

TRANSCRIPT OF PROCEEDINGS

1 IN THE WORKERS' COMPENSATION COURT
2 OF THE STATE OF MONTANA

3 CASSANDRA SCHMILL,) WCC No. 2001-0300
) Claimant,)
4 vs.))
) LIBERTY NORTHWEST INSURANCE)
5 CORPORATION,))
) Respondent/Insurer.)

6 TRANSCRIPT OF PROCEEDINGS

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11 BE IT REMEMBERED, that the proceedings in the
12 above-captioned matter was heard before the
13 Honorable Mike McCarter, at the offices of the
14 Workers Compensation Court, 1625 Eleventh Avenue,
15 Helena, Montana, on the 25th day of June, 2003,
16 beginning at the hour of 3:30 p.m., before Laurie
17 Crutcher, Registered Professional Reporter, Notary
18 Public.

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1 Whereupon, the following proceedings were
2 had:

3 * * * * *

4 THE COURT: This one, this next case is
5 the Schmill matter. And Laurie, you weren't here
6 this morning. And maybe I ought to try to
7 summarize how we're proceeding in those cases
8 because it may affect this case.

9 First, one of the questions is about the
10 notice of lien to the insurance companies, and I
11 think in this case you did file a notice of lien.
12 Did you file a notice of lien?

13 MS. WALLACE: I think Larry kind of
14 filed it for me, didn't you? You notified the
15 Court that that's what I was proceeding under, and
16 then you sua sponte just issued an order. I don't
17 think I ended up having to file anything.

18 THE COURT: Is this the one I authorized
19 withholding by Liberty, and I authorized
20 withholding by everybody else, too?

21 MR. JONES: Yes.

22 THE COURT: The universe? So are you
23 going to be one of those global persons, I call
24 them global claim, bring against all outstanding
25 claimants and insurance companies?

1 of -- What were we going to do? Somebody was
2 going to draft some language telling them what
3 the --

4 MR. ANGEL: You had asked us to do that.

5 THE COURT: -- basic holding was in the
6 case.

7 MR. ANGEL: To get you a synopsis by
8 July 3, next Wednesday, Thursday.

9 THE COURT: So I need a synopsis from
10 you of what the holding is in Schmill, and I may
11 play with that, so at least give me a head start
12 on it. Then what I'll do is I'll grab the
13 proposed notice, and I will circulate it among all
14 attorneys.

15 And then the mechanics of sending it
16 out, I thought we would just send one out, rather
17 than sending a separate one out in each case. And
18 I guess my thought was that probably the
19 attorneys, the claimant attorneys, can share the
20 costs of that. We've got a list we're creating.

21 In Wild, we went back to 1983. In this
22 case, we're only back to 1987. We may have a
23 little bit different set of -- in Stavenjord and
24 Schmill, we may have a different set of insurance
25 companies.

1 MS. WALLACE: Well, I'll definitely go
2 along with the pack. But my understanding was
3 that you already made a ruling that indicates that
4 the liens are only valid against the parties to
5 the action.

6 THE COURT: That's going to be appealed.
7 And the question is: Do you want to agree with my
8 ruling and abandon it, or do you want to wait
9 until the Supreme Court rules on it?

10 MS. WALLACE: I will of course wait and
11 leave that open.

12 THE COURT: I assume that that's a
13 reasonable thing to do. So what we're going to do
14 is I'm going to issue -- I'm going to draft some
15 sort of notice that will go out to the insurance
16 companies in Stavenjord, Wild, this case; and
17 we'll probably do the same thing in Dave's case,
18 which is Cheetham, telling them, basically telling
19 them that a notice of lien has been created,
20 telling them about my ruling, telling them that
21 that ruling has been appealed, and basically
22 telling them that they should continue to withhold
23 for their own protection.

24 We're going to put in language in that
25 for each case. Are we going to just put a summary

1 Carol, did you get any more information
2 on the --

3 MS. GLEED: No. The person I needed to
4 talk to wasn't there to know what information we
5 carried over from DB02.

6 THE COURT: We're trying to find out how
7 we get the names of insurers who insured in this
8 state between 1983 and 1991. We have from 1991
9 forward, but we don't have 1991 and backward,
10 because of some of the dates. At least in Wild,
11 the claim may go back to 1983, so we were looking
12 for 1983 insurers.

13 In this case, we're back to 1987, and my
14 recollection is we have another case that's
15 challenging the pre-1987 act. Did we find that,
16 Jay?

17 MR. DUFRECHOU: No.

18 THE COURT: Did Dave file that? Do you
19 know anything about that?

20 MR. MARTELLO: Minnick.

21 MR. OVERTURE: Judge, if I could, we
22 have a case filed against the State Fund by Dick
23 Martin called Minnick, which is a Schmill case
24 against the State Fund.

25 THE COURT: Is that a pre-1987 case?

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1 MR. OVERTURF: It's not a pre-1987 case.
2 On Schmill we're talking about apportionment. So
3 does the definitional change of what an
4 occupational disease in 1987 is have relevance?
5 Is it really that relevant?

6 THE COURT: Wait a minute.

7 MR. OVERTURF: That line was drawn in
8 1987 for Henry, because the definition of what is
9 an occupational disease changed in 1987.

10 In this case, we're just talking about
11 apportionment, which I don't know if that hinges
12 on how you define what an occupational disease and
13 apportionment has been in the statute for much
14 longer than 1987. It could go back.

