

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

3  
4       ROBERT FLYNN and CARL MILLER

5               vs.   WCC NO. 2000-0222

6       MONTANA STATE FUND

7               and

8       LIBERTY NORTHWEST INSURANCE

9       COMPANY

10  
11       ALEXIS RAUSCH, et al.

12               vs.   WCC NO. 9907-8274R1

13       MONTANA STATE FUND

14               and

15       JEREMY RUHD

16               vs.

17       LIBERTY NORTHWEST INSURANCE

18       COMPANY

19  
20       DALE REESOR

21               vs.   WCC NO. 2002-0676

22       MONTANA STATE FUND

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CATHERINE E. SATTERLEE

vs.

WCC NO. 2003-0840

LUMBERMAN'S MUTUAL CASUALTY  
COMPANY

HONORABLE MIKE MCCARTER, presiding

On the 1st day of April, 2005, beginning  
at 1:00 p.m., the above-referenced in-person  
conference was held at the Workers' Compensation  
Court, Helena, Montana, before Yvonne Madsen,  
Registered Professional Reporter, Certified  
Shorthand Reporter, Notary Public.

## 1                           A P P E A R A N C E S

2           Honorable Mike McCarter, Judge

3           Patricia Kessner, Clerk of Court

4           Jackie Bockman, Deputy Clerk of Court

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## 6           ATTORNEYS PRESENT:

7           Leo Ward                           Lon Dale

8           Dave Hawkins                         Monte Beck

9           Rick Davenport                         Steve Roberts

10          Carrie Garber                         Mike Heringer

11          Tom Marra                             Larry Jones

12          Rex Palmer                            Tom Martello

13          Brendon Rohan                        Brad Luck

14          Wayne Harper                         Tom Harrington

15          Justin Starin                         David Sandler

16          Mark Cadwallader                    Charlie Adams

17          Tom Murphy

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1 FRIDAY, APRIL 1, 2005

2 THE COURT: All right. We have a crowd  
3 here so we'll probably have to do things a little  
4 bit differently. First off, for our court  
5 reporter, since we have, I think, 20 attorneys and  
6 other representatives here, I think what we're  
7 going to have to do is whenever you speak, you'll  
8 have to identify yourselves.

9 And let's start it out just by going  
10 around the room and having everybody identify  
11 themselves initially. We'll start with Tom.

12 MR. MURPHY: My name is Tom Murphy. I'm  
13 here on the Reesor and Satterlee cases.

14 MR. DALE: My name is Lon Dale. Our  
15 office represents Mr. Rausch in the Rausch, Fisch,  
16 Ross cases.

17 MS. GARBER: I'm Carrie Garber with  
18 Liberty Northwest/Liberty Mutual.

19 MR. JONES: Larry Jones, Liberty  
20 Northwest.

21 MR. PALMER: Rex Palmer representing  
22 Flynn and Miller.

23 MR. HARRINGTON: Tom Harrington for the  
24 Montana State Fund.

25 MR. LUCK: Brad Luck for the State Fund.

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1 MR. MARTELLO: Tom Martello, State Fund.

2 MR. CADWALLADER: Mark Cadwallader from  
3 the Department of Labor & Industry.

4 MR. ROBERTS: Steve Roberts, I represent  
5 Tom Frost, and I represent Tom Frost on the Rausch  
6 and the Ruhd cases.

7 MR. BECK: Monte Beck on Rausch and Ruhd.

8 MR. ROHAN: Brendon Rohan, I'm here with  
9 Bankers Standard.

10 MR. MARRA: Tom Marra, Saint Paul  
11 Travelers, Travelers and Target.

12 MR. HERINGER: Mike Heringer in Rausch,  
13 for K-Mart and Conoco Phillips, and Satterlee for  
14 Lumberman's Mutual.

15 MR. STARIN: Justin Starin for Hiett.

16 MR. SANDLER: David Sandler for various  
17 self-insureds.

18 MR. DAVENPORT: Rick Davenport, one of  
19 those various self-insureds.

20 MR. ADAMS: Charlie Adams here for  
21 entertainment.

22 MR. WARD: Leo Ward because I love the  
23 law.

24 MR. HARPER: Wayne Harper for  
25 Northwestern Energy.

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1           THE COURT: Okay. The reason I called  
2 you together today is because there were a lot of  
3 issues that were coming up in these common fund  
4 cases and we're proceeding down the road with  
5 regard to some of them and others we're sort of in  
6 a holding pattern, specifically in Stavenjord and  
7 Schmill, those are still sitting up at the Supreme  
8 Court; some of the cases, we're sort of starting  
9 down the road, that are in their infancies, such  
10 as the Satterlee case. Others are further along,  
11 like basically the Rausch and the Ruhd case.

12           But a lot of things were happening and a  
13 lot of questions were occurring to me, and I  
14 thought it would be a good idea to sit down with  
15 everybody who is involved in these cases and sort  
16 of strategize a little bit, find out what's going  
17 on and figure out where we're going, because what  
18 we do in these cases, especially the Rausch and  
19 the Ruhd case and also in the Flynn case, will  
20 probably set more or less of a paradigm for how we  
21 handle the other cases, 7 5.

22           Although, you know, once we set on a  
23 particular course, that doesn't mean it can't  
24 change and it doesn't mean that we can't make  
25 adjustments, but it will at least provide the  
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1 starting point and the starting paradigm.

2 I've given everybody an agenda. And  
3 these -- the agenda probably isn't as well  
4 organized as it could be or should be. It  
5 basically got created organically as questions  
6 came up, and we basically threw them on this list  
7 of questions or list of topics to cover today. So  
8 there's no significance in the way the issues are  
9 listed and there's no significance in the way the  
10 issues are phrased.

11 And also, I would invite anybody who  
12 wants to add anything to this to do so as we go  
13 along. Our only restraint here today is our  
14 numbers. Usually when I sit down in these cases,  
15 we sit down around the table and there's a half a  
16 dozen of us, sometimes there may be as many as ten  
17 of us, and we get going and it works out pretty  
18 well. This will have to be a little bit more  
19 structured because of our numbers, and I apologize  
20 for that.

21 Does anybody want to raise anything  
22 before I start down this list of stuff and just  
23 start plowing in? Okay. Let's plow.

24 The first issue that arose is an issue  
25 that I think got my attention because of Dave  
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1 Sandler who got left out of a telephone conference  
2 that we should have probably given him notice of,  
3 and at least given him an opportunity to get  
4 involved in.

5           We're using telephone conferences often  
6 just to talk about little procedural things,  
7 little things that come up. Generally, we're not  
8 deciding major issues and they're not resulting in  
9 formal decisions and usually they result in  
10 proceeding by agreement, everybody gets together  
11 and basically agrees over the telephone as to what  
12 we're doing, but there may be an interest in the  
13 telephone conferences by other people. And the  
14 question is, who should I involve in the  
15 conferences, who should I notify? And if we have  
16 too many, what do we do in that particular case?

17           And one of the particular problems we  
18 have is in some of these, the issues may involve,  
19 for example, a single insurer. For example, in  
20 Rausch and Ruhd, we've asked each insurer to reply  
21 and identify the claimants that are benefited in  
22 their particular cases. And we might have a  
23 particular problem with a particular insurer in  
24 the case regarding procedures or whatever. And  
25 the question is, is who do we give notice to if  
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1 the issue involves a particular insurer? In some  
2 cases, it may be an issue that might be common to  
3 others, other people might raise the issue. So in  
4 those cases, we probably want to give notice to  
5 everybody.

6 I think right now, Jackie, we're pretty  
7 much giving notice to pretty much everybody? The  
8 conferences, we're setting them up, but then we're  
9 giving notice and an opportunity for anyone who  
10 wants to to participate, is that --

11 MS. BOCKMAN: Right, right. That's how  
12 we've been doing it.

13 THE COURT: Okay. So in the Rausch and  
14 the Ruhd case, are we giving notice just to the  
15 Rausch attorneys or to everybody to let them know?

16 MS. BOCKMAN: Well, actually, the last  
17 ones you've talked with Clair about setting those  
18 up and so I'm not positive. I thought that she  
19 was, you know, letting everybody globally know,  
20 let all the attorneys know.

21 THE COURT: I think we've been letting  
22 everybody globally know by e-mail.

23 MS. BOCKMAN: Right.

24 THE COURT: And try to do that. One of  
25 the problems we have is it's almost going to be

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1 impossible to try to globally contact everybody  
2 and say, you know, What times are you available to  
3 talk about this, because there's just too many  
4 people to do that. So I think what I've been  
5 doing in those cases is the principals that are  
6 involved in the particular question or the  
7 particular discussion, I've been getting times  
8 from them and then notifying everybody else.

9 And I guess the question I pose to  
10 everybody is the practice, the way that we're  
11 doing it at present, is that satisfactory? Do you  
12 have some suggestions on how we do this?

13 Is anybody unhappy with our trying to  
14 figure out who the principals are in the  
15 discussion, arranging the conference with them and  
16 then notifying everybody else, and if you want to  
17 participate you can? Is everybody happy with  
18 that? Is there a better arrangement?  
19 David, do you have any thoughts?

20 MR. SANDLER: No, I think the e-mail is  
21 working fine now.

22 THE COURT: Okay. Is everybody happy  
23 with the e-mail?

24 MR. PALMER: Uh-huh.

25 THE COURT: Okay. We'll talk about that

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1 in a minute.

2 Okay. So that's the way we're going  
3 to -- we'll procedure. If it's an issue, for  
4 example, involving Liberty and Larry and the  
5 Rausch/Ruhd attorneys, we'll get ahold of them,  
6 we'll set up the conference, but we'll let  
7 everybody know. And we'll just let everybody know  
8 who is involved in the common fund cases, and  
9 we'll try to give you the topic about what we're  
10 going to talk about.

11 So I suppose it will be important when we  
12 set up these telephone conferences that we know  
13 what the topics are, and generally we do.  
14 Sometimes -- we just won't take any open-ended  
15 requests, we'll have to make sure we know what the  
16 topics are so everybody is informed.

17 Any thoughts, if we have too many people  
18 what we do? I think we have the capability to  
19 conference six parties in?

20 MS. BOCKMAN: I believe seven.

21 THE COURT: Seven? Seven parties in. If  
22 we get beyond seven, what do we do?

23 MR. ROBERTS: AT&T.

24 THE COURT: Steve Roberts.

25 MR. ROBERTS: Yeah, I think AT&T can  
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1 patch in as many people as you want, as necessary.

2 THE COURT: Okay.

3 Okay. My next agenda item is court  
4 reporters. We have not been using court reporters  
5 on the telephone conferences. My feeling is for  
6 the most part, it's not necessary. I haven't  
7 gotten any complaints about the minute entries.  
8 But the minute entries I've been doing, I've  
9 attempted to make pretty thorough.

10 And there's several possibilities. We  
11 can either not use courts reporters, we can use  
12 court reporters if anyone specifically requests  
13 it, or we can use court reporters at all times on  
14 the telephone conferences. Thoughts?

15 MR. LUCK: How many entries have been  
16 flagged?

17 THE COURT: Does anybody think we ought  
18 to use court reporters in every instance? Is  
19 everybody happy? I mean, you can always request a  
20 court reporter. Is that satisfactory?

21 Okay.

22 MR. MURPHY: I was going to say that you  
23 could have tape backup to your minute entries, if  
24 you want it.

25 THE COURT: We'd have to have a taping

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1 system, though, to do that.

2 MR. MURPHY: Yeah.

3 THE COURT: You know, if somebody wants  
4 to tape them, if one of the attorneys wants to  
5 tape it, I don't have any objection to that unless  
6 the attorneys do.

7 Okay. We'll -- I'll just leave that  
8 open. If anybody wants to tape them, just let us  
9 know that you want to tape them, and I'm sure  
10 everybody will agree to do that. I don't have a  
11 problem with it.

12 MR. MARTELLO: Judge -- this is Tom  
13 Martello -- I think if you're going to record it,  
14 a court reporter. If the person wants to record  
15 it, they ought to retain a court reporter to do  
16 it. Otherwise, let's just do it the way we're  
17 doing it because I think you run into problems  
18 when you start doing things like tape recording  
19 telephone calls, which, granted, you have to have  
20 consent of all the parties. And I just think it  
21 runs into problems with, you know, the equipment  
22 and having it transcribed in some form. I think  
23 if somebody wants to have a court reporter, then  
24 it ought to be up to them to retain someone.

25 THE COURT: Or the Court.

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1           MR. MURPHY: Well, it's a public hearing.  
2 They can tape-record it. I don't see any reason  
3 why any one of the parties can't tape-record it if  
4 they want to at any time.

5           THE COURT: Well, other than the fact  
6 that you have those other statutes that say you  
7 can't. I think we need to know if you're  
8 recording.

9           MR. MURPHY: Yeah, you have to know.

10          THE COURT: Yeah. Well, I'll tell you  
11 what, if you want to record it, just let us know  
12 that you want to do that and we can talk about it.  
13 And if there's a huge problem or something, we can  
14 get a court reporter.

15          Okay. Our next problem -- some of these  
16 are administrative problems, and they're  
17 administrative problems that we've been debating  
18 what to do about. One of the questions that has  
19 arisen is with respect to service and,  
20 particularly, we were getting back information  
21 from individual insurers that have been  
22 identified, and that information we've been  
23 sharing universally with the petitioners'  
24 attorneys in Rausch and Ruhd under a  
25 confidentiality agreement and a confidentiality

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1 order which, by the way, I think that was going to  
2 be amended, wasn't it? Did that get taken care  
3 of, Lon?

4 MR. DALE: Larry.

5 MR. JONES: We'll need to talk to the  
6 Judge. We're just about there.

7 THE COURT: Okay. Do you need my  
8 intervention, or are you --

9 MR. DALE: Have you responded to our --  
10 what Steve and Monte discussed, or are you going  
11 to think about that?

12 MR. JONES: We just discussed it, but we  
13 can resolve it today.

14 THE COURT: Okay. Do you want to save  
15 that to the end?

16 MR. JONES: If we could, please.

17 THE COURT: Okay. I just have to make a  
18 note.

19 At some point, we probably need to come  
20 up with a confidentiality agreement that's pretty  
21 much uniform. I think we're just about there, in  
22 any event. And maybe this one, we can spring off  
23 of.

24 In any event, in the Rausch and Ruhd  
25 cases, what we've gotten back is we've gotten back  
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1 some formal responses from attorneys, including,  
2 in a couple of cases, objections. And, Wayne, I'm  
3 going to want to talk to you about yours in a bit,  
4 not right now.

5 In other cases, the insurers have just  
6 furnished the claimant information, which gives us  
7 a problem as far as filing because we don't want  
8 to put the claimant information in the regular  
9 court file that's available for the public. And  
10 if we did, we'd have to seal that information, and  
11 so we'd have a file that's full of sealed  
12 information, full of manila envelopes that are  
13 sealed.

