

TRANSCRIPT OF PROCEEDINGS

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IN THE WORKERS' COMPENSATION COURT
OF THE STATE OF MONTANA

KELLY WILD,) WCC No. 2001-0286
Claimant,)
vs.)
MONTANA STATE FUND,)
Respondent/Insurer.)

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, that the proceedings in the
above-captioned matter was heard before the
Honorable Mike McCarter, at the offices of the
Workers Compensation Court, 1625 Eleventh Avenue,
Helena, Montana, on the 25th day of June, 2003,
beginning at the hour of 8:30 a.m., before Laurie
Crutcher, Registered Professional Reporter, Notary
Public.

* * * * *

1 A P P E A R A N C E S (CONTINUED)

2 ALSO PRESENT:

3 MR. MARK CADWALLADER
4 Legal Counsel
5 Department of Labor and Industry
6 Legal Services Division
7 P.O. Box 1728
8 Helena, MT 59624-1728

9 MR. GEOFFREY C. ANGEL
10 Attorney at Law
11 125 West Mendenhall
12 Bozeman, MT 59715

13 MR. DEAN BLACKABY
14 Attorney at Law
15 303 Ewing
16 Helena, MT 59601

17 MR. LARRY JONES
18 Attorney at Law
19 700 SW Higgins, Suite 108
20 Missoula, MT 59803-1489

21 MS. CAROL GLEED

22 MR. PETER STRAUSS

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24
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TRANSCRIPT OF PROCEEDINGS

1 Whereupon, the following proceedings were
2 had:

3 * * * * *

4 (Mr. Angel, Mr. Jones and Ms. Gleed not present)

5 THE COURT: Let's start with
6 appearances.

7 MR. CADWALLADER: Mark Cadwallader,
8 Department of Labor and Industry; not a party to
9 this action, but an interested bystander.

10 MR. FOUST: Lucas Foust. I represent
11 Kelly Wild, and am involved in the request for
12 class certification and/or common fund status.

13 MR. HUNT: I'm Jim Hunt. I represent
14 Kelly Wild and an unknown myriad of injured
15 workers.

16 MR. OVERTURE: Greg Overturf, I
17 represent the State Fund.

18 MR. LUCK: Brad Luck, for the State
19 Fund.

20 MR. HARRINGTON: Tom Harrington for the
21 State Fund.

22 MR. BLACKABY: Dean Blackaby, observing.

23 MR. MARTELLO: Tom Martello, State Fund.

24 MR. HAWKINS: Dave Hawkins, State Fund.

25 MR. STRAUSS: Peter Strauss, State Fund.

1 encourage that the issues go up to the Supreme
2 Court, because I think we need some Supreme Court
3 guidance in what we're doing, particularly with
4 regard to what I call a global claim for common
5 fund fees.

6 I don't know whether all Counsel for
7 each of these cases are going to claim a global
8 common fee issue. Also on retroactive and
9 common fund I think are critical issues, and I
10 don't think we have sufficient guidance from the
11 Supreme Court as to those issues for various
12 reasons.

13 Number one, common fund hasn't gone
14 global previous to this, so this is sort of a case
15 of first impression retroactivity issues. If
16 you've read my latest decision on retroactivity,
17 there seems to be some confusion or conflict as
18 far as the governing precedents are concerned, and
19 specifically whether the Chevron criteria apply in
20 determining retroactivity in Montana. And I think
21 the Supreme Court needs to address that head on.

22 And I may be able to seek an answer to
23 that, where I think the law is, but I think in
24 view of the fact they seem to have abandoned
25 Chevron and Porter, and then used in a later case,

1 MS. BUTLER: Nancy Butler, State Fund.

2 THE COURT: Well, maybe we can go ahead
3 and get started, and then hopefully Geoff will
4 show up in this process.

5 Has everybody had a chance to access
6 the website and look at the order I issued for
7 amicus briefs, and also the minute entry for
8 Stavenjord, where four issues were identified for
9 Stavenjord and Sutton, and all those other cases.
10 There was a transcript up there of the Stavenjord
11 conference.

12 Has everybody had a chance to look at it
13 and get sort of familiar with what was going on --
14 is it Stavenjord?

15 MR. HUNT: Yes.

16 THE COURT: I guess my intent in
17 scheduling these all for today -- and I'm not
18 going to consolidate them as Larry Jones had
19 requested. I'm trying to put them on parallel
20 tracks, so everybody one has a chance to address
21 the common issues before I decide the common
22 issues.

23 I'm going to put them on a pretty fast
24 track because I frankly expect that the issues are
25 going to the Supreme Court. In fact, I would

1 that creates at least an issue as to which
2 standard we're going to apply in that case.

3 Then with respect to the common fund,
4 we've got -- these cases all differ to some
5 extent, and the question may be in some of these
6 cases as to whether or not they're common fund
7 cases at all, and that probably needs to be
8 addressed, what are the criteria requiring common
9 fund. We can adopt basically a class criteria or
10 criteria broader. And I don't know the answer to
11 that, but I probably get first stab at formulating
12 some sort of answer.

13 So those are so sort of my thoughts
14 about where we're at on these actions. We've
15 added one more action here to the schedule for
16 today, the Cheetham cases. I don't know that that
17 affects other insurers. That's a case with
18 Liberty I think. Yes, it is with Liberty. And
19 that involves calculation of the cost of living
20 wages. I don't know if other insurers have
21 elected to calculate after Social Security. You
22 can't do that. You've got to calculate before the
23 Social Security offset.

24 Given the pattern that's being followed,
25 at this point my expectation is that we'll be a

1 common fund fee case. David Lauridsen sent his
2 attorney lien notice, and that's in the file, and
3 so I expect that we'll have similar proceedings in
4 that case as we're having in these cases.

5 MR. LUCK: We did an initial review of
6 the State Fund, and they were doing it, taking
7 that cost of living and offset in the proper
8 sequence that the Court directed. So that may be
9 one that the State Fund is not interested in.

10 THE COURT: That's comforting.

11 MR. OVERTURF: We were all stunned.

12 MR. HAWKINS: You don't need to tell us.

13 THE COURT: There's one other thing that
14 arises in these cases. In the Fisch, Frost, and
15 Rausch case, the attorneys gave notice to all of
16 the insurers in Montana of their attorney lien,
17 and that's the only case that that's been done in,
18 and basically puts them on notice of an attorney
19 fee claim.

20 And I don't know what Counsel want to do
21 in these other cases. What we did in that case, I
22 issued what was essentially the only Court notice
23 notifying that there was an attorney fee lien,
24 gathered names of all of the insurers in the
25 state, and we did a mass mailing. We participated

1 MR. LUCK: Just because it makes sense
2 to bring it up at this point, the other side of
3 coin is to stay -- since retroactivity is being
4 challenged in most of these cases -- to consider
5 whether you would stay the implementation of
6 retroactivity until that issue was determined.

7 THE COURT: That's another issue.
8 You're right.

9 MR. OVERTURF: I think the orders that
10 you issued authorizing withholding of attorney
11 fees, I think it mentioned Plan 1's and Plan 2's,
12 but not the State Fund. I take it that it's okay
13 for us to do it, too?

14 THE COURT: Actually I think that the
15 thing to do would be to just request an order
16 if you're affected by it. I did Plan 1, and Plan
17 2. The State Fund is already a party. I didn't
18 have to issue a stay in those cases. And I don't
19 remember which cases I've issued stays in.

20 MR. HAWKINS: The Stavenjord order.

21 MR. LUCK: I think that might be the
22 only one.

23 THE COURT: I think it was in Schmill.

24 MR. LUCK: At least the ones we're
25 involved with.

1 in that mass mailing, the attorneys actually took
2 care of the actual mailings, and have absorbed the
3 cost for doing that.

