

TRANSCRIPT OF PROCEEDINGS

WORKERS' COMPENSATION COURT  
CONFERENCE

Hearing No. 3750  
Volume XVIII

Helena, Montana  
September 20, 2006

\* \* \* \* \*

CASSANDRA SCHMILL

Laurie Wallace

vs.

LIBERTY NORTHWEST INSURANCE CORP.  
and MONTANA STATE FUND

Larry W. Jones  
Bradley J. Luck

An in-person conference was held on the above date at the request of Petitioner's counsel. The purpose for the call was to set out the issues to be briefed. Counsel and persons attending the conference were:

APPEARANCES:

JUDGE SHEA  
JEANINE BLANER  
BRYCE R. FLOCH  
OLIVER GOE  
BRIAN HOPKINS  
STEVE JENNINGS  
MALIN STEARNS JOHNSON  
LARRY JONES  
BRAD LUCK  
TOM MARRA  
TOM MARTELLO  
CRIS MCCOY  
TOM MURPHY  
PAUL SIMON  
RONALD A. THUESEN  
LAURIE WALLACE

1                   The following proceedings were had:

2

3                   THE COURT: We are here on Schmill versus  
4 Liberty. This is a conference that had been requested by  
5 petitioner's counsel on this to kind of work through some  
6 issues. The cause number on this is 2001-0300.

7                   So, Laurie, why don't -- I'll just kind of let  
8 you get the ball rolling. I know the only -- and I want to  
9 make sure I didn't miss anything. The only e-mail I  
10 received was from Brad. That kind of set out some stuff,  
11 and I assume everyone else has that and had a chance to  
12 look at it. If you haven't, if anybody hasn't, let us know  
13 and we can print up a copy and give it to you. Is there  
14 anybody who didn't get Brad's's e-mail?

15                   Okay. So, Laurie, why don't you just kind of --  
16 I'll let you take us off here, and we will just kind of see  
17 where we can move through and have the whole case resolved  
18 by noon.

19                   MS. WALLACE: Okay. Well, thank you guys.

20                   COURT REPORTER: Could you please hold up your  
21 number to identify yourself?

22                   MS. WALLACE: So it seemed to me that, you know,  
23 we are at the stage in the claim where we need to start  
24 briefing whatever issues are still unresolved that are out  
25 there.

1           It seemed as though, obviously, some of these  
2 issues are being briefed in other cases, so we don't need  
3 to duplicate that. I wouldn't think that would make much  
4 sense.

5           THE COURT: And I am sorry, I don't want to --  
6 this is "Jim/Jim."

7           I don't want to step on -- but one of the things  
8 that I would kind of let you, you know, and I was hoping to  
9 have this out because one of the, obviously, the big issues  
10 that was specifically sent back to this Court to do -- and  
11 I apologize it hasn't come out sooner -- is we have got the  
12 order drafted in Flynn on the final settled issue. And I  
13 was hoping to actually have that issue before we had this  
14 conference, and just couldn't get it finalized. It will be  
15 out by the end of next week. So we might be able to kind  
16 of at least, as far as that issue goes, we can kind of  
17 move, you know, short-circuit that, and move through, just  
18 because that obviously is one of the significant issues for  
19 this case.

20           And then just to kind of let you know where my  
21 thoughts are, as I was kind of looking through things is  
22 the scope of the retroactivity, and I will throw this out  
23 and I will let you address it, Laurie, and whoever else.

24           It would seem to me that the scope of  
25 retroactivity on this is one that I don't see any

1 appreciable difference between that and what's going to be  
2 decided in Stavenjord at some point, unless I'm missing  
3 something. These seem to be basically the same class of  
4 claimants, and so is that -- I mean, is that something  
5 that -- and I guess I'll throw that out there because those  
6 are two of the main issues that I'm kind of looking at,  
7 that I'm wondering about and ask you to just kind of speak  
8 to.

9 MS. WALLACE: Well, I think factually maybe there  
10 is a difference on that issue because as I read Brad's  
11 briefs on that, you know, one of their challenges to  
12 Stavenjord of retroactivity is the fact that some of those  
13 issues maybe weren't raised or could have been raised  
14 sooner, and I don't think that same issue is evidenced in  
15 the Schmill -- with the Schmill issue.

16 THE COURT: Okay.

17 MS. WALLACE: So it seems as though, seems as  
18 though, you know, the request at the time that we raised  
19 the case was that it be retroactive to July 1 of '87, and  
20 that's what McCarter had said, unless there was nothing  
21 that changed that --

22 THE COURT: Right.

23 MS. WALLACE: -- on appeals, so I think there  
24 maybe are a little different issues with that claim.

25 THE COURT: And that's the same request in

1 Stavenjord, isn't it, the July of '87?

2 MS. WALLACE: Well, he requested that, but he  
3 wasn't given that in the lower court, so there was a court  
4 ruling that date was a different date.

5 THE COURT: And you know, and maybe I should just  
6 speak in the broader sense, then, and I don't want to get  
7 you off track, if you haven't, kind of an organized way of  
8 moving through these.

9 I want to speak to, as we were talking about some  
10 issues that, as you said, can be or -- and will be decided  
11 by other cases either here or up there. And one of the  
12 ones that specifically I am wondering is, maybe if we can  
13 identify, is there something -- because obviously the ones  
14 like on the final enclosed, that's something that's within  
15 my power to at least give some measure of guidance with the  
16 order in Flynn.

17 But the ones with Stavenjord are obviously beyond  
18 my control. So what I am wondering is: What are issues  
19 that, if we can identify issues that are in Schmill that we  
20 can address that are going to be just that, really, we are  
21 not duplicating efforts or we're not going to make a  
22 decision that ultimately may be covered by Stavenjord  
23 anyway, which is obviously going to be the final word on  
24 it.

25 Go ahead, Brad.

1 MR. LUCK: Your Honor, one thing I think is  
2 important to note is that the briefing, I think, in Reesor  
3 and Flynn in relation to those retroactive implementation  
4 issues was much more focused than any discussion or  
5 briefing in Stavenjord. And even though Stavenjord is  
6 going to decide, talk a lot about retroactivity, and  
7 certainly be guiding us as we move through that.

8 It creates an interesting problem, because I  
9 don't think the issues, you know, certainly on oral  
10 argument they started to be developed, but in terms of the  
11 actual briefing, the briefing done in Reesor and Flynn was  
12 so much more developed in terms of those particular issues  
13 than Stavenjord. And it may be that the Stavenjord  
14 decision still rules and maybe even supersedes some of the  
15 things you do, but I think it's going to create an  
16 interesting study for all of us after it's decided,  
17 especially compared to what the Court is going to do with  
18 the Flynn decision next week.

19 THE COURT: Okay. And I wasn't trying to  
20 over-simplify. I guess one of the things I was just kind  
21 of noting and obviously the parallels, and I'm aware there  
22 actually was a request to consolidate these for the Supreme  
23 Court's determination, wasn't there --

24 MS. WALLACE: Brad kept trying, right.

25 THE COURT: Yeah, so I mean, we are talking about

1 constitutional challenges, the equal protection challenges  
2 to the Occupational Disease Act, so I can appreciate there  
3 are some distinctions. It seems, in the general sense, a  
4 lot of this -- and I appreciate your comment, Brad, on the,  
5 you know, the development and the focus of the briefing and  
6 that.

7 I'm trying to identify, I guess, with respect to  
8 Stavenjord, how am I going to be making decisions that  
9 ultimately are going to be, you know, decided by  
10 Stavenjord, in any event, and that's what I am trying to  
11 focus on. And if there are none because of the scope of  
12 the briefing of the development of the briefing, that's  
13 fine.