14 So what we've done is we have set up  
15 separate files for each of the insurers to put in  
16 the responses that contain claimant information,  
17 to put in copies of settlement agreements that are  
18 provided with respect to individual claimants and  
19 that sort of thing. And those files are being  
20 maintained separately, they're being maintained  
21 outside of the main file.

22 And with respect to the claimant  
23 documents, what we've been doing in the Rausch and  
24 the Ruhd case is we are scanning everything.  
25 Actually, we're scanning -- we're scanning

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1 everything that comes in in the Rausch and Ruhd  
2 cases. And we're making CDs of the claimant  
3 information and anything else, and we send that to  
4 the petitioners' attorneys, so Lon and Monte and  
5 Steve are getting that on a CD subject to the  
6 confidentiality agreement.

7           And we have not -- we have been  
8 sending -- what we've been doing is we're posting  
9 all of the public responses on the Internet, on  
10 the web site. And those responses are available  
11 by clicking on the title of the document and you  
12 can view them. And I've tried to let everybody  
13 know that they're up there so that they can see  
14 them, so that if Liberty wants to see what  
15 Travelers' response is or what Wayne's response is  
16 on behalf of NorthWestern Energy, that you can go  
17 up there and see those responses. But I have not  
18 been disseminating those responses either by  
19 copying them or sending out CDs.

20           Or do we send out -- we did send out --  
21 we sent a CD out with the nonconfidential  
22 information at one point. I think we did at one  
23 point to the attorneys in Rausch and Ruhd, but I  
24 don't think we're continuing to do that. I think  
25 we're just putting them up on the web.

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1           In any event, does everybody have access  
2 to the web site and are aware that we're posting  
3 the public stuff up there? Does anybody not know  
4 that? Is everybody happy with the way we're doing  
5 it? What we're doing is we're eliminating sending  
6 out a lot of paper.

7           David

8           MR. HAWKINS: I'm very happy with it,  
9 Judge.

10          THE COURT: Oh, okay. I like happy  
11 responses, too.

12          The posting on the web site is something  
13 I think we're moving to, anyway, by way of  
14 e-filing. We had an e-filing committee meeting.  
15 Tom was here and some the rest of you were here  
16 for that committee meeting. And we're moving in  
17 that direction to eventually everything will be  
18 transmitted by computer and by e-mail and over the  
19 web, and everything will be available over the web  
20 to everybody in every case. That's our eventual  
21 goal, except for confidential information, we have  
22 to work through those problems. We're going to  
23 continue to have to address those problems.

24          But if everybody is happy with the way  
25 we're doing it, we'll just continue to do it.

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1       Okay.

2                 Okay.  Hearing no nay sayers, we'll just  
3       do it.

4                 Okay.  Another sort of a housekeeping  
5       matter for us is when do we docket?  And the  
6       question is really arising because of our  
7       increased use of e-mail.  And I think I've given  
8       you an e-mail log in a case called Montana State  
9       Fund vs. Liberty Northwest.  Did everybody get a  
10      copy of that in your package?

11                And I've given this to you because it's  
12      going to illustrate to you what our problems are  
13      as far as discerning what we file and what we  
14      don't file.  And we've been debating this  
15      internally and we haven't come up with a final,  
16      absolute solution at this point.

17                Sometimes I get e-mails which come to me  
18      where the attorneys are simply sending me e-copies  
19      of their briefs, proposed findings, pretrial  
20      orders and stuff like that.  In the past, I  
21      haven't kept that correspondence, or if I've sent  
22      out a request for that sort of thing, I haven't  
23      kept that sort of thing.  The only thing I'm doing  
24      now with my own computer is I'm archiving all of  
25      my e-mail messages, including my private e-mail

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1 messages, in case any question ever comes up. And  
2 I think I queried attorneys before as to whether  
3 or not I should keep that stuff, and the answer to  
4 that was no. But the problem is, is sometimes we  
5 get into a little bit, a little bit deeper than  
6 just cover stuff, and this "Laundry" case  
7 illustrates that.

8           What happened in Laundry is, I had a  
9 telephone conference with counsel and it was about  
10 further briefing. And we basically agreed that  
11 further briefing was necessary. And then we came  
12 back and discovered that the further briefing  
13 would go beyond the trial date that we had  
14 scheduled in the case. So the question came up as  
15 to whether or not we vacate that trial date. And  
16 we started e-mailing back and forth on that and on  
17 the condition that there were some provisos as to  
18 whether or not it should be continued. And so  
19 there was a whole series of e-mail correspondence  
20 which took place over, oh, I think about two or  
21 three days, and the ultimate agreement was to  
22 vacate the trial. And we were trying to figure  
23 out what to do with that.

24           And initially what we had decided to do  
25 was that stuff didn't belong in the court file and  
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1 it didn't belong in the docket, but we thought  
2 maybe we ought to keep it. So we started  
3 keeping -- we generated what we called logs for  
4 each case where we could log stuff in to keep  
5 track of it, and we could keep copies of the  
6 e-mail correspondence. And what you've got in  
7 this "Laundry" case is what we did.

8           Then as we were doing that and realizing  
9 that this could become fairly extensive and really  
10 not have too much information, one of the  
11 questions that arose was we almost have a parallel  
12 docketing system going on. We have our regular  
13 case management system that we have, and then we  
14 have a separate log system that is going on. And  
15 that logging system is going on in Word Perfect so  
16 that we discussed the possibility of merging the  
17 log into the case management system. And then we  
18 came back and started wondering again what should  
19 be filed and what should not be filed, what should  
20 we keep and what should we not keep. And that's  
21 the question that I pose to all of you. Does  
22 anybody have any feelings on that?

23           MR. CADWALLADER: Mark Cadwallader. I  
24 have a question. What becomes part of the record  
25 on appeal, Your Honor?

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1           THE COURT: Well, one of the things that  
2 we were going to do is, basically when we came up  
3 with this log idea, what we were going to do is at  
4 the end of the case, if there was an appeal would  
5 basically be to generate the complete log and make  
6 it part of the docket so it was available on  
7 appeal. That was one of the possibilities that we  
8 considered. So that the first question is whether  
9 or not we keep all of these e-mails that are going  
10 back and forth, more or less on an informal basis  
11 and probably -- I mean, basically the stuff that,  
12 I mean, that gets informally taken care of and  
13 disposed of, we don't really even have an official  
14 record of it unless we just have a minute entry.  
15 Do we keep that sort of stuff? That's the first  
16 question. And if we keep that sort of stuff, what  
17 do we do with it and how do we keep it? So  
18 there's sort of two issues there.

19           MR. MARTELLO: Judge, this is Tom  
20 Martello. I think if the parties agree whether  
21 it's a procedural or substantive matter would  
22 determine whether it should be kept, because then  
23 it, I think, becomes part of the record. Really,  
24 you're making some sort of substantive  
25 determination as to how the thing is going to

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1 proceed. But if you're just doing some  
2 housekeeping matters and trying to decide some  
3 procedural things, it would just seem like that  
4 would just clutter up the record in keeping all of  
5 that.

6 THE COURT: It's definitely going to --  
7 because e-mail is so easy and it's so easy to  
8 retain, it's definitely going to expand what we  
9 do. There's no question about that.

10 Somebody must have some other -- some  
11 other people must have some feelings about this.

12 MR. MURPHY: I wanted to ask you. I have  
13 not looked through a record on appeal, but for  
14 things like carrying letters from counsel,  
15 irrelevant, superfluous stuff, everybody agrees  
16 should be part of the record that's transmitted up  
17 to the court, but is it? I don't even know if it  
18 is.

19 THE COURT: If it gets puts in the file,  
20 it does. If it gets docketed and put in the file,  
21 it does.

22 MR. MURPHY: So we send a letter, Dear  
23 Judge, here's this pleading. What happens to that  
24 letter?

25 THE COURT: Well, that letter isn't going

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1 to be docketed separately. It's going to be  
2 attached to the pleading. And I've sort of dealt  
3 with this a little bit with the e-filing, and the  
4 question is, what are other courts doing with it?

5 And what the federal courts are doing, at  
6 least, I think, what the federal district court  
7 here in Montana is going to do is, if the letter  
8 comes, it will be attached and it will be part of  
9 the document. So if it's a letter of enclosure,  
10 it gets attached to the documents and it doesn't  
11 get a second document number. And, basically,  
12 they're not going to accept letters --

13 MR. MURPHY: Right.

14 THE COURT: -- outside of that. And the  
15 problem with doing that with our system is quite  
16 often we use letters and correspondence in lieu of  
17 formal motions, and we use minute entries  
18 sometimes to record a formal action rather than  
19 issuing a formal order of the action that was  
20 taken, and the determination that was given orally  
21 is just recorded in the minute entry. So we do  
22 things a little bit more informally.

23 But, I mean, if it gets put in the file,  
24 it goes up to the Supreme Court, and most stuff  
25 gets put in the file. One of the problems we've

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1 got is, for example, we're circulating proposed  
2 summonses in some of these cases. Like Reesor and  
3 Satterlee, we've been circulating a proposed  
4 summons in that case.

5 Generally what happens in that, the  
6 proposed summons goes into our court file loosely.  
7 And my expectation is, is when we complete that  
8 process, we'll probably have an agreed-upon  
9 summons, everyone will have agreed to it. And if  
10 we don't and I have to make a formal ruling on  
11 something, then I'll make a formal ruling on it.

12 But in the meantime, we have a lot of  
13 e-mail exchanges back and forth about particular  
14 provisions and things like that, so the question  
15 becomes -- because those ordinarily would have  
16 been put in the file, I think, probably loosely  
17 and not necessarily been a part of the record,  
18 although I can't say for sure. Is Pat around?

19 MS. BOCKMAN: She's out front.

20 THE COURT: She takes care of that. But  
21 my suspicion would be that that sort of stuff, the  
22 e-mail sort of stuff doesn't get put into the  
23 file, it goes up to the Supreme Court.

24 But that's my dilemma. I mean, I have no  
25 objection to keeping it, it sort of becomes an

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1 administrative nightmare. And the question is, is  
2 it necessary, do we want to keep it? If we want  
3 to keep it, are there guidelines for culling out  
4 purely extraneous stuff? See, e-mail really helps  
5 a lot, but it also complicates our lives.

6 Pat --

7 MS. KESSNER: Yes, Judge.

8 THE COURT: Stuff like e-mails that gets  
9 thrown in our court files, and oftentimes it  
10 will -- sometimes I ask that it be docketed  
11 because it has substantive stuff and I'll just  
12 say, "Put this in and file it." But the stuff  
13 that isn't docketed, the loose stuff where we're  
14 just exchanging stuff, when an appeal is taken,  
15 does that get put in the file and sent up to the  
16 Supreme Court, or are we taking that out?

17 MS. KESSNER: Nothing that has been  
18 e-mailed so far has been in a court file that has  
19 been sent up to the Supreme Court. That all gets  
20 removed and put in our dummy file. But we started  
21 this process since I have had an appeal to the  
22 Supreme Court, so nothing has gone up to the  
23 Supreme Court that has been in a file like that.  
24 No e-mails or anything have ever been included to  
25 a Supreme Court -- to the Supreme Court from our

26

1 court as of this date.

2 THE COURT: Except there are some e-mails  
3 that I've said to put in the file because they're  
4 sort of more of something substantive or something  
5 that I wanted to reflect, those don't get taken  
6 out, do they?

7 MS. KESSNER: No.

8 THE COURT: And if they're ACCO-fastened  
9 into the file --

10 MS. KESSNER: They remain.

11 THE COURT: -- they remain. It's just  
12 the loose stuff that's not getting --

13 MS. KESSNER: The loose stuff does not  
14 get sent to the Supreme Court.

15 THE COURT: Okay.

16 MS. KESSNER: But all the e-mails that we  
17 are now getting from counsel and we pass back and  
18 forth for whatever reason, those are all now  
19 being docketed, so they will be included if  
20 there's something substantive in there.

21 MR. MURPHY: Couldn't you docket them  
22 under one heading "Various superfluous e-mails"?  
23 I mean, could they be -- like, for instance, all  
24 the ones from Mr. Luck over there, things like  
25 that.

26

1 MS. KESSNER: He always just says "Good  
2 morning."

3 MR. MURPHY: I'm sorry. A little joke  
4 there.

5 MS. KESSNER: I know. Tom, we would have  
6 to talk to our IT people over at the department on  
7 that because my understanding is they're going to  
8 be -- Amber is going to be setting up a log or a  
9 memo section in our Oracle system, isn't she,  
10 Judge?

11 THE COURT: Yeah, that's what we talked  
12 about. One of the things we were talking about is  
13 setting up just sort of a memo section where we  
14 can record certain things that are going on in the  
15 case and reflect, you know, minor things like  
16 setting up for court reporters, for example, that  
17 would be a simple one that we do on a regular  
18 basis but also some other things. The problem is  
19 is, those memo fields are limited and we couldn't  
20 put the e-mail filings in it.

21 Another option that we've thought about  
22 is distinguishing between documents that are part  
23 of the official court record, file documents which  
24 would be the orders, the pleadings and things like  
25 that as opposed to lodged documents, documents

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1 that aren't formal, documents just to distinguish  
2 so that we could generate a second docket sheet  
3 that would have the official documents versus the  
4 nonofficial documents, so to speak, and still go  
5 ahead and throw the nonofficial, the lodged  
6 documents into a file. That would be another  
7 option that we would have, and we could do our  
8 e-mails that way.

9 And then, of course, the last one was to  
10 create this log and then we would have that kind  
11 of thing that you talked about, Tom, which would  
12 be one place to put all the e-mails that just go  
13 in that one particular thing. I don't know  
14 whether we could do that. We might be able to do  
15 that in the case management system so that we  
16 actually had an e-mail section and just kept it  
17 sequentially. That might be a possibility.

18 Help me here. I need input on this, I  
19 really do. I'm struggling with it. And I think  
20 all of us are struggling with it and talking about  
21 it.

22 Monte.

23 MR. BECK: Look, it seems pretty simple  
24 to me. If it's worthy of having that issue be in  
25 front of the Court, then make it a proper

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1 pleading. E-mails are -- you know, I think you're  
2 just creating a whole bunch of problems. I agree  
3 with what Tom had to say, if it's worth something,  
4 then make it a pleading so that it's there in the  
5 file. I wouldn't take a chance that, with all due  
6 respect to Pat and your office, I'm not going to  
7 chance that there's an e-mail that's going to go  
8 up that I think is important for the Court to  
9 review. And I don't think the Court is going to  
10 look at it, anyway.

11 THE COURT: Yeah. I don't see these  
12 e-mails as generating stuff that's going to be  
13 reviewable, to be honest with you.