15 THE COURT: I'm not dealing with
16 anything prior to 1987 because we're going to see
17 a challenge anyway. And I thought we had a case,
18 but I can't remember the name of the case, and
19 it's not in our submitted baskets, so it may be in
20 process. It may be a case that I saw that just
21 came in. I think there's a case out there that's
22 now challenging the 1987 one, especially in light
23 of some of the language that was used in some of
24 the recent decisions. And I will cross that
25 bridge when I come to it.

1 create two different lists.

2 MR. JONES: Does that list include
3 self-insurance?

4 THE COURT: Yes.

5 MR. JONES: That will have Great Western
6 Sugar.

7 MR. MARTELLO: The defunct Great Western
8 Sugar.

9 THE COURT: So that's the first thing
10 that we're going to do. What I need to get from
11 you, Laurie, is probably a formal notice of lien
12 that can be sent out with the notice, the Court's
13 notice. Then we've got some --

14 MS. WALLACE: I want to clarify, if I
15 could, Judge. In my notice of lien, you want me
16 to specify, I take it, exactly what years I'm
17 claiming for and all of that?

18 THE COURT: Right, and what insurers.
19 And basically you're claiming against all insurers
20 and all claimants that are affected by the
21 decision.

22 MR. MARTELLO: Can I interject? Laurie,
23 you and I spoke about the prospective application,
24 that's one of the issues that comes in here. I'm
25 wondering if the lien notice would -- maybe that

1 In this case, all we have is 1987 and
2 after I think. You're not going to disagree with
3 me, are you, Greg?

4 MS. WALLACE: I will. I agree with
5 Greg. There is -- the apportionment statute
6 hasn't changed, and the definition of OD has no
7 relevance to it, because you're going to be an OD
8 before you get apportioned. So you've already
9 passed that threshold, whatever the definition is,
10 that just gets you to being an OD, and then the
11 apportionment applies no matter what.

12 THE COURT: But for purposes of this
13 case, all that the Supreme Court has dealt with is
14 the 1987 act, and they've dealt with it based on
15 it being different from the pre-1987 act. So
16 whether or not we can expand the logic and go back
17 before 1987 is the question of the day that I
18 haven't answered, and I will have to answer it.

19 But at least in this case, it seems to
20 me that the global claim is at least back to 1987.
21 We'll have to figure out how we're going to
22 notify. Maybe just go all the way back to 1983
23 and notify them, and they can put a claim in, and
24 they can sort out; and if doesn't apply to them,
25 it doesn't apply to them, rather than trying to

1 would be an appropriate place to address that, or
2 in any group regard, that's one of the things that
3 would be an issue here, is what is the prospective
4 application, and whether the lien is going to be
5 claimed on that, and if so, what is the date that
6 you're going to claim it from.

7 THE COURT: If I recall correctly, at
8 least in the other cases we've had so far, there's
9 no prospective claims.

10 MR. MARTELLO: Except for Wild.

11 MR. ANGEL: Jim Hunt, he wanted to
12 consider it first.

13 THE COURT: He's going to think about
14 it.

15 MR. ANGEL: He's the only one that
16 potentially may.

17 (Off the record briefly)

18 THE COURT: Shift back to serious
19 business. The only one so far who is thinking
20 about claiming a lien prospectively is Jim Hunt,
21 so I guess I can give you the same latitude to
22 think about whether or not you want to --

23 MS. WALLACE: It wouldn't make sense in
24 my case.

25 THE COURT: You don't want to do that.

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1 MS. WALLACE: How can you get a portion
2 of apportionment when they're not going to be
3 apportioned anymore? So it just doesn't work that
4 way.

5 MR. JONES: You have the exactly
6 appropriately right trust in the insurance
7 industry.

8 MS. WALLACE: That's right. Maybe I
9 should reserve some action of the insured.

10 THE COURT: So we don't have to worry
11 about that. We won't worry about prospectivity,
12 of the lien prospectivity.

13 The next things that we did, we're
14 dealing with whether or not there's a common fund,
15 and also whether or not the decision is
16 retroactive. Am I correct those are issues in
17 this case, too, Larry?

18 MR. JONES: Yes, Your Honor.

19 THE COURT: And the State Fund had
20 indicated in their case in Schmill, and Larry has
21 indicated in Wild and Mathews, that they want an
22 opportunity to muster some evidence that goes to
23 whether or not this should be a common fund case
24 or a class action, and the Chevron test also, with
25 respect to the Chevron test, if we apply that.

1 MR. CADWALLADER: Excuse me. You said
2 Schmill as one of those cases. Stavenjord.

3 THE COURT: Is that what you, Dave --
4 right. And the way this thing is developing is
5 I'm going to make a determination in Flynn
6 upcoming regarding retroactivity, and there's
7 another issue in there, but these cases are
8 different than Flynn. Flynn is maybe a little bit
9 more certain, and a question is one of the
10 distinguishing features of the rest of these
11 cases from Flynn, if I determine Flynn is
12 retroactive.

13 One of the things I'll do in Flynn is
14 determine whether or not I'm going to follow
15 Chevron, or I'm going to follow Porter -- and I
16 can't remember the name of the Supreme Court case
17 that Porter is based on -- which is a case that
18 says all civil cases are retroactive. I'll make
19 that call.