14 I just -- obviously, it seems to be -- I don't  
15 want to be engaging in an exercise of futility by issuing,  
16 and obviously, the key one in Stavenjord, and Tom sure can,  
17 obviously, speak to it as anyone here, is the scope of the  
18 retroactivity. So that's what I am trying to identify for  
19 my own benefit.

20 MR. MURPHY: This is Tom Murphy. We did brief a  
21 lot of the other issues like the, you know, the -- I call  
22 them the "grab bag" defenses, the contract issue, and  
23 things like that. They threw in three or five or six or  
24 seven extra things, one page of argument on each.

25 And I also would note for the Court that the

1 Supreme Court took particular attention to, you know, that  
2 question about, "What's a settled claim?" I think we are  
3 going to get a clear answer on that, too. Three or four of  
4 them wrote that down when I informed them there was a  
5 question about that.

6 THE COURT: Well, and Tom, you came in late. I  
7 was saying, I was actually hoping to, on the final or  
8 settled -- and probably whether it's going to be addressed  
9 by Stavenjord, this may be an example of, you know,  
10 Stavenjord may, you know, either validate or overrule. But  
11 I have got -- the final or settled issue has been drafted.  
12 The order is drafted on that in Flynn, and I was hoping to  
13 have that out before we had this conference. You weren't  
14 here to hear that. But that's something we are going to  
15 have out next week, so...

16 Okay, anyway, Laurie, I'm sorry. So I mean, I  
17 guess, obviously, we want to identify what issues, and I  
18 think Brad's e-mail is helpful in this regard, too. I  
19 think, then, maybe what we can do is try to move through,  
20 identify the issues that are still left to be decided.

21 And obviously, the specific one that came back  
22 from the court in Schmill II finally settled, and I believe  
23 that will be just, that would be addressed by Flynn next  
24 week.

25 But then, so what other things do we have to do



1 to kind of move this forward? If we can get any sense of  
2 consensus on that. And I'm sorry, go ahead.

3 MS. WALLACE: What I did is I simply went through  
4 the responses to the summaries, and I wrote down the  
5 defenses that were raised, and then I just cross-referenced  
6 to see which ones were already briefed in the other cases.  
7 And that left, you know, a handful of ones that were not  
8 yet briefed and didn't seem like that might be. They were  
9 raised in Schmill, but not particular to Schmill, but they  
10 were raised here.

11 THE COURT: Right.

12 MS. WALLACE: And I don't see where they were  
13 briefed anywhere else.

14 So it seems to me that, you know, I still --  
15 there isn't a specific response to the summaries from the  
16 State Fund, and so there possibly are other defenses that  
17 might be raised here.

18 But it seems as though we need to identify what  
19 defenses the insurer still wants to raise, and begin the  
20 briefing process of those defenses.

21 THE COURT: Without, obviously, duplicating the  
22 briefing in Reesor and Flynn.

23 MS. WALLACE: Right.

24 THE COURT: That makes sense to me.

25 MS. WALLACE: So, I just -- I mean, I can read

1 the ones that I wrote down as having come up from the  
2 responses that we have gotten so far.

3 THE COURT: Sure.

4 MS. WALLACE: There was one about the order to  
5 identify all of the Schmill beneficiaries, creates an  
6 unreasonable and undue burden on the defendants. That was  
7 kind of addressed in the Chevron (phonetically) factors,  
8 not really being a defense, but --

9 MR. JENNINGS: That one is mine, and I think it's  
10 assumed in some other ones that, I guess, are on your desk.

11 MS. WALLACE: I think most of these first ones  
12 are yours, Steve, then. There is a due process claim that  
13 the due process clause of both the state and federal  
14 constitutions preclude application of Schmill to non-party  
15 defendants, non-party insurers.

16 There's also one of the non-participating  
17 beneficiaries who cannot be identified; and therefore, no  
18 common fund can be maintained. And the basis for that is  
19 that simply the age of some of the files, maybe they have  
20 been destroyed or, you know, the passage of time would  
21 limit the identification of the beneficiaries, and so you  
22 can't maintain a common fund.

23 Let's see, it was also raised that the Court  
24 lacks personal jurisdiction over the non-party defendants.  
25 Since they didn't participate in Schmill I or II, they are

1 not bound by the decisions in those cases.

2 And there was also one that I just wrote down in  
3 brief that this is not a proper Common Fund case. I think  
4 that's already been decided.

5 And then the UEF had some of its own defenses,  
6 mainly that it's not an insurer, and so that special rule  
7 should apply to the UEF so they could raise their own.

8 But the other ones that have been raised as far  
9 as the waiver and the statute of limitations, the attorney  
10 fee lien and the breadth of it, and the amount of the  
11 attorney fee lien, have all been raised in either Reesor or  
12 Flynn, so I don't think those would be still out there as  
13 defenses.

14 THE COURT: Okay. So I count five exclusive of  
15 the UEF defense, or am I --

16 MS. WALLACE: Right.

17 THE COURT: Okay.

18 MR. JENNINGS: With respect to the amount of the  
19 attorney's fee, I understand its been briefed before and I  
20 would like to reference that previous brief so we can keep  
21 it in the record in this case.

22 THE COURT: In terms of?

23 MR. JENNINGS: In terms of the 25 percent  
24 across-the-board fee --

25 THE COURT: Okay.

1 MR. JENNINGS: -- what's contemplated by the  
2 Common Fund.

3 She is right, that's been fully briefed, but I  
4 would like to reference that to keep it in the record.

5 THE COURT: Sure, and I don't think there's any  
6 problem with that.

7 Okay, well, why don't -- I guess, I just -- I  
8 mean, obviously, and I guess maybe what I might ask you to  
9 do, Laurie, is just by way of e-mail, to copy everyone so  
10 that we are -- we are going to have a transcript of this to  
11 kind of set out that you're identifying these issues that  
12 you think still require additional briefing so we can set a  
13 briefing schedule, and I think that makes sense.

14 What about -- and I guess Laurie has kind of  
15 identified these things, so I guess I would ask anyone else  
16 to speak if they think there are additional issues to be  
17 briefed or identified. If they think these have been the  
18 ones she has identified, have somehow been covered in other  
19 cases or that are have been raised in other cases and are  
20 pending a decision in other cases, or where we are at on  
21 that, so I'll throw that open.

22 MR. LUCK: Well, Your Honor, I guess those that  
23 we listed that weren't included in Laurie's list that  
24 wouldn't be determined by your determination in Flynn  
25 that's coming out, I think we believe needs some attention.

1 THE COURT: Okay, and you are talking about from  
2 your e-mail?

3 MR. LUCK: Yes, sir --

4 THE COURT: Okay.

5 MR. LUCK: -- as to the retroactivity issues.

6 THE COURT: That's what I was looking at, myself.

7 MR. LUCK: The others, some are very individual  
8 to our remediation, and working with Laurie, in terms of  
9 the State Fund, but there are a few things there that do  
10 overlap with the other carriers.

11 THE COURT: Okay, specifically?

12 MR. LUCK: The first thing in particular, I  
13 think, is the -- I'm not sure what the status of the  
14 implementation order was that we sent in for discussion  
15 purposes last September. We were going to have a  
16 discussion and a call, and I don't think -- I think other  
17 things kind of took over at that time, and we didn't get it  
18 finalized.

19 THE COURT: Right, and maybe we should -- this is  
20 the one you are talking about that is the September 15,  
21 2005 --

22 MR. LUCK: Yes.

23 THE COURT: -- order?

24 Okay, and maybe that is something, because this  
25 is obviously on the withholding of the attorney's fees.

1           And I note, and probably this is, since we have  
2 got kind of all of the relevant parties here, it certainly  
3 makes sense to address that because, obviously, this  
4 implicates Stavenjord, as well.