14 MR. BECK: So why bother with it. If  
15 it's important enough, make it a pleading or --  
16 and I don't like e-mails, anyway. I mean, I think  
17 it's very efficient and all that, but I don't  
18 trust it, and it should be in letter form. If I  
19 want something in my file, we don't necessarily  
20 print every e-mail in my office. And I don't  
21 know, I just -- I guess I'm G31 3.

22 , but I prefer it to be on a piece of  
23 paper. And I think if it's important enough, put  
24 it on a pleading.

25 THE COURT: Or we could put it in a  
26

1 minute entry, too.

2 MR. BECK: Or a minute entry, that's a  
3 good record.

4 THE COURT: Well, maybe I can ask this  
5 question: Does anybody think the e-mails are  
6 important enough that we should keep all of them  
7 as a matter of routine or even attempt to separate  
8 out what we think is important or not important,  
9 or shall we just rely that if there's something  
10 that comes up that is important enough that we  
11 need a record of it, that somebody -- it will  
12 either be in a minute entry or somebody is going  
13 to write a formal motion or something along that  
14 line?

15 MR. LUCK: The important thing, I think,  
16 Judge, is that people understand. It would be a  
17 lot easier if you did just the opposite of what  
18 you're talking about. I agree with Monte, that,  
19 you know, you have the communications, that's  
20 fine, but have everybody understand that if they  
21 want it to be part of the record, it's either got  
22 to be in a minute entry or something that is  
23 submitted to the Court formally. Then we'll know  
24 that e-mails aren't part of the record and what  
25 is, there won't be any discretion about it, it  
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1 will just be something that's in a minute entry or  
2 a formal pleading or filing. Otherwise, you get  
3 paranoid about what's part of the record. I don't  
4 think that things that are informally part of the  
5 record that the Court, the Supreme Court is ever  
6 going to take a look at.

7 THE COURT: And shouldn't have to.

8 Does everybody agree with that? I mean,  
9 it sort of makes sense and it eliminates our  
10 problem of trying to distinguish between what's  
11 just totally superfluous or partially superfluous.

12 MR. MURPHY: It's counsel obligation to  
13 make sure it's in your record.

14 THE COURT: Okay. All right. We  
15 probably ought to send out some notice to the  
16 whole Bar and let them know that that's the way  
17 we're going to handle it. If they want anything  
18 reflected in an e-mail to be part of the record,  
19 they need to let us know by some fashion in  
20 writing.

21 Anybody object to that?

22 You had mentioned paranoia, that's  
23 probably what my problem is, is paranoia, worrying  
24 about somebody asking, raising questions about  
25 what's going on sort of outside this official

26



1 context without court reporters.

2 MR. LUCK: And that's why I think the  
3 more simple the rule, the better off you are.

4 THE COURT: Okay. All right. We'll  
5 draft something up and make sure that we send it  
6 out so everybody is on the same page.

7 And also, one of my concerns was the  
8 smart ass comments that I get back from Brad.

9 MR. LUCK: That's exactly what I was  
10 thinking about.

11 MR. MURPHY: He wants them out of the  
12 record.

13 MR. LUCK: My heart was starting to  
14 thump. And I need to tell you, I save everything  
15 that Pat sends me, too, so I have quite a folder  
16 on her.

17 MS. KESSNER: You do not.

18 THE COURT: You know, actually, I don't  
19 worry about things like that. I figure if  
20 somebody reading this doesn't have a little bit of  
21 a sense of humor, it's their problem.

22 Okay. Well, that's solves that issue.  
23 This meeting has been worth it just to solve that  
24 issue.

25 Okay. The next item -- I'm down to "G"

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1 already, was handling of requests by petitioners'  
2 attorneys for the Court for further information  
3 from insurers who are not represented by counsel.

4           In the Rausch and Ruhd case, in many  
5 cases, the insurers are not represented by  
6 attorneys, rather they've responded to the  
7 summons, taken it to heart and simply supplied the  
8 information that we requested with respect to  
9 claimants. But those responses and that  
10 information is going to give rise, I'm sure, to  
11 requests for additional information. And my  
12 thought on this is, we just go ahead and go  
13 through the claims adjusters who -- and that's who  
14 they are in most cases, is claims adjusters -- is  
15 go ahead and ask them for further information.

16           Is there any reason that that presents a  
17 problem? Does anybody think it presents a  
18 problem?

19           MR. MURPHY: I think they should be  
20 formally designated as the corporate  
21 representative for purposes of discovery. If  
22 they're going to be representing information for  
23 the corporation, they should be the designate.

24           THE COURT: The problem with that is the  
25 rule basically prohibiting nonattorneys from

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1 appearing in court proceedings.

2 MR. MURPHY: If they're the designate,  
3 they can appear, I would argue.

4 THE COURT: Well, I think the latest word  
5 from the Supreme Court is they can't.

6 MR. MURPHY: Well, then how can they  
7 appear informally?

8 THE COURT: Well, they're basically  
9 providing information to the Court, but I'm not  
10 sure I could treat them as formal representatives  
11 akin to being attorneys. I think we can ask them  
12 for further information, but I think if we run  
13 into a roadblock as far as that information, we're  
14 probably going to have to use some formal court  
15 process. But to be honest with you, I expect -- I  
16 mean, it appears to me that we're going to get  
17 cooperation, so we probably don't have to worry  
18 about it.

19 MR. MURPHY: But if they don't have some  
20 capacity, they're not held to the information that  
21 they're providing. I mean --

22 THE COURT: They're not subject to  
23 Rule 11 sanctions.

24 MR. MURPHY: They're not subject to any  
25 kind.

26

1           THE COURT: That's probably true. I  
2 guess the question would be is, what do we do?  
3 Particularly, as I said, in most cases we're going  
4 to get cooperation and the information we get is  
5 going to be good information, I suppose.

6           I wonder if it wouldn't be incumbent upon  
7 petitioners' attorneys, if they're dissatisfied  
8 with it, with them proceeding in some fashion  
9 either by deposition or something like that, if we  
10 had a problem, if you were really worried about  
11 it.

12           MR. MURPHY: Yeah, if you're worried  
13 about it, you could serve discovery requests or  
14 something.

15           THE COURT: Yeah, because the alternative  
16 would be to require all these insurers to appear  
17 through attorneys, and I'm not sure that's a good  
18 process because in many cases just coughing up the  
19 information and they're done with it, going out  
20 and hiring an attorney and getting more attorneys  
21 involved, is, I think, going to just complicate  
22 things.

23           MR. MURPHY: From a petitioner's  
24 perspective, you want to be able to rely on the  
25 information provided and you want to have sanction  
26

1 power to go after that person if they've misled  
2 you.

3 THE COURT: Yeah, but do you think that's  
4 a big risk?

5 MR. MURPHY: No, not in Montana. But if  
6 it happens, it would be a bad thing.

7 THE COURT: Yeah.

8 MR. CADWALLADER: Judge --

9 THE COURT: Yes.

10 MR. CADWALLADER: -- Mark Cadwallader.

11 To the extent that the Court is ordering an  
12 insurer to provide information, I would think that  
13 the Court's power to hold an insurer in contempt,  
14 just as any individual, may address that concern.  
15 That if the question is, if information is  
16 provided and it turns out to be substantially  
17 inaccurate, I think the Court could address it  
18 that way, a show cause hearing as to why not to be  
19 held in contempt for not complying fully with the  
20 Court's order.

21 THE COURT: Because they're, in essence,  
22 responding to a court order, so there may be  
23 something to that.

24 I guess the way I'd rather approach it is  
25 to assume that they're going to be cooperating in  
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1 good faith. But if we have evidence that that's  
2 not true, then confront it then.

3 Do you think that's okay, Tom?

4 MR. MURPHY: Yeah. As you say, I don't  
5 see it as a big problem in Montana, but you'd want  
6 to have some resource if it became a problem.

7 THE COURT: Well, if it becomes a  
8 problem, we'll deal with it. You know, we won't  
9 sweep it under the rug, that's for sure.

10 Any other thoughts out there? Some of  
11 you are being really quiet.

12 Okay. All right. Now, we get to some  
13 more substantive stuff, legal issues remaining in  
14 Rausch and Ruhd.

15 Wayne, you filed a response for  
16 NorthWestern Energy. Let's see if I have it here.  
17 You raised some defenses. And Todd and David  
18 raised some defenses that I rejected that are  
19 fairly similar to the ones that you raised for  
20 NorthWestern Energy, and I would expect that I  
21 will probably deal with those in the same fashion,  
22 yours in the same fashion as theirs.

23 And one of the questions I had is -- are  
24 you aware of what I did with those objections,  
25 Wayne?

26

1           MR. HARPER: I seldom read anything  
2           that --

3           THE COURT: You must have because yours  
4           was so close to theirs.

5           MR. HARPER: I probably plagiarized them  
6           some way, but --

7           THE COURT: It had to do with no class  
8           and --

9           MR. HARPER: I don't think we said you  
10          had no class, I think we said it wasn't a class  
11          action.

12          THE COURT: Right. There were some  
13          others. In any event, to the extent that I  
14          projected those in the filings that Todd Hammer  
15          and David Sandler filed, I would expect to do the  
16          same thing in your case.

17          There was another issue in your case and  
18          I'll get to that in a minute, but the question is,  
19          and I suppose I ought to throw that to you and  
20          also to David, who is here, is whether or not  
21          those issues are going to be appealed. If they're  
22          going to be appealed, then we need to figure out  
23          some sort of process to do that.

24          MR. SANDLER: I mean, we don't expect to,  
25          but we haven't heard definitely from some of the  
26

1 clients what their position is.

2 MR. DAVENPORT: Rick Davenport. If I may  
3 speak, too, I'm not recommending an appeal.

4 MR. HARPER: Even though you haven't  
5 ruled on ours formally, should you rule against  
6 us, I think, you know, we filed them in good  
7 faith, but I doubt we would appeal, either.

8 THE COURT: Okay. So maybe what I need  
9 to do is just issue a ruling on what you've got  
10 tendered to me and then just not worry about it  
11 unless either of you decide to change your minds  
12 to go forward, then you need to let me know and  
13 we'll figure out how we do that, whether we  
14 certify it up or what we do with it and cross that  
15 bridge when we come to it.

16 MR. HARPER: Again, inform the Court in  
17 our situation now that we're a little to speed on  
18 this on the work comp side of it, our shop, that I  
19 doubt they're appealing that. That, if you would  
20 rule us against, I doubt it would be appealed  
21 because of the fact of what we're going through in  
22 another case.

23 THE COURT: Okay. So in your case, we're  
24 not going to have a hassle over lack of  
25 jurisdiction because of the bankruptcy to assure

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1 that these fellows or women get paid?

2 MR. HARPER: Not as to the claimants,  
3 no. As to the attorney lien, we think that's a --

4 THE COURT: Well, that comes out of  
5 claimant's pocket, anyway.

6 MR. HARPER: Yeah, that's a bankruptcy  
7 issue, only as it would be against NorthWestern  
8 Energy. But as against the claimants and their  
9 pockets, no.

10 THE COURT: Okay. Yeah, the only thing  
11 the lien is going to do, Wayne, is when you figure  
12 out what that impairment award is and you're going  
13 to send it to the claimant, you just send --  
14 instead of sending the whole thing to the  
15 claimant, you send 25 percent or whatever to  
16 the -- 20 percent, whatever we figure out, to the  
17 petitioners' attorneys. So there won't be  
18 anything that will come from Northwest other than  
19 what's due the claimants.

20 MR. HARPER: And I read that response  
21 letter to you after you replied to it. I had  
22 never seen it before, so -- East Coast counsel  
23 gets paid a lot more than I do, but they read your  
24 subpoena differently, I guess.

25 THE COURT: I think they did. That's why  
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1 I sent back the letter that I did telling them  
2 that they really needed to retain Montana counsel.  
3 I could have told them just to call you, but --

4 MR. HARPER: You should have told them to  
5 actually retain Montana counsel.

6 THE COURT: Okay.

7 MR. LUCK: Just for the record, Your  
8 Honor, we like to read all the things that come to  
9 us.

10 THE COURT: Wait until you read the  
11 latest decision that's coming out.

12 MR. LUCK: I didn't say we liked them, I  
13 said we liked to read them.

14 THE COURT: Well, this latest one is on  
15 the Playground up in Great Falls, are exotic  
16 dancers independent contractors. We do have  
17 interesting cases.

18 Okay. Maybe I can solicit at this point.  
19 You know, other than the formal objections that  
20 Wayne had filed and that David and Todd filed, I  
21 don't have any formal objections to what we're  
22 doing and how we're applying the Ruhd decision.

23 Are there issues out there that I'm going  
24 to have to face that are going to be raised? I  
25 know there's one about the settlement stuff, and

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1 we'll get to that. I know about that one. What  
2 do we do, we settle cases, and I'll talk about  
3 that specifically, but just other things floating  
4 around out there. Is anybody aware of any issues?

5 MR. PALMER: Well, this is Rex Palmer and  
6 I'm not sure if we're on this or not yet, but  
7 there's been some suggestion that if somebody is  
8 identified as having an entitlement, that it would  
9 be good to wait and pay them sometime farther  
10 down. And I don't if this is the time to talk  
11 about it, but I don't think the Court has ever  
12 suggested that if there's not a legal issue and  
13 you've decided you're going to comply, you just  
14 need to pay that money and retain the attorney's  
15 lien part for later determination. There's no  
16 reason to hold up the claimant in receiving their  
17 benefits that I've heard from the Court.

18 THE COURT: No, I certainly haven't  
19 suggested that. Has anybody gotten that  
20 impression, anybody else in the audience?

21 MR. PALMER: So if we don't have a legal  
22 issue, we should be expecting insurers to make  
23 payments in common fund issues subject only to the  
24 attorney's lien.

25 THE COURT: If they've identified them as  
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1 due, yes.

2 MR. JONES: Well, Your Honor, that goes  
3 to the implementation issue. And I think Rex is  
4 maybe talking about the Flynn/Miller case.

5 MR. PALMER: That's right.

6 MR. JONES: I thought the Court's  
7 position was the insurer could make those files  
8 available under the appropriate conditions and  
9 that's how they would be identified.

10 THE COURT: That's an identification  
11 issue. I think what Rex is talking about is if  
12 you've identified the individual and you know that  
13 the amount is due, do you withhold it or do you  
14 pay it immediately. And I think the answer to  
15 that is pay it as quick as you can.

16 MR. JONES: Are you saying the insurer,  
17 then, right now should be going out, for example,  
18 in the Ruhd case, we should be going through  
19 files that we're going to produce for the  
20 attorneys.

21 THE COURT: No, because we want to do  
22 that as a concerted joint effort in your case. I  
23 mean, if the insurer knows -- some of the insurers  
24 have already done that. And if they've done that,  
25 we've got those identified, they should be paying

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1 those. But in cases where we haven't identified  
2 it and we've got issues or difficulties in  
3 identifying them and you're working with  
4 petitioner's counsel, I think that's sufficient,  
5 unless I hear otherwise, because, you know, I  
6 think the petitioners' attorneys are monitoring  
7 that.