20 But I'm going to go ahead, and even if
21 I make that call, and say I'm not going to apply
22 Chevron, I'm going to go ahead and apply a Chevron
23 analysis in the alternative. In each of these
24 cases, I'll do the same thing, in Schmill,
25 Stavenjord, and Wild, and everything else, so that

1 we've got a complete record. So these are all
2 going on up to the Supreme Court again for the
3 determination on these other issues.

4 And my goal is to get all of these
5 issues decided, and packaged, and all up to the
6 Supreme Court, so that even though I'm having to
7 decide in the alternative, if I get reversed on
8 one point, I don't have to go back and have a fact
9 finding, new hearing, and then have that shipped
10 up again to the Supreme Court.

11 So my expectation is a Stavenjord II,
12 and Schmill II, and a Ruhd and a Rausch II,
13 there's not going to be three, four, five, that
14 sort of thing. So that's the way I'm
15 contemplating handling that.

16 And I assume -- Am I correct, Larry,
17 you're going to want the same opportunity in this
18 case to muster some evidence, at least look at the
19 possibility of doing that?

20 MR. JONES: Yes, Your Honor.

21 MS. WALLACE: What do you anticipate
22 that involving?

23 MR. JONES: Evidence, as I understand
24 it, that it's an unduly burdensome issue applied
25 retroactively. I would then look at the various

1 facts that I would hope would be relevant to
2 convince the Judge that it would be unduly
3 burdensome to apply retroactively.

4 MS. WALLACE: That's the internal
5 investigation then?

6 MR. JONES: Right. And then pursuant to
7 Judge McCarter's earlier discussions of other
8 cases, give you information, too, and maybe there
9 might be some agreement reached about something,
10 for example, maybe a class of cases that you would
11 agree should not be effected by this
12 retroactively. I don't know what they would be.
13 But there's the hope that something is out there.

14 But that would be the idea, and then it
15 may be that we look at this, and we find that we
16 really don't have enough of a volume or a problem,
17 I would have to abandon that approach.

18 THE COURT: And the class question is a
19 little bit different, but a little bit similar as
20 far as what's going to have to be done, or in just
21 those cases whether or not you've got a class or
22 you've got a common fund. And I don't know what
23 evidence you're going to develop, but I'm going to
24 give everybody an opportunity to sort through
25 that.

1 And my expectation being that you can
2 develop a set of stipulated facts as to the
3 kinds of things you want me to consider, then that
4 would be the best way to go, if we have to have an
5 evidentiary hearing, because if there is some sort
6 of dispute over certain things, then we could
7 probably do that.

8 But I gave everybody this morning 45
9 days to take a look at that, and the expectation
10 that there'll be communications back and forth.
11 Larry will communicate what he's doing; you'll
12 talk about whether or not it's possible to develop
13 some sort of stipulation and facts for purposes
14 of presenting the retroactivity issue, common
15 fund, class action issue.

16 MR. OVERTURF: Judge, we've formally
17 intervened.

18 MR. HAWKINS: Judge, I believe you
19 signed an order of intervention.

20 THE COURT: And you want to develop
21 similar evidence?

22 MR. OVERTURF: Correct.

23 MS. BUTLER: Or have that option at
24 least.

25 THE COURT: Okay. Because you're going

1 minute to have a little conference outside one
2 minute?

3 THE COURT: Oh, sure.
4 (Off the record briefly)

5 THE COURT: Back on the record.

6 MR. HAWKINS: With the Ruhd decision,
7 the State Fund is left in a pretty awkward
8 circumstance. We have that decision saying that
9 only the common fund applies to Liberty. So the
10 State Fund, at this point, we're trying to get
11 ready to implement this decision.

12 And we're not just like everyone else
13 here. We don't know quite how about to go about
14 it. At the same time we're waiting for somebody
15 to sue us because of Ruhd. Schmill doesn't apply
16 to common fund. It doesn't apply to us. So we're
17 kind of left out in the cold, basically waiting to
18 get shot at.

19 So we're not real clear on what to do
20 about attorney fees. We do have a case, Dale
21 Minnick, which Dick Martin has filed, and I know
22 that there's a couple of others in the hopper with
23 claimant attorneys about ready to bring those up
24 that flagpole as well.

25 So we're in a bit of a quandary as to

1 to be identically situated as far as carrying
2 everything out. So you need to communicate with
3 Laurie, too.

4 MR. HAWKINS: Not exactly, Judge,
5 because doesn't Ruhd throw a monkey wrench into
6 that?

7 THE COURT: It throws a monkey wrench
8 into the common fund fee thing, but it may not
9 throw a monkey wrench into what your
10 responsibilities are. I don't know. It's up to
11 you what you want to do intervention-wise.

12 MR. OVERTURF: I think we need to --
13 Clearly Ruhd is going to be appealed, and we're
14 not sure what's going to happen with that. So I
15 think our course will be to proceed along the
16 lines that Schmill will apply globally, so we can
17 put together the evidence and proceed that way,
18 because we don't know what's going to happen with
19 Ruhd.

20 So our preference would be to be able to
21 go ahead, and do the same thing Larry is going to
22 do, work with Laurie, produce our factual
23 evidence, what we frame as hardship in applying
24 retroactively.

25 MR. HAWKINS: Could we have just a

1 what to do as far as withholding, and withhold for
2 attorney fees, waiting to get sued or --

3 THE COURT: I think the same thing is
4 going to apply to all insurers in the state, that
5 is, I've authorized everybody to withhold, and
6 the withholding will have to continue until we
7 resolve who gets those attorney fees, just like in
8 Ruhd. In Ruhd, we keep withholding attorney fees,
9 and the Supreme Court will sort out who's
10 entitled to what.