5           So I know and I have read your letter, Brad --  
6 actually, I guess it would be Tom Harrington. I read Tom's  
7 letter and Tom Murphy, just to distinguish our Irish "Toms"  
8 here.

9           His response, and so I know that, I mean, this  
10 should be something that -- and Laurie is here. And now,  
11 Laurie, you are -- this was something that was prepared  
12 jointly by you and the State Fund, right?

13           MS. WALLACE: Well, we were working on it. I  
14 couldn't find any of the back-and-forth that we did. It  
15 seemed as though there were still some things that weren't  
16 quite -- I think maybe I agreed to it and Tom still had  
17 some reservations about some of it.

18           THE COURT: And I think Tom's reservations were  
19 to the Paragraphs 3 and 4, or 2 and 3? What was it?

20           MR. LUCK: Your Honor, I think, as I recall the  
21 progression and some of these things get jumbled and then  
22 the cases do, we proposed an initial order, and Tom had  
23 some input. And I think the two Toms worked together and  
24 maybe attended to those, and Laurie still had some  
25 questions at that point. And the letter was still, the

1 order was still in a proposed draft form, and then we were  
2 going to have some further discussions, and I think other  
3 things came up and we didn't get it finalized.

4 THE COURT: Okay. Maybe that would be something  
5 that if -- probably the easiest way to do that, rather than  
6 since we have a lot of other people here who probably don't  
7 have any interest in it one way or the other is -- and it  
8 sounds like you are kind of moving towards a resolution of  
9 it, is that --

10 MR. MURPHY: We haven't even talked about it for  
11 a long time, have we? For a year.

12 MS. WALLACE: No, we haven't.

13 THE COURT: Then maybe, you know, we are all  
14 here. It might be just as easy to do it right now, or it  
15 might be just as easy to, if you feel you have something  
16 that can be resolved, to put your -- go ahead, Brad.

17 MR. LUCK: Your Honor, the scope of the order as  
18 proposed does affect all of the other carriers, too. So we  
19 were involved in it, trying to keep Stavenjord and Schmill  
20 and the carriers that were involved there clear and on the  
21 same page, but I think that the scope of the order would  
22 include everybody.

23 THE COURT: Well, why don't we -- you know, what  
24 might be a good idea is, let's -- I mean, it's only a  
25 two-page order, not even a two full pages. I don't know if

1 anybody else would have seen it. Why don't we make a copy  
2 of this with these letters, then, and circulate that  
3 around?

4 CLERK: Do you want me to make everyone copies?

5 THE COURT: Yeah, unless anybody has an objection  
6 to that? Why don't we do that, and we can get that  
7 hammered out, if nothing else.

8 MS. WALLACE: As to substantive defense, Brad,  
9 are there any others that needed to be added to the list?

10 MR. LUCK: Anything other than on the e-mail?

11 MS. WALLACE: Well, what, in the first part of  
12 your e-mail, is not covered by the defenses that I have  
13 read earlier.

14 MR. LUCK: Right.

15 MS. WALLACE: Yeah, which ones? What issues?

16 MR. LUCK: Well, we don't know how many of these  
17 will be determined by the order of the Court's issuing, so  
18 we need to see that.

19 THE COURT: And I think that under 1-A, Roman  
20 Numerals II and III, that those will both be addressed, and  
21 those will be addressed in the order in Flynn, I think.

22 Now, it may take a different view of it when you  
23 see Flynn, and I won't be surprised, and you can feel free  
24 to raise that, obviously. But I think as to that issue --  
25 and the order in Flynn is going to come out before I issue



1 an order saying that these are the issues that I want to be  
2 briefed anyway. So we will have Flynn out next week on the  
3 final enclosed issue, and so then you can look at that.

4 And my belief is that these two, whether claims  
5 are inactive litigation, claims are in final, settled  
6 claim, closed or inactive, is going to be addressed in  
7 Flynn. But then after you have a chance to review Flynn,  
8 then you can actually -- I don't think we have to do this  
9 again, but you can actually, if you still think that is  
10 something, then we can maybe have a conference call or  
11 something on that with the people who believe that still  
12 has to be addressed, and I will be happy to hear that, or  
13 maybe by e-mail or whatever.

14 MR. LUCK: So in answer to the question, it may  
15 be that Roman Numeral VI is consumed by the Flynn order,  
16 also, but that would leave Roman Numeral I, IV, and V in  
17 terms of substantive issues that we think should be  
18 included.

19 THE COURT: Well, now, and on V, and you made a  
20 reference in there, Brad, in parenthesis at the bottom of  
21 V -- I'm assuming this is just pertaining specifically to V  
22 when we are talking about what dates will be utilized for  
23 the entitlement date -- that you set forth the parameters  
24 in the Stavenjord stipulation, which that was the thing  
25 that I asked him to e-mail to me yesterday.

1           So is that -- and Laurie, have you looked at  
2 the --

3           MS. WALLACE: I have. I copied it, but I must  
4 have forgotten to grab it out of the machine. It really  
5 just has to do with the one sentence identifying the  
6 definition of the onset of an "OD."

7           MR. LUCK: For the purposes of the State Fund, we  
8 would be willing to utilize that same agreement in Schmill,  
9 but don't know if the other carriers and Laurie would be  
10 interested in doing that. But we just need to do something  
11 to define that date.

12          THE COURT: The entitlement date, okay. And  
13 that's probably something -- I guess what I would ask,  
14 because I don't know -- well, this stipulation, I actually,  
15 I suppose this is probably up on our web site, isn't it?

16          MR. LUCK: Yes.

17          THE COURT: So I mean, that's available to the  
18 other carriers to look at, so maybe what we need to do on  
19 that, because, obviously, there's not everybody here, thank  
20 God. But maybe what we just need to do on that is just  
21 send out an e-mail to the list to reference specifically  
22 that they should look at that, and set an order of people  
23 that can either just agree -- and obviously, you know,  
24 Laurie, you are going to be, because you are pretty much  
25 representing the one side there on this, so you're going to

1 be saying whether that's acceptable to you. And I am not  
2 going to put you on the hot seat and ask you to say whether  
3 it is or isn't right here and now, but that's something  
4 that probably can be addressed in a more expeditious  
5 fashion than the entire briefing schedule, and we can send  
6 out an e-mail to everyone and say, "Here's the stipulation.  
7 It's at docket number such and such. Here's a link to  
8 that. Look at that and advise the Court within" -- it's a  
9 paragraph, so I would think "advise the Court within  
10 10 days whether you -- who is in agreement with the  
11 stipulation."

12           And I mean, my expectation would be is that -- or  
13 is that, you know, we are going to, obviously, not get  
14 responses from a lot of people, but at least what we can  
15 try to do and what I have been trying to do in sifting  
16 through this binder is just, you know, if we can identify  
17 the vast majority of the claimants and/or the vast majority  
18 of the insurers who are covering the vast majority of the  
19 claimants, and whether they are on board with this  
20 stipulation or not.

21           But I think we can at least make some substantive  
22 progress on that, so that's what we will do on that, is  
23 just circulate that out and get people -- we will do that  
24 today and send that out, reference where they can look at  
25 the stipulation and ask for a response within 10 days.

1 Does that make sense to everyone else?

2 MS. WALLACE: Sure.

3 THE COURT: Okay, what else? Let's move through.

4 Some of these, actually, Laurie has identified  
5 some things that are somewhat -- Laurie, in the first issue  
6 that you raised about identifying all of the onerous -- or  
7 I didn't write down the specific words of identifying all  
8 the beneficiaries. Is that going to be at least somewhat  
9 dovetailed with Brad under specific implementation issues?