4 At this point, I've I think in most of
5 these cases I've authorized insurers to be given a
6 global authorization to insurance to withhold
7 attorney fees. I don't know whether I've done
8 that in this case at this point yet or not, or
9 whether anybody is going to request it. But I'm
10 just indicating that that's the procedure we
11 followed in that.

12 And my thought is that that sort of
13 procedure protects everybody until we're through
14 sorting out all these issues. If it protects
15 attorneys as far as their liens are concerned, if
16 they're correct in the global assertion. It also
17 protects the insurers in that I've authorized them
18 to withhold. So there aren't any questions of
19 improperly withholding and these fees being
20 unregistered.

21 I think the reasonable and a common
22 sense thing to do in these cases, is to withhold
23 them until we have an answer to these questions.
24 So that's the other thing that we need to address
25 in these various proceedings.

1 MR. HAWKINS: Withholding in Schmill was
2 made applicable to Plans 1 and 2.

3 THE COURT: Did I just say all insurers
4 and self-insured?

5 MR. HAWKINS: You said Plans 1 and 2.
6 You said other insurers may apply for a similar
7 order.

8 THE COURT: Okay. We probably need to
9 clean that up so that we've got some sort of order
10 in all these cases insofar as there's a claim.
11 And I don't know what all attorneys are going to
12 claim in each case.

13 In Mathews, for example -- Geoff is not
14 here. I'm sorry. It wasn't Mathews. It was in
15 Ruhd. Geoff Angel argued that there is no global
16 attorney fee. And he's en route, so I don't know
17 as he's going to claim universal attorney fee for
18 the work he did in Ruhd. I suspect not.

19 So the issues I've got that I sort of
20 listed off when I was sitting down thinking about
21 this, I think I've pretty much covered. The lien
22 notice, and non-FFR cases, retroactivity issues,
23 the scope of lien claim -- that's the global
24 issue -- common fund issues, is it a common fund
25 at all, and the retroactivity stay issue. I'm

1 sure by the end of the day there will be more.
 2 We'll cross those bridges when we reach them.
 3 MR. OVERTURF: Do you want us to go
 4 ahead and file a motion requesting an order for a
 5 stay on all the cases for us?
 6 THE COURT: Yes, we could do that.
 7 Maybe we could address that. I think maybe we'll
 8 address that issue. We can address that today to
 9 some extent in each of the cases.
 10 I don't know what the position is of the
 11 Counsel for claimants. So --
 12 MR. HUNT: I'm not sure I understand the
 13 issue.
 14 THE COURT: The issue is --
 15 MR. HUNT: I know I don't understand the
 16 issue. I'll rephrase that.
 17 THE COURT: That's honest and frank.
 18 The issue on the retroactivity is an argument that
 19 the decisions in these cases should not be applied
 20 retroactively, they should be applied only
 21 prospectively. And --
 22 MR. HUNT: From the date of the Supreme
 23 Court decision, the date of injury --
 24 MR. LUCK: That's an additional issue,
 25 about what does prospective mean.

1 THE COURT: Right. That's Brad's issue.
 2 I'm still confused. I don't know exactly where
 3 he's coming from on that one.
 4 MR. LUCK: We'll try it again.
 5 THE COURT: We'll keep trying it until
 6 we get it right.
 7 MR. HUNT: I guess the next thing I
 8 don't understand is: I assume what you mean by
 9 stay with the implementation of it, that there are
 10 no funds going to be distributed until that's
 11 determined.
 12 THE COURT: Right.
 13 MR. HUNT: The only funds that might be
 14 distributed prospectively would be funds after the
 15 date of whatever date it is, less the attorney
 16 fees.
 17 THE COURT: Right. And the
 18 implementation issue is to preserve that issue.
 19 If I don't issue that order, and they have an
 20 obligation to start paying, or I order them to
 21 start paying those, then those funds are probably
 22 gone, once they're spent, even if they prevail on
 23 the reactivity issue. So that was my thought on
 24 that. And I think I granted that in which case?
 25 MR. LUCK: The stay?

1 THE COURT: Yes.
 2 MR. LUCK: Stavenjord.
 3 THE COURT: So we've got a stay in
 4 Stavenjord. I don't think we have a stay in the
 5 other cases.
 6 MR. LUCK: Tom thinks we might have one
 7 in Flynn.
 8 THE COURT: I think there is one in
 9 Flynn. I think we have Flynn on today's docket,
 10 too. Flynn, as you know, if you've --
 11 MR. LUCK: We don't. That's fully
 12 submitted at this point. Everything has been
 13 briefed and submitted, and it's not on this
 14 calendar.
 15 THE COURT: Did I ask for a conference
 16 in Flynn?
 17 MR. OVERTURF: No.
 18 THE COURT: Okay. Maybe I didn't
 19 because it had been fully submitted. It's fully
 20 submitted, but I've invited amicus briefs, so
 21 everybody is going to get an opportunity to do
 22 amicus before I make that decision. So that's
 23 sort of a lead case, and what I say in that
 24 probably is going to affect all of these other
 25 cases. At least it's going to lay down the

1 standard that I'm going to apply.
 2 And the cases are all factually
 3 different. This case is -- The Wild and Mathews
 4 cases are very different from these other cases,
 5 and we need to talk about that.
 6 MR. HUNT: I think briefs are due July
 7 11th.
 8 THE COURT: Right, July 11th, the
 9 retroactivity issue.
 10 I guess with that, maybe what I should
 11 ask is, from either side, which of the issues are
 12 present in this case, and what additional issues
 13 are present in this case. And probably I should
 14 start out with you Jim, and you Luke, and tell me
 15 what you see from your perspective, and what
 16 you're going to ask me to be doing.
 17 MR. HUNT: Well, what we're going to ask
 18 you to be doing is to -- it's a little bit
 19 different because with the other cases, there's
 20 already been -- the money has already been
 21 established, so to speak, I guess. When you have
 22 the Flynn case, people have already had the money
 23 deducted from their -- not deducted from their
 24 Social Security Disability award. So that amount
 25 of money has been determined already.

1 In this case, it hasn't been determined.
 2 So I wondered if this is a common fund case or a
 3 class action case.

4 THE COURT: Okay. And I wonder what --
 5 The first question on my mind in this case is
 6 whether it's either of those things.

7 MR. HUNT: Right. It's Brad's position
 8 it's neither. Our position is that the
 9 determination itself of whether somebody is an
 10 employee is generally, I don't think, a real
 11 difficult determination, if you set aside the
 12 independent contractor exemption as not being
 13 conclusive.

14 And then the damages are what will be, I
 15 think, the main issue in the case, and the class
 16 action criteria taking into account the damages
 17 will be significantly different in a lot of the
 18 different cases.

19 So we think that it is either a common
 20 fund or a class action suit. I'm not sure it's
 21 necessarily a common fund case, because the common
 22 fund itself, the moneys themselves have not been
 23 identified, so to speak, like they have in the
 24 impairment cases or Social Security Disability
 25 cases. So it's dissimilar in that respect.

1 just a question of identifying who is entitled to
 2 it and paying it.

3 In a class action, you have, I think,
 4 sort of a similar concept -- and I don't pretend
 5 at this point to be a class action expert. I may
 6 be have to become one, but at this point no. But
 7 my understanding is there has to be a similarity
 8 among the members of a class such that you're not
 9 litigating individual lawsuits on each behalf.
 10 They have to be sufficiently close as far as their
 11 entitlement is concerned. There has to be
 12 entitlement. I don't know whether it has to be
 13 as certain as in a common fund case, but some
 14 certainty as to what they are due just by
 15 identifying them.

16 If when I go through these cases -- The
 17 easiest case, for example, was the Murer case,
 18 because all that required, once you identified
 19 them and you identified the dates, it was simply a
 20 mathematical computation. So it was what we would
 21 call, I think, in the law a ministerial act to
 22 determine what those claimants were owed.