8 MR. DALE: Well, I don't know about that.  
9 It depends on how you define it, Your Honor. This  
10 is Lon Dale for the record. For example, if  
11 Liberty Northwest knows that their -- or a review  
12 of their files would have indicated that there are  
13 individuals that should have been paid impairment  
14 amounts, they don't have to wait for us to review  
15 the file to implement that.

16 THE COURT: Yeah, if they know that  
17 impairment awards are due, then they should be  
18 paying them, right.

19 MR. DALE: And so there should have been  
20 an independent review of the file in response to  
21 the Supreme Court decisions to at least meet that  
22 threshold. And then our review, at least my  
23 understanding of it, and Monte and Steve can also  
24 provide their comments, would be that we would  
25 then come and look at files, particularly on those

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1 that perhaps were not permanent totals but had  
2 been long-term temporary totals, to determine  
3 whether or not, in fact, that temporary total  
4 should have been a permanent total and maybe  
5 should have had an impairment determination.  
6 Those are the kind of things that we deal with as  
7 opposed to, you know, clear issues that involve  
8 impairments that are due and owing under the  
9 existing statutes and case law.

10 MR. JONES: Your Honor, Liberty's  
11 understanding must be a little different then,  
12 because we've had many discussions at many  
13 hearings about implementation issues, and one of  
14 those issues was how are we going to identify what  
15 files are relative rather than having an insurer  
16 just go run amuck through thousands of files. And  
17 part of that limitation process was to ensure that  
18 petitioners', claimants' attorneys were satisfied  
19 with how the decision would be implemented.

20 So what we have done, for example, in  
21 Cheetham, was to identify those cases that we  
22 thought could fall in and then allow the common  
23 fund attorney to review those cases under a  
24 confidentiality order, and we've been proceeding  
25 on that basis on the Ruhd case and the Flynn case.

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1 So we have not preemptively gone out and done the  
2 review that we understood was going to be done by  
3 the claimants' attorneys.

4 MR. ROBERTS: Judge, my understanding of  
5 the Rausch and the Ruhd opinions would be that it  
6 imposes a duty on the insurer to identify those  
7 claimants who should be getting their impairment  
8 awards because they should be classified as  
9 permanent total and be entitled to those benefits.  
10 If there's files that are in dispute, that's what  
11 we can look at and say, Hey, we've got a dispute  
12 with the company here.

13 But I think those decisions clearly put  
14 an affirmative duty on the insurer to do as the  
15 State Fund did, identify those claimants who are  
16 entitled to their benefits, for example, with the  
17 State Fund on that first Rausch case.

18 THE COURT: But it's an identification  
19 process with you looking over their shoulder. And  
20 I think their position is, and I think the way  
21 we've been working through this, is for them to at  
22 least identify the files, but have you satisfy  
23 yourself as to which ones are due, so it's sort of  
24 a combined process as opposed to them unilaterally  
25 and then your going back through and reviewing

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1 each and every file and deciding whether or not  
2 they made the right decision on it.

3 MR. ROBERTS: Well, Judge, I think  
4 there's going to be files that perhaps are obvious  
5 that they ought to be identifying on their own.  
6 And then ones that we dispute, for example, they  
7 say, Well, we don't think this is one, and we look  
8 at it and we think it is, then that we can fight  
9 about it. But there's going to be some, I think,  
10 that are real obvious.

11 In the first Rausch case, the State Fund  
12 identified, you know, dozens and dozens of files  
13 that they said these clearly should be ones that,  
14 even though they weren't identified previously as  
15 permanent total, I think the State Fund found  
16 several that were from their own review.

17 MR. MARTELLO: Judge -- Tom Martello --  
18 with respect to the identification, I think you  
19 have to have some sort of a formal process whereby  
20 you're doing it as part of an implementation. And  
21 I think there is, in some respects, some duty to  
22 identify what potential claimants may fall under  
23 certain categories. But then as part of the  
24 process of paying it out, I think you have to have  
25 the involvement of claimant's counsel as part of  
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1 that process rather than to just have the insured  
2 go ahead and make the determination, because it  
3 does end up with the problems that you pointed out  
4 where a determination is made and then after the  
5 fact, after the money has been paid out,  
6 claimant's counsel may look at it and it really  
7 creates confusion with double and sometimes triple  
8 payments that occur. We ran into kind of that  
9 problem in Murer.

10 And in the process in Murer that I  
11 thought kind of set the stage for this was to have  
12 involvement with the Court kind of overseeing the  
13 implementation of it. And then if you're not  
14 having orderly procession of the issues, then  
15 claimant's counsel has the ability to bring that  
16 before the Court. But I think if you take it out  
17 of that formal process, I think it's going to  
18 create problems.

19 THE COURT: You know, where the insurers  
20 can specifically identify a respondent in a  
21 fashion to the summons that we had, where they can  
22 do that, then I don't have any problem with just  
23 having them do that. And then if the claimants'  
24 counsel have difficulties with anything that  
25 they've done in any of those cases and wants to

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1 review them, we can do it.

2 But where you've got a fairly large  
3 insurer and you're obviously going to have  
4 difficulties in identifying some of these people,  
5 I would rather see it be a cooperative effort  
6 rather than have them do it, then you look at it  
7 and that sort of thing. I'd rather have it be a  
8 cooperative effort.

9 But one of the things I've noticed, have  
10 Rausch and Ruhd counsel, have they gone through  
11 the responses that have been filed by the  
12 insurers? I compiled a list and a number of  
13 insurers actually provided us with claimant  
14 information. One, two, three, four, five, six,  
15 seven, eight, nine, ten, eleven, twelve, thirteen,  
16 fourteen, about fifteen of the insurers have  
17 provided us specific claimant information. Have  
18 you gone through that information?

19 MR. DALE: Well, we've received it. I  
20 mean, in terms of I've gone through it, in what  
21 respect do you mean?

22 THE COURT: Reviewed it.

23 MR. DALE: Well, I mean, we know what's  
24 been reported.

25 THE COURT: Because I went through that  
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1 claimant information and I was a little bit  
2 surprised. And what surprised me is there's not  
3 very much there. Many of these claimants were  
4 being paid out their impairment awards over time  
5 and have been completely paid their impairment  
6 awards. There were a few cases where they were  
7 paid in a lump sum after Rausch came down and the  
8 attorney's fees have been withheld. There's a  
9 couple cases where they haven't been withheld and  
10 we'll have to figure out what to do with that, but  
11 there's very little where it's resulted in an  
12 impairment award.

13           And when I looked at the temporary total  
14 stuff, it doesn't look like it's very rich  
15 pickin's. A lot of that stuff that's in the  
16 temporary total disability category doesn't look  
17 like there's going to be very much there. There's  
18 some of it that has whole lists here.

19           So I guess I would throw out to you that  
20 the overall universe, when we start looking at it  
21 may be fairly large, but when we get to the actual  
22 beneficiaries who are going to benefit by the  
23 decision, it sort of really squeezes down, at  
24 least that's my initial impression.

25           MR. DALE: Well, I think that that's

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1 perhaps true, but that's obviously dependent on  
2 market share and Liberty's -- their reports are  
3 significantly, you know, fairly voluminous, as  
4 you're probably aware. It seems to me that  
5 Liberty has an obligation to go through their  
6 files, and they're going to go through their files  
7 before we see them, at least that's my  
8 understanding under the way that this  
9 confidentiality agreement is going to be  
10 implemented, to determine if there are  
11 attorney-client privilege issues involved. So it  
12 isn't like there isn't going to be administrative  
13 review of the file, anyway. So if there is a  
14 review of the file and if there's a determination  
15 that an impairment hasn't been paid or should be  
16 paid, then it seems to me that they have an  
17 obligation to do that independent of our review  
18 and independent of our request.

19 THE COURT: Well, but the question is,  
20 are you going to ask to review those files when  
21 they make payment?

22 MR. DALE: Well, we may have to review  
23 them. But the thing of it is, if they're going to  
24 pay them, the only thing that would result from  
25 our review is an obligation to pay more than

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1 they've already paid, so why not pay the threshold  
2 amount as soon as possible. I think they have a  
3 duty to do the review, and I think they have a  
4 duty to make the payments the law requires them to  
5 pay.

6 MR. JONES: Your Honor, could we get a  
7 clarification? Apparently, the FFR attorneys are  
8 prepared to allow Liberty to choose the physician  
9 who will do the impairment rating in advance, and  
10 be bound by that?

11 MR. DALE: Well, we didn't say that.  
12 That's part of the review. But the point of it  
13 is, if they have an obligation to get the  
14 impairment rating, if they choose a physician and  
15 the physician determines an impairment, and the  
16 claimant situation is such that it would probably  
17 be obvious that it would mandate an impairment,  
18 then they have to do that. The impairment comes  
19 out. If we review the file and say, We dispute  
20 that, we want him to be seen by somebody else, I  
21 mean, there we are. We can do that, but I don't  
22 think that this process, now that it has been  
23 delayed several months, should be on our shoulders  
24 to have to do the review of the file to make them  
25 fulfill what I believe is their duty since the

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1 decision.

2 MR. JONES: Your Honor, will Lon  
3 stipulate that the payment of the physician for  
4 the second review be borne by the FFR attorneys?

5 MR. DALE: We're not going to --

6 THE COURT: Well, we haven't gotten to  
7 that point. I mean, there may be a question as to  
8 whether or not they're entitled to -- I mean, if  
9 there's an impairment rating in the file whether  
10 or not FFR allows them to go beyond that, and I  
11 don't know the answer to that. But let me ask  
12 another question here, maybe more directly.

13 What has Liberty's policy been as far as  
14 impairment awards for permanently totally  
15 disabled? Because I know at this point, we know  
16 that a lot of insurers were saying they're payable  
17 but they're payable out over time. The State Fund  
18 had taken the position they're payable but they're  
19 not payable until retirement age. So I don't know  
20 what Liberty's policy is and that may reflect upon  
21 what we do, so what --

22 MR. JONES: I don't know the answer to  
23 that question. I'd have to go back and ask our  
24 adjusters and our claims manager. I'm not even  
25 sure if there was a policy. If it was

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1 automatically asked for one or just if the  
2 physician gave one and it hit the file, so I'd  
3 have to look at those files, Your Honor.

4 THE COURT: You're going to be going  
5 through the files before you turn them over to Lon  
6 and Steve and Monte?

7 MR. JONES: Under the minute entry that  
8 you gave us after our conference, we have that  
9 right to go through and remove privileged  
10 material, and that was the plan, Your Honor.

11 THE COURT: Well, why not when you do  
12 that, go through those files and if there are  
13 impairment awards in there and they're permanently  
14 totally disabled, just set those aside and pay  
15 them.

16 MR. JONES: We can do that, Your Honor,  
17 that's not a problem. But again, I want to  
18 emphasize, based on what happened in Murer and  
19 what's been happening in this case, it was our  
20 understanding we would receive just the way you  
21 described, in other words, we would not go out and  
22 preemptively do a bunch of things precisely  
23 because of the potential problems I've just noted  
24 with getting the ratings. And then if there's a  
25 dispute over who did it or what it was, to me

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1       those are implementation issues, Your Honor, that  
2       have to done in a systematic way.

3               THE COURT:   Okay.  Well, let's just do it  
4       in that fashion.  Let's go ahead, when you go  
5       through those files to remove privileged material,  
6       find those that are -- if you have impairment  
7       awards for the permanently totally disabled, go  
8       ahead and pay them and just set those aside.  And  
9       then if the FFR attorneys think that they're  
10      entitled to review them and entitled to maybe have  
11      a second guess on them, then we'll to have take  
12      that up.

13              MR. JONES:  I agree entirely that's the  
14      way to proceed, Your Honor.

15              THE COURT:  And then the other files that  
16      are identified in there, you'll have to go through  
17      those and figure out what the heck to do with  
18      those.

19              MR. JONES:  This question, I'm sorry,  
20      this line of discussion was prompted by Rex's  
21      question.  And so in that particular set of cases,  
22      I understand it from talking to Rex, we would be  
23      looking to see in which cases there were Social  
24      Security awards, and then if an attorney fee were  
25      owed.  And so I'm anticipating following the

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1 procedure you just set out for the Ruhd case in  
2 Rex's case. In other words, it won't be done  
3 preemptively. We'll agree on how to identify  
4 those cases. We'll set them aside with a similar  
5 order regarding confidentiality and the ability to  
6 remove privileged information. And then we'll  
7 make our preliminary review for the confidential  
8 information. If we find a case that clearly falls  
9 under the holding in Flynn, we could go ahead and  
10 start to implement at that time. Is that what  
11 you're telling us to do, Judge?

12 THE COURT: I think so. I mean, from my  
13 point of view, the best thing that we can do is  
14 involve petitioner's counsel with insurer's  
15 counsel and figure out a way to do it and get the  
16 job done, and to the extent that we can figure out  
17 how we're going to identify these files.

18 I mean, the first problem is identifying  
19 the files, and I've been through that in Broeker  
20 and I've been through that in Murer, and sometimes  
21 it's not so easy to identify which claimants may  
22 be benefited. And as everybody is aware, we have  
23 the computer-generated run from the Department of  
24 Labor which identified permanently totally  
25 disabled claimants and it's come up short. I

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1 mean, based on the data that we've compiled, we've  
2 gotten back from the insurers that have  
3 voluntarily gone through, identified the claimants  
4 and furnished us with information, we know there  
5 are a lot more people out there than identified on  
6 the department list. And plus we have this other  
7 complicating factor of the temporary total people  
8 who have been paid for 18 months or more and what  
9 we're going to do with those. And at least for  
10 the time being, we've put those in to identify  
11 those people and look at them.

12 So we've got it -- I mean, we still have  
13 to go through that process, but I think insofar as  
14 we can identify easily the people that have the  
15 impairment awards or in Rex's case, you identify  
16 the files and then you identify those people who  
17 have gotten the Social Security awards, and if  
18 there's attorney's fees due, we pay them as we go  
19 to the extent that we can.

20 MR. JONES: That's my understanding of  
21 what all this has been about, Your Honor.

22 THE COURT: But I think we need to keep  
23 exchanging information on both sides so we all  
24 know what we're doing.

25 MR. DALE: Would this be like a minute  
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1 entry? So, I mean, back to our docket. I mean,  
2 this sounds like a court order to me.

3 THE COURT: Yeah, it's in the transcript.  
4 That's a procedure I want to follow. We'll put  
5 that in the minute entry. That's one of the  
6 reasons why I've got the court reporters for these  
7 kinds of conferences, so we can go back.

8 MR. PALMER: The idea being that it would  
9 be more convenient for the company to do them all  
10 at once. And yet the person that's totally  
11 disabled and wanting to buy a Christmas present,  
12 it's not very convenient for him to wait until the  
13 end, if for some reason he's identified, maybe his  
14 attorney provides every bit of information that  
15 they need out of order, he's just entitled to his  
16 money. There's nothing about this proceeding that  
17 should delay anybody from getting their benefits  
18 if they're identified.