11 MR. ANGEL: I was just going to say I
12 have briefed that issue in Ruhd. That's the great
13 thing about it. As long as you guys implement
14 the remedy before you get sued, the claimants get
15 the money, and the only issue is possibly if this
16 attorney does -- I apologize. I don't remember
17 your name -- But I think that's the neat thing
18 about the way Judge has applied it. You can avoid
19 being sued by simply complying quickly and
20 correctly.

21 MR. HAWKINS: It's going up on appeal.
22 You can't tell us how to implement.

23 MR. ANGEL: So you have to keep the
24 money, but I think in the future once this is
25 resolved by the Supreme Court, that will be the

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1 effect.
2 THE COURT: Right now, all the insurers,
3 even though they're paying the claims, there's
4 these retroactivity issues which will have to be
5 sorted out, which will affect them, and which is a
6 good reason probably to be intervened, so you have
7 an opportunity to argue it, although I'm giving
8 everybody an opportunity to argue it in any event.

9 But until we get that sorted out, I
10 think the insurers are just simply going to be in
11 the position of withholding, and I've authorized
12 that.

13 MR. HAWKINS: Not for us, you haven't.

14 THE COURT: Well, I will. I'll need --
15 This is a case where I need to authorize -- Well,
16 I'll issue an order, I'll issue a global order in
17 all of these cases.

18 MR. JONES: Your Honor, on the idea of a
19 global order -- and I can hear the State Fund with
20 permission -- we don't know how retroactive it is.
21 I think it's real simple to take the cases in
22 Schmill and Stavenjord from the date of your
23 decision forward, and clearly they're entitled to
24 the benefits of those decisions.

25 But are we now supposed to be going back

1 THE COURT: I think this morning we
2 agreed that prospectively, it would apply to all
3 injuries occurring on or after the Supreme Court
4 decision if they reverse me; my decision if they
5 affirm me; and the only issue would be -- and
6 that's for injuries -- the only issue would be the
7 date with respect to occupational disease cases
8 because of the discovery rule.

9 MR. MARTELLO: I understand that. But
10 what I'm saying is that my conversations with Tom
11 Murphy, that's not what his claim is going to be.
12 His claim is going to be that it is retroactive
13 from the date of the Stavenjord Supreme Court
14 decision.

15 MR. JONES: Your Honor, the effect of
16 that is just to create a bigger retroactive group.

17 MR. MARTELLO: Exactly, because he's not
18 claiming it prospectively. And so I assume that
19 that is exactly the reason for it, is to have a
20 larger pool to apply the common fund to.

21 MR. JONES: Which simply points to the
22 absence of a clear bright line on this issue of
23 what is prospective. I think this morning, the
24 persons, the attorneys who participated in
25 individual cases conceded in their cases exactly

1 and culling through our files, and identifying in
2 all of these common fund cases beneficiaries, and
3 then make a payment, because we don't know how far
4 we're going back, but we don't really have an
5 order that I'm aware of stating the effect of all
6 these decisions until or unless there's a
7 retroactive ruling. Am I correct on that?

8 MR. OVERTURF: I guess that's where I
9 was getting a little bit lost here. I don't think
10 the withholding is such a big issue right now.
11 Laurie has said she's not asserting a fee
12 prospectively. We can apply the precedent
13 prospectively, and we don't need to worry about a
14 fee. As far as retroactive claims, that issue is
15 still yet to be decided. So we're not going to go
16 back and start paying those until we get a
17 decision retroactive.

18 MR. MARTELLO: And then there's a
19 further issue. It's not as clear cut as it being
20 prospective from the date of -- on Stavenjord and
21 Schmill going forward. Conversations I've had
22 with Tom Murphy, his take -- and I don't want to
23 be misrepresenting it -- is that it goes from the
24 date of the Supreme Court decision, a prospective
25 application.

1 what you said. And I believe Tom is simply
2 pointing out that there's an attorney on another
3 case that was not discussed today, in other words,
4 we didn't have a conference, who has taken a
5 different view.

6 THE COURT: But he's taken -- his view
7 -- wait a minute. Is it narrower or broader?

8 MR. MARTELLO: His view, if I understand
9 it correctly, is that he's not going to claim a
10 fee prospectively consistent with everybody here;
11 but in order to enhance the pool that he can apply
12 it to retroactively or common fund, he believes it
13 should begin with the Supreme Court decision and
14 not with your initial decision.

15 MR. JONES: I would agree with that,
16 though, in our case, because they did reverse.

17 MR. MARTELLO: Stavenjord and Schmill
18 were simply affirmed.

19 MR. HAWKINS: That just adds another
20 year to his attorney fee bucket.

21 MR. JONES: And the point I'm simply
22 making, and that Tom is making, is at least one
23 other party disagrees with the approach. What
24 prompted my question was this idea of withholding.
25 If I'm not paying on cases prior to your decision

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1 in Schmill, or your decision in Stavenjord, then
2 there's nothing really for me to withhold because
3 I'm not paying.

4 We've not been paying in anticipation of
5 these hearings that would set the ground rules,
6 and I'm not aware of a ground rule that clearly
7 says you insurers do not have to go back actively
8 prior to the date of your decision in Schmill and
9 Stavenjord, and start identifying cases, and
10 making payments withholding attorney fees.