10 I mean, that would, obviously, I would use the  
11 implementation issue. Does that somewhat dovetail under  
12 2-B, Roman Numeral II, that about the search identification  
13 documentation acceptable to claimant's counsel? Has there  
14 been any discussion among you and Brad and Larry or whoever  
15 about whether there is what would be acceptable procedure?

16 I know there are things that were raised that's  
17 addressed in the Court in Schmill II about the number of  
18 claimants and everything like that, and I guess maybe just  
19 dealing specifically with that, and some of this is,  
20 obviously, this will be narrowed, too, by some other orders  
21 just in terms of final settled and things like that because  
22 that could narrow down that number.

23 I can't remember, I think 3,154 is the number I  
24 heard from State Fund, but has there been any discussions  
25 among the parties, you and Brad, Larry, whoever, about when

1 it talks about, "What is a -- what would be a procedure or  
2 protocol that would be acceptable"?

3 MS. WALLACE: Well, there hasn't been a general  
4 discussion with the people that you have identified. I  
5 have had any number of insurers call me and say, "What  
6 parameters should I use to try and identify the appropriate  
7 Schmill claimants," and we have discussed what might work  
8 with their computer system. But somewhat, I think it's  
9 flexible somewhat to how their data is input into their  
10 computer, so we tried to identify some means.

11 And I think we talked about it once, Larry, at  
12 one of these hearing about looking for, obviously, if they  
13 have identified between "OD" and injury, that's the first  
14 step. Some of them don't.

15 THE COURT: That's kind of the threshold.

16 MS. WALLACE: Some of them, I thought if they  
17 could look at the cases that don't identify maximum PTD  
18 rates, you are going to get some out of that. You know,  
19 some people just didn't earn enough to get the maximum, but  
20 some of them did, and it was reduced because of the  
21 apportionment.

22 You know, it probably won't be relevant if the  
23 settled claims, obviously -- not obviously, but the writing  
24 is on the wall, they are not going to be part of this  
25 claim.

1 I did indicate to some of the insurers, if they  
2 looked at the settlement amount and if it was less than the  
3 \$10,000, you know, they could identify it as "OD" and it  
4 came under the ten, maybe that was a way to identify the  
5 fact there had been an apportionment.

6 So those are some of the things that we have  
7 discussed with some of the other insurers that have called.

8 MR. LUCK: Your Honor, each carrier has such a  
9 different system, different computer system, that it's  
10 really difficult to try to attempt to get something general  
11 other than responding, I think, to particular questions.  
12 And that's why we proposed, and I talked to Laurie about it  
13 yesterday, that our hope is that we can work through all  
14 the implementation issues in relation to the particular  
15 database that the State Fund has and the problems that  
16 arise there, and hopefully not have to come back with  
17 anything or too many things at all.

18 And once we get by those threshold issues,  
19 perhaps that's going to be the course with all the  
20 different carriers, because there may be some common  
21 themes, but most of its going to be particular to the  
22 record keeping of the individual carrier.

23 THE COURT: Sure, and that's what I guess I'm  
24 trying to identify for my own benefit. I mean, what is --  
25 I'm happy to try and, I mean, I want to try to facilitate

1 this, move this along as much as possible, but obviously, I  
2 don't expect there's any sort of universal software they  
3 are using here, or even file-keeping protocol. And so I  
4 guess, I'm wondering, you know, what can I do, if anything,  
5 in that regard other than if there's, you know, you come to  
6 loggerheads on a conference call about it and try to  
7 resolve it. Is there anything that can be accomplished?

8 MR. LUCK: Our feeling at this point, Your Honor,  
9 at least as far as State Fund is concerned, if we could get  
10 an order issued authorizing the payment and withholding by  
11 that Step One, then we can work with Laurie in relation to  
12 the notification of our claimants and the remediation  
13 efforts.

14 THE COURT: Okay. So, along those lines, that, I  
15 mean, that kind of brings us back to this order that was, I  
16 guess, still in the proposed stage that was attached to Tom  
17 Harrington's September 15th letter. You know, why don't we  
18 do this, so that we are not all here with a pregnant pause  
19 while everybody looks at it, but probably the easiest  
20 thing, because I don't know who all has seen or read it,  
21 and take a minute to look it over, and then I think is  
22 Tom's letter in response to the August 29th letter?

23 MS. WALLACE: Uh-huh.

24 THE COURT: I guess I needed to look at a  
25 calendar because, obviously, your objection would have been

1 before. Yours is an August 29th letter talking about the  
2 proposed order.

3 So why don't you take a minute to look that over,  
4 and then, I mean, is that basically -- does this order,  
5 Brad, does this order, you think, is that what you are  
6 talking about that would address this in some fashion?

7 MR. LUCK: Yes, Your Honor.

8 THE COURT: So why don't we take five minutes or  
9 three minutes or whatever it's going to take to look  
10 through, and we can discuss that, if anybody has input.

11 (Brief pause.)

12 THE COURT: Tom, what was the one, we had the due  
13 process hearing here? We got two letters. I'm drawing a  
14 blank on which case it was.

15 Steve, you were there, too.

16 CLERK: Was it Flynn?

17 THE COURT: That's what I thought.

18 MR. LUCK: It was after Rausch.

19 THE COURT: That's what I was saying to Jackie.  
20 I thought it was Flynn. That's fine.

21 Well, why don't we go off the record for a  
22 second.

23 (Off-record discussion.)

24 MS. WALLACE: So are you thinking due process  
25 issues have been briefed? Is that what you are referring



1 to?

2 THE COURT: No. I'm kind of putting the cart  
3 before the horse here, but I'm jumping down to 2-B, Roman  
4 Numeral VIII, where it talks about implementation  
5 consideration, and it talks about the determination of  
6 actual Common Fund attorney fee obligation, and payment by  
7 way of due process hearing.

8 I mean, is there -- and, you know, obviously, as  
9 I say, I admit at the time, I am putting the cart before  
10 the horse, but in terms of ticking these off in whatever  
11 way we can, is there any reason why this would be handled  
12 differently than the due process hearings that had been  
13 done before? And obviously, the only one I was involved  
14 with was Flynn.

15 MR. LUCK: From our standpoint, Your Honor, we  
16 raised it only because that was the last procedural thing  
17 that needed to occur to make sure we covered the bases on  
18 actual payment fees after they had been withheld.

19 THE COURT: Sure, okay, and I appreciate that.

20 MS. WALLACE: I'm unfamiliar with that process.  
21 What do you do?

22 THE COURT: Basically, what it was, and what we  
23 can do, Laurie, is e-mail you specifically the notice. It  
24 was just -- we hammered out, and there's minute entries we  
25 can send to you, too, just how we got to the point in

1 Flynn. And I assume it was pretty much a similar procedure  
2 that happened in any of the ones before, is just basically  
3 sent out a notice to all potential claimants or the ones  
4 that could be identified. And there are, obviously, there  
5 were some parameters that had to be hammered out, and gave  
6 them, I think it was, 30 days to send in an objection, to  
7 send in a written objection to the attorney's fees that  
8 they could send to the Court.

9 And also, we set a hearing, and the only one I  
10 have been involved with has been Flynn, but we just had the  
11 hearing in the court. And in the case of Flynn, nobody  
12 showed up, and I think we got two responses prior to  
13 showing up.

14 And I mean, obviously the main consideration is  
15 just from a due process standpoint, just giving these folks  
16 an opportunity to be heard on it.

