could actually gather that information?
22   MS. FERRITER: Yes.
23   JUDGE McCARTER: And the insurers are basically
24   complying with the requirement.
25   MS. FERRITER: I can't tell you what the compliance

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1 rate would be, but -- I don't know. I can't tell you that.
2 I don't know how many indemnity claims are out there. We
3 know that there's an industry standard of approximately
4 20 percent of all first reports that are filed, you can
5 estimate that's how many indemnity claims would be involved,
6 and we are pretty close to that, but I can't give you any
7 other information about the compliance rate.
8   MR. BECK: Have you ever known about a claimant
9 that was really in a status, and it wasn't reported to the
10 Department?
11   MS. FERRITER: What we do know about those specific
12 instances, we might know because of some other business
13 process that's occurring in the Department, then we do
14 request the subsequent report information that has the
15 payments on it.
16   MR. BECK: But I guess that leads to my inquiry
17 about whether or not this information could be relied upon,
18 if we just went to the Department of Labor, and it sounds
19 like there's a little bit of a question mark whether they
20 really truly report it. And that leads me to the next issue,
21 would be, I would like to do it both ways. I would like the
22 insurers, the active insurers, to tell us how many PTs they
23 have, and perhaps if you order, how many TTs over a year they
24 have, and we will see what they will do, either voluntarily
25 or -- then we'll start a process, and I plan to do that with

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1 Liberty Northwest, so I will bring it to you if you want it
2 done that way.
3   But the main thing is, just to sort of cross-check
4 because I think we can get good data from the Department of
5 Labor. They have a top notch computer person, or maybe it's
6 you that gets this.
7   MS. FERRITER: I oversee the production of
8 information from the database, but we have IT staff that are
9 the ones that program it.
10   MR. BECK: Then we could cross-check. At least we
11 could get raw numbers. We know roughly what numbers we are
12 working with: 377 total; 167 from State Fund, so now we are
13 down to 210.
14   JUDGE McCARTER: 377, 167, okay.
15   MR. BECK: Is State Fund, so we have about 210 PT
16 right now that are other carriers, and my guess is that
17 Liberty Northwest, let's just say you have 40 percent of the
18 business.
19   MR. JONES: I wish we did. It's closer to --
20   MR. BECK: I mean, 40 percent of what's left over
21 from State Fund.
22   MR. JONES: I wish we did.
23   MR. BECK: My guess is you do.
24   MR. JONES: We have about 20 percent.
25   MR. BECK: That's still pretty good, so even his

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1 number, 20 percent, there's about 45 people right there.
2   MS. FERRITER: Judge McCarter, our database wasn't
3 really implemented until 1994, after the '93 legislative
4 session, so you have to keep that in mind. That's when we
5 started requiring the reporting, and so what we ask insurers
6 to do at that point was to report any open claims.
7   JUDGE McCARTER: So we may have a bunch of claims,
8 especially if we go back to '87, that may not be reflected in
9 the Department's system, potentially.
10   MS. FERRITER: Right, exactly.
11   MS. GLEED: They may be housed at the State Fund
12 database, and they may have that information.
13   MR. BECK: They used to keep it for the Plan I and
14 Plan IIs.
15   MS. FERRITER: When we were in the Escrow Division
16 of Workers' Comp at State Fund, it was part of the Division.
17   MR. LUCK: If that predated '87, that wouldn't help
18 us for our purposes here, though, would it?
19   MR. BECK: You were saying they might have data
20 from '87 to '91?
21   JUDGE McCARTER: '94.
22   MR. BECK: Well, that's good to know.
23   JUDGE McCARTER: So this 300 figure may be a bit
24 light.
25   MR. LUCK: We would probably have to pay State Fund

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1 to get that information, unless you ordered it, of course.
2   MR. OVERTURF: Are you helping, Brad?
3   JUDGE McCARTER: Okay. You see, the Department's
4 computer can identify the insurers and the claimants, as
5 well, right?
6   MR. CADWALLADER: Yes.
7   JUDGE McCARTER: So we can actually get a printout
8 of those people?
9   MR. CADWALLADER: Yes.
10   JUDGE McCARTER: Okay.
11   MS. FERRITER: It may require some programming, but
12 it is possible, yes.
13   JUDGE McCARTER: Well, okay. Now, one of the
14 things that we are going to have to do --
15   MR. BECK: Judge, just so you -- while we're on
16 that topic. Mark does have this. I did ask him to do this.
17 I didn't know he was going to read back the name, but here is
18 the whole list of the permanent/total claimants that totaled
19 377, and it shows whether they are a Plan I or Plan II, and
20 it shows the State Fund as being 167. And he says he has
21 this in the form with it filled in, so we could get the
22 carriers that have that. He just left it off.
23   MR. CADWALLADER: You asked about numbers, and I
24 provided the numbers. I did, in anticipation, we ran it, and
25 we got it with the names of each insurer, and if the Court