11 THE COURT: That goes to the question of
12 the stay. When I issued the stay -- in which
13 case, Stavenjord, or was it --

14 MR. HAWKINS: You issued a stay in
15 Stavenjord and Schmill pending the Supreme Court
16 decision.

17 THE COURT: No, I issued a stay
18 regarding retroactive application, because we got
19 the issue, and basically said pending I'm not
20 ordering to you pay it. I'm going to stay that
21 part.

22 MR. JONES: Your Honor, I'm simply not
23 aware. Maybe it's on my desk in the stack of mail
24 from hell. But what I'm suggesting is if we, in
25 all of these cases, get a clear rule that says

1 Schmill decision or the Stavenjord decision which
2 was an OD.

3 THE COURT: You're talking about a claim
4 that arises --

5 MR. JONES: -- has an effective date
6 arising, that has clearly arisen after those two
7 dates, we are paying those. There's just no doubt
8 about that. It's just that for cases with dates
9 of onset arising prior to those dates, we have the
10 whole retroactivity application issue before us.

11 And I'm hearing this discussion of
12 withholding attorney fees, which implicitly
13 acknowledges that we are going back, and looking
14 at these cases, and identifying them; and I'm not
15 aware of any insurer actively doing that because
16 we've all been awaiting this series of hearings on
17 that issue. So I have seen in my office --

18 THE COURT: There may be some issue
19 because of the -- The problem is other insurers
20 may just start paying these, especially if they're
21 small insurers, and don't have very many claims,
22 and they may not want to fight it, so they may
23 just pay them, so that's a clear possibility. So
24 if they do that, they could get them to abide, to
25 pay out the whole thing, so I think I still have

1 insurers, you do not now have to go back actively,
2 pending an order from this Court directing you to
3 go back, and start looking at decisions in Schmill
4 and Stavenjord prior to the date of your decision,
5 and in Mathews and Wild after the date of the
6 Supreme Court decision.

7 MS. WALLACE: So is it your position
8 that an active ongoing case where you were taking
9 an apportionment, that this ruling doesn't apply
10 to it?

11 MR. JONES: We don't know if the date of
12 OD predates the Schmill decision by Judge
13 McCarter. We don't know how far back it goes.

14 MS. WALLACE: But active OD cases that
15 were ongoing at the time of the decision, you're
16 saying you don't know if you have to pay those
17 pursuant to those decisions?

18 MR. JONES: If it would require
19 retroactive application, it would depend on how
20 far --

21 MS. WALLACE: That's what I'm asking.
22 Are you considering payment of active files to be
23 retroactive application as opposed to closed
24 files?

25 MR. JONES: Any OD with a date after the

1 to authorize withholding for anything that is
2 paid.

3 MR. JONES: Yes, Your Honor. There's
4 no doubt about that. But we're getting claims in
5 mediation now where they're saying pay under
6 Stavenjord and pay under Schmill, and they have a
7 date arising before the dates of those decisions.

8 THE COURT: That's the retroactivity
9 issue.

10 MR. JONES: Right. And we don't have
11 something from the Court saying you don't have to
12 go out and identify those claims now, and start
13 making payment for this time period.

14 THE COURT: I thought I had stayed
15 retroactive.

16 MR. MARTELLO: You did in Flynn.

17 THE COURT: In Flynn. Okay.

18 MR. MARTELLO: There was this discussion
19 about that very issue this morning, and again it
20 gets back to the issue that isn't resolved
21 obviously by this, but it's raised as to whether
22 it's the date of the OD, the entitlement date that
23 establishes whether -- if it's before the
24 decision, whether that then -- even though there's
25 ongoing benefits, whether that's retroactive

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1 application, because you're going back.
 2 And then that was one of the issues that
 3 was brought up, and I assume is going to be part
 4 of the briefing on the retroactivity.
 5 THE COURT: I would anticipate that
 6 that's the reasonable thing to do -- and I guess
 7 I'd ask you, Laurie, if you have any objection to
 8 this -- would be just to stay the retroactivity
 9 until we can get a decision on whether or not it's
 10 reversed, or stay any requirement that you proceed
 11 with those cases that are under issue, and the
 12 retroactivity issue, until we get that issue
 13 revolved.
 14 MS. WALLACE: I would disagree to the
 15 extent that your decision in Ruhd limits it to
 16 the parties. So to the extent you're getting a
 17 mediation request, somebody is getting a mediation
 18 request like -- not State Fund now -- but
 19 Travelers gets it on a Schmill case, I don't think
 20 they can say, "Oops, there's a stay," because
 21 they're not a party.
 22 THE COURT: But I can stay it as far as
 23 the parties are concerned.
 24 MS. WALLACE: As to the parties. But I
 25 think it would be limited to that.