19 THE COURT: No.

20 MR. PALMER: And if the information is  
21 provided.

22 THE COURT: No. If they're identified  
23 and the liability is clear, we ought to be able to  
24 go ahead and pay them.

25 MR. JONES: And all I'm discussing is  
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1 when the identification is supposed to have taken  
2 place. And you've said it will take place in a  
3 procedure and Liberty then follows; is that  
4 correct, Your Honor?

5 THE COURT: That's correct.

6 MR. JONES: That's what we'll be doing  
7 then, Your Honor, when we contemplate this  
8 implementation process to play itself out.

9 THE COURT: But you should be working  
10 together. I mean, unless you've identified them,  
11 and if you've identified them, that's a different  
12 case. I mean, if you identified the claimants  
13 that are due, then you need to pay them.

14 MR. JONES: We agree with that, Your  
15 Honor, if they're identified. But some of them,  
16 obviously, we don't know anything about because we  
17 have not finished the implementation process or  
18 the front end of it.

19 THE COURT: Okay. But we're going to do  
20 it.

21 MR. JONES: We are, Your Honor. And  
22 we've got the warehouse from Helena, or Missoula,  
23 with all of these documents. And then when we get  
24 to the Ruhd case, you'll see we've identified the  
25 files and provided the four categories of

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1 information requested, we're going to pull those  
2 files and we're going to make them available, and  
3 we'll go through them and then the claimant's  
4 attorney can go through them.

5 THE COURT: Did the queries that you  
6 generated today identify the permanently totally  
7 disabled people?

8 MR. JONES: Some do, Your Honor. Some  
9 do.

10 THE COURT: Okay. Well --

11 MR. JONES: Well, I should say, we've  
12 identified some that are labeled with our code for  
13 permanent total disabled. We've certainly done  
14 that.

15 THE COURT: Okay. But they don't  
16 identify whether or not they have impairment  
17 ratings and they don't identify whether or not  
18 they've been paid impairment awards?

19 MR. JONES: Exactly, Your Honor.

20 THE COURT: So you have to go through the  
21 files?

22 MR. JONES: Exactly. And then I was  
23 concerned about the issue of the impairment  
24 rating, if one has not been given, because we know  
25 different physicians can see the same patient and

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1 give very different ratings, so that was an  
2 implementation issue that has now arisen,  
3 obviously. But if we've gone out and preemptively  
4 looked at these files and got a physician on to do  
5 the ratings with whom the petitioners later  
6 disagree, we'd have another dispute and additional  
7 expenses and additional time spent.

8 THE COURT: What are we going to do about  
9 the claimants that don't have ratings that are  
10 permanently totally disabled?

11 MR. JONES: I would propose we mutually  
12 agree to a physician who can do them in the  
13 appropriate community.

14 THE COURT: Wouldn't it be appropriate  
15 just to send back a query to the treating  
16 physician in the first instance?

17 MR. JONES: That's another possibility,  
18 Your Honor.

19 MR. DALE: Well, I mean, I don't know if  
20 we can judicially direct what they ought to have  
21 done to begin with. As far as I'm concerned, they  
22 had a duty to identify these and pay them, and we  
23 have a right to review to make sure what they're  
24 doing is correct. I mean, they can send them to  
25 whoever they want for impairments.

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1           THE COURT: Well, yeah, but I don't want  
2 to do that. I mean, that's where we start going  
3 off the rail, I think, in these cases. I mean, I  
4 think we need to get together and agree how we're  
5 going to handle those cases. I mean, I can tell  
6 them to unilaterally do it and then you come in  
7 and you say you don't like it, then I have to  
8 unravel that dispute. It seems to me that we're  
9 better off trying to fashion some sort of way to  
10 handle this that's agreeable to both parties.

11           MR. DALE: Well, it would be standard  
12 claims procedure, I think, Your Honor. Just like  
13 we did with the State Fund. When the State Fund  
14 did this, normally they'd start with the treating  
15 physician, if the treating physician is available.  
16 That's a pretty obvious decision, that's standard  
17 practice.

18           THE COURT: That's what I just suggested.

19           MR. DALE: So why do we have to tell them  
20 to do that? That's standard procedure, they  
21 should be doing that anyway. And if that person  
22 for some reason hasn't, isn't practicing any  
23 longer, isn't available, they find somebody else,  
24 that person gives them an impairment. That's what  
25 should be done. We don't have to sanction that or

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1 ratify it in any way. That's their independent  
2 obligation to do that, anyway. We get to look to  
3 see if we might disagree with what that  
4 determination is, and then we'd have to come to  
5 you and say, Well, we think we should perhaps have  
6 this person looked at by someone else and we'd  
7 have to decide, you know, who is going to bear  
8 that expense. But we don't have to ratify or  
9 somehow direct what they ought to do when it's  
10 their clear obligation to do it.

11 THE COURT: Well, except they're doing it  
12 under the Court's supervision. And what I want to  
13 try to do is I want to confront these problems up  
14 front rather than having disputes down the road.  
15 If to the extent that we can confront these things  
16 up front, figure how to deal with them, we avoid  
17 disputes down the road and the process goes more  
18 smoothly.

19 So, I mean, if you agree that that's what  
20 they should do, send them back to the claimant,  
21 then that's what to do then. And it sounds like  
22 you do, so let's just do that, send them back to  
23 the treating physician. So let's go ahead, the  
24 ones that don't have ratings, let's send back to  
25 the treating physician, request -- we may not get  
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1 a reply, then what do we do?

2 MR. JONES: Well, Your Honor, as you  
3 know, there's sometimes disputes about who is the  
4 treating physician. And if they -- I'm concerned  
5 about duplication of effort and who is going to  
6 pay for this? Shouldn't we be able to try to  
7 reach an agreement on who the evaluator is going  
8 to be on a one-time deal?

9 THE COURT: You're going to pay for it.

10 MR. JONES: Well, do we pay for two or  
11 three, four or five?

12 THE COURT: Well, just one, for sure. I  
13 mean, if they just disagree with it, then that's  
14 another story. But at least if there's no  
15 impairment rating and they're permanent totally  
16 disabled, then I think the insurer needs to pay  
17 for that exam. I think you send them back to the  
18 treating physician to see if they'll render the  
19 rating. If there's a dispute about who the  
20 treating physician is, then I suggest that you  
21 discuss the matter and try to resolve it. And if  
22 you can't resolve it, then you can get ahold of me  
23 and maybe I can resolve it for you.

24 MR. JONES: Well, Your Honor, here's what  
25 I'm getting at. I want to make sure I understand

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1 the timing on this. Liberty does not dispute the  
2 fact that it must pay for the first evaluation.  
3 There's no doubt about that. The question is,  
4 when is it going to be -- when is it going to ask  
5 someone to do it?

6 And again, as I understood you, we would  
7 all sit down with the files, we would agree that  
8 this is a perm total that needs an impairment  
9 rating, that Liberty is going to pay for that,  
10 there's no doubt about that.

11 But are you saying that the FFR attorneys  
12 have now stipulated that we will go initially to  
13 the treating doctor, that's what we're going to do  
14 automatically?

15 THE COURT: Well, the feedback I got is  
16 they agree that that's the thing that should be  
17 done. Am I right about that?

18 MR. DALE: Right. I mean, I think it not  
19 only should be done, it should have been done.

20 THE COURT: Well, once they're  
21 identified, absolutely.

22 MR. JONES: Well, Your Honor, maybe I can  
23 just cut to the chase on this. What I hear is an  
24 argument that if they find a claim in their review  
25 that they think we should have gone out and done

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1 all of this already rather than going through this  
2 procedure, they may want to knock on the door and  
3 say you've unreasonably delayed payment of  
4 benefit.

5 THE COURT: Oh, I don't know whether  
6 they can do that or not. I don't know whether  
7 they have any standing to do that or not. But  
8 what I'm interested in is making sure that we've  
9 got a process in place to get this done.

10 MR. JONES: So am I authorized now to  
11 wait until they get on the file and we agree this  
12 is a case that needs an impairment rating, am I  
13 authorized to wait, or are you telling me to go  
14 out tomorrow and start looking at these cases?

15 THE COURT: Well, you're going to go  
16 through the files initially.

17 MR. JONES: Right.

18 THE COURT: And you're going to look  
19 for -- just find out the claimants that are  
20 permanently totally disabled that have impairment  
21 awards and you're going to pay those.

22 MR. JONES: Right.

23 THE COURT: At the same time, what I  
24 would suggest you do is go ahead and find those  
25 that don't have impairment awards. If the doctor,  
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1 the treating physician is clear, then send out a  
2 request for impairment rating. If the treating  
3 physician is not clear, then call Monte, Lon,  
4 Steve, and say, It's not clear. Here's our  
5 problem in this case, see if you can reach an  
6 agreement. If you can't reach an agreement as to  
7 how to handle that case, who to send it to, then  
8 I'll resolve it.

9 MR. JONES: That's the guidance I need,  
10 Your Honor.

11 THE COURT: And, you know, if the  
12 treating physician won't give the impairment  
13 award, then talk about who you're going to send  
14 them to.

15 I mean, the thing that I don't want to  
16 get into, I don't want to get in a situation where  
17 you send him to one doctor, they think that doctor  
18 is too insurance oriented and so they want their  
19 own doctor, and we go back and forth. I'd rather  
20 see you agree on somebody to do the impairment  
21 rating and have one impairment rating and be done  
22 with it.

23 MR. JONES: That's the procedure we want,  
24 Your Honor.

25 THE COURT: Do you disagree with that,  
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1 Lon?

2 MR. DALE: Well, in some respects  
3 because, I mean, here's a guy waiting for an  
4 impairment rating and he doesn't need an agreement  
5 from us, we haven't seen the file. I mean, their  
6 file is under their control, and they should have  
7 sent in to get his impairment rating independent  
8 of ours.

9 THE COURT: Well, Lon.

10 MR. DALE: Or input, and that was their  
11 obligation. And it doesn't wait on our review of  
12 the file or the Court's order telling them to do  
13 what they're already obligated to do. So, I mean,  
14 if there's a dispute -- I mean, the likelihood of  
15 there being a dispute is pretty minimal. They  
16 just have to meet the threshold obligations that  
17 they have. And in the meantime, everything is  
18 being delayed.

19 THE COURT: Well, when are you going to  
20 review the files? Everything is getting delayed  
21 in all these cases. I mean, no matter what we do,  
22 Murer took us five years, six years, seven years  
23 to work through. I mean, it's not going to happen  
24 yesterday. And my concern is, is we're going to  
25 delay these matters further if we just

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1 unilaterally do things and then we start having  
2 disputes. We have you coming back to me and  
3 saying, I don't like that impairment award and,  
4 therefore, we want to get another impairment  
5 award, so then I have to adjudicate it. Then we  
6 just delay the process further.

7           So it makes sense to me to spend a little  
8 bit of extra time up front and reach an agreement  
9 as to what we're going to do, or in this case  
10 reach an agreement as to the doctor who is going  
11 to do the impairment award, get it done, get it  
12 done once and that's the end of it. So, I mean,  
13 there's a balance there. I understand your point.  
14 These people are waiting for their money, but  
15 they've been waiting for their money for a while  
16 some of them.

17           MR. DALE: Well, I mean, I guess our  
18 position is pretty clear. I mean, I think that  
19 they should -- they should not be waiting for us  
20 to review a file to send someone that they know is  
21 entitled to an impairment.

22           THE COURT: Okay. Well, I'm telling him  
23 that, they're going to do that. They will  
24 identify the permanently total, they'll pay the  
25 ones where they've got the impairment awards.

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1 They'll send the claimant back to the treating  
2 physician, if that treating physician is  
3 identifiable. If not, they'll get ahold of you,  
4 you'll see if you can work it out.

5 And if you can't work it out -- and there  
6 may be none of those cases, we may be just wasting  
7 our time even talking about it, but if there are,  
8 we'll get together and figure it out.

9 MR. ROBERTS: Judge, this is Steve  
10 Roberts. Can we have some time frame on Liberty  
11 Mutual? When we implemented it with the State  
12 Fund, you know, we weren't talking five, four,  
13 three or even two years. It went fairly quickly.

14 THE COURT: Well, we're not talking five,  
15 four, three years here. But you've got to realize  
16 the State Fund has experience in this because  
17 they've already been through two of these. So  
18 they've got the track record and they know what to  
19 do and how to do it. And these other insurers, we  
20 may have to educate them a little bit and get them  
21 involved. I think this is Larry's really first  
22 crack at it.

23 MR. JONES: Your Honor, what would the  
24 other attorneys like as a deadline?

25 THE COURT: Originally, I thought the  
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1 file review was supposed to have taken place. We  
2 were talking about doing it in March and then it  
3 sort of got derailed.

4 MR. JONES: We had a confidentiality  
5 issue arise and once that's resolved today, and it  
6 will be resolved today --

7 THE COURT: Okay.

8 MR. JONES -- I'd like a deadline by which  
9 they would like it done and see if that's  
10 reasonable?

11 MR. ROBERTS: It was our understanding  
12 that you were going to do individual reviews of  
13 the files for the attorney-client material, right?

14 MR. JONES: Yes.

15 MR. ROBERTS: And that was going to be  
16 done fairly promptly because the expectation was  
17 we were going to start looking at files after that  
18 fairly promptly.

19 MR. JONES: Can we get the wish list,  
20 Your Honor? What's the date?

21 THE COURT: Do you want to put a date on  
22 it?

23 MR. ROBERTS: A week following. Maybe we  
24 can talk about this outside of everybody else  
25 afterwards so we don't waste their time. But if  
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1       you can give us some parameters, we can tell you  
2       if we thought that was reasonable.

3               MR. JONES:   Your Honor, I'm here to set  
4       the date.

5               THE COURT:   Two weeks?

6               MR. JONES:   I'll need more than two  
7       weeks, Your Honor.

8               THE COURT:   Three?

9               MR. JONES:   If we had four, that should  
10       be more than sufficient.

11               MR. ROBERTS:  Four weeks, that's  
12       sufficient.  Yeah, four weeks.

13               MR. JONES:   Four weeks it is, Your Honor,  
14       with the Court's agreement.

15               THE COURT:   Okay.  Four weeks.

16               MR. PALMER:   David suggested that I  
17       possibly attend that.  Is there any objection to  
18       that?

19               MR. JONES:   No objection from Liberty,  
20       Your Honor.

21               THE COURT:   Do we have a confidentiality  
22       agreement between the two of you in place?

23               MR. JONES:   We have a draft we've been  
24       working on.  And I'm sure -- Rex and I have worked  
25       together before, that it won't be a problem.