23 You get away from that a little bit in
 24 the impairment award cases. In most cases, that
 25 just requires identifying whether or not there's

1 THE COURT: So you see a difference
 2 between class action and common fund?

3 MR. HUNT: Well, I know you've described
 4 a common fund as a case where you're going to
 5 adopt the class action criteria, for the most part
 6 anyway, that's going to be the guideline. That's
 7 my reading of what you've done so far, at least
 8 your intent in one of the orders. I can't
 9 remember which one it is.

10 I don't know that there's a practical
 11 distinction. However, with, for example,
 12 impairment rating, when you're looking at an
 13 impairment award, and you say that John Doe got an
 14 impairment award two years ago, for example, and
 15 does he get paid that impairment award when he
 16 reaches age 65, or when the impairment award is
 17 issued, that's already been established. Here, we
 18 don't know who is out there yet.

19 THE COURT: Right. And that's the thing
 20 that's troubling me in this case.

21 MR. HUNT: Right.

22 THE COURT: So how do we do that?
 23 Because I guess in class actions and also in
 24 common fund actions, certainly with a common fund,
 25 you create a fund, it's out there, it exists, it's

1 an impairment award. The glitch in that is that
 2 in some cases, there may be a dispute over what
 3 the impairment award is. So that's once removed.

4 Then we get to these Wild and these
 5 Mathews cases, and firstly we may have disputes
 6 over -- the primary one is going to be identifying
 7 who is out there, and who is out there that's
 8 going to make these claims, number one; and number
 9 two, whether or not they're independent
 10 contractors. So it's probably going to be
 11 resolved on a case-by-case basis.

12 But I agree with you. For the most
 13 part, the independent contractor criteria are
 14 fairly clear, and are going to be fairly easy to
 15 determine.

16 MR. HUNT: With respect to the damages,
 17 it's no different than Stavenjord. You've got to
 18 go through, and you've got to calculate each
 19 criteria in Stavenjord. You've got to figure out
 20 whether they have had a wage loss, and all of
 21 that, and you would have to do the same thing
 22 here.

23 THE COURT: Right. And that's one of
 24 the things I had to address in Stavenjord. But
 25 this is little bit more removed, because in

1 Stavenjord, at least you know, you're going to
 2 know whether or not they're permanently partially
 3 disabled, and the criteria for permanent partial
 4 disability are fairly mechanical, they're not
 5 totally mechanical, but some of those are totally
 6 mechanical. The age factor is totally mechanical;
 7 the educational factor is totally mechanical.

8 Impairment award isn't totally
 9 mechanical, but in most cases it is not going to
 10 be disputed. In those cases you rarely see
 11 impairment award disputes. And the physical
 12 restrictions is less likely to be disputed than
 13 maybe wage loss restrictions. So that's sort of a
 14 mixed bag. Stavenjord is sort of a mixed bag.

15 MR. HUNT: But I think we need to ask
 16 ourselves whether it's any more in dispute than --
 17 for example, a wage loss or not is any more in
 18 dispute than is whether is somebody is an employee
 19 under the "A" and "B" criteria. And I would
 20 submit to you that that is no more -- I think one
 21 is as clear as the other. They both can be
 22 disputed.

23 But if, for example, somebody doesn't
 24 have their own separate business, then the odds
 25 are they are an employee.

1 THE COURT: Okay. We're sort of laying
 2 out what the problems are, and I'm not making any
 3 decision. To some extent, we're sort of arguing
 4 what the merits are here. But that's one thing we
 5 have to do. I think the first order of business
 6 is identifying whether or not this is a common
 7 fund or class action case.

8 MR. LUCK: Or either or neither.

9 THE COURT: Right. I understand that.

10 MR. HUNT: I think one other
 11 consideration goes along with that, Your Honor.
 12 And I don't say this as a threat. I don't want to
 13 you to take this that way at all.

14 But the fact of the matter is if you
 15 rule that it's neither a class action suit nor a
 16 common fund suit, I think we have a right to go
 17 out and solicit these guys, and I think we can go
 18 to the Department of Labor and get the list of
 19 independent contractors, and send out a notice,
 20 which would be essentially the same thing we'd do
 21 here if we get the claims in that we think we
 22 might get. Then you're going to be dealing with
 23 them on an individual basis without a management
 24 plan. It's just a thought. I'm not --

25 THE COURT: Yes.

1 MR. FOUST: And it also won't be just
 2 us, it will be lot of claimants' lawyers lined up
 3 on this as well.

4 MR. LUCK: This kind of underscores the
 5 global problems in this case, and I think
 6 exemplifies it -- and I'm happy it's first,
 7 because it exemplifies it more than any of the
 8 rest of them -- how out of control maybe this
 9 whole common fund retroactivity situation has
 10 gotten.

11 In Wild especially, by its very term,
 12 the implementation of the decision if it's
 13 retroactive requires a specific factual
 14 determination on whether someone is an employee or
 15 an independent contractor, and then all of the
 16 entitlement determinations, not just by going
 17 through the 703 formula. There's no fund created.
 18 There's no commonality between the people other
 19 than a concept and precedent.

20 And it's a clear example of trying to
 21 turn a precedent into a common fund/class action,
 22 and the difficulties that are associated with it;
 23 and why, one, there's no common fund, and two, I'm
 24 arguing, that the standards of retroactivity
 25 wouldn't be applied.

1 But it's a real good example of the
 2 practical and legal problems that we are
 3 associated with now that has become en vogue.
 4 Every time you make a decision, or the Supreme
 5 Court makes a decision, and we've got to deal with
 6 the common fund situations.

7 This is the worst of all of the cases I
 8 think factually that exemplifies that.

9 THE COURT: I think that the Wild and
 10 Mathews case are going to be the most difficult
 11 to deal with, irrespective of whether or not
 12 they're common fund cases, because even if I say
 13 they're not common fund cases and there's no class
 14 action, Jim and Luke are absolutely right. We're
 15 going to get individual claims, and we're going to
 16 have to handle them as a matter of fact.

17 From my perspective, I think probably
 18 that's the biggest thing that's probably hit the
 19 Court in quite awhile. But there's lots of other
 20 issues, too, that I envision. And the one year
 21 claim filing is going to be -- claimants who
 22 didn't file within one year because they believed
 23 my original decision in Bolden, that the exemption
 24 is absolute, so why should they file a claim? I
 25 mean I can envision that being raised as a

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1 defense.

2 That can be also envisioned that there's
3 mutual mistake in the law being alleged for
4 failure to file some sort of relief being
5 requested from them under the statute of
6 limitations.

7 MR. LUCK: And the other side of the
8 coin is estoppel is a two-way street. If Jim says
9 he's going to go get a list of all the people that
10 held themselves out to be independent contractors,
11 and invite them to come in and now say they're
12 employees, that doesn't involve necessarily a
13 change in the law or a confusion over Bolden. It
14 involves a total change of course based on this
15 opportunity, and kind of underscores what my
16 concern is.

17 THE COURT: Except for Wild and Mathews
18 made it pretty clear, at least to me, that
19 estoppel isn't going to arise as far as the person
20 that has an exemption. If they're an employee,
21 they're going to be an employee whether or not
22 they've actively participated or even requested
23 the independent contractor status. That's the
24 problem with that.

25 MR. LUCK: So it is a one-way street.

1 procedure whereby you determine independent
2 contractor status or not. It didn't change the
3 test, it just simply changed the procedure whereby
4 you determine that. It doesn't automatically
5 entitle someone to benefits as a result of the
6 decision.

7 And to me, that is a tremendous
8 difference between all of the other cases that
9 we're talking about, because in and of themselves,
10 they did change something substantively, and that
11 then I think distinguishes this case.

12 THE COURT: Those are all things that
13 we're going to have to address, and also
14 probably in this whole process is address exactly
15 what the Supreme Court has said in those cases.
16 As I read them, it was sort of the employer has to
17 inquire, but it's also, when you read it, it looks
18 like if an employer sees certain things, then
19 they're employees, and they can't put their head
20 in the sand.