17 MS. WALLACE: Sure.

18 THE COURT: So what we will do, Laurie, is we  
19 will, like I say, we will e-mail you the minute entries,  
20 but we had a couple conferences leading up to it, and do it  
21 from Flynn since it's the most recent one. And we will  
22 send you the minute entries and then the order that went  
23 out, which was just like a one-page order, and kind of go  
24 from there so you can see what your thoughts are.

25 And well, actually, we can just send this e-mail

1 out to whoever, but we are, obviously, not anywhere close  
2 to that point yet, but it's something I was jumping ahead  
3 as I was looking through these things.

4           Okay, so, but then back -- I assume folks have  
5 had a chance to look at the proposed order authorizing the  
6 withholding. And I know, along with Tom Harrington's  
7 letter and then Tom Murphy's letter, responding to it, let  
8 me ask some -- I just want to make sure that I'm not  
9 missing something here, because we were talking about this  
10 yesterday, Jeannine and I were.

11           In terms of -- obviously, Stavenjord has not been  
12 decided yet. In terms of any potential overlap or dispute  
13 in terms of between the counsel for Stavenjord, counsel for  
14 Schmill, is there -- there's no question there's going to  
15 be at some point a discreetly identifiable benefit to that,  
16 whether they got that from -- I mean, we are going to be  
17 able to put a dollar figure that this person is going to  
18 get "X" amount of dollars additional, whether that's  
19 because of the decision in Stavenjord or whether that's  
20 because of the decision in Schmill, right?

21           I mean, we will be able to put -- they have a  
22 certain amount before. They are going to have a certain  
23 amount now. I mean, we can identify a dollar figure. So  
24 what I am wondering is, when it comes to the issue of the  
25 attorney -- how those attorney fees would be divided up

1 among the counsel for the respective parties, that amount,  
2 whether it's, you know, let's assume for sake of argument  
3 we will do a 25 percent withholding, it's going to be --  
4 that total aggregate amount, the amount withheld is going  
5 to be 25 percent.

6 I mean, it's not like Laurie is going to be  
7 entitled to 25 percent, Tom is entitled to 25 percent, and  
8 the claimant gets 50 percent, right? It's going to be, you  
9 guys are going to divide up -- I know, this seems pretty  
10 elementary, but I want to make sure that I am not making  
11 assumptions.

12 MR. MURPHY: Correct. I agree that the total  
13 aggregate attorney's fee will be 25 percent.

14 THE COURT: Right. And just one second, Steve.

15 So I guess in terms of Tom's -- and that's why  
16 I'm wondering, in terms of, from the standpoint of  
17 withholding, why, whether Liberty or State Fund or whoever  
18 is going to be doing withholding, they can withhold  
19 25 percent.

20 And I guess I'm speaking specifically to Tom's  
21 objections here, the withholding is going to be withholding  
22 no matter what. And it seems to me like it would make  
23 sense to go ahead and just do that withholding, and when  
24 Stavenjord is decided or whatever, that then Tom and  
25 Laurie, whoever, can -- and if that's something that

1 requires the Court's involvement, we can address that  
2 afterwards, but as far as the 25 percent withholding, I  
3 don't see the reason not to -- so when Tom is talking about  
4 these objections to paragraph --

5 MR. LUCK: Your Honor, I think it's important.  
6 Tom's objections, as I understood it, were to the original  
7 draft of the order and this draft of the order --

8 THE COURT: Is that different?

9 MR. LUCK: -- took those into account, so when  
10 that letter refers to Paragraph 3 and 4, it was the  
11 original draft of the order, and I think that's right that  
12 you worked out with Tom Harrington on this draft of the  
13 order.

14 MR. MURPHY: No, I don't think you are right  
15 about that.

16 MR. LUCK: Oh, okay. That's what his letter  
17 says.

18 THE COURT: And the only reason -- and to be  
19 honest with you, I was looking at this stuff yesterday and  
20 did not have an appreciation that -- I did not notice the  
21 chronology of the dates here, that this letter with  
22 presumably this was the order attached to it, actually  
23 postdated it, but it still seemed to me that those  
24 paragraphs address an apportionment of fees.

25 MR. LUCK: From our standpoint, we don't care.

1 You are right. It's 25 percent. What we want to be sure  
2 is the authorization to withhold the money, and counsel of  
3 Stavenjord and Schmill, ultimately can, with the Court's  
4 assistance, can determine how that's split up, so we can  
5 take out whatever Tom wants to take out, as long as it  
6 authorizes us to withhold the money.

7 THE COURT: So why don't we do that, then? It  
8 would seem to me, if we are still talking about  
9 Paragraphs 3 and 4, obviously, I won't assign something and  
10 send it out before you guys have hammered it out, but it  
11 seems to me, then, if we do just strike what would be  
12 Paragraphs 3 and 4, then the order is going to authorize  
13 you to withhold --

14 I'm sorry, Steve, go ahead.

15 MR. JENNINGS: The 25 percent across-the-board  
16 fee was addressed in our briefing in Flynn and Rausch, and  
17 there's been no decision on that with respect to the other.  
18 As a matter of fact, the State Fund and other insurers are  
19 willing to stipulate to 25 percent. Certainly, I have no  
20 business there, but I would object to the across-the-board  
21 25 percent figure.

22 MR. LUCK: I think all we are agreeing to right  
23 now is the withholding. It's still subject to a  
24 determination at a later date what the actual fees are  
25 going to be, and it's honoring the lien that's been filed

1 and, I don't think, taking any other position beyond that.

2 MR. JENNINGS: Okay. If we are not deciding that  
3 it is 25 percent, then I don't have an objection. We are  
4 setting aside a pile of money from what is determined.

5 MR. MARTELLO: And to further address that in  
6 here, I think we originally withheld at 20 or 25 percent,  
7 and then ultimately in McGarby (phonetically), took  
8 15 percent of fees on that, and that's what was brought  
9 before the hearing. So we can, I think Brad is correct  
10 that all this is is just with regard to withholding and  
11 then the ultimate determination of fee is a later event.

12 THE COURT: It seems to me, as far as withholding  
13 goes, nobody is arguing above 25 percent. It would seem to  
14 me that it makes sense to withhold the higher number,  
15 because if you withhold 20 and you disburse that money,  
16 it's good luck to you guys going back and finding that  
17 extra two-and-a-half percent each, or whatever.

18 So, okay, well, why don't you guys -- and I  
19 think, and I am just suggesting, it would seem that if we  
20 strike those paragraphs, but if you guys, then, you know,  
21 by sometime next week give us that, I'll issue that order  
22 and we can have that order out for withholding on it, if  
23 you guys can hammer out that language, okay?

24 Okay. What's next? The floor is open.

25 MR. JONES: Your Honor, it seems like the

1 chronology we are anticipating would be that we will get  
2 the Flynn order, and that will set the boundaries to  
3 identify what cases fall in that chronology. But then,  
4 it's at least conceivable your order might be appealed at  
5 the conclusion of the whole process, and then --

6 THE COURT: Do you think?

7 MR. JONES: It's been rumored that it's a  
8 possibility, and so what we might then find are two  
9 possibilities: One is that Stavenjord comes down after  
10 Flynn and after we have put a lot of effort into  
11 identifying cases that fit within the boundaries that you  
12 have set in Flynn. Stavenjord can change that, make it a  
13 larger or make it a smaller chronology.