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1 desires that the Department provide that to the Court and to
2 the parties, I have extra copies with me.
3   MR. DALE: Without the claimant's identification.
4   MR. CADWALLADER: Just by insurer, not identified
5 on a claim.
6   JUDGE McCARTER: If I count these lines, it'll tell
7 me the numbers of insurers involved. Probably about 35 to
8 40, somewhere in there.
9   MR. BECK: He has it filled in, if you would look.
10   JUDGE McCARTER: Okay.
11   MR. BECK: I know, Judge, when we send out
12 certified letters, we probably sent certified letters to
13 probably every one of these, because Pat gave us the database
14 for all of that.
15   MR. DALE: Because we had the lien letter that went
16 out.
17   JUDGE McCARTER: Right, that went out to all
18 600-some-odd insurers, though. There aren't 600 on this
19 list.
20   MR. ROBERTS: It probably would include all of
21 those on the list, Judge.
22   JUDGE McCARTER: I would think so, yes.
23   So we are dealing with 57, including State Fund,
24 and some of these are self-insurers. Did our master list --
25 do you remember, did our master list include self-insurers,

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1 or just Plan II insurers?
2   MS. GLEED: I believe it included self-insurers, as
3 well.
4   JUDGE McCARTER: The 600?
5   MS. GLEED: Uh-huh.
6   JUDGE McCARTER: Okay, so the question is: The
7 lien notices went out to everybody, so everybody's on notice.
8 Do we just use the list of insurers that I have sitting here
9 in my hand with the -- what did I say? How many did I
10 say? -- with the 57 on it, or do we send notice to everybody,
11 or do we try to develop additional information by somehow
12 utilizing the State Fund's DBO-2 database?
13   MR. DALE: Because as I understand it, they
14 wouldn't have '91, '92, and '93, except in the old database,
15 and we would certainly be interested in those three years.
16   JUDGE McCARTER: Unless they were open claims.
17   MS. FERRITER: Correct.
18   JUDGE McCARTER: It should be a heck of a lot
19 easier to do it one at a time. If we are going to query the
20 DBO-2 from '91 to '93, it would be nice to know if we should
21 be doing it back to '97.
22   MR. CADWALLADER: Did we load data that was on the
23 DBO-2 to do the initial population of our work comp database?
24   MS. FERRITER: Yes.
25   MR. CADWALLADER: So there was an effort in

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1 building the database initially to get the information out of
2 DBO-2, but I think the concern is that there may not have
3 been there -- there was not the reporting requirement prior
4 to '94 of -- there wasn't the same reporting requirement of
5 every six months on every open claim.
6   JUDGE McCARTER: Was there any reporting
7 requirement?
8   MS. FERRITER: What were those event-driven reports
9 that had to be submitted? Do you remember if they would
10 identify the payment type?
11   MS. GLEED: Anytime there was a change of benefits
12 or termination of benefits, they were required to submit a
13 compensation report, is what I call it, and that wasn't
14 cumulative, it was whatever was paid at that time.
15   JUDGE McCARTER: So if they converted them over to
16 permanent/total disability, that would have been a reportable
17 event, so that should be captured if they were complying.
18   MS. GLEED: Yes.
19   JUDGE McCARTER: And that stuff would be in your
20 computer.
21   MR. CADWALLADER: Yes.
22   JUDGE McCARTER: So --
23   MS. FERRITER: No, it would be in the DBO-2 system.
24   JUDGE McCARTER: Okay.
25   MS. FERRITER: Because it doesn't capture the

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1 information the same in our present computer system, so it
2 wouldn't be converted.
3   MR. OVERTURF: I think there were some problems
4 when they tried to convert the databases in DBO-2 over to the
5 new system. Some data was captured, and some was not.
6   JUDGE McCARTER: It sounds to me like, if we are
7 going to capture pre-1994 information, we are going to have
8 to query the DBO-2. Okay. Well, let me ask -- I'm going to
9 give this back to you for the time being, Mark.
10   Well, it brings me back to my other question: Do
11 we isolate the insurers that we know have paid
12 permanent/total disability benefits and just give them notice
13 and drag them in here, or do we give notice to everybody and
14 ask them to respond in some fashion?
15   MR. BECK: You know, my thought is to stick with
16 the 57 and, you know, you can even see how many, just one,
17 two claimants there are with even that, so there may be one
18 or two out there, but don't you feel pretty confident that we
19 are getting 95, 96, or 99 percent of them?
20   MS. FERRITER: I would think so.
21   MR. BECK: So why chase this with all these
22 carriers and order everybody to show up or produce something?
23 We would be willing to stick with what it is, in addition to
24 if we go from '87 to '91, and with the thought that, you
25 know, if you run across something, you know, you can add it