21 So you're almost making a substantive
22 judgment, not just a procedural judgment, when
23 you're looking at those cases.

24 But in any event, I guess we're going to
25 have to flesh that out and argue whether or not

1 THE COURT: It seems to me that it's a
2 one-way street. When I read Wild and Mathews, I
3 think it's real one way.

4 (Mr. Angel enters)

5 MR. MARTELLO: I'm just kind of a
6 bystander here. And having been involved in a lot
7 of these cases, what I'm having a disconnect with,
8 is -- Again, I guess I obviously share with what
9 Brad has said. To me, it's become so far removed
10 that --

11 What's been established in Wild is a
12 procedure, a procedure whereby you determine
13 whether someone is an independent contractor or an
14 employee; and in and of itself, the decision
15 doesn't change anything. It doesn't automatically
16 deem someone an employee, nor does it deem them an
17 independent contractor.

18 And so to me, when I see this decision,
19 what I think it does make most sense is to have
20 the individual claims come forward, because
21 they're factually going to be different. Each one
22 is going to turn on the facts of the individual
23 case.

24 And the legal precedent that was
25 established in Wild is simply with regard to a

1 this is an appropriate case for class action or
2 common fund. One of the questions that I have is:
3 How do we even identify these people out there?
4 What do you do in a case like this?

5 These other cases, we formulated methods
6 to identify people; but in this case, we don't
7 know who has been injured because the claimants
8 have -- they may not have filed claims, number
9 one. There may be some that have filed claims
10 that have been denied. How do we ferret those
11 out? It's going to be short of maybe what you're
12 suggesting, Jim, which is to go get a list of all
13 the independent contractors in the state, and send
14 them out a notice they might be -- if they were
15 injured, they might be entitled to workers
16 compensation benefits.

17 MR. LUCK: I don't think from a claims
18 standpoint, from a claims records standpoint,
19 there's a viable way to do it.

20 THE COURT: That's what I wondered.

21 MR. HUNT: You know, and Your Honor, the
22 way that I was notified about Blockbuster
23 overcharging me late fees because my wife never
24 gets the videos back on time, is by mail. And I
25 could go get my money if that's what I wanted to

1 do.
 2 That's why I wonder if this is different
 3 in that respect, too, from class versus a common
 4 fund. And we can call it whatever we want, but it
 5 is dissimilar in that respect. I don't disagree
 6 with that. But it's not an unmanageable problem,
 7 when you look at recall notices on cars,
 8 Blockbuster Video stuff, overcharging for my
 9 mortgage insurance.

10 MR. LUCK: But the essential concept of
 11 this class action situation is if it requires a
 12 trial, we go to trial to determine what you're
 13 entitled to all the way through, you don't have
 14 the necessary commonality in order to have a class
 15 action, so it seems like it's neither.

16 I agree with you. I don't think there's
 17 a fund created, so the traditional common fund
 18 approach doesn't apply, and it does seem that
 19 we're going to have to brief and argue about that.
 20 But it seems like because of the mini trial
 21 requirement on each entitlement, that it doesn't
 22 seem like it's a proper class action situation
 23 either.

24 THE COURT: Here's my thought. I think
 25 we need to brief it. I think we need to pay

1 it different than the Blockbuster case or the auto
 2 recall because the manufacturer has records of
 3 what's happened here; whereas here, if it's some
 4 guy who has never filed a claim, there is no way
 5 for us to go and locate the people. You're
 6 essentially just waiting for them to come forward
 7 and file their individual suit, which I think
 8 distinguishes from the idea of a class action,
 9 where you can say Blockbuster Video, you can go
 10 through their records, and you can see 3,000 times
 11 where they overcharged them.

12 THE COURT: I think you're almost
 13 mailing a notice out to all the independent
 14 contractors.

15 MR. HUNT: That's what it is in
 16 asbestosis cases. Why not these class actions?
 17 Because you still get into mass mailing, I think.

18 THE COURT: There's only 60,000 of these
 19 people out there.

20 MR. LUCK: And who, as an independent
 21 contractor with a legitimate objection that had
 22 been hurt in the work place, wouldn't respond
 23 favorably, human nature being what it is, the fact
 24 that, "Oh, yeah, I must have been an employee,"
 25 and the sorting process, and the individual

1 particular attention to the class action criteria.
 2 Any of these things, even if we say this satisfies
 3 the class action criteria, I'm probably going to
 4 handle it in the more informal way rather than
 5 doing it the other way, because it just makes more
 6 sense to do it that way.

7 But it seems to me -- and I think I'm
 8 hearing this from both sides -- is that we really
 9 need to look at the class action criteria and see
 10 how they fit, or how this situation fits with
 11 these criteria, and work off of those. I don't
 12 know that other criteria are out there that we
 13 could use.

14 Common fund, if it's a common fund, it
 15 seems to me it probably would be a class action.
 16 But I guess what I'm hearing is that it may be a
 17 class action, but not a common fund, so they're
 18 not totally interchangeable, and maybe that's
 19 right.

20 MR. LUCK: Or it may be just precedent
 21 that we need to move on, and we don't need to deal
 22 with either.

23 MR. OVERTURF: I think as far as
 24 identifying the people, maybe you could do it by
 25 looking at people who have filed claims. I do see

1 factual circumstance consideration is multiplied
 2 when that's your method of identification.

3 MR. OVERTURF: Why not a notice,
 4 identifying the injury --

5 MR. HUNT: We're willing to do that.

6 THE COURT: Let me hear from Mark, and
 7 then I'll throw you a couple of questions.

8 MR. CADWALLADER: In all class action
 9 cases cited as an example, you had the defendant
 10 having the records, and it is the defendant who
 11 has presumably done whatever bad acts that is
 12 alleged.

13 Here you're saying, "Let's get the
 14 non-party," i.e., the department, who hasn't done
 15 anything bad or wrong, to come up with all this
 16 data.

17 MR. FOUST: I believe we have the right
 18 under the Freedom of Information Act to receive
 19 that information if we request it.

20 MR. HUNT: Just the list of the
 21 independent contractors.

22 MR. CADWALLADER: A list of just names?

23 MR. FOUST: Yes, names and addresses.

24 MR. CADWALLADER: There's a specific
 25 statutory provision that says you can't get, under

1 essentially the Freedom of Information, a list of
 2 names and addresses for use as a mailing list.
 3 2-6-210, 211, something like that. There is
 4 potentially a claim of individual privacy.
 5 Potentially. I don't know. But we do at least
 6 have the statutory issue of not being able to
 7 furnish a mailing list.

8 MR. FOUST: I would hope this isn't junk
 9 mail.

10 THE COURT: There's all sorts of
 11 problems. Here is my thought. Obviously I think
 12 we need to brief it. I think we need to identify
 13 what the problems are. Obviously Jim and Luke,
 14 you have some answers to that, so we need to know
 15 what those answers are, as far as identification
 16 and what kind of problems we're going to have or
 17 not have in the whole process. So we're going to
 18 need to brief that.

19 Geoff Angel just came in a few minutes
 20 ago, and let me sort of, for his edification, sort
 21 of outline where we're at.

22 Geoff, I had actually intended for you
 23 to be here for this one, too, and sort of combine
 24 the two, so we're probably a little bit ahead.

25 MR. ANGEL: I was surprised to see so

1 on both sides. So to some extent, I'm hearing
 2 argument on it already, but we're going to brief
 3 all those, and we're going to revisit all of that.
 4 It's just sort of an initial get acquainted
 5 introduction to what kinds of complexities we
 6 have in the case.

7 (Ms. Gleed enters)

8 (Mr. Jones enters)

9 MR. LUCK: Did you put prospective
 10 application on your master issue list?

11 THE COURT: Okay. I'll put that on.
 12 And then Brad has an issue of prospective
 13 application, which he's absolutely going to
 14 convince me as to what he's asking about. I
 15 haven't figured it out yet, but he's going to make
 16 sure I figure it out.