1 MR. MARTELLO: But implicit in that is
 2 a determination as to what retroactivity is.
 3 That's part and parcel of this.
 4 MS. WALLACE: No, because once it gets
 5 filed, and they get to you, then as a party, you
 6 can decide the case, and say yeah, you're entitled
 7 to it pursuant to Schmill, but I'm going to now
 8 stay you paying it.
 9 MR. MARTELLO: That's assuming, though,
 10 Laurie, that the case is one that arose after the
 11 determination from this Court.
 12 MS. WALLACE: No, before.
 13 MR. MARTELLO: But if it occurred
 14 before, then are we not -- at least we're going to
 15 argue that that would be a retroactive
 16 application, and that determination is going to be
 17 made by this Court at some point, and I don't
 18 think --
 19 THE COURT: Laurie's point is simply
 20 that anybody can file, and they really aren't
 21 bound by what happens in this case. They can
 22 reargue it, or they can argue that it does
 23 apply to them, but it's not retroactive. And we
 24 shouldn't be stopping them from doing that.
 25 Now certainly there's other things. You

1 can come in and ask for a stay of the proceedings
 2 until this finds its way through this case, so we
 3 can stop the proceedings entirely, or we could do
 4 like we did with Geoff in the Ruhd case, which
 5 would be enter a judgment following whatever I do
 6 in these other cases, and then that could be
 7 appealed along with everything else, that it would
 8 just on the same track as the other cases.
 9 MR. MARTELLO: But I would think that
 10 would create a huge problem for the Court. If
 11 the --
 12 THE COURT: This is a huge problem for
 13 the Court. There's just no avoiding it.
 14 MR. JONES: Well, Your Honor --
 15 THE COURT: Because I guess Laurie is
 16 right in the sense that I can't stop people from
 17 pursuing the claims, from pursuing Schmill claims,
 18 even though it may involve a retroactive
 19 application. I can't stop them from doing that.
 20 And essentially I would almost have to do that to
 21 enter some sort of stay that would prevent them
 22 from doing it. So I think they can do it.
 23 So I think the only stay that I can
 24 enter is as far as requiring you, requiring the
 25 particular insurers in this case, from going,

1 sorting through and starting to pay claims on a
 2 retroactive basis until I've decided the
 3 retroactive issue. I think that's the limit of
 4 it.
 5 MR. MARTELLO: I would agree, but with
 6 respect to these other insurers, they do have the
 7 ability, then, to argue the retroactivity of it,
 8 which then I would assume that that issue is going
 9 to be determined in these main proceedings --
 10 THE COURT: You're absolutely right. It
 11 will be determined in these proceedings. And as
 12 everybody knows, I'm giving notice, universal
 13 notice. Anybody who wants to file a brief on this
 14 can file a brief, even Ralph Nader.
 15 MR. JONES: Your Honor, can I ask you a
 16 hypothetical just to flesh out what's going on.
 17 THE COURT: Will this require a bright
 18 line?
 19 MR. JONES: I sure hope so. Liberty
 20 Northwest is not a party to the Stavenjord
 21 decision. If I get a demand for Stavenjord
 22 benefits on a case that's, let's say, three years
 23 prior to your decision, would I be obligated then
 24 to go through and pay those benefits in the
 25 absence of any decision on retroactivity?

1 THE COURT: You can deny them based on
 2 the same reason you're denying them in this case,
 3 which is you don't think it's retroactive, and
 4 then their option would be to file a petition with
 5 the Court, which would present the same issue in
 6 these cases, and then my option would be to either
 7 stay that proceeding, or allow it to go forward,
 8 and just issue a judgment consistent with whatever
 9 I do here, hoping that I'm consistent.

10 MR. JONES: I think that's going to open
 11 the flood gates of litigation.

12 MR. MARTELLO: It's a nightmare.

13 THE COURT: It is. But the problem is
 14 everybody has got to think about this, who is out
 15 there, and that is these cases are going to
 16 proceed, and they're going to be determinative of
 17 the rights of all of these other cases. So
 18 hopefully everybody will wait.

19 There might be some statute of
 20 limitations problems for some people that they may
 21 want to get in and get it filed for sure, but I
 22 can't stop them at the courtroom doors and say,
 23 "You can't make your demand. You can't file
 24 this." Laurie is absolutely right about that.

25 What I can do in these cases is say in

1 on all of these issues about the same time so that
 2 we will know the answers to the retroactivity.
 3 And so there wouldn't be a need for that.

4 If we know it's retroactive, we know
 5 Laurie has a global claim, then I think basically
 6 this Court is in the position of administering the
 7 remedy for the whole industry. And that scares
 8 me, and I think I've made it pretty clear that if
 9 I'm going to do that, I want a better -- something
 10 more definite from the Supreme Court before we
 11 start embarking on that, and that's one of the
 12 things Ruhd will answer.

13 MR. MARTELLO: What I've struggled with,
 14 though, on this in the Ruhd case is how the Court
 15 is differentiating between the precedent that's
 16 set, and then who gets the common fund fees.

17 Because the precedent, for example, in
 18 Schmill was clearly established, and that
 19 precedent that -- depending upon whether it is or
 20 is not retroactive -- is applicable to everybody.

21 Now, the claim for common fund fees may
 22 be a different issue, but -- and whether you
 23 withhold for those to me is a separate issue from
 24 a determination as to retroactivity as to the
 25 precedent that was established in Schmill, and

1 these cases with these parties, I'm not going to
 2 require you to go back and start applying it
 3 retroactively using the common fund, and using
 4 the -- or creating as a class action until I've
 5 revolved these other issues, and then I'll
 6 consider -- then we'll go from there. I can do
 7 that, and that's what I will do.