14 The same is true if Flynn were to go on appeal,  
15 so what I would like to throw out as a possibility for  
16 discussion is, we do really nothing except get this order  
17 out so the insurers have authority to withhold money,  
18 should cases pop up that they think should be paid under  
19 Schmill. And if you give a party a certain period of time  
20 within which to consider appealing, or actually need to  
21 certify for appeal under Rule 54, your decision in Flynn,  
22 as we did in the Reesor case, because Laurie and I had --

23 MS. WALLACE: Kessle (phonetically).

24 MR. JONES: -- Kessle, I'm sorry, case -- because  
25 we had a series of cases that would be affected by that



1 ruling. We could have tried six, seven, or eight cases and  
2 only find the key holding reversed and all that time  
3 wasted.

4 So I would raise that as a possibility. The  
5 effect would be that if you did certify it for appeal, that  
6 really all these Common Fund cases would be held in  
7 abeyance because we don't know the beginning and ending  
8 dates to start looking for cases. And that seems to be  
9 just a fundamental concept that we are going to need, if we  
10 want to try to avoid unnecessarily duplicating work. So  
11 that is the proposal that I throw out.

12 MS. WALLACE: I don't much care for that  
13 proposal. That's no surprise, either. It seems to me, you  
14 know, I have been dealing with a lot of insurers that are  
15 smaller than the parties present here, but they haven't  
16 really had too much trouble identifying the cases that  
17 potentially fall within Schmill, just under what we know  
18 now of the parameters of the claim. And I would still like  
19 to go forward, certainly, with the briefing on the other  
20 issues that aren't being addressed in the other cases to  
21 keep things moving.

22 THE COURT: And I think we are talking about two  
23 different things there, too, where I think we are talking  
24 about legal issues versus implementation. I agree with  
25 you. I think it makes sense, as best as we can do, to

1 create some sort of -- and Lord knows, that's always like  
2 trying to nail Jello to a wall, there's always more issues  
3 that seem to be cropping up.

4 But as best we can, at least provide some sort of  
5 global sense. We were talking about this, actually, just  
6 yesterday in preparing for this, is that, obviously,  
7 there's going to be appeals, and maybe that's just my  
8 responsibility. And what I need to do is get these out so  
9 that they can be appealed, and at least be creating the  
10 body of law on these or augmenting the body of law on these  
11 issues so that ultimately, we can try to, hopefully, nail  
12 this, you know, create a box that we are going to have at  
13 least parameters set forth.

14 MR. JONES: Your Honor, my recollection is in the  
15 Flynn case, arguments were made and if adopted by this  
16 Court will perhaps require an appeal. The only cases that  
17 would fall under Common Fund doctrine would have been those  
18 actively in litigation at the time of the decision, so  
19 that's a thimble. That's not even a box, okay?

20 And so while I agree that if we were to agree  
21 with Laurie, that if we were to accept certain assumptions,  
22 we could identify cases that fall in there. There's no  
23 doubt about that, because we did that in the FFR case. But  
24 it may be, in FFR, we paid out on claims we shouldn't have  
25 paid out on because of what could be the future holding

1 regarding retroactive applications.

2 So that's really where my concern is, that I'm  
3 not saying that we can't implement it, if we make certain  
4 assumptions, but what assumption are we going to make with  
5 that retroactive application? Right now, we can only make  
6 assumptions, and next week, we will have an order from you  
7 what that is.

8 So again, it's intended to avoid this unnecessary  
9 duplication that could occur.

10 THE COURT: What about even, though, doesn't it  
11 make sense that even as far as the -- I mean, there are,  
12 and it may be a thimble, but there are ones out there that  
13 can be identified. What would be -- is there any reason,  
14 just, I guess I'm just trying to find as much common ground  
15 as I can, and if it's a thimbleful, it is. But is there  
16 any reason not to identify at least from an implementation  
17 standpoint if we can address the other issues?

18 We have, I mean, aside from, you know, well, it's  
19 settled and closed, if even though argued, obviously,  
20 taking into consideration the appeals that will follow  
21 there, what about just moving forward on from an  
22 implementation standpoint on the thimbleful? What's the  
23 reason not to do that?

24 MR. JONES: Well, Your Honor, there would be  
25 none, if all the other issues are resolved. But what you

1 are really asking for, I think, is a stipulation from the  
2 parties involved, that these cases are the absolute  
3 smallest number of cases that we all agree fall under the  
4 the holding.

5 THE COURT: Yeah.

6 MR. JONES: And we can certainly try to do  
7 something like that, but given the arguments pending in  
8 Flynn, which could be appealed, and which Stavenjord might  
9 do, because as Tom pointed out when the discussion of --  
10 Tom Murphy -- when the discussion of whether it settled and  
11 the like was raised, it seemed pretty clear to me and the  
12 audience, watching the faces of the justices, they didn't  
13 understand how comp can be multiple claims on a single  
14 claim, and that these cases can go on for quite a while,  
15 and sometimes they are never settled in the formal sense of  
16 an approved settlement petition.

17 So I think we could get just about anything back  
18 from the Stavenjord court and have dramatic impact, and it  
19 could even impact our stipulation. So what we are talking  
20 about is, there's a risk there. Certainly, we can manage  
21 it and try to reach an agreement, but again, if Flynn is  
22 rather expansive, we may find ourselves working on a lot of  
23 cases which later we found out really didn't fall under the  
24 holdings.

25 So I understand what would be probably Tom

1 Murphy's objection on staying Stavenjord and the other  
2 Common Fund claimant's attorneys, but one of the benefits  
3 would be the more efficient use of all of our time and  
4 money, and this Court's time.

5 THE COURT: I guess one of the concerns that I  
6 would have is, you know, you look at the long and winding  
7 road that these follow, and like I said yesterday, it seems  
8 like there is continually some measure of new issues that  
9 come up. And I mean, this could just conceivably end up  
10 being a thing where, you know, if they are at a certain --  
11 I guess what my thought is, is at a certain point, if we  
12 start at the smallest number that can be agreed upon, and  
13 then as issues start falling by the wayside, I can see that  
14 number growing.

15 And rather than waiting until, you know, with  
16 every new issue that crops up that people who, by any  
17 definition, would be, would fall within the parameters or  
18 not waiting until the people who are in the outer circle  
19 fall within or without of the parameters. Do you see?  
20 That's my concern.

21 MR. JONES: Your Honor, as a general principle, I  
22 can't really argue against that. Again, we are going back  
23 to how do we identify that?

24 THE COURT: And I see what you are saying, and I  
25 am sorry, Larry, I didn't mean to cut you off.

1           Go ahead. Go ahead, Brad.

2           MR. LUCK: I have to be careful because I'm  
3 agreeing with Larry, and I try not to do that too much.

4           MR. JONES: I have obviously said something  
5 wrong, Your Honor.

6           MR. LUCK: And it's not a matter of delay but a  
7 matter of certainty, and you talk about the concept of  
8 identifying what we would all agree to. But once we get  
9 past settled, clear settlement petitions that have been  
10 approved by the court or final decisions by the court.  
11 There was a whole spectrum of arguments on what would be  
12 considered in closed, final application of potential  
13 statutes of limitation and those things. And whether we  
14 agree or not, there's a lot of, you know, whether it's  
15 appropriate arguments or whether they are well-taken or  
16 whatever your rule is, there's a wide spectrum after the  
17 court determination and actual settlement petitions of what  
18 we would consider. So it's very hard to find that common  
19 ground, even that small part, until there's a final  
20 determination. And so there is some merit to that that has  
21 nothing to do with delay but has to do with certainty.

22           MR. MARTELLO: The other thing to add to that, as  
23 far as the administration of it, and Chris McCoy  
24 (phonetically) has been heavily involved in that, is you  
25 would have to categorize, take a large pool, if you will,

1 start to review those, and then put them into subcategories  
2 as to the various issues they would fall into. That  
3 requires a tremendous amount of review and administrative  
4 effort, if you will.