26

1           THE COURT: Okay. Yeah, we need to get  
2 those confidentiality agreements in effect.

3           Okay. So four weeks for Liberty to do  
4 their initial review and --

5           MR. JONES: And if you want, Your Honor,  
6 we can set another date after that when the three  
7 FFR attorneys can come on site under the  
8 confidentiality agreement.

9           THE COURT: Well, I'll let you pick the  
10 date. Unless you have a dispute about it, you  
11 guys ought to be able to agree to it.

12           MR. JONES: I have asked them if they  
13 would consult among themselves and send me a  
14 letter proposing the dates. And we'll know how  
15 much time we'll need at the conclusion of this  
16 hearing when we resolve the issue of how many  
17 cases on the ones we've identified that have to be  
18 pulled and made available.

19           MR. LUCK: When would you like that  
20 letter by?

21           MR. JONES: Oh, I think Monday at 5:00,  
22 Brad. If you'd like to help with that, I would  
23 appreciate your involvement.

24           MR. DALE: On that subject, Your Honor,  
25 I'm just down the street from Larry's office and  
26

1 so -- I mean, we don't need to -- you know, if  
2 they have a file -- if they have the files  
3 reviewed that are to be reviewed available, I can  
4 go down any time they have one, two or two  
5 hundred, for that matter. So, I mean, we don't  
6 have to wait for a specific date. It would be  
7 nice if we could probably agree on two or three  
8 days when Steve and Monte could come over, too,  
9 and we could work through a lot of them, but --

10 THE COURT: Do you really need all three  
11 of you to do this spot review?

12 MR. DALE: Well, we weren't going to  
13 review every file, all three of us, but we could  
14 break it up. So that's what I'm saying, if they  
15 have 60 of them, each of us can do 20 of them. So  
16 that's what we planned on doing, just implement  
17 the process, expedite it.

18 THE COURT: Okay. You know, I really  
19 don't care how you do it, but alls I care about is  
20 that you do it.

21 MR. JONES: Well, Your Honor, they can  
22 call me when they would like to come, sometime  
23 after the conclusion of the four-week period.

24 THE COURT: You need to make a list of  
25 the files, too, where you're making the payments,

26

1 so that they know that, because those files may  
2 take a lot less review or they may not even want  
3 to review them, I don't know.

4 MR. JONES: We'll do that, Your Honor.

5 MR. BECK: Just one clarification, Judge,  
6 this would include the affiliated companies as  
7 well?

8 THE COURT: Well, who are we dealing  
9 with?

10 MR. JONES: Your Honor, we had that  
11 hearing and Monte was unavailable. He had  
12 proposed to apprise affiliated companies in the  
13 minute entry and you said you've issued a minute  
14 entry and it's limited to Liberty Mutual.

15 THE COURT: Liberty Northwest.

16 MR. JONES: Liberty Mutual and its fire  
17 insurance. It's one of the Liberty Mutual  
18 companies and Liberty Northwest, the files we have  
19 identified. Now, the affiliated companies, that's  
20 another implementation issue.

21 THE COURT: Okay. Are you representing  
22 the affiliated companies?

23 MR. JONES: Wausau, and there are three  
24 other companies, I believe, with Liberty in the  
25 first word of the title. And we're going to have  
26

1 to see if there are any cases that even fall under  
2 this with these people.

3 THE COURT: Have we got a response from  
4 them yet?

5 MR. JONES: I filed a response, Your  
6 Honor. And it was based on something you said in  
7 one of our earlier hearings that I could respond  
8 by saying here's my earlier letter, I'd like to go  
9 through the Court to implement the files that are  
10 covered, if any, and how they're reproduced.

11 THE COURT: Okay. Well, we need to get  
12 down to business with them.

13 MR. JONES: Your Honor, why don't we, if  
14 it's agreeable with the FFR attorneys, I will  
15 identify who the claims managers are and whatever  
16 state they're in and see what resources they have  
17 to identify any Montana claims.

18 THE COURT: You haven't done that yet?

19 MR. JONES: No, we have not, Your Honor,  
20 because we've been dealing with the bulk of what  
21 we know is the largest part of this, the Mutual  
22 and the Northwest.

23 THE COURT: Were any of those companies  
24 the -- we'll call them the affiliated companies  
25 for loss of a better word -- were any of them

26

1 identified in the Department of Labor run?

2 MS. GARBBER: Yes.

3 MR. JONES: Wausau, I believe was, Your  
4 Honor, and maybe a couple of others, I believe.

5 THE COURT: Were there specific claims?  
6 Well, there must have been specific claims  
7 identified in respect to that.

8 Well, let's get on that.

9 MS. GARBBER: But the problem with those  
10 is that those files are typically handled out of  
11 another state even though they're Montana  
12 jurisdiction cases. So, we aren't going to be  
13 familiar with them, nor would anyone in our office  
14 be.

15 MR. JONES: We'll have to identify the  
16 claims, the relevant claims manager for that  
17 company who can do that, see if there are any.

18 THE COURT: Can you do that in about a  
19 week?

20 MR. JONES: We'll do it in a week, Your  
21 Honor.

22 THE COURT: And furnish that information  
23 back to me and also to the FFR attorneys?

24 MR. JONES: Will do, Your Honor. We'll  
25 ask for it and I'll let you know what I'm told,

26

1 because for all I know, some claims manager in  
2 Wausau out of Florida who may handle these cases  
3 is on vacation or something, so I'll do the best I  
4 can to try to get those available.

5 MS. GARBER: Could we have two weeks on  
6 that?

7 MR. JONES: Yeah, I am volunteering  
8 Carrie Garber to do that so --

9 MS. GARBER: And I'm going back East.

10 MR. JONES: Would two weeks be agreeable,  
11 Your Honor?

12 THE COURT: Yeah, two weeks is okay.

13 Carrie, just tell them that they need to  
14 get huffing.

15 MS. GARBER: I think they -- I can do  
16 that.

17 THE COURT: Okay.

18 MR. PALMER: This is Rex Palmer again.  
19 Rather than doing this twice, maybe we can do the  
20 same process for the Flynn matters, Flynn and  
21 Miller, because we're going to have to contact  
22 these same people again, the same files are going  
23 to have to be brought up, only a little -- maybe  
24 substantially larger group. And I'm happy to look  
25 through the ones which are permanent partial

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1 disability files with the FFR attorneys to  
2 maybe -- than clear the warehouse out again. If  
3 we do that once, I don't mind that, but I'd hate  
4 to have to then wait six months to start the  
5 group that goes beyond that because they might be  
6 temporary total disability claims or that they  
7 might go outside the time frames of the FFR.

8 MR. JONES: Well, I think it's up to Rex  
9 to decide if he wants to see the perm total claims  
10 or potentially perm total claims that we've  
11 identified, and he's certainly welcome to.

12 MR. PALMER: No, no, I'm happy to do  
13 that. I'm thinking that might even be an  
14 efficient way to do it, but I'm concerned that we  
15 have the other part moving, like the notice to  
16 these other claims examiners, whoever you're going  
17 to be representing, and the other files for  
18 Liberty Northwest and Wausau, the ones that you're  
19 more clear about that we know we don't have a  
20 broader time frame and a broader category, but  
21 they need to be kind of moving towards that. So  
22 shall we pick a time frame for that, too?

23 MR. JONES: Well, we can do that, Your  
24 Honor.

25 THE COURT: Okay. I'm lost. And we need  
26



1 to give a Yvonne a break, too.

2 MR. JONES: After we have a side bar.

3 THE COURT: Okay. Let's take a break.

4 (Whereupon, the conference was in recess  
5 at 2:31 p.m., and subsequently reconvened at  
6 2:50 p.m., and the following proceedings were had  
7 and entered of record:)

8 THE COURT: Let's get started again. I  
9 think when we left off, Larry and Rex were  
10 talking. Do you want to put anything else on the  
11 record here? Do we need to?

12 MR. PALMER: What we were trying to do is  
13 to define what areas the insurer is going to be  
14 searching and some kind of broad categories to  
15 simplify that process. And, of course, in the  
16 computer age, it's easier. So we talked about the  
17 computer period of time and the pre-computer  
18 period of time and then to break each of those  
19 down into the kind of categories that are affected  
20 by the Flynn decision and that includes anybody  
21 that is either temporary totally disabled or  
22 permanently totally disabled. Those would be  
23 possible claims that a Social Security offset may  
24 have been garnered by the insurer. And the search  
25 would be something that would be reduced after you  
26

1 identify all temporary total disability cases or  
2 permanent total disability cases, a query could be  
3 done that would identify all of those where the  
4 rate had been reduced because that might suggest  
5 an offset, and that's how the State Fund did it.  
6 They went through and that was their first  
7 narrowing process. That avoided looking at simply  
8 every case that comes through.

9           It's our position that now that the law  
10 is clear, it's the insurer's duty to do the  
11 search, that's to query the computer and look at  
12 the pre-computer files to determine which ones  
13 these events occurred in. And Larry has a  
14 position that they'll do the computers, not under  
15 duty, but as a matter of -- because it's easy,  
16 they'll do it and the pre-computer is our problem.  
17 So that's really how close we got.

18           MR. JONES: Your Honor, our computers,  
19 I'm told, can go back to 1991 with a query asking  
20 has a TTD or a PTD rate been reduced by a dollar  
21 award. We may be able to go back with code  
22 numbers -- in fact, I'm confident we can go back  
23 somewhat with code numbers to identify additional  
24 TTD and PTD cases prior to 1991. But then whether  
25 they are relevant to Flynn, it appears it would

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1 take a manual search. And we're prepared,  
2 certainly for Liberty Northwest cases, to identify  
3 what we can by computer that doesn't fit the first  
4 category of a reduced rate and allow Rex, under  
5 the appropriate confidentiality order, to do a  
6 manual audit of those.

7 THE COURT: Well, how many files are we  
8 going to have? That's another question.

9 MR. JONES: Well, I can get you some  
10 numbers on that, Judge.

11 THE COURT: What did the State Fund do?  
12 Did you deal with pre-computer stuff under Flynn?

13 MR. MARTELLO: We dealt with -- there  
14 were computer tapes, if you will, for a period of  
15 time, but I don't think we went prior to -- prior  
16 to '87, I don't know that we identified anything.

17 MR. HARRINGTON: This is Tom Harrington.  
18 I think in Flynn we were able to use a lot of the  
19 Broeker population for the pre-computer age and  
20 identify the folks that responded to the Broeker  
21 ads and mailings, because those populations  
22 overlapped quite a bit.

23 THE COURT: Well, in Broeker, we used the  
24 newspaper for some of them. And another  
25 alternative is in the pre-computer age, if we

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1 can't winnow it down to people whose rates were  
2 changed, we just know that they were temporary  
3 totally or permanently totally disabled, another  
4 option would be a mass mailing to them and have  
5 them reply rather than having everybody go sift  
6 through that stuff. So you might want to think  
7 about that when you're talking about it, and then  
8 we can all talk about that some more.

9 We probably will have similar problems  
10 with other insurers in Flynn, too. We have some  
11 replies in Flynn at this point, and I haven't  
12 looked at them. And those are coming to the  
13 Court, aren't they, they're not coming to you, so  
14 you haven't even seen them?

15 MR. PALMER: Those are State Fund.

16 THE COURT: Well, no. Okay. You're  
17 right, that's right, they're just State Fund  
18 stuff. But we've sent out -- didn't we send out a  
19 summons in Flynn, though?

20 MR. PALMER: That was one of the things  
21 we were going to work through.

22 THE COURT: The global summons, we  
23 haven't done that yet?

24 MR. PALMER: No, there was a global lien  
25 but not a global summons. Our last discussion was

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1       that we sent you one, you made some changes and  
2       Larry had some thoughts on that.

3               THE COURT:   What's the status of that?

4               MR. JONES:   Well, Your Honor, I don't  
5       have that in front of me, but rather than keep  
6       everyone here, if it only involves Liberty, we can  
7       do that at the conclusion.  I'm sure we can get  
8       this resolved today.

9               MR. PALMER:   Yeah, I'm not sure it just  
10       involves Liberty.  I think it's the summons that  
11       actually involves everybody.

12              THE COURT:   Right.  That's what I'm  
13       thinking of.  We were going to give notice to all  
14       the rest of them and see where that landed us.

15              MR. JONES:   I believe the concern I have  
16       was the same as the Ruhd one, that you're asking  
17       them to step forward with all this information.  
18       And our understanding all along in this process  
19       has been that you were going to give us guidelines  
20       about how to identify those files.

21              Again, we're concerned that if we go out  
22       and do something only to find out that the common  
23       fund attorney would like to see it done  
24       differently.

25              THE COURT:   Well, the problem in Flynn  
26

1 is, and in some of these other cases, is we don't  
2 have a Supreme Court decision saying that there's  
3 a common fund or dealing with retroactivity in  
4 other issues, and we don't have the benefit of  
5 Stavenjord and Schmill yet. So there may be some  
6 uncertainty as to the defenses that may be raised  
7 in those cases. And I think I redrafted the  
8 summons. I think I drafted it more generically  
9 and basically asked them to reply to your total  
10 lien. Is that what I did?

11 MR. PALMER: That's my recollection, Your  
12 Honor.

13 THE COURT: Okay. Well, we don't have to  
14 do this now. I don't want to waste the time of  
15 everybody else. But let's go back and take a look  
16 at that summons and let's see -- and also the  
17 State Fund, I think you looked at it, too, didn't  
18 you? Did you look at the Flynn global summons,  
19 Tom Harrington?

20 MR. HARRINGTON: I'm sure we did, Your  
21 Honor. Was that circulated a couple weeks ago?

22 THE COURT: Yeah, I think so. The  
23 problem is we've got so many of these floating  
24 around, it's sometimes hard to figure out which --

25 MR. LUCK: The Satterlee one we've been  
26

1 looking at, and I think that's one of the things  
2 you want to talk about. If we looked at it, we  
3 didn't spend a lot of time with it because we  
4 weren't involved.

5 THE COURT: Okay. All right. Well,  
6 let's go back and revisit that and let's get that  
7 pinned down so that we can get that out.

8 Let's work back to Rausch just a minute.

9 And, Wayne, what kind of problems do you  
10 have in identifying claimants along the lines that  
11 we're talking about in that Rausch summons?

12 MR. HARPER: Well, the issue is if the  
13 people that have the time to do that and can do  
14 their work that they have to do for the bankruptcy  
15 court and stuff, whether it's a violation of the  
16 State. I don't think it is. I think they'll plow  
17 through them.

18 THE COURT: Okay. I think we need to  
19 look at that a little bit more closely. I don't  
20 know what you can do, I don't know what you're  
21 capable of doing, whether by computer or what you  
22 have to do. So maybe if you could go back and  
23 look at that and tell me and tell, also, the FFR  
24 attorneys what's involved in your getting the  
25 information that we requested in that summons and

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1 let us -- maybe give us a little bit better idea  
2 of what kind of time frame that you have.