8 MR. OVERTURF: Do these problems go away
 9 if Ruhd is overturned and --

10 THE COURT: What do you mean?

11 MR. OVERTURF: If Ruhd goes to the
 12 Supreme Court they say no, Laurie can assert her
 13 claim against all the insurers, then --

14 MS. WALLACE: Then the State would be
 15 universally --

16 MR. OVERTURF: Then you could do a
 17 universal stay.

18 MS. WALLACE: Because the decision in
 19 Ruhd --

20 MR. OVERTURF: It's because of the
 21 decision in Ruhd that we run into this problem.

22 THE COURT: Right, but I don't want that
 23 problem. When Ruhd goes up, at least -- I hope
 24 these other cases go up fast enough that maybe
 25 that won't happen. I would hope to get decisions

1 whether that decision goes back and applies -- it
 2 would apply, I would assume, to everyone, and it
 3 wouldn't differentiate between insurers.

4 THE COURT: You're probably right about
 5 that. I mean irrespective of whether Laurie gets
 6 paid, if it's retroactive, there may well be -- as
 7 I read the Supreme Court at this point subject to
 8 revision, if I happen to have an argument on a
 9 specific point. But it seems to me that they
 10 would have to follow the precedent that it's
 11 retroactive, even though no attorney fees flow
 12 from it.

13 And then the question is: What
 14 affirmative obligation do you have to go out and
 15 identify those cases? And certainly, you know
 16 what my read is on Murer. My read on Murer is for
 17 sure, at least as far as the parties are
 18 concerned, that the insurer that was the losing
 19 party on the decision does have an affirmative
 20 obligation. I guess that I said that in Rausch.

21 MR. OVERTURF: I guess taking Tom's
 22 point a little bit further, though, if because
 23 Laurie set the precedent in Schmill, the question
 24 of whether retroactivity cases will have to apply
 25 it to will be answered in her case, the only thing

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1 we have left out there is a precedent that can be
2 applied prospectively going forward.

3 If someone else comes forward and tries
4 to file -- another insurer, somebody files against
5 another insurer, asking that it be applied
6 retroactively, that question is already before the
7 Court. And I think you have the power to say no,
8 I'm staying the decision on the retroactive
9 application of that precedent that's going to
10 apply to everyone.

11 THE COURT: When that case comes to me.

12 MR. MARTELLO: How is that any different
13 from any other case?

14 THE COURT: I can't stop them.
15 Basically I can't close the courtroom doors and
16 say okay, universally, nobody has to pay benefits
17 until this gets up to the Supreme Court, and you
18 can't even file litigation on that. I can't close
19 the courtroom doors. I've got to let them
20 through.

21 Now once it's in the courtroom doors,
22 procedurally I may be able to say I'm staying
23 these proceedings pending a Supreme Court
24 decision, or I'm just going to rule as a matter of
25 law, as I did in Ruhd, and certify them, and then

1 goes to, aren't you?

2 MR. MARTELLO: I'm concerned about the
3 fact that what it does is it invites litigation
4 because --

5 THE COURT: The problem is I can't make
6 a decision until I have that case. I think I'll
7 have the case. If they want to step into the
8 courtroom, and I have to listen to their argument,
9 or should I stop this, should I make a decision on
10 it. Obviously everybody is going to be aware
11 that if they force me to make a decision on it,
12 I'm probably to going make the same decision. I
13 certainly did that in Ruhd.

14 There's different things that -- I can't
15 stop them from coming into the courtroom. I can't
16 commit myself in advance, and say that this is
17 exactly the way that I'm going to handle it,
18 because I have to deal with these cases on a
19 case-by-case basis if they're filed. That's the
20 best I can --

21 MR. MARTELLO: And I agree. But if the
22 issue is exactly what is being claimed here, which
23 is Schmill, whether the apportionment applies or
24 not, that's been determined here. You're right.
25 The other issues that may come up, you can't

1 you can stand in line waiting for the Supreme
2 Court decision one and two.

3 MR. MARTELLO: And that process sounds
4 like a good one to implement, such that the
5 parties then are allowed to preserve, if they
6 think they're there -- there may be some statute
7 of limitations problems, but then they're aware of
8 the fact that it's going to be governed by a
9 determination on this case because a precedent was
10 established in this case.

11 THE COURT: Oh, sure, and they'll be
12 aware of that.

13 MR. MARTELLO: But I don't know if they
14 are. I guess that's what I'm getting at, is that
15 at least the impression I get from the Ruhd
16 decision is that it's "Katie bar the doors" as far
17 as going forward with your claim, and it's insurer
18 specific. And I think if this Court were to put
19 out something indicating that obviously they can
20 bring their claims, but those matters will be
21 stayed pending the determination of the underlying
22 case that set this precedent, then I think that
23 that would send --

24 MS. WALLACE: But you're more worried
25 about the common fund, and what you're thinking it

1 decide on those. But with respect to the
2 apportionment, I think that's determined, and I
3 think that can be announced.

4 MR. OVERTURF: I think maybe we're
5 making this more complicated than it needs to be.
6 If there's a stay again for the State Fund as an
7 intervenor in this case, a stay for Liberty as an
8 intervenor in this case, from retroactively
9 applying, digging up the claim and paying them,
10 then when we get -- somebody wants to file
11 mediations and claims against us, it's very easy
12 for us to say we've got a stay.

13 If another insurer comes in, or someone
14 files against another insurer, and they bring that
15 claim to you, then I guess my question would be:
16 Who then would have standing to ask for a stay in
17 that case? Does Laurie have --

18 THE COURT: It would have to be. There
19 would have to be -- somebody would have to file a
20 case. We couldn't stop a claimant who came in to
21 you and say, "Well, I disagree. I want to be paid
22 for my benefits, and if you don't pay them, I'm
23 going to file with the Court." They could
24 certainly file with the Court. And then we'd be
25 in that same situation.