17 MR. HUNT: I think the argument is good
 18 because it helps define the issues.

19 THE COURT: Right. That's the purpose
 20 of this, and that's my thought.

21 MR. LUCK: I think Mark's point is
 22 especially interesting. I wasn't aware of that
 23 statute, because if Jim's threat comes through,
 24 and he has to solicit clients, that is a mass
 25 mailing under that statute.

1 many people in the room.

2 THE COURT: And that's our fault because
 3 we scheduled them at different times. But
 4 basically the issues that are appearing in most of
 5 these cases that we've identified are the lien,
 6 whether or not the lien notice is going to be sent
 7 in these other cases, including this case, and to
 8 whom are we going to going to send this lien
 9 notices, is there a global claim.

10 In your case -- and Mathews may be
 11 different because of the position that you've
 12 taken, and we'll talk about that when we get to
 13 your case. A question of retroactivity, a
 14 question of whether or not we should stay payment
 15 of retroactive benefits before the retroactivity
 16 issue can be resolved; the scope of the lien
 17 claim, again that's the global issue; and then
 18 common fund issues, whether these cases are
 19 appropriately common fund cases, or if not common
 20 fund cases, then can they be -- are they
 21 essentially class actions, is there a class out
 22 there that we can identify.

23 We're sort of working through some of
 24 those issues, and I think more than anything,
 25 we're sort of fleshing out what the arguments are

1 MR. HUNT: I'll figure something out.

2 MR. FOUST: Billboards.

3 MR. HUNT: One page ads in the
 4 newspaper.

5 THE COURT: I express no opinion on
 6 whether or not it's appropriate to solicit clients
 7 under these circumstances. That's beyond my
 8 off-the-top-of-my-head knowledge on something like
 9 that, and that may be more of an ethical issue
 10 than anything else. I don't know what the ethics
 11 are on that these days.

12 Certainly in the context of a court case
 13 in my orders, we can do the Court supervision and
 14 things like that. We're doing those sorts of
 15 things. But that may be different than just
 16 soliciting, and I don't know the answer to that.
 17 So I don't know what happens.

18 Retroactivity issue, are you going to
 19 raise it?

20 MR. LUCK: Yes.

21 THE COURT: We're going to need to brief
 22 that.

23 MR. CADWALLADER: Quick question, Your
 24 Honor.

25 Brad, when you're talking about

1 prospective, are you really talking about whether
2 we need an implementation date?

3 MR. LUCK: Yes. If we have a stay on
4 retroactivity, at what point does prospective
5 implementation start, and for what claims?

6 THE COURT: It certainly starts on the
7 day the decision is issued, and probably in a case
8 where I issue the decision initially, and I wasn't
9 reversed, it probably starts on that day.

10 MR. LUCK: Do you want me to take my
11 next shot at trying to explain my concern, or is
12 this a bad time for it?

13 MR. HUNT: I would like to hear it.

14 THE COURT: Yes. It's a good time.

15 MR. LUCK: There's no question that on
16 the date of your decision or on the date of a
17 final decision from the Supreme Court, we have the
18 precedent. But we're caught up in comp with other
19 rules in terms of entitlement dates. It's the
20 date on which the statute is passed; it's the date
21 on which an injury occurs; it's the date on which
22 you have OD entitlement.

23 And it's more complicated in OD cases
24 because these cases span time, and the OD statute
25 has changed in terms of statute of limitations

1 to PPD before, but they're still entitled to PPD
2 because they still meet the criteria, and in the
3 future they'll be still be entitled to PPD. So if
4 we apply that on that date, anybody who is
5 entitled to PPD on or after that date --

6 MR. LUCK: That's effectively -- for
7 some of them, if they were ongoing old injuries,
8 old OD's -- that would be a retroactive
9 application.

10 THE COURT: Well, that's under your
11 definition, but the question of prospectivity is:
12 Are we applying in prospective to anyone -- is it
13 a prospective application if on the date of the
14 decision or after the date of the decision they're
15 entitled to it? Do you see what I'm saying?

16 MR. LUCK: Yes.

17 THE COURT: So that would effectively --
18 If a prospective application encompasses anybody
19 who is entitled to on or after the date, which
20 they would be, then the retroactivity question
21 just about goes away, doesn't it?

22 MR. HUNT: So are you saying that only
23 those people whose entitlement would have ended
24 prior to the --

25 THE COURT: -- yes, would be barred.

1 from one year from when you knew or should have
2 known you were totally disabled, to a year from
3 the time in which you knew you had an occupational
4 disease.

5 So on a given date, we have a Supreme
6 Court decision that says that people who are
7 workers compensation and occupational disease
8 claimants have effectively a new benefit; we have
9 people that were injured before that time; we have
10 people that have entitlement dates before that
11 time; there are on ongoing benefits.

12 Does it apply to everybody? Does it
13 apply to a date of injury after that period? Does
14 it apply to a date of entitlement under OD after
15 that period? Or do you just simply open up the
16 books at that point, and everybody getting
17 benefits has it modified? Because people are not
18 similarly situated in terms of entitlement dates
19 and scope of entitlement.

20 THE COURT: Actually the answer to that
21 question may moot the retroactivity question, it
22 sounds to me like. I see what you're asking now.
23 Basically, if on the date of the decision we have
24 people who are entitled to benefits, it's sort of
25 a continuing entitlement. So they were entitled

1 That's exactly the question that I'm raising, for
2 purposes of prospectivity.

3 The problem in workers compensation is
4 that you don't have a fixed thing. It's sort of a
5 continuing entitlement. Because it's an
6 entitlement, it doesn't go away.

7 MR. LUCK: But the entitlement, the
8 first lines of every decision --

9 THE COURT: You're not liking this
10 conversation.

11 MR. LUCK: All we're looking for is
12 direction. This is just a search for justice.
13 This isn't necessarily a system that doles that
14 out in an equal fashion.

15 MR. HUNT: Give us the list.

16 MR. LUCK: The beginning of every
17 decision, though, is that the law at the time
18 controls this person's entitlement. And so
19 someone has date of a injury, just as a simple
20 example, of three years before the decision. The
21 decision comes out; so we've got an entitlement
22 determined by the law at this point in time, and
23 the decision out here. And they're still on
24 benefits, yet it's still determined on the basis
25 of the law at the time.

1 Absent retroactivity, the law as it
 2 existed at the time of their entitlement is going
 3 to rule their claim. The fact that they're just
 4 on ongoing benefits doesn't seem to abrogate that
 5 fundamental principle.

6 THE COURT: Okay. I see that. That's
 7 the flip side of that argument. I understand that
 8 argument, too.

9 The problem is -- Well, okay -- This may
 10 get -- Prospectivity and the retrospectivity may
 11 get bound up into one question really because --

12 MR. CADWALLADER: Of retroactivity?

13 MR. LUCK: Right.

14 MR. CADWALLADER: Because of when you
 15 implement.

16 THE COURT: I wonder if you can separate
 17 the two.

18 MR. MARTELLO: I think you can separate
 19 them. If you're just simply looking for a
 20 prospective application, then there should be some
 21 point at which the decision is going to go forward
 22 without making the call on the issues that are
 23 raised here. The retroactive, whether it is
 24 retroactive, it applies to cases, even though
 25 there's ongoing benefits, but the case goes back a

1 you -- The law and effect idea, what law was
 2 in effect. And that comes back to the
 3 retroactivity question in the Supreme Court,
 4 because generally judicial decisions are applied
 5 retroactively, meaning that was the law in effect.
 6 You didn't know that it was in effect at the time,
 7 but that really was the law in effect.