3 And then Lon and Monte and Steve, you can  
4 look at that and we can talk about, you know,  
5 setting some sort of time frame.

6 That's the other thing. I've given  
7 extensions. A number of the replies that we got  
8 back indicated that the insurers needed additional  
9 time to identify the claimants. And I gave  
10 basically blanket extensions to those people that  
11 needed to do that, or to the insurers up to, I  
12 think, April 18th. And so we should be getting a  
13 second, a second series of replies to look at.

14 And I think there's been a couple of cases where  
15 I've given more time because of the specific needs  
16 of the insurer. And I think I'm going to have to  
17 deal with those on a case-by-case basis.

18 And I guess what I would query here, is  
19 there anybody else here in the Rausch or Ruhd case  
20 that needs additional time or that has particular  
21 problems with identifying claimants?

22 MR. HERINGER: K-Mart is having  
23 difficulties. The current claims adjusters have  
24 just started adjusting the files for about the  
25 last year and someone else has them for the past

26



1 time frame, and so they don't have familiarity  
2 with the files, they don't have the longevity with  
3 the files. You know, they don't even know what's  
4 back after a certain period of time. So it's just  
5 trying to get ahold of all the information, then  
6 trying to figure out what is out there so that  
7 they can respond to the summons. I mean, there's  
8 just difficulties in getting all that together.

9 THE COURT: Okay. Do you have an  
10 extension in effect at this point?

11 MR. HERINGER: No, I don't, but I would  
12 move at this time for an extension.

13 MR. LUCK: One of them indefinite ones.

14 THE COURT: No, Lon is going to make me  
15 put a deadline on it.

16 Would you go back and find out what kind  
17 of difficulties are involved and what type of time  
18 frame they have and let us know? Can you do that  
19 in a couple of weeks?

20 MR. HERINGER: Yes, I can.

21 THE COURT: And then what I'll do is when  
22 you give us that report, if there's an objection  
23 to the time frame that he's talking about, then  
24 let's have the FFR attorneys file an objection to  
25 it or a conference call and reach an agreement or  
26

1 something on it.

2 MR. HARRINGTON: This is Tom Harrington,  
3 again. Your Honor, our firm is representing the  
4 Western Guarantee Fund as well.

5 THE COURT: Okay.

6 MR. HARRINGTON: We identified some of  
7 the identification issues we were experiencing  
8 when we responded to the first summons. And we  
9 followed that up with a conference call with you  
10 and the FFR attorneys.

11 We've had the Guarantee Fund do an  
12 initial survey with their adjusters because  
13 they're computer system just does not let them  
14 identify claimants through computer queries. It's  
15 possible that we might be asking for additional  
16 time. We've received some written materials from  
17 the Western Guarantee Fund. I don't know if it's  
18 enough yet to satisfy the Court's requests, I  
19 think in paragraph 4 of the original summons, but  
20 we should know more, I would guess, by April 8th.  
21 So if we need additional time, we might be  
22 contacting the Court.

23 THE COURT: What did I give you, until  
24 April 18th?

25 MR. HARRINGTON: You gave us until  
26

1 April 18th.

2 THE COURT: Okay. Yeah, these dates are  
3 aren't written in stone. I mean, I think one of  
4 the things that we're going to encounter is the  
5 individual insurers may have different problems  
6 and so we'll have to deal with that as they come  
7 up. I don't see any way around it.

8 MR. HARRINGTON: I think you issued a  
9 second summons, didn't you, in Rausch, that had  
10 the April 18th deadline in there for other  
11 insurers?

12 THE COURT: I think for other insurers,  
13 but I don't know what the status -- we had some  
14 insurers that just ignored us and so we served  
15 them formally through the Secretary of State or  
16 their registered agents. And I put a little thing  
17 in there that we intended to enforce the summons.  
18 And I don't know what kind of response we've  
19 gotten from that so far. They won't get in  
20 trouble as long as they get involved in this  
21 proceedings and tell me what their problems are,  
22 but if they don't answer, I have not a clue what's  
23 going on.

24 Jackie, do you know if we've gotten any  
25 responses from any of the --

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1 MS. BOCKMAN: No, the only thing I've  
2 received back is just, you know, a certificate of  
3 them being served by the processor, so --

4 THE COURT: Okay. So we've got them  
5 served, but we'll have to see. And if they still  
6 don't respond, then the FFR attorneys will have to  
7 give me guidance about what I'm supposed to do  
8 about that.

9 Anybody else have a particular problem?  
10 Rick, and then I'll get to you, Tom, because --

11 MR. DAVENPORT: Rick Davenport. One of  
12 my questions that I have for this proceeding is  
13 that we know that we've got Rausch and Ruhd and  
14 we've got Flynn sitting there, but we also have  
15 Stavenjord and Schmill that are coming down.

16 And my question is, would it make more  
17 sense for us to arrive at a global, if you will,  
18 set of rules and procedures to account for all of  
19 the cases where we anticipate where they're going  
20 to be coming up so that we are not obligated to go  
21 through every file six times to try and identify,  
22 you know, if it meets the criteria for Stavenjord  
23 or if it meets the criteria for Flynn or meets the  
24 criteria for all of these others?

25 In our particular case, being a  
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1 third-party administrator, we have multiple  
2 clients, some of them who have been with us since  
3 1990 and some of them whom we just picked up in  
4 the last year. And typically what happens when we  
5 take over a new client is we get tape dump with a  
6 bulk amount paid on any one particular claim so  
7 that we have no way of knowing whether it was paid  
8 as permanent partial impairment or PPD or TTD.  
9 There's no classification, we have just one  
10 lump-sum amount.

11 So that means that, you know, even files  
12 as early as 2000 or 2003, we have to go through  
13 every file physically, you know, which in some  
14 cases we're taking files that were handled by  
15 other third-party administrators, they're not --  
16 we can't guarantee what those files are like even,  
17 if we even have them all, we don't know where they  
18 all are. So it's going to be a very  
19 time-consuming process. And we would like to be  
20 able to be in a position to comply with the spirit  
21 of what's going on here but be able to do it in a  
22 very orderly fashion that doesn't cause  
23 significant confusion to take place over time.

24 THE COURT: Does the information you get,  
25 does that identify whether or not they're

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1 permanently totally disabled? It doesn't even do  
2 that?

3 MR. DAVENPORT: No. If we've had a  
4 client for a significant period of time and, you  
5 know, we're saying back in 1999, we can almost  
6 by -- you know, my assumption is that almost by  
7 figuring out what the minimum amount of temporary  
8 total has been paid to meet perm total  
9 classification. So if you use 1991, if we paid  
10 more than \$25,000 in indemnity benefits, in theory  
11 that would be one file you would want to look at  
12 because it might beat that minimum threshold. But  
13 in terms of being able to classify it as from a  
14 query, no.

15 THE COURT: I take it that you as  
16 third-party administrator are not making the  
17 actual payments, those are coming directly from  
18 the insurance company?

19 MR. DAVENPORT: No, we make the payments  
20 for them. And so, you know, from a date certain  
21 when we have taken them over and they're on our  
22 system, I can slice and dice that information, you  
23 know, a large number of ways.

24 THE COURT: Okay. So your problem is  
25 with regard to files that precede your taking over  
26

1 the account?

2 MR. DAVENPORT: Yeah, it's the archival  
3 data that comes to us. You know, unfortunately,  
4 even as recently as 2000, there wasn't the  
5 sophistication for us to be able to take over data  
6 from another TPA and have it be broken down by  
7 individual checks issued to individual parties and  
8 be able to sort it out. It's going to literally  
9 take hands-on looking at every file.

10 THE COURT: Have you contacted your  
11 clients, your insurer clients to find out if they  
12 can get that information, either they have it or  
13 they can contact the prior TPA to get it?

14 MR. DAVENPORT: That's the next step that  
15 we're working on now, but the problem is that the  
16 archival data that they have going back to 1999  
17 isn't necessarily as sophisticated now -- or then  
18 as it is now. So they may have basically the  
19 amounts paid on each claim, but not necessarily  
20 the breakdown. You know, so for 2004, since we  
21 switched to the new computer system, we're in  
22 pretty good shape.

23 THE COURT: But were they using TPAs for  
24 their prior payments such that they --

25 MR. DAVENPORT: Yes.

26

1 THE COURT: Can you go back to them?

2 MR. DAVENPORT: And a lot of them were  
3 issuing floppy checks and recording them in  
4 spreadsheets that who knows where they are. And  
5 so you just have a roll-up number for any  
6 particular file. Unless the third-party, unless  
7 the insurer, or shall we say the self-insured was  
8 keeping their own set of data independently and  
9 has -- and then they can do it. But NorthWestern  
10 Energy is an example, they've had their own  
11 information for quite some time, so they're a  
12 little bit more sophisticated, but not a lot than  
13 a lot of others.

14 But in terms of answering the question, I  
15 don't know how close we can get to being able to  
16 identify without a physical exam.

17 THE COURT: Do you have name-and-address  
18 information?

19 MR. DAVENPORT: Yes.

20 THE COURT: Okay. It sounds like you're  
21 in a situation we probably need to talk about and  
22 need to get Lon and Monte and Steve involved in to  
23 try to figure out how we proceed in that.

24 How many files, do you know?

25 MR. DAVENPORT: I can tell you that we've  
26



1       numbered 25,000 files from the time we've been in  
2       business. But as far as, you know, how many  
3       different files we're talking about, I don't know.  
4       I mean, that's the great unknown. When we've  
5       taken over the files that we closed and benefits  
6       paid on them and they've been inactive since we've  
7       handled the case, we really have no way of  
8       knowing.

9                THE COURT: Okay. David, are you  
10       representing all of his clients?

11               MR. SANDLER: Most -- I think all of  
12       them, and then I have a couple others that have  
13       similar problems. We thought they were TPAs and  
14       whatnot. And one client has, of mine, that's  
15       appeared, they have that problem. They have the  
16       additional layer that they're having trouble  
17       getting their software, I think, from pre -- I  
18       think it's '98, working, and we're running into  
19       problems like that. And that same company also  
20       has a problem of, on some of the stuff they have  
21       been able to dig up, they can get files where they  
22       know the perm total has been paid, but they  
23       can't -- their system is not able, for whatever  
24       reason, to tell you what state it's out of. So  
25       this is a national insurance company who is

26

1 saying, We have thousands of files and we don't  
2 know which ones are in Montana right now. We're  
3 trying to figure it out, but --

4 THE COURT: Well, what kind of time  
5 constraints did I impose on you?

6 MR. SANDLER: April 18th.

7 THE COURT: Okay. Well, we're going to  
8 extend that. I think what we need to do is we to  
9 identify the specific problems. You probably need  
10 to make some more inquiries of the insurers that  
11 you represent to see if they've got a way to  
12 obtain that information, if it's in some form  
13 somewhere. And I think what we're going to have  
14 to do is we're going to have to deal with each of  
15 them individually, and that raises the question  
16 that I had again before, is involvement of other  
17 counsel. I suppose we could set up a meeting or  
18 maybe a telephone conference, maybe get some of  
19 this information in advance as far as what your  
20 particular problems are, what kind of time frames  
21 you're looking at, et cetera, and get that  
22 disseminated to everyone and then maybe sit down  
23 and talk about it. And, of course, I mean, you  
24 could talk about it, too, with Lon, Monte and  
25 Steve, but I think we need to do that. And then  
26

1 if anybody else wants to participate.

2 I mean, the only problem is we may -- how  
3 we deal with that may effect how we deal with  
4 others, but I think we're going to end up dealing  
5 with each of these individual situations on an  
6 individual basis.

7 And I remember, Rick, you filed an  
8 affidavit at the time that David or Todd, I don't  
9 remember, was it you, David, or did Todd --

10 MR. SANDLER: Both of us, yeah.

11 THE COURT: Okay. Anyway, when you filed  
12 the objections that I overruled, there was an  
13 affidavit in there. And I don't know, you may  
14 want to supplement it. But it sounds to me like  
15 we need to talk with Lon, Monte and Steve and  
16 figure out how we're going to -- what steps we  
17 need to take to get that information.

18 MR. DAVENPORT: As I recall in my  
19 affidavit, we have done some initial surveys with  
20 some of the clients we've had for an extended  
21 period of time to identify, just ballpark numbers,  
22 you know, for some of them. But again, those are  
23 the ones that we've had since '90 or '91 that we  
24 have the data on and all the files, so yeah.

25 THE COURT: We may need to supplement  
26

1 that information. Why don't you get as much  
2 information as you can and get it to the FFR  
3 attorneys and then let's schedule something and  
4 talk about it.

5 Lon, Monte or Steve, do you see a better  
6 way of handling that other than to get the  
7 information and sitting down and trying to  
8 brainstorm it?

9 MR. BECK: I don't see any other  
10 alternative except trying to impose dates is  
11 probably the better way to go rather than  
12 open-ended.

13 THE COURT: Yeah. How much time will it  
14 take you to get more information?

15 MR. DAVENPORT: I can probably supply  
16 some real rough data. Again, it won't be broken  
17 down. I mean, it would be names and numbers, but  
18 not a specific breakdown as to individual payments  
19 for a good portion of our clients, relatively by  
20 the 18th or the 25th of April. So we'd have the  
21 base computer information, we can supply that.  
22 But in terms of the details of the files,  
23 obviously, that's probably going to be a  
24 summer-long project.

25 MR. PALMER: It does seem like it might  
26

1 be important to include that with Flynn so we  
2 don't just start the whole thing over again,  
3 because while ours is going to be somewhat of a  
4 larger group, I think he's just described the same  
5 problem that they're going to run into with ours  
6 and we would probably serve ourselves well to just  
7 do the larger group to begin with realizing that  
8 the Rausch matter is going to be winnowed down a  
9 little bit from that, but not to start in the fall  
10 trying to do Flynn and Miller.

11 THE COURT: You mean, have them tailor  
12 whatever they're looking for to make sure that  
13 you've got the Flynn information in there, too?

14 MR. PALMER: That's what I'm thinking.

15 THE COURT: We could certainly do that.  
16 I'm not sure exactly how we're going to work that.

17 MR. DAVENPORT: We could run a query to  
18 be able to identify claimants where there's been a  
19 rate change. I mean, you know, certainly since  
20 2001 it's a possibility. But, you know, prior to  
21 that time -- I think it's possible. I've got my  
22 IT person here that's kicking me in the shin like  
23 with promises, but --

24 THE COURT: Well, we may need your IT  
25 person, too, at some point. And the other problem

26

1 is, Flynn isn't as far along and we may have some  
2 other issues in Flynn because we haven't got  
3 formal responses from any of the insurers. I  
4 mean, Ruhd and Rausch is a little bit unique  
5 because we've got a specific determination from  
6 the Supreme Court that says, This is a common  
7 fund, and I have to enforce it, so we're going  
8 gung ho on Rausch. The other stuff, we may have  
9 some -- you know, I think some of the insurers are  
10 going to agree common fund applies and we're going  
11 to do it, others may not and we may have legal  
12 issues that we have to take up. So imposing that  
13 sort  
14 of -- imposing it as a requirement that they  
15 provide the Flynn information at this period of  
16 time is probably a little bit premature. But  
17 insofar as insurers want to avoid duplicating  
18 efforts and can basically compile that information  
19 and you can get them to do it, I think that's  
20 probably a good idea.