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1 to the database. But I say, let's just run with these that
2 we know for sure have claimants.
3   JUDGE McCARTER: Are we going to find other
4 insurers in DBO-2 that aren't in this pool of claims?
5   MS. FERRITER: Older ones, especially self-insurers
6 that are no longer self-insured.
7   MR. DALE: Is there a lot of transition there
8 between Is to IIs, for example? I would think that once you
9 were a I, you probably would be a I unless you went out of
10 business or something.
11   MS. FERRITER: Or ceased to operate in Montana.
12   MR. BECK: If they do go out of business, what
13 happens to the claimants?
14   MS. FERRITER: It depends whether a new entity
15 assumes the claims and they continue to pay on the claims
16 they have liability for.
17   MR. BECK: What's been your experience?
18   MS. FERRITER: Usually, they keep the liability, if
19 they are no longer self-insuring just because they are no
20 longer doing business in Montana.
21   MR. BECK: So they will still keep the liability in
22 there?
23   MS. FERRITER: Yeah.
24   MR. DALE: What about Guaranteed Fund? There are
25 some Guaranteed Fund rules, too, right?

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1   MR. CADWALLADER: The Plan I Guaranteed Fund came
2 into existence in --
3   MS. FERRITER: '91.
4   MR. CADWALLADER: '91. I'm not aware that there
5 have been any claims where the Guaranteed Fund has had to
6 make payment since '91. For pre-'91 self-insurers, there
7 were some that have been gone out of business or bankrupt.
8 Often, in those cases, even though there has been a going out
9 of business, there may be assets that have been set aside for
10 payments of claims.
11   The Department has gone after security deposits and
12 through the bankruptcy court process, essentially saying that
13 we have a surety bond that's earmarked to this set of claims,
14 and the surety carriers administer and pay out until we run
15 out of money. We have not had notification that anybody has
16 run out of money in that situation.
17   MR. DALE: But then there are some Plan II carriers
18 that are on Guaranteed Plan, too.
19   MR. CADWALLADER: And that is a different
20 guaranteed fund through the Insurance Commissioners Office --
21 and the Guaranty Association which I believe is administered
22 through Western States Guaranty Association -- has been
23 paying claims and assessing on that, so I think the claimants
24 are going to be taken care of on the whole and for the most
25 part.

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1   MR. BECK: Do you have a record of that? Is it
2 identified as such so that we know that at least that person
3 is out there?
4   MS. FERRITER: You mean, of which claimants --
5   MR. BECK: Say, the ones that went out of business
6 or bankrupt --
7   MS. FERRITER: Are you talking about the carriers
8 or --
9   COURT REPORTER: Excuse me. Please talk one at a
10 time.
11   MR. BECK: Either way, in order to be able to
12 identify the claimant, is what we are concerned about.
13   MS. FERRITER: We can identify the claimants of
14 carriers that went bankrupt, and we may be able to identify
15 the claimants whose claims are being adjusted by the Western
16 Guaranteed Fund.
17   MR. BECK: Is that on the list of the 377?
18   MS. FERRITER: If those adjusters are reporting to
19 us, it will be on the list. I don't know that Western
20 Guaranty Fund is required or are reporting these reports to
21 us. Do you know, Carol?
22   MS. GLEED: No, I don't believe so.
23   JUDGE McCARTER: Western Guaranty may have some out
24 there that aren't reflected in this report?
25   MS. GLEED: Yes.

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1   MR. ROBERTS: Judge, how about the DBO-2 from '91
2 to '94? Those wouldn't be reflected in the report, either.
3   JUDGE McCARTER: Right.
4   MR. ROBERTS: So if we can get access to that
5 information...
6   JUDGE McCARTER: As far as a step-by-step process,
7 do we want to try to get access to that information before we
8 start sending our notices out, just in case there are some
9 additional insurers in there?
10   MR. ROBERTS: I don't see what the harm would be in
11 sending the notices out for all the insurers we know now, and
12 then we could supplement it if there should be anybody else
13 in the DBO-2 from '91 to '94.
14   JUDGE McCARTER: I'm going to have to -- who at the
15 State Fund can tell me what we can do and how easy it is to
16 do and how much it's going to cost to query the DBO-2.
17   MR. OVERTURF: We have one computer guy who's from
18 way back when who understands the DBO-2 system that we have
19 used that we could try to check with him and talk to Nancy
20 about the logistics of getting him to do it.
21   JUDGE McCARTER: Yeah, because I take it that the
22 DBO-2 is something that was part of the Division --
23   MR. OVERTURF: Right.
24   JUDGE McCARTER: -- that the State Fund has it now.
25   MS. FERRITER: The State Fund has physical