8 I characterize it as an airplane flying
 9 over the landscape, and you've got one of those
 10 photographers who is taking strip films, and then
 11 you have the interpreter sitting down there and
 12 looking at it. And so at one point in time, we
 13 look at it, and say this doesn't exist, and then
 14 somebody comes along years later and says, "Oh,
 15 you didn't magnify this enough. It does exist."
 16 So all we're doing is declaring it really existed
 17 at the present time and I just missed it type of
 18 thing.

19 So I think the two issues may be bound
 20 together.

21 MR. OVERTURE: I think what we were
 22 looking for, Judge, is I think we could all agree
 23 that there's a point in time when the prospective
 24 application is appropriate.

25 Probably the clearest one is after the

1 number of years.

2 I think you can find that mark, and
 3 that's kind of what we were looking, is to have
 4 that so that we can start to apply this thing
 5 prospectively, and then deal with the issues that
 6 have to do with retroactivity.

7 THE COURT: But see, the problem is
 8 assuming that you've got somebody who is injured
 9 under the Workers Compensation Act and is entitled
 10 to permanent partial disability, and he's never
 11 requested it, and they can go back to 1987, to
 12 1984, to 1983, to 1979. I mean I don't know how
 13 far back I've seen those claims. But they can
 14 come in today and request it because it's a
 15 continuing obligation. It exists today just as
 16 much as it existed back then.

17 And so in a sense, you're not applying
 18 it retrospectively when you have somebody where we
 19 have this new decision out, and says that they can
 20 now collect. They can now collect it, but now
 21 they're entitled to it, it's a continuing
 22 entitlement.

23 But the other problem that Brad has
 24 raised, the flip side, is this retroactivity
 25 issue. The flip side of that is, again, when do

1 date of the Supreme Court decision, if it reversed
 2 you; or probably the date of your decision in
 3 cases where they didn't reverse you. Claims that
 4 come in after that date, I don't think anyone
 5 would argue that the precedent is going to apply.

6 THE COURT: But you don't need me to
 7 tell you that. You already know that, I think.

8 MR. LUCK: What we were looking for --
 9 and we did put this in a couple different
 10 pleadings. We're looking for your direction so
 11 that it's appropriate, and that we have your
 12 approval for that process, because there's claims
 13 being made that some of these payments should be
 14 made, and if they're not being made, there's an
 15 extra contractual implication of that.

16 And our hope was that we would do
 17 whatever we do under the guidance of the Court,
 18 that's something that's approved. Basically we're
 19 covered because we're doing what you said is okay.

20 MR. MARTELLO: The additional problem,
 21 too, is for example in Flynn, there's not a claim
 22 for attorney fees prospectively. Now, unless we
 23 know what that means, and that's where we had
 24 filed the --

25 THE COURT: Those are fixed events.

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1 That's different from my continuing entitlement
2 example. Flynn is very different because those
3 cases have already been litigated, and the
4 attorney fees have already been paid that they're
5 talking about. So that's clearly a question of
6 retrospective application. The rights are fixed
7 in the past, and there's no continuing thing.

8 MR. MARTELLO: And it may well be. For
9 example, on Schmill, in conversations with Laurie
10 Wallace, she's indicated that she's not going to
11 claim something prospectively. Now, if in fact
12 that is her position that she does take, there
13 needs to be a determination as to what that point
14 is, so that for management and for administering
15 these cases, we can make the appropriate calls on
16 attorney fees.

17 MR. LUCK: If your first impression on
18 prospective is right, then she's not entitled to
19 any fees under her request for anybody that's on
20 ongoing benefits.

21 THE COURT: Laurie, where are you?

22 MR. LUCK: It just shows you the
23 difficulty of the issue.

24 THE COURT: Well, it is difficult. I
25 think that the only thing that we can probably say

1 see what the nuances are.

2 But this particular case is a little bit
3 different because this is a question of whether
4 or not they were employees at the time that they
5 were injured, or I suppose occupational disease
6 as well. And those are going to be fixed pretty
7 much, except you're going to have the Schmill and
8 Stavenjord questions if it's actually an
9 occupational disease, I suppose.

10 MR. OVERTURE: I guess the way we look
11 at this is the safest way for us to be sure that
12 we were applying the prospectively correctly in an
13 injury, it would be the day after the Supreme
14 Court decision in the case you were reversed, or
15 the date after your decision in the case you were
16 upheld in.

17 In the case of an OD, when you're
18 dealing with a one year statute to file it from
19 the time you knew or it was diagnosed, it would be
20 a claim which was filed a year after the decision
21 that set the precedent, because then it could have
22 been a whole year before they knew or should have
23 known or had it diagnosed. We feel that we're not
24 going to get caught on any like that.

25 THE COURT: Well, I think -- Why don't

1 as far as prospectivity is for sure claims arising
2 after the date of the Court decision are
3 prospective, and you've got to take care of those.

4 MR. LUCK: For injuries, that's easy.
5 How would you -- What is the date of arising for
6 an occupational disease? Would it under the
7 present circumstance be when someone knew or
8 should have known that they had an occupational
9 disease, which is the beginning of the statute of
10 limitations?

11 Because the entitlement dates by
12 history -- they weren't so important for OD's --
13 have been arbitrarily assigned to claims, usually
14 when the claim came in.

15 MR. OVERTURE: That was really the
16 problem with the OD's is -- we can say okay, if
17 you have a claim that comes in the day after your
18 decision in Stavenjord, now, did that person's
19 entitlement arise the day they filed the claim --
20 which would make it clearly a prospective case --
21 or does his entitlement arise within a year back,
22 when he either was diagnosed or should have known
23 he had an OD, which would make it a retro.

24 THE COURT: I'm going to have to deal
25 with those in Stavenjord and Schmill. I think I

1 you --

2 MR. HUNT: Well, I may be speaking
3 against myself a little bit --

4 MR. OVERTURE: That's okay.

5 MR. HUNT: I'm used to it. I don't know
6 that I would have an objection to -- What I hear
7 these guys saying, and I don't blame them, is that
8 we don't want fees and penalties for
9 unreasonableness and all that because we're
10 trying to figure something out. And I can
11 appreciate that problem that they have.

12 I don't know that it would be
13 unreasonable for you to say, "Any claims that come
14 in the day after my decision," for example, then
15 you pay those, and any of the rest are up in the
16 air, so you don't have to pay those, and therefore
17 you're protected from fees and penalties, and all
18 of that because --

19 MR. LUCK: That's easy for injuries,
20 tough for occupational diseases.

21 MR. HUNT: But when the claim comes in,
22 if he says -- when you get the piece of paper,
23 then you've got it identified, for the State, for
24 purposes of the State. Then they're protected.
25 Then we don't have to worry about it. And you can

1 make that decision now, and then we can work
 2 through this whole process.
 3 MR. LUCK: If we get an OD claim the day
 4 after the operative date, and the entitlement
 5 person knew or should have known six months before
 6 that that they had an OD, the OD entitlement then
 7 predates the decision, and it would effectively be
 8 a retroactive application to that entitlement.

9 MR. OVERTURF: Do we have clear law on
 10 that, the law that applies? Is it the date that
 11 they filed that claim, or that date when they had
 12 it diagnosed? Let's say you span two laws.

13 THE COURT: With the date of injury,
 14 that's pretty easy because you've got a specific
 15 identifiable event. I don't know that the Supreme
 16 Court has ever addressed the Occupational Disease
 17 Act. Wait a minute. I did, didn't I? What did I
 18 say?

19 MR. OVERTURF: I think you addressed it.

20 MR. HUNT: Well, how many of those do
 21 you think you're going to have?

22 MR. LUCK: You know what the most
 23 important point is? All we need is the direction,
 24 because there may or may not be that many, but
 25 it's the direction and the blessing of the Court

1 statute of limitations, and we'll set a date for
 2 that, and we can sort out later what that is, but
 3 let's fix it.

4 Then we've got those out, and you go
 5 forward on those, and there's no question about
 6 those, and we've also set the line as far as what
 7 we're arguing about, I think.