5           And you know, with all due deference to what  
6 Laurie said, with the small insurers, I mean, they have a  
7 smaller number, obviously. But when we are talking State  
8 Fund or Liberty, you are talking about a large number of  
9 individuals that you have to go through. And in our case,  
10 you have different data systems, some of which are -- and  
11 we visited this in the past -- some of which, the numbers  
12 are reliable, but a lot of it involves a very manual  
13 search, and particularly when you are looking for specific  
14 issues, which, they are not going to be classified for  
15 purposes of any sort of data recovery, and is going to  
16 require an individual search to categorize them, and so it  
17 does, it's very time and labor intensive.

18           MR. JENNINGS: Your Honor, I would like to second  
19 Tom's point. The additional parameters and variables that  
20 we would nail down with the final decision on closed,  
21 settled, final and inactive would help the search function  
22 because the variables that we are now looking for are not,  
23 the records are not collated by those variables. And the  
24 more definitive parameters we can get for insurers, the  
25 easier and more certain the search is going to be.

1           And that's one of the problems we have had so  
2 far, certainly without the ruling in Flynn, you know, even  
3 though these fit parameters of the Court's decision in  
4 Flynn, do they -- are they actually Flynn claimants because  
5 retroactivity applied to their claims? Once we nail down  
6 those further variables, that makes the search more certain  
7 and more doable.

8           THE COURT: So, well, let me -- and part of this,  
9 and I will admit, I'm not trying to over-simplify them.  
10 I'm, obviously, speaking in general principles here, and I  
11 can appreciate that there's a lot more involved in it than  
12 what I am saying.

13           So let me ask -- well, I guess, let me ask just  
14 Laurie or Tom. Obviously, I know your positions, but  
15 specifically what they are saying on that, I mean, what is,  
16 in terms of -- do you have specific recommendations that  
17 you have in terms of specific implementation procedures?

18           MR. MURPHY: I can't really tell what they are  
19 saying here. I think they are asking you to wait for not  
20 only the Stavenjord decision, they are waiting to see your  
21 Flynn decision. They want -- it sounds to me like they  
22 want you to wait for Flynn to be appealed again. And then,  
23 I'm not all that clear about whether there's going to be a  
24 cavalcade of additional issues after that.

25           But what I think is, like you, we should start



1 having them identified. Now, their affidavit tells us that  
2 they could identify, what was it, 2,500 claimants within  
3 eight hours of work. It seems to me that they should start  
4 identifying claimants, and they should tell us which ones  
5 are disputed and which ones are not. And there's no reason  
6 why they should make them wait another three to five years  
7 for all the other seemingly ominous issues that are going  
8 to be raised later.

9 I think that you have got a clear set of  
10 claimants that are entitled to benefits in Schmill, and  
11 hopefully in the other cases, too, and I think it's time  
12 for them to start paying them. Schmill II is decided.  
13 There's a Common Fund. It goes back to a definitive start  
14 date. They ought to pay the benefits, and if that's not  
15 our obvious position, I guess I'll wait for a lawyer to  
16 clarify it for me.

17 MS. WALLACE: I think you said it very well.  
18 Yeah, Schmill is a little different, certainly, than  
19 Stavenjord. Those issues were resolved. It is retroactive  
20 to July 1 of '87. It is a Common Fund, and there is a  
21 global lien. Those were all decided already. So there is  
22 a set of claimants out there that fit those parameters.

23 MR. MURPHY: Let's go.

24 MR. LUCK: Your Honor, we have to deal with the  
25 reality of the situation. Tom said we can identify -- and

1 then identify what the claimants -- identify what is  
2 disputed. We don't define what "disputed" might mean or  
3 those that we have questions on files until we have a final  
4 determination. Again, beyond adjudicated and settlement  
5 petition, what the scope of retroactivity is, and what that  
6 population is going to be, we can't even venture a guess,  
7 and even though you will give us your opinion here in a  
8 couple weeks, which we may or may not agree with, if we  
9 agree with it, Laurie and Tom are going to disagree with  
10 it, I know. And so it's inevitable that there needs to be  
11 a final determination on that, and Schmill itself said we  
12 needed to get these other issues resolved.

13 And I think in the Stavenjord argument, they  
14 acknowledged that the implementation of Dempsey and what  
15 was meant by those terms and the language they used still  
16 needs to be determined.

17 The other thing is that, if we get your order,  
18 good. If it's certified and if it goes up, we run less of  
19 a risk of Stavenjord and the final determination in Flynn  
20 being inconsistent, which is critical, in fact, to all the  
21 cases pending in terms of implementation.

22 MR. JONES: Thank you, Your Honor. In response  
23 to Tom Murphy, if I understood Tom correctly, he envisages  
24 there could be 2,500 State Fund cases which, under his  
25 analysis, money is owed. But the final arbiter is the

1 Montana Supreme Court on that, and it might be that an  
2 insurer -- we don't have 2,500 cases at Liberty, as far as  
3 I know -- that an insurer would make these payments to  
4 2,500 claimants, hypothetically, only to find out they only  
5 owed 500. So what do we do with those 2000?

6 MS. WALLACE: I believe we were just talking  
7 about implementation again, the issue of withholding.  
8 That's what, we're trying to get through that process. I  
9 don't think we are try talking about payment.

10 MR. JONES: I hear Tom Murphy say "payment."

11 THE COURT: And I was talking about "payment,"  
12 too. What I was talking about is, like I said, trying to  
13 see if there's a way we can, you know -- and as I said, I  
14 mean, I appreciate there are variables, so I don't want  
15 anybody to misunderstand that I am trying to over-simplify.

16 But what I am trying to do is, I mean, I guess my  
17 thought is, and maybe this is going to sound  
18 over-simplified, too, is that I mean, obviously, there is a  
19 certain amount of moving boundary here, and some some of  
20 it's going to be decided by, well, by the closed issue, and  
21 that's going to be appealed in Flynn, and whatever.

22 But it seems to me that, speaking specifically to  
23 Schmill, I mean, a lot of these issues in terms of, we  
24 talked about the global lien and all of that, that most of  
25 these issues were decided. And that, although there are

1 still other variables within the implementation, that it's  
2 got to apply to somebody right now. As we sit here right  
3 now, it seems it's going to apply to somebody.

4 Go ahead, Larry.

5 MR. JONES: Your Honor, I hold out the  
6 possibility that might not apply to anyone, given the  
7 language of the Schmill decision at Paragraph 19 of the  
8 2005 decision, where they reference the settled, closed, or  
9 inactive, in the context of workers' compensation law. And  
10 to date, no one has defined what that context is, because  
11 those of us in the business, we are used to settled being a  
12 settlement. And we have lots of inactive files that have  
13 never been settled, and we close administratively, and all  
14 those terms are yet to be defined by the Montana Supreme  
15 Court.

16 So I think it's quite possible there could be  
17 zero members of the class that appears to have been created  
18 by these Common Fund cases.

19 THE COURT: But I mean, in looking at  
20 Paragraph 19, and like I said, I mean, even if we are  
21 talking about the thimble again, when they are saying, you  
22 know, that in the context of workers' comp, we need to  
23 determine, this court needs to determine the initial  
24 determination as to how many of the 3,500 claimants would,  
25 in the context of workers' comp law, be considered final or

1 settled under the holding in Schmill I?

2 Aren't they -- isn't there somebody, I mean, out  
3 here? Aren't there people out here right now that by any  
4 definition of their cases just were flat out not finalized or  
5 settled? Active litigation cases that were going on  
6 that --

7 MR. JONES: That's the one category, Your Honor,  
8 that may be uncontested. But again, the carriers haven't  
9 had a chance to sit down and come to a collective agreement  
10 in that smoke-filled room about what they collectively  
11 think.