1 possession of it, but it seems to me, Judge, there was recent
2 discussions between the Department and the Division over
3 obtaining the records from DBO-2 and some other media, and I
4 would like to check on that and see what we have at the
5 Department. We may have some translation of that DBO-2
6 information with the Department, and I would like to check
7 that out.
8   JUDGE McCARTER: Okay, so basically what you are
9 saying is, you may have or may be able to get access to the
10 DBO-2 using the Department people.
11   MS. FERRITER: Yes.
12   MR. OVERTURF: Judge, we looked into some of this,
13 and as I recall, there was some of the database, the actual,
14 physical components were stored somewhere.
15   MR. LUCK: With the State Auditor or somebody. It
16 was off site with another agency for safekeeping. I recall
17 that, and I don't know if it was the entire system, or what
18 the story was.
19   MS. FERRITER: That sounds familiar. That's why I
20 need to check that out.
21   JUDGE McCARTER: So you can track that down?
22   MS. FERRITER: Yes.
23   MR. OVERTURF: There was also a question about how
24 much, when they did the conversation to this new system, how
25 much of the data points got transferred to the new system, so

1 I don't know right now whether the ones that you are
2 identifying now would be for some of the DBO-2 people or not.
3   MS. FERRITER: Some of them could be, if they were
4 open claims when we converted, yeah.
5   MR. OVERTURF: It would still be comprehensive,
6 though, to look at both.
7   MR. ROBERTS: Uh-huh.
8   JUDGE McCARTER: Okay. All right, so it sounds to
9 me like we can start working on that, just to check it out,
10 and then, obviously, we'll have to reassemble ourselves and
11 figure out where we go from there, and I suppose, in the
12 meantime, we can send out some sort of notice to the 57
13 insurers and self-insurers that we have on the list. And
14 what about the UEF? Are they...
15   MS. FERRITER: Oh.
16   JUDGE McCARTER: Did I just scare you?
17   MS. FERRITER: They haven't been reporting the same
18 information as other insurers at this point, but I will check
19 on that also and see if it's possible to give you the
20 information.
21   JUDGE McCARTER: Okay, so Diana will check on that,
22 too.
23   All right, so what kind of notice do we want to
24 send out to these 57 companies? Well, we have a few of them
25 here already, but to the remainder of them. Have you thought

1 about it?
2   MR. BECK: Why don't we take a stab at trying to
3 write up something, basically a generic notice that, you
4 know, "As we notified you earlier in our notice of lien," and
5 describe then that there was an appeal and the Supreme Court
6 has determined that, in fact, they all are part of the Fund.
7 Please identify those claimants that you have since,"
8 such-and-such a date.
9   You know, if we go with at least from '91 forward,
10 that are of permanent/total disability status, and "Please
11 report whether impairment," -- just like we did here
12 (indicating). We'll go through the list, whether the
13 impairment has been paid, whether there has been a full
14 settlement. Just kind of that same criteria that you told us
15 early on with some of these that have already been resolved
16 or however it is, or those that are currently getting
17 permanent/total disability, and we'll just kind of list the
18 criteria and we'll ship it all around and see if we get some
19 input.
20   Maybe, Larry, it would be good to have your review
21 of it just to see if this is the kind of, you know,
22 information that you could access.
23   Hopefully, we'll get it consistent with the
24 Department of Labor's criteria and run it by, and then when
25 we get through editing it, we'll give it to you and see if

1 that sounds like something you would sign.
2   JUDGE McCARTER: Okay, so obviously we have to haul
3 them into court, and give it to me.
4   MR. BECK: Why don't we just say that there will be
5 a hearing if you do not respond. There will be a hearing, or
6 something like that, or if you respond, give them the
7 affirmative duty to respond in some fashion, and if you
8 don't, a hearing will be set for...
9   MR. DALE: Instead of a hearing, could we have
10 discovery options with them?
11   JUDGE McCARTER: Well, we could.
12   MR. DALE: So that you don't have to micro-manage
13 it, you know. If someone has --
14   MR. BECK: 30(B)(6)?
15   MR. DALE: We could do 30(B)(6) depositions, if we
16 had to.
17   JUDGE McCARTER: I hope we don't have to do that.
18   MR. DALE: If they don't appear, though.
19   JUDGE McCARTER: I think what we ought to do is
20 figure out the information we want to get from them, and ask
21 them to produce that information, or indicate why they can't
22 produce it or what difficulties they are going to have, and
23 then if some of the insurers are going to have difficulties,
24 then sit down with them and see if we can't hash it out, and
25 try to do that with respect to all of them that have any