1 MR. JONES: You will be issuing a stay
 2 in this case.
 3 THE COURT: In this case, yes.
 4 MR. JONES: Then a separate one in the
 5 Ruhd case as regards Liberty -- we're in that
 6 case -- and a stay in Mathews.
 7 THE COURT: I'll issue a stay in the
 8 these cases insofar as the defendants are
 9 concerned, relieving them from, at least at the
 10 present pending my determination of that,
 11 affirmatively identifying those claims, and paying
 12 those claims until we resolve the issue.
 13 MR. JONES: Staying the named
 14 defendants.
 15 THE COURT: Yes.
 16 MR. ANGEL: I just want to be sure I'm
 17 clear. If it's going to be stayed until your
 18 decision, it sounds like that's 90, 120 days,
 19 something like that, retroactive application,
 20 which we're going to get guidance from in Flynn.
 21 It's not going to then be stayed after that again
 22 until the appeal comes back? Because some of
 23 these people, like medical bills, could be several
 24 more years away from coverage.
 25 THE COURT: The thing is we don't have

1 The other thing that came up when we
 2 were just off the record is Larry, as I understand
 3 it, you're also challenging the request for common
 4 fund for class certification on the basis it
 5 wasn't pled, and that's another issue that we need
 6 to address.
 7 MR. JONES: Yes, Your Honor. The Flynn
 8 issue.
 9 THE COURT: And probably Flynn is
 10 probably going to decide that.
 11 And so Laurie, I've issued a blanket
 12 invitation, and if you want to brief that in the
 13 Flynn case when I decide that, it will probably
 14 carry over to your case.
 15 MS. WALLACE: Our deadline is the 11th?
 16 THE COURT: Right.
 17 MS. WALLACE: You're going to put me in
 18 my grave, Your Honor.
 19 THE COURT: Do you need an extension of
 20 other cases?
 21 MS. WALLACE: I need an extension of my
 22 life. How about cloning?
 23 THE COURT: Welcome to the club. If you
 24 know if you have specific problems and you need
 25 any extensions, let me know.

1 medical bills that are involved --
 2 MR. ANGEL: I'm thinking Mathews and
 3 Wild.
 4 THE COURT: Mathews and Wild may be a
 5 little bit different situation. Once I make the
 6 determination, I'll have to make the determination
 7 I assume on whether or not to stay it on appeal,
 8 and I may or may not stay it on appeal, and it may
 9 or may not depend on how confident I am in ruling,
 10 and that in turn may depend on the particular
 11 case. We may get different results in different
 12 cases because they're different cases.
 13 MR. ANGEL: And the stay excludes the
 14 named parties; is that fair to say?
 15 THE COURT: Right. Yes. The named
 16 parties have to -- the insurer ought to be paying
 17 those real quick.
 18 MR. JONES: Prospective.
 19 THE COURT: No, the parties.
 20 MR. ANGEL: Prospective and named.
 21 MS. WALLACE: Like you paid in Schmill.
 22 THE COURT: You already paid Schmill?
 23 MR. JONES: I paid Schmill.
 24 THE COURT: So that's the way I'll deal
 25 with that.

1 MS. WALLACE: Okay.
 2 THE COURT: I'm pretty good. I'm pretty
 3 sympathetic to attorneys' problems that they have.
 4 Do we have any other issues that are lurking in
 5 this case?
 6 MR. JONES: Not that I'm aware of, Your
 7 Honor.
 8 MS. WALLACE: I don't think so.
 9 THE COURT: That's enough. Anything
 10 else we want to discuss? This is the last of the
 11 conferences today.
 12 MR. JONES: Your Honor, only because
 13 Laurie is here, and perhaps Laurie would rather
 14 defer on the Cheetham case. Perhaps because
 15 Laurie is in the same office, we could do it by
 16 telephone where we have to discuss these same
 17 issues.
 18 MS. WALLACE: That would be great.
 19 MR. JONES: We may need adult
 20 supervision on this issue. I have a feeling Dave
 21 is going to look to you for a lot of adult
 22 supervision.
 23 MR. MARTELLO: I think the Court can
 24 enter a guardian.
 25 THE COURT: Let's do that. We can do

1 that by telephone. Why don't you talk to Dave and
 2 arrange for a telephone conference. I would
 3 expect basically Cheetham to follow the same track
 4 as the rest of all of these cases unless there's
 5 nuances to it. All right. We will be adjourned
 6 for the day.

7 (The proceedings were concluded
 8 at 4:26 p.m.)
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1 CERTIFICATE
 2 STATE OF MONTANA)
 3 : SS.
 4 COUNTY OF LEWIS & CLARK)
 5 I, LAURIE CRUTCHER, RPR, Court Reporter,
 6 Notary Public in and for the County of Lewis
 7 & Clark, State of Montana, do hereby certify:
 8 That the proceedings were taken before me at
 9 the time and place herein named; that the
 10 proceedings were reported by me in shorthand and
 11 transcribed using computer-aided transcription,
 12 and that the foregoing -44- pages contain a true
 13 record of the proceedings to the best of my
 14 ability.

15 IN WITNESS WHEREOF, I have hereunto set my
 16 hand and affixed my notarial seal
 17 this day of , 2003.

18
 19 LAURIE CRUTCHER, RPR
 20 Court Reporter - Notary Public
 21 My commission expires
 22 March 9, 2004.
 23
 24
 25