8 MR. LUCK: And that would be great. And
 9 then in each case, we need to know something about
 10 the scope of lien, and what's being claimed if
 11 there's prospective fees; because if we're going
 12 to be withholding on those prospective
 13 applications, we need to know that.

14 THE COURT: So we need to know that,
 15 too.

16 MR. LUCK: And so far, I don't think
 17 anybody has claimed fees on the prospective
 18 benefits being paid.

19 MR. OVERTURF: No, not FFR. We've got
 20 an indication in both Flynn and Schmill that they
 21 won't.

22 MR. HARRINGTON: In Stavenjord also.

23 MR. HUNT: Let me go on the record as
 24 making that claim right now.

25 THE COURT: You're going to make a claim

1 that's the most important.

2 MR. HUNT: If you don't have very many,
 3 maybe those could be dealt with on an individual
 4 basis. If you've got five, then -- more than
 5 that, you think?

6 THE COURT: I'll tell you what let's do.
 7 Firstly what I'm doing is I'm carving out what's
 8 not covered by my stay on retroactivity, I think
 9 is what I'm doing. Am I right? Does that --

10 MR. LUCK: Yes.

11 MR. HUNT: I think so.

12 THE COURT: So what I need to do is I
 13 need to spell out what is not involved in that
 14 stay.

15 And certainly I think we can say right
 16 now today that claims arising, as Greg says, after
 17 the date of the decision; if it's a Supreme Court
 18 decision, the one that reverses me; if it's my
 19 decision, it's my decision. Any injury occurring
 20 after that is covered.

21 Let me look at the Occupational Disease
 22 Act and see what I say about the statute of
 23 limitations, and we'll set a date as far as what
 24 that's concerned. You're saying it should be a
 25 year beforehand. Let me see what I said in the

1 on the prospective?

2 MR. HUNT: Yes.

3 THE COURT: For how long?

4 MR. HUNT: I knew that question was
 5 going to come up. I figure until about 2008.

6 MR. FOUST: He's going to retire then.

7 MR. HUNT: How about we make that a
 8 temporary one as well, and then we can figure that
 9 out.

10 THE COURT: Just withhold for the time
 11 being.

12 MR. OVERTURF: That's a very interesting
 13 application of the lien, though, because if now
 14 essentially the exemption doesn't apply, a claim
 15 arises, it's never going to even be considered.
 16 So I'm having a hard time seeing how the lien
 17 could apply prospectively.

18 MR. ANGEL: If I could say something
 19 there. I think that it would apply prospectively
 20 only for the people if it's treated as a common
 21 fund or class action, only for people that
 22 actually need our help. In other words, if you
 23 guys accept the fact for a claim that comes in
 24 next week, that the exemption means nothing, you
 25 can give it an individual analysis without our

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1 involvement obviously, or theirs if they're not
2 joined. Obviously there's no fee.

3 If it's treated as a common fund or a
4 class, until the administration is done, we'll
5 actually actively have to litigate those cases.

6 MR. LUCK: If the claims are coming in,
7 we're going to apply the precedent.

8 MR. ANGEL: So they're out.

9 MR. OVERTURF: So we're not going to
10 consider the exemption.

11 MR. ANGEL: So as soon as you guys start
12 applying it that way, treating them individually,
13 they're not represented.

14 MR. LUCK: If you would like notice if
15 you we take an unreasonable position, and fail to
16 apply precedent to an individual claim, then we'll
17 call you.

18 MR. HUNT: Have any of the other lawyers
19 in any of those cases taken the position that
20 after the Supreme Court case, they are entitled to
21 common fund fees?

22 THE COURT: For cases arising after the
23 Supreme Court case? They haven't so far.

24 MR. HUNT: I don't want to waive that
25 right at this point.

1 THE CLERK: July 11.

2 THE COURT: That's the same date those
3 other briefs are due, so why don't you issue some
4 sort of notice of whether or not you claim or do
5 not claim attorney fees on cases arising after the
6 date of the decision.

7 MR. HUNT: With a brief.

8 THE COURT: I don't know as you need to
9 brief it at that point. We haven't really talked
10 about a briefing schedule. But at least so we
11 know that there's an issue out here, because I
12 think --

13 Well, that's the next point. Let's talk
14 about what are we doing about attorney liens and
15 notices of that? How do we even do that in this
16 case, other than I suppose the same way we did
17 Fisch, Frost, and Rausch? Do you want to do that?

18 MR. HUNT: Yes.

19 MR. OVERTURF: To all insurers?

20 MR. HUNT: Right.

21 THE COURT: So a global claim. Have you
22 filed a notice of lien?

23 MR. FOUST: No.

24 MR. HUNT: No.

25 THE COURT: You need to do that. So

1 THE COURT: I understand it.

2 MR. HUNT: I guess Geoff and I would
3 disagree or at least separate a little bit on
4 that.

5 THE COURT: He's cutting out your fees.

6 MR. HUNT: Yes, he is. That's exactly
7 right. I'm not necessarily willing to go down
8 that road without thinking more about it and
9 taking a look at it.

10 THE COURT: Let's do this. Why don't
11 you think about that. You might want to look at
12 the law in the cases, and figure whether or not
13 you have a good shot at it, and then tell me. Do
14 you want to set a time period for that? A couple
15 weeks?

16 MR. HUNT: Yes.

17 THE COURT: Can you do it and study your
18 lines at the same time?

19 MR. HUNT: I've pretty much got my
20 lines. I've got a lot more to do with that, but I
21 have the lines down.

22 MR. LUCK: In both cases.

23 MR. HUNT: The lines are easy. Yes, I
24 think I can do that. A couple weeks would be --
25 Why don't you give us two weeks from this Friday.

1 file a notice of lien. And Pat, do we have the
2 list of all of the insurers that we got for Fisch,
3 Frost, and Rausch?

4 THE CLERK: I'm not sure.

5 THE COURT: Okay.

6 THE CLERK: I think so. I think we
7 still do.

8 THE COURT: I think we have it. If we
9 don't have it, then the attorneys in Fisch, Frost,
10 and Rausch have it.

11 MR. LUCK: What we might consider doing
12 is sending a global order out advising the
13 insurers of two things: One, of all the
14 individual cases; and two, subscribe to Montana
15 Law Week, and consider themselves liened on every
16 decision that's reported. Maybe just the first
17 part.

18 THE COURT: Well, I think one thing we
19 could do, is we could send out a notice for all
20 the cases, and that makes sense to just send them
21 out for all the cases that liens have been filed
22 in this case, and maybe we can spell out what the
23 dates are.

24 MR. LUCK: Especially if it's that list
25 of 600.

1 THE COURT: I don't want to be sending
2 out a notice in every case. So that makes sense.
3 So we'll coordinate the lien notices.

4 MR. HUNT: So there's going to be one
5 lien notice sent to out all insurers for all
6 cases.

7 THE COURT: For all the cases, right,
8 let them know which cases that liens are claimed
9 in.

10 MR. HUNT: Who is going to be
11 responsible for that?

12 THE COURT: We'll coordinate it. We
13 will have to figure out. In Fisch, Frost, and
14 Rausch, the attorneys paid the postage, and they
15 paid the copying costs. I think they mailed
16 copies of the decision. Did they mail copies of
17 the decision out?

18 THE CLERK: Yes.

19 THE COURT: All these decisions maybe we
20 want to microfiche them, and send them the
21 microfiche.

22 MR. LUCK: You know, your internet
23 situation, if you load up all of the information
24 there, and give them a capsule, and refer them to
25 that.

1 presentation, part of our consideration and review
2 in each of these cases that relates to
3 retroactivity is the necessity of a factual record
4 being made because we think that that should be
5 taken into consideration.

6 Each of these cases required, like
7 Stavenjord, an individual internal review to
8 determine what are the practical difficulties, and
9 all kinds of -- and each case will be a little bit
10 different because of the nature of the reviews.