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1 particular problems.
2   I suspect that if attorneys are involved, we'll
3 probably get joint representation of some of these companies,
4 so I wouldn't anticipate we're are going to have a huge
5 amount of attorneys. I don't think we are going to have 57
6 attorneys in the Court or 57 objections, but I would rather
7 try that than to go to the formal discovery, because then we
8 are going to start doing a lot of work.
9   MR. BECK: You could write it: "If you fill out
10 this report, this will suffice. And in the event you don't,
11 this will be a show cause hearing to show why you cannot
12 comply with it and appear," so then you could even cut it
13 down from there because probably most of them will comply.
14   JUDGE McCARTER: What I can do is require that they
15 file a response within a certain period of time.
16   MR. BECK: Yeah.
17   JUDGE McCARTER: Just like we would with respect to
18 a petition, and if they don't, then we'll take the next step.
19   MR. DALE: We would have to put something in there
20 for temporary/total over a year or two, or some number.
21   JUDGE McCARTER: Yeah, and maybe you want to talk
22 about that. Again, I'm inclined to do that because I think
23 this whole idea of multiple lawsuits, it seems to me that we
24 ought to try to avoid it, and I'm just -- it's just one of
25 those things that if we don't do it up front in this case,

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1 somebody's going to bring the next case and we'll end up
2 doing it, again.
3   MR. DALE: Well, there is a built-in incentive for
4 insurers to do that. I mean, they're looking at the bottom
5 line, and if a person doesn't have representation, a claimant
6 is getting paid the same bi-weekly amount, it's just the COLA
7 things that they are saving which amounts to significant
8 money. But then again, if a claimant isn't represented...
9   JUDGE McCARTER: Okay. Well, you guys arrived at a
10 year. You think that's a reasonable period? I know we had
11 this discussion, Jeff Angel was in on it, and he thought two
12 years, and maybe two years is too long.
13   MR. OVERTURF: We talked about two years and the
14 State Fund on it's own had already run it down to a year, so
15 we already had the year, so I don't know what the reasonable
16 time is. It's not unusual for a claimant to be on PTD for a
17 year, at all, so that may be too short.
18   JUDGE McCARTER: I wonder, if you can't use your
19 experience to identify by way of a percentage of those claims
20 where they had only been a year, or whether there's a
21 different cut off date of permanent/total disability.
22   If for example, you found no claims where
23 temporary/total disability benefits had been paid for less
24 than two years, which turned into permanent/total disability
25 benefits, then that might be a good cut off point.

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1   MR. BECK: We could look at those 17 to see what's
2 going on.
3   MR. ROBERTS: Actually, there were more than 17
4 right, Greg?
5   MR. OVERTURF: I'm thinking there were 35.
6   MR. ROBERTS: Eighteen didn't qualify for other
7 reasons.
8   MR. OVERTURF: There were several.
9   MR. ROBERTS: So there's a bigger sample.
10   MR. HARRINGTON: There were 35 that met the
11 criteria, and 17 were added to the list.
12   MR. OVERTURF: I think the problem we run into is
13 each claim is individual, and you can have unusual cases
14 where somebody is on PTD for five, six, eight years, and it's
15 legitimate just because of the nature of how the claim has
16 progressed.
17   JUDGE McCARTER: Sure. The question is: Do we
18 want to narrow down the number of files that will have to be
19 examined, the number of claims to look at? So if you have
20 35, and of those, 17 are -- or are all 35 involved payment of
21 benefits for more than two years or five years or something
22 like that, then it makes sense to use a greater period of
23 time than the one year. So if you can give us a breakdown on
24 that, that would help us is a lot in determining whether to
25 go with a year or year and-a-half or two years, or whatever.

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1 I suspect two years would probably be good.
2   We have all of the statistics in literature about
3 if people don't go back to work within a certain period of
4 time, they never go back to work.
5   Okay, disclosure. Brad's given me a proposed order
6 in the Flynn case regarding disclosure of information because
7 of a concern about the St. James Community Hospital case.
8 What do we want to do here at this point in time with
9 disclosure? Brad, sort of explain it, you know, in what you
10 are trying to do there, and what the limits are.
11   MR. LUCK: Well, in Flynn, because we are in the
12 process of an implementation situation where we have to give
13 information to claimant's counsel, because of the
14 St. James case which was decided in December of 2003, there
15 was some concern raised.
16   The St. James case is a class action that was
17 certified, and Judge McKittrick ordered the disclosure of
18 patient's names. It's one of the cases that deals with
19 disclosure of medical records and copying and those kinds of
20 things, out of Great Falls. And he directed the hospitals in
21 that case to provide information to claimant's counsel,
22 plaintiff's counsel, in a certified class action.
23   They were concerned about Health Care Information
24 Act obligations and the constitutional right of informational
25 privacy, took it up on a writ, and the Supreme Court said