12 MR. MURPHY: That's because the carriers haven't  
13 been asked to. We are asking the Court to tell them to do  
14 it. "Go find your claimants, tell us which ones you are  
15 fighting against and which ones you are not, and then we  
16 will be way further down the road."

17 THE COURT: Why don't we --

18 MR. MARTELLO: Just one other thing, but in order  
19 to get to -- let's say there are three, okay? To get to  
20 those three, we have to go through the 2,500. I mean, it's  
21 not just we can pluck those things out and they are readily  
22 available. You have to refine it, go through all of the  
23 ones to get to that parameter.

24 And the difficult part about that is, let's say  
25 all we are looking for is those. Then, if we don't know

1 what the other issues are that we should be looking for, we  
2 have to go back and do the same process again. We may have  
3 the 2,500, and we can maybe guess as to what categories  
4 they are going to be in, but if we know what the categories  
5 are when we go through them, we can put them into each of  
6 the groupings that they require, and you don't then  
7 duplicate our efforts going back once these issues then are  
8 further refined down the road.

9 THE COURT: You know, here's what I think, and  
10 what I will have to do is what makes sense to me is, and  
11 this is going to require -- we will have the transcript on  
12 this. What I am inclined to do, so that we can have some  
13 sort of -- and I can have a better grasp on the exact nuts  
14 and bolts of it, which I think will help facilitate this,  
15 is that this will be one of the things we identify, and  
16 it's not necessarily a legal argument, but I think whether  
17 it's done by affidavits, the only way I can see to put it  
18 in front of me in a kind of cogent and organized fashion is  
19 to have the sides to set -- and I will issue an order that  
20 specifies exactly kind of what I am wanting the sides to  
21 argue that lays out, "Here are what my thoughts are on it  
22 in terms of the protocol," and ask the sides to respond to  
23 that. And then you can do an affidavit, like, from Chris  
24 or whoever that I can get a better sense of the nuts and  
25 bolts, too, to see exactly.

1           And go ahead, Brad.

2           MR. LUCK: Your Honor, maybe that's a good  
3 process, I think, and maybe it's best defined after we see  
4 your Flynn order.

5           THE COURT: Oh, no -- yeah.

6           MR. LUCK: So we can react to that from both  
7 sides' perspective to determine what can be done and what  
8 those different categories might be, and then suggest an  
9 appropriate --

10          THE COURT: Absolutely, and I appreciate that.  
11 And that was actually what I planned on doing because, Lord  
12 knows, I was telling Jeanine yesterday there are some  
13 times, with Common Fund, where I feel like I have ADHD, and  
14 I don't want to get, since Flynn is drafted and I don't  
15 want to, you know, then set that aside to work, you know,  
16 we want to get Flynn finalized, out next week on the final,  
17 closed issue or final or settled issue, and then we will  
18 issue that following after it and ask the sides to respond.

19           And the transcript will be available, then, on  
20 the web, too, for purposes of this discussion, so I can  
21 get, A, a better grasp of what the nuts and bolts of the  
22 process would be so that I can have an idea of why we can't  
23 just start with kind of ever-expanding concentric circles  
24 there.

25           And like I said, I appreciate what you are

1 saying, Tom, and that in and of itself is -- and that's why  
2 I want to do this in kind of an organized fashion that it's  
3 sitting in front of me because it helps me out, too.

4 Because I obviously don't know the inner workings and how  
5 these things are being identified, so I know that, I mean,  
6 we have a pretty precise number in Schmill, in Schmill II  
7 in Paragraph 19 is where we have, you know, 3,543 claims.

8 Now, I understand this is an aggregate about a  
9 lone number, and this is the umbrella and we are looking  
10 for, you know, the handle. And it may -- and I don't want  
11 to be over-simplifying the process that you would follow,  
12 but that's why I kind of need a little more expounding on  
13 that.

14 Go ahead, Brad.

15 MR. LUCK: Your Honor, we don't know at this  
16 point whether the determination in Flynn will come together  
17 with these cases we have been talking, but in relation to  
18 Flynn by itself, are you going to certify that order for  
19 appeal?

20 THE COURT: I would anticipate I would, yeah.

21 MR. LUCK: So even if it's not tied to this, if  
22 that was an appropriate action, that that would be going up  
23 at least --

24 THE COURT: You are presupposing that somebody is  
25 going to want to appeal. I haven't seen it, so, yeah, I



1 think it makes sense because it is an issue that -- and who  
2 knows, I obviously was not at the Stavenjord oral argument.  
3 It may be this might ultimately be addressed by Stavenjord,  
4 as well. But yeah, that's what I would anticipate doing.  
5 I mean, it just seems to me what I would like to do is move  
6 whatever is going to expedite matters as much as possible,  
7 that's what I would like to do.

8 So, okay, anything else?

9 MR. MURPHY: Mr. Martello asked when you argued  
10 Stavenjord II, and I believe it was late October of last  
11 year.

12 THE COURT: I thought maybe you had some insight  
13 as to when it was coming out or something, but okay.

14 Well, what I will do is -- what I need to do is  
15 kind of, if nobody has anything else right now, I'm going  
16 to look through that, and I will issue an order on the  
17 issues that I think need to be briefed. And what I think  
18 I'll probably do is, I'll send out an e-mail saying these  
19 are the ones based on Brad's e-mail, based on what's been  
20 said today, so I would anticipate there will be two orders.  
21 One is going to say, "Here are some issues that I don't  
22 think are covered by other cases that are either, you know,  
23 Stavenjord on appeal or some other cases that are pending,  
24 as like with Flynn and Reesor or whatever else might be  
25 that are going to be addressed here."

1           And so I'll identify the ones that I think still  
2 need to be briefed here, and we will set a schedule on  
3 that. And I will also -- and what I will do is, I'll  
4 circulate that and ask for some input to make sure since  
5 this is kind of a free-forum discussion, but then I'll  
6 finalize it and make the ultimate decision on it,  
7 obviously.

8           But then as far as the -- and then I'm going to  
9 issue an order on this issue of kind of the implementation  
10 and identifying the discreet classes and why that can't be  
11 done and kind of as the parameters are expanded or  
12 contracted, whatever the case may be.

13           MS. WALLACE: And you will also issue an order or  
14 an e-mail as to the onset?

15           THE COURT: The onset will also -- yeah, there  
16 will be an e-mail issued on that. And then what I will do  
17 is, I'll just look for sometime next week as far as we can  
18 issue the order on the withholding, and I expect you guys  
19 will be able to hammer something like that out, and I can  
20 get that issue next week.

21           Based on the draft that I have seen and just what  
22 was discussed here today, I think that if something can be,  
23 I would anticipate that you guys can hammer that out pretty  
24 easily, and we can issue that out and get that hammered out  
25 as well, okay?

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MS. WALLACE: All right.  
THE COURT: Anything else?  
(The hearing concluded at 11:00 a.m.)  
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1 STATE OF MONTANA )  
 2 County of Lewis and Clark ) : SS.

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I, Kimberly Johnson, Professional Court Reporter,  
 Notary Public in and for the County of Lewis and Clark, do  
 hereby certify:

That the witness in the foregoing deponent was  
 first duly sworn by me in the foregoing cause, that the  
 deposition was then taken before me at the time and place  
 herein named, that the deposition was reported by me and  
 that the foregoing pages contain a true record of the  
 testimony of the witness to the best of my ability.

IN WITNESS WHEREOF, I have hereunto set my hand  
 this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

\_\_\_\_\_  
 Kimberly E. Johnson  
 Professional Court Reporter  
 Notary Public