11 And so as we start setting dates, I
12 think it's important. In Stavenjord at least, we
13 were given 30 days to go through everything, make
14 a report to Counsel on the other side, discuss it,
15 and then about a week or ten days later
16 reporting to the Court what the situation there
17 is.

18 All of that I think would -- We need to
19 go through that process before we have a briefing
20 schedule on those issues, because we may need to
21 make a factual record or stipulate to some facts
22 in order to make the arguments on retroactivity,
23 for instance. So that's kind of a precursor, I
24 think, in terms of a process.

25 THE COURT: That's part of laying out

1 MR. HUNT: To the website?

2 THE COURT: Yes. So okay, I think
3 that's probably a good idea rather than sending it
4 out. So we probably ought to do a little summary
5 to tell them what the case decided, and what the
6 nature of the lien is, and probably I'll want
7 input on that. I don't know. Does somebody want
8 to volunteer to do a draft?

9 MR. LUCK: It's their lien.

10 MR. HUNT: We'll do it for our case,
11 and then all the claimants' lawyers can do for
12 each of their cases, we will submit that to you
13 and to them for --

14 THE COURT: When do you want to do that
15 by?

16 MR. HUNT: We can do that by the end of
17 next week. We can get that done pretty quick. So
18 give us ten days for that.

19 THE COURT: July 3.

20 MR. LUCK: Your Honor, as we start
21 talking about dates, can I bring up one point?

22 THE COURT: Sure.

23 MR. LUCK: As I understand it, we've got
24 a July 11th retroactivity brief due. Thinking
25 back to our Stavenjord discussions, part of our

1 what you see is the problem in identifying these
2 claimants and dealing with them, and then the
3 counter to that is what kind of solutions you can
4 come up with. We do need some time to develop
5 that.

6 MR. LUCK: So that will be at the front
7 end of each one of these.

8 THE COURT: Yes. If you read my
9 transcripts in Stavenjord, what I'm trying to do
10 is get cooperation so there's a full exchange of
11 information, so that you will know what they're
12 looking at, and you'll be able to have some input
13 in it.

14 MR. HUNT: Right. I don't think there's
15 going to be any problem with that.

16 THE COURT: Okay. So we'll deal with
17 the lien notices. So the big issues are going to
18 be the retroactivity issue and the common fund
19 issues. And I suppose -- Well, we're actually at
20 the point you're talking about, I suppose, Brad,
21 which is: Do we want to put some sort of time
22 frame on developing the sort of information that
23 you want to put in on it?

24 MR. LUCK: With all of these issues in
25 mind, we need to go back per case, and decide what

1 factual information might be important, what
 2 factual problems, and each one is going to be a
 3 little bit different. We've been thinking about
 4 it, of course, but all of this stuff is kind of
 5 steam rolling everything, and we need to
 6 individualize it.

7 So at the outset, if we could get on
 8 that same schedule. It's easier said than done
 9 also. We've been working at it on Stavenjord, and
 10 there are so many people to talk to, and the time
 11 frame is so long, and getting the input from
 12 everybody, from the computer people to the claims
 13 people, to put everything together. We're pushing
 14 it to get that done in thirty days. But I guess
 15 that's an okay time period.

16 And now we'll have five or six more of
 17 these to do the same process involving a lot of
 18 the same people, and so additional duties in
 19 addition everything else that's going on every
 20 day. Maybe thirty days isn't enough. But it's
 21 just a lot of the same people having to retool for
 22 different issues to determine what individual
 23 claim problems there are, and then communicating
 24 with the other side to determine. So --

25 THE COURT: Well, Jim has got other

1 we're looking at. Even if I say Chevron doesn't
 2 apply, and these cases are automatically
 3 retroactive under Porter and the most recent
 4 United States Supreme Court case, even if I say
 5 that, I'm going to allow the development of a
 6 factual record, so that we have a complete factual
 7 record.

8 And I'll make an alternative
 9 determination based on that factual record, you
 10 know, "If Chevron were to apply, this is the
 11 result I would reach," so that once these cases go
 12 up to the Supreme Court, we have one decision, we
 13 don't get remanded for a further factual hearing,
 14 for a further evidentiary hearing and that sort
 15 of thing. We have one decision, and we have all
 16 the issues tied up, and we can move forward, so we
 17 don't have Wild III, Wild IV, Wild V. That's my
 18 goal.

19 MR. HUNT: Are you going to have this
 20 transcribed?

21 THE COURT: You bet.

22 MR. OVERTURF: Will you put that on the
 23 website?

24 THE COURT: I'll put it on the website.

25 MR. HUNT: Are the briefs on Flynn on

1 commitments, I know, so we probably could do a
 2 little bit more than thirty days on this to work
 3 this out. What do you think?

4 MR. HUNT: Yes.

5 THE COURT: 45, 60?

6 MR. HUNT: Why don't we set it for 45,
 7 and then if they need extra time -- The July 7th
 8 amicus brief, though.

9 THE CLERK: 11th.

10 THE COURT: That stays.

11 MR. HUNT: July 11th still stays.

12 THE COURT: Right. Because what that
 13 case is going to do is I'm going to say whether
 14 I'm going to follow Chevron or not, number one.
 15 Probably I'm going to say --

16 Whether or not I follow Chevron, I'm
 17 going to apply the Chevron criteria, so I've
 18 developed that out in that particular case. And
 19 then I'm going to apply it to the facts of that
 20 case, which are fairly simple and straight
 21 forward. That's the most straight forward of all
 22 the cases, I think, at this point in time. So I
 23 think I can do that.

24 And that will sort of set the ground
 25 rules of what we're doing down the road, and what

1 the website?

2 THE COURT: The briefs in Flynn should
 3 be on the website.

4 MR. MARTELLO: Yes, they are.

5 MR. HUNT: The briefs are?

6 THE COURT: Yes.

7 MR. MARTELLO: If you go in and then
 8 click on the Flynn case, then it will pull up, show
 9 the orders, then it will show the briefs that
 10 have been filed to date. The brief on
 11 retroactivity and on the common fund is on there,
 12 and responses, and that's --

13 THE COURT: Let me ask a question. Is
 14 there anything more that we need to talk about in
 15 this case, in the Wild case?

16 MR. HUNT: Tons, but not necessarily
 17 today.

18 THE COURT: Well, I guess the question
 19 is: Have we identified the issues, and have we
 20 taken all the initial necessary steps we have to
 21 take?

22 MR. LUCK: We've talked about them all.
 23 I'm still a little bit fuzzy. We're going to have
 24 about a 45 day period to do this initial stuff.
 25 Are you going to set the briefing schedule on this

1 case on these other issues now, or are you going
2 to wait until after we get the 45 day period done?

3 THE COURT: I think after -- The thing
4 that I need to do is I need to issue an order on
5 the prospectivity and what's encompassed in the
6 retroactivity, and I think I can do that without
7 further briefing, because I think we know where
8 that's at. I'll look at that other decision.

9 And I might want to discuss that with you, but if
10 I do, I'll conference call you in, and we'll talk
11 about the scope of that order.

12 So I don't think we need briefing on
13 that, and the rest of the stuff I think needs to
14 wait, other than what we've set out.

15 MR. HUNT: With respect to the
16 prospectivity, if we're not available at the same
17 time, I don't have any problem with you talking to
18 them without my being present on that issue.

19 THE COURT: I don't think I need to do
20 that. Usually I can gather everybody up by phone,
21 so I'll make sure everybody is included. Besides,
22 it's more fun when you do it that way. Why don't
23 we take about five minutes.

24 (The proceedings were concluded at 9:45 a.m.)

25 * * * * *

1 CERTIFICATE

2 STATE OF MONTANA)

3 : SS.

4 COUNTY OF LEWIS AND CLARK)

5 I, LAURIE CRUTCHER, RPR, Court Reporter,
6 Notary Public in and for the County of Lewis and
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 -64- 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 this day
17 of , 2003.

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