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1 that it didn't matter that it was a certified class action
2 and had been ordered by a court. We have Health Care
3 Information Act concerns, and this broader right of
4 informational privacy guaranteed by the constitution that
5 said, "You can't give them the names of the patients," and
6 didn't really give an idea of what the do other than saying,
7 "You might look at some other avenues, including opting in."
8 So what we have done in Flynn, just to be careful
9 is, one, we previously had a confidentiality agreement with
10 counsel that's pretty strong, but we have asked the court to
11 consider entering an order that modifies our communications
12 that indicates that when we write these people about the
13 possibility of being included in the remediation, they can
14 sign a form and release to Common Fund counsel a release that
15 says they can look at the information, or initial that they
16 won't do it. Those that don't want to have Rex Palmer, in
17 that case, be able to look at their medical information, will
18 look at the numbers and see about having a master, or
19 whatever.
20 But absent that, effectively opting in that
21 authorization, their health care information and even their
22 identification, won't go to Common Fund counsel.
23 MR. BECK: Did Common Fund counsel need to look at
24 the individual medical records, is that the issue?
25 MR. LUCK: In that case, Flynn is a matter of who

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1 was on social security, and did you pay, did you get a social
2 security award, and did you pay attorney fees. And the State
3 Fund has to pay back half the attorneys' fees.
4 JUDGE McCARTER: The question would be whether
5 St. James extends to protect the identity of these claimants,
6 and it's probably better to be conservative and err on the
7 side of trying to protect it, but still, giving you the
8 opportunity to basically monitor what's going on, and I think
9 most of these claimants are going to be happy to have that
10 done.
11 MR. ROBERTS: How about a special master? Does
12 that get around that problem, Judge?
13 JUDGE McCARTER: We could appoint a special master,
14 too. I'm not sure it's going to be necessary. If we don't
15 have a lot of claims, if there's a handful of people who opt
16 out, I can take a look at them, so I'm not going to employ a
17 special master to do that.
18 MR. BECK: What if Larry says, "I really don't
19 think any of our temporary/total have been over 18 months,"
20 or whatever date we choose, or a year on permanent/total, and
21 we have no way of knowing that, and we don't even know if the
22 claimant knows enough to say, "Wait a second. I think I'm
23 permanent/total and I'm not represented by an attorney," that
24 says, "I'm not going to bother with it because the PT rate is
25 the same as the permanent rate," and hasn't thought through

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1 COLA and all of that.
2 So if we go down there, maybe, and he says, you
3 know, "I don't want to produce it," or "I'm thinking that
4 they are temp/total, what about a master that would, you
5 know, be of some the experience that could look at a file and
6 say, "Wait a minute. This seems to fall into a
7 permanent/total status," instead of us doing it, if you don't
8 want us to see the medical records of somebody.
9 JUDGE McCARTER: We could do that, but what did you
10 guys do when you worked with State Fund? Were you happy with
11 the response?
12 MR. BECK: We were. We just trusted that they were
13 looking at the file, and like you said, they converted 35 of
14 them, and it was only --
15 MR. LUCK: Your Honor, that's kind of an ongoing
16 process, and he agreed in our arrangement to the extent that
17 people became eligible or were converted at a later time, we
18 would review it. They are outside of the scope of settlement
19 in terms of fees, but we agreed that we would pay them the
20 benefits that they were doing.
21 JUDGE McCARTER: I think the answer to that is
22 we'll cross the bridge when we get there. If it looks like
23 there's a problem in the identification and conversion
24 process, then we can think about a special master. I'm not
25 adverse to anything, and these things sort of take on a life

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1 of their own a bit, and we just sort of roll with the
2 punches.
3 MR. ROBERTS: How would we know if there was a
4 problem? Would be we notified? For example, let's say we
5 choose a year or 18 months for the PTD. Can you tell us,
6 would we be notified? For example, Liberty Mutual has
7 identified 25 people who have been on PTD for more than a
8 year, and they don't think any of those qualify, and then we
9 make the decision with those statistics. It's appropriate
10 for a special master?
11 JUDGE McCARTER: My suggestion is, if they refer to
12 the files, they may be able to advance some sort of checklist
13 as to why they are still continuing on temp/total status,
14 including, you know, that the doctors certified that they
15 haven't reached maximum medical improvement.
16 We probably can develop some sort of thing like
17 that which would make it real easy just to check it off, and
18 then if you guys aren't satisfied with that, then we can talk
19 about whether we need to take a sampling, or whatever. I
20 mean, we need to develop a certain degree of trust in these
21 proceedings, and my experience in these other cases, the
22 other Common Fund cases, is that once everybody got over
23 being a little bit gun shy of the informal process that we
24 were using, that everybody has cooperated very well. And we
25 have developed a great deal of trust in it, so hopefully the

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1 remaining proceedings we'll have will be the same thing.
2   MR. BECK: I know, but we have the names of
3 claimants, and we would agree that we would keep them
4 confidential.
5   MR. LUCK: We don't think that we need to do things
6 differently now than before St. James.
7   JUDGE McCARTER: If I have to rule to that, maybe I
8 could take a quick trip up to the Supreme Court and get an
9 answer from him. It just seems to me that by disclosing, a
10 duty to this court is to enforce the Common Fund and find
11 these claimants, we have to take whatever necessary actions
12 we can to do it, and there may be different ways to get
13 around the St. James problem, or maybe St. James just doesn't
14 apply to this kind of basic information, or at least part of
15 the information certainly applies to medical information.
16   But I think to the extent that we can avoid the
17 St. James concerns by the procedures that we establish, we
18 ought to do that, and if we can't avoid it, then I will have
19 to rule and ask the Supreme Court to tell us what they want
20 us to do.
21   MR. ROBERTS: One other method is, if there were a
22 special master, or if we ourselves were to review files that
23 were just an honest different of opinion, or we were curious
24 to see if there was an honest difference of opinion, is the
25 name of the claimant could be blacked out because we only

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1 need to see if the medical supports a conclusion. We don't
2 need to see the name, and the name of the individual's
3 privacy can be protected that way.
4   JUDGE McCARTER: That may be a tough and difficult
5 process to do that because names crop up all over the place
6 in those medical reports, and going and blacking everything
7 out and making sure you haven't identified information that
8 would identify the people is going to be tough. But I think
9 we just leave it be for now, and we'll figure it out when we
10 get there.
11   MR. BECK: You still get medical information, don't
12 you, Carol?
13   MS. GLEED: Some cases.
14   MR. BECK: What if we used the Department of Labor
15 people? I don't know, you have been in this for how many
16 years?
17   MS. GLEED: A long time. I'm not going to date
18 myself. A long time.
19   MR. BECK: But I mean, you are the one who used to
20 sign off on settlements. You can reject it. There's been
21 rejections by you saying, "Wait a second. This doesn't
22 satisfy this or that on a medical basis." If we already know
23 that the Department of Labor can and does see medical, what
24 about some from them, you know, as a --
25   JUDGE McCARTER: Their services are free --

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1   MR. BECK: Well --
2   JUDGE McCARTER: -- and they don't have anything
3 else to do.
4   MR. BECK: -- pay for it, and I don't think, like
5 Mickey Nolan would do a lot. Is she still around, Carol?
6   MS. GLEED: She is maybe retired?
7   MR. BECK: I don't know. There's some people
8 involved that I think could serve in that role, but running
9 an afoul of some confidentiality --
10   JUDGE McCARTER: We will deal with it. If there's
11 a problem and we need somebody to get it done, we'll figure
12 out a way to do it, but those are all valid suggestions. All
13 you have to do is just file them for right now and don't
14 forget them. Just file them for the future.
15   Okay. Do we need to do anything else right now
16 other than kick this back to Monte, Steve, and Lon to draft a
17 proposed notice to the claimants or to the insurance
18 companies? The notice will be to the insurance companies.
19   MR. ROBERTS: I think that would be the logical
20 first step.
21   JUDGE McCARTER: You want to try to get something
22 to me in two weeks?
23   MR. ROBERTS: Yes.
24   JUDGE McCARTER: Circulate it to Larry.
25   MR. CADWALLADER: I would be interested in seeing a

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1 copy of a draft.
2   JUDGE McCARTER: Circulate it to Mark, and
3 circulate it to the State Fund attorneys, too.
4   MR. LUCK: Your Honor, do you want some sort of
5 profile information on the 35 people we identified?
6   JUDGE McCARTER: Right.
7   MR. OVERTURF: How long they were on PTD?
8   JUDGE McCARTER: Right.
9   MR. LUCK: Did you also want us to provide you some
10 information on the DBO-2, or wait and see what the Department
11 comes up with?
12   JUDGE McCARTER: I wonder if you might want to talk
13 to Diana and coordinate there so you are not duplicating your
14 efforts, so that would be my suggestion, and then, if you
15 need to involve me, you know, let me know.
16   MR. BECK: Mark, do you have any problems with us
17 getting the names of these insurers? I already have them, so
18 I don't know if it's a secret.
19   MR. CADWALLADER: Let me ask Larry. On behalf of
20 your fellow insurers, do you see a proprietary or trade
21 secret claim or basis for objecting to the release of
22 information that identifies not only the insurer but how many
23 permanent/total disability claims they have over a broad
24 range of time?
25   MR. JONES: Speaking for Liberty Mutual and Liberty

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1 Northwest, we have no objection.
2   JUDGE McCARTER: I think we have to have that
3 information in any event because it's going to be part of the
4 court record because I'm going to have to basically name
5 them, and it gives them an opportunity to respond and appear.
6   Before you leave, why don't you get a copy and we
7 will include that? Mark's already got that, including the
8 court file.
9   Does anybody have any other issues that we need to
10 talk about today?
11   MR. OVERTURF: I'm not exactly clear, and maybe I
12 need to talk to Diana about what information are we trying to
13 find out from DBO-2.
14   JUDGE McCARTER: Trying to identify other claimants
15 and insurers, or claimants who were on permanent/total
16 disability or were using the time frame Lon told us,
17 disability for more than a year or two, or whatever criteria.
18   MR. DALE: '91 to '94.
19   JUDGE McCARTER: Right, but I would sure like to
20 know the answer. That's all breached up there.
21   MR. BECK: I'm sure there is a dissent being
22 written, otherwise it would have come out right at the same
23 time.
24   MR. DALE: It was argued the same day. They were
25 consolidated.

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1   JUDGE McCARTER: Oh, okay. Well, it ought to be
2 coming out pretty soon.
3   MR. BECK: By the time we get this draft, I'll bet
4 it's --
5   JUDGE McCARTER: Yeah, that might be one case where
6 I could give them a call and say, "Is it coming," ask them if
7 it's coming. I usually don't bug them, but this is a case
8 where it would be nice to know.
9   MR. DALE: We certainly don't bug them, so we will
10 let you do that.
11   MS. FERRITER: So you are not interested if we can
12 provide '87 to '91?
13   JUDGE McCARTER: Not at the moment.
14   MR. BECK: But could you just determine whether
15 it's possible to do that?
16   JUDGE McCARTER: Yes.
17   MR. BECK: We are optimistic on this side.
18   MR. LUCK: When you call them, Your Honor, you
19 might tell them you are pretty comfortable with your
20 reasoning in that case, also.
21   JUDGE McCARTER: They don't care.
22   MR. LUCK: As long as you are calling them.
23   JUDGE McCARTER: They don't care whether I am
24 comfortable or not.
25   MR. CADWALLADER: They don't care, Brad, any more

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1 than when the Judge thinks you are right.
2   MR. BECK: The only other issue was that if you get
3 it somewhere in here or something, you know, that this case
4 doesn't stop because Jeff Angel goes to the US Supreme Court.
5 You have heard about him threatening to go up to the big
6 boys.
7   JUDGE McCARTER: I'm trying to figure that out.
8   MR. BECK: I don't want it to stop here because you
9 are not entitled to stop it, unless --
10   MR. DALE: He would have to get a stay order.
11   MR. ROBERTS: Right.
12   MS. GARBER: Right.
13   MR. BECK: I was going to write you a letter saying
14 that he intends to appeal it to the US Supreme Court.
15   JUDGE McCARTER: Well, he told Pat that this
16 morning when he called us --
17   MS. KESSNER: Yesterday.
18   JUDGE McCARTER: -- to find out about this hearing,
19 so I know, and I wish him luck. I have had some experience
20 with petitions in the past.
21   MR. ROBERTS: Just for the record, Judge, we do not
22 wish him luck.
23   JUDGE McCARTER: Well, that's not what I meant.
24   MR. LUCK: You mean "Godspeed."
25   JUDGE McCARTER: It's going to take a lot of luck

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1 to find some ground to be persuasive for the Supreme Court to
2 even look at it for two seconds.
3   MR. JONES: Maybe he was going to.
4   MR. BECK: I don't know, but anyway, I just want to
5 be clear that you wouldn't stop something just because
6 something is filed.
7   JUDGE McCARTER: Not unless I have to, so unless he
8 can give me some persuasive authority to stop, I would not do
9 it. No, we will push on. This one should be a piece of cake
10 compared to some of the others that are lurking out there.
11   MR. BECK: Some of the other writs, you mean?
12   JUDGE McCARTER: It's going to be a lot more
13 complicated than that.
14   MR. LUCK: You can go on the record and talk about
15 your present feelings with the Common Fund and how it was an
16 error to get started.
17   JUDGE McCARTER: That's an argument you have to
18 make to the Supreme Court. I laid out that one decision that
19 I made long, long ago what my view of the Common Fund was
20 and the historical basis of it, and they didn't find that
21 persuasive, so that's an argument that you will have to make
22 to the 7 and not to me.
23   All right, thank you. Thanks for coming.
24   (The conference concluded at 2:10 p.m.)
25   * * * * * * * * * *

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1   CERTIFICATE
2
3   STATE OF MONTANA   )
4   )
5   COUNTY OF LEWIS AND CLARK   )
6   I, KIMBERLY E. JOHNSON, Professional Court
7   Reporter, Notary Public in and for the County of Lewis and
8   Clark, State of Montana, do hereby certify:
9   That the foregoing hearing was taken before me at
10   the time and place herein named; that the deposition was
11   reported and transcribed by me with a computer-aided
12   transcription system, and that the foregoing pages contain a
13   true record of the proceedings to the best of my ability.
14   IN WITNESS WHEREOF, I have hereunto set my hand and
15   affixed my notarial seal this _____ day of
16   _____, 2004.
17
18   _____
19   KIMBERLY E. JOHNSON
20   Court Reporter-Notary Public
21   My Commission Expires 3/19/08
22
23
24
25

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