21 MR. PALMER: Which probably raises one of  
22 the other points on your agenda here, which is  
23 establishing some kind of time frames for the  
24 insurers and the affected parties to raise their  
25 issues so that we don't go through this and then  
26

1 have this exact same three sentences you just did  
2 come up again next October and then the next  
3 October.

4 THE COURT: Okay. The issues that I was  
5 talking about before that I asked if there were  
6 any out there and was greeted by silence had to do  
7 with Ruhd and Rausch. And these other cases, we  
8 are going to have deadlines because we're going to  
9 have summonses and they're going to have to  
10 respond. Like in Flynn, the summonses will go out  
11 and they'll have to respond. So if they have  
12 legal objections to the court proceeding and to  
13 the application of the common fund doctrine, then  
14 they're going to have to file that in their  
15 response and then I'll have to deal with it at  
16 that point in time.

17 But do we want to set a deadline in this  
18 case for the insurers to raise any legal issues as  
19 far as the implementation of Ruhd and Rausch? I  
20 mean, right now, the insurers that have replied,  
21 the only ones that have raised objections was --  
22 David raised objections for the insurers he  
23 represents and Wayne has raised objections. Other  
24 than that, nobody has objected. There are still a  
25 few floating out there and they'll have to

26

1 raise it. But I suppose once we get the ones in  
2 that haven't replied yet, that ignored the  
3 original summons, we'll know. They'll have to be  
4 raised in those, in those responses. So I think  
5 we're covered. I think we've got it covered.

6 MR. PALMER: So if some insurer appears  
7 and simply provides the information, then that  
8 makes it real easy.

9 THE COURT: Right.

10 MR. PALMER: If they appear and just say,  
11 We're looking for the information, then are you  
12 suggesting that their time is running out right  
13 then because by virtue of them not saying we're  
14 going to object to retroactivity, we're going to  
15 object to scope, we're going to object to how he,  
16 in fact, is deceased, you know, if they don't  
17 raise those at that juncture, that some time frame  
18 will be running out, and that's my concern, is  
19 that perhaps if there isn't some time frame  
20 running by virtue of their service, then when does  
21 it start to run?

22 THE COURT: Well, in the Flynn and those  
23 other cases, we could make that express in the  
24 summons, and I think I did. I think the way I  
25 drafted the summons was that they had to lay out  
26



1 any objections that they had or forever hold their  
2 peace type of thing, but we'll look at that.

3 MR. PALMER: Well, we're on the same  
4 wavelength.

5 THE COURT: I think so.

6 Okay. Well, Rick, why don't you try  
7 to -- and David -- why don't you see what you can  
8 put together by the April 18th date insofar as the  
9 information you've accumulated, the additional  
10 problems that you face. And maybe if you can --  
11 but if different insurers have different problems,  
12 identify what those different problems are and put  
13 that in your response, along with a statement as  
14 to what additional time you need and what  
15 additional stuff that you would have to do type of  
16 thing and put that in by April 18th, if you could  
17 possibly do that. And then after that, we'll give  
18 the FFR attorneys a chance to digest it and then  
19 we can talk about where we go.

20 I mean, the problem is, if you got 25,000  
21 files and you have to hand review them, we ought  
22 to be talking about alternatives to doing that,  
23 such as a mailing, which is going to be expensive  
24 but maybe better than doing 25,000 file reviews,  
25 but it's something that we need to talk about.

26

1           Okay. All right, Tom Marra, you had  
2 a question.

3           MR. MARRA: I was just going to comment  
4 that one of my clients, Target, is in the same  
5 situation as K-Mart is. They just got the second  
6 summons. They didn't even know the first summons  
7 existed. So I don't think that there are very  
8 many cases, but I've let them know what it is they  
9 need to find and they're looking for it. And your  
10 paragraph 5 in your second summons is where I was  
11 going to go if I needed to in the event that the  
12 information couldn't be obtained by April 18th.

13           THE COURT: Okay. That was that if you  
14 need more time, you can ask for it?

15           MR. MARRA: Correct.

16           THE COURT: Okay. Who is your client?

17           MR. MARRA: Target. And I think  
18 St. Paul Travelers thinks they can have the  
19 information available by the 18th. And again, if  
20 it's not, I would follow, adhere to paragraph 5.

21           THE COURT: Okay. All right. Anybody  
22 else have a problem?

23           MR. DALE: Your Honor, just to follow up,  
24 Lon Dale. On the TPA situation, how do they  
25 interface their information with the Department of  
26

1 Labor and Mark's statistical information?

2 Wouldn't that be of assistance for them in

3 implementing their review process?

4 THE COURT: Well, I think they have that

5 information, don't they?

6 MR. DALE: I don't know, that's the

7 question.

8 THE COURT: Mark?

9 MR. CADWALLADER: Mark Cadwallader.

10 Many insurers had their third-party administrators

11 supply information to the workers' compensation

12 database system. Whether they all do or all do a

13 good job of reporting that, I don't know. There

14 is a problem, also, pre-database information that

15 keeps information on claims that were outstanding

16 at the time the database system came up and we

17 started gathering the data.

18 MR. DAVENPORT: Yeah, what Mark is

19 referring to is when the SROIs went online, then

20 everybody was on equal footing. But prior to that

21 time, even before the SROIs came about, there was

22 no consistency in how the various TPAs did it.

23 Now, it's easy, it's just done on online, but I

24 don't know how reliable that data would be.

25 THE COURT: Okay. Well, we had them do

26

1 a run on the data and they kicked out all of the  
2 permanently totally disabled claimants. And if  
3 you don't have that information, we can get that  
4 to you for your clients, for the clients that you  
5 are servicing.

6 MR. DAVENPORT: Good.

7 THE COURT: Do you know whether or not  
8 you do have it?

9 MR. DAVENPORT: I do not.

10 THE COURT: Why don't you check, and if  
11 you don't have it, let us know.

12 MR. DAVENPORT: I'm sure I don't.

13 THE COURT: Okay.

14 MR. DAVENPORT: I would have been  
15 intrigued to get it.

16 MR. DALE: And, of course, just to follow  
17 up on that, Your Honor, I mean, if they only have  
18 data back to when they started doing work, 1991, I  
19 think, is the date that he gave, then some of  
20 Mark's data predates that, I believe.

21 MR. CADWALLADER: We have some data for  
22 claims that are prior, but my recollection is the  
23 implementation we were asking for on subsequent  
24 reports of injury where there were, in fact,  
25 payments being made at the time the system came

26

1 up.

2 THE COURT: That's my recollection, they  
3 only put on open files.

4 MR. CADWALLADER: Although, if they're  
5 not open, it's likely they've probably been  
6 settled or something happened there.

7 THE COURT: Okay. Settled case  
8 discussions.

9 Larry didn't want to cough up any settled  
10 cases and, Lon, you wanted him to cough up the  
11 settled cases. And I guess my first question  
12 about that is, are we talking about cases settled  
13 after the Rausch decision only?

14 MR. DALE: Well, that would obviously be  
15 primary because those would be covered within the  
16 decision.

17 MR. JONES: Your Honor, they're not  
18 common fund, if the date of injury is after the  
19 date of the FFR decision.

20 THE COURT: No, I'm talking about just  
21 settlements that occur after the date of the  
22 decision, because they could contain an impairment  
23 award in those settlements.

24 MR. JONES: But the date of injury  
25 predates the FFR decision.

26

1 THE COURT: Right.

2 MR. JONES: Those we would have to make  
3 available, Your Honor.

4 THE COURT: Okay. So you don't have any  
5 disagreement about that?

6 MR. JONES: No, and we may have to -- and  
7 the confusion, if there was any, was caused by  
8 letter. Carrie signed it for me. No, I'm  
9 responsible for that. I said all settled cases.  
10 I don't know if any of the cases that we have  
11 identified fit in this category of date of injury  
12 before FFR decision but settled after. And if  
13 they are in that category, clearly we have to  
14 divulge those.

15 The objection I have is to settled cases  
16 that were settled before the date of the FFR  
17 decision. I'm sorry for the confusion on that.  
18 That's what I would be referring to.

19 THE COURT: Why do we need to look at  
20 those?

21 MR. JONES: Your Honor, it's my  
22 objection. If you want, I can give you the case  
23 law and they can respond, if you want to do it  
24 that way.

25 THE COURT: Go ahead, but they need to

26

1 consult just a second.

2 MR. DALE: I think what we did in the  
3 State Fund situation, if I'm correct, I mean, if  
4 they were represented by attorneys, we made an  
5 exception for a review of those situations,  
6 settled cases where there was representation,  
7 didn't we?

8 MR. LUCK: No, I don't think so, Your  
9 Honor. I think since Murer, we've all been under  
10 the impression that settled cases, and that was  
11 reaffirmed by Dempsey --

12 THE COURT: Are dead.

13 MR. LUCK: -- prior to the decision are  
14 dead. And I think Dempsey may have added  
15 litigated cases to that, also. But certainly, the  
16 settled cases, pre-decision, we've been going on  
17 for years on the basis that they were excluded  
18 from consideration.

19 THE COURT: Yeah, that was my  
20 understanding.

21 MR. DALE: No. But what we did, Brad, is  
22 if your cases, when you did our review, if they  
23 were represented by an attorney, we didn't look at  
24 them. Isn't that what we did on our review with  
25 you guys?

26

1           MR. LUCK: For settled cases? I don't  
2 think so for settled cases, Lon. I think if they  
3 were settled, we agreed right from the outset,  
4 because that's also the way that your and the  
5 other settlements went, that they were just  
6 excluded, regardless of representation or not.

7           MR. JONES: Your Honor, Liberty is not  
8 bound by what the State Fund did.

9           THE COURT: Well, I know that, but it's  
10 to your benefit.

11          MR. ROBERTS: We'll stipulate to that.

12          MR. JONES: And we're relying on the  
13 Murer decision. It's the third one in the  
14 trilogy.

15          THE COURT: Right, and they were  
16 following Murer, too, so --

17          MR. JONES: Right. So rather than  
18 discuss what the State Fund did, can we just cut  
19 to the chase, and it's the third Murer decision,  
20 it's the second issue, it's crystal clear. And we  
21 go to the Dempsey decision in paragraph 31 that  
22 Brad just referred to, the Court concluded that  
23 the retroactive effect of a decision does not  
24 apply ab initio, that is, it does not apply to  
25 cases that became final which could be litigated

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1 cases, or were settled prior to a decision's  
2 issuance. So the law is just black-and-white on  
3 this, Your Honor.

4 MR. DALE: So we'll go with the ones  
5 forward from the decision.

6 THE COURT: Okay.

7 MR. PALMER: The Supreme Court decision  
8 or this Court's decision?

9 THE COURT: The Supreme Court decision.  
10 Well, originally my decision, but the Supreme  
11 Court affirmed me on it.

12 MR. PALMER: But in the cases where it  
13 went the other way, like in Murer, haven't you  
14 ruled that where you were reversed at the Supreme  
15 Court that those cases that fell in between, which  
16 is like the Flynn issue, the ones that came after  
17 your erroneous decision and before the Supreme  
18 Court's overruling, those, you've made a ruling,  
19 are part of the cases that are reviewed because  
20 they were settled under the misconception that  
21 they might not have been entitled to additional  
22 benefits. I think you've ruled on that, haven't  
23 you?

24 THE COURT: So you're talking about where  
25 I issue a decision and say no benefits are  
26

1 entitled, they're not entitled to any benefits,  
2 and then the Supreme Court comes along and  
3 reverses me, I've said that the ones that -- the  
4 cases settled in that interim between my decision  
5 and the Supreme Court decisions are fair game?

6 MR. PALMER: Right. Isn't that right,  
7 Tom?

8 MR. LUCK: You don't want to know.

9 MR. MARTELLO: I don't remember.

10 MR. PALMER: Well, I say that because  
11 several of my clients got letters in that period  
12 of time. It was much later and it was after a  
13 ruling and I followed up on that. It has been  
14 addressed, that the people that were, shall we  
15 say, misled at the lower level and settled, that  
16 they aren't bound by that incorrect ruling.

17 THE COURT: Well, there was some stuff  
18 in Murer, but that was sort of a unique situation.  
19 I think there was an agreement in that case.

20 MR. MARTELLO: Yeah, Murer was unique in  
21 the fact that there was some representations  
22 supposedly made that one of the bases was to look  
23 at some selected settlements.

24 THE COURT: Okay.

25 MR. MARTELLO: That's why there was that  
26

1 exception.

2 THE COURT: Let's do it -- oh, Tom.

3 MR. HARRINGTON: I don't recall any cases  
4 that Rex is talking about. I do know that the  
5 dates of the liens, the attorney fee liens, have  
6 varied based on whether or not you were affirmed  
7 or reversed.

8 THE COURT: Right.

9 MR. HARRINGTON: And I'm not aware of any  
10 cases that have looked at the settlement issue.  
11 But I know we've used dates of reversal or  
12 affirmants to guide the dates that are in the  
13 attorney fees, but I'm not aware that we've  
14 addressed it in terms of the settled cases. I've  
15 just been under the impression that the settled  
16 cases are out if they were settled before the  
17 decision came out.

18 THE COURT: Let's do this. Lon, you're  
19 certainly entitled to look at the cases that are  
20 settled after the Rausch decision, which is what,  
21 December 2002?

22 MS. GARBER: September 5th.

23 THE COURT: September 5th. Okay. But,  
24 anyway, settled cases after that --

25 MR. JONES: That have an injury that  
26

1 predates.

2 THE COURT: Right, that's understood.

3 If, after further reflection and after  
4 this hearing, you think that you're entitled to  
5 look at any settlements before that date, then  
6 file a motion asking the Court to make that  
7 determination and cite me the case. You might  
8 want to go back and look. I don't recall such a  
9 case as Rex is talking about off the top of my  
10 head, other than some peculiar circumstances  
11 dealing with the State Fund, which wouldn't apply.  
12 But if you think that it's out there and you can  
13 cite me the case, then we'll revisit it.

14 MR. ROBERTS: Judge, this is Steve  
15 Roberts. This is a matter of logic, what Rex is  
16 saying makes total sense. If somebody is relying  
17 on your decision, that's going to factor into the  
18 settlement they made in the interim between your  
19 decision and the Supreme Court reversal.

20 THE COURT: Well, except for the fact  
21 that the common fund entitlement arises at the  
22 point in time that the decision, the precedent is  
23 established and that doesn't occur until the  
24 appeal. It occurs in the first instance with my  
25 decision, and I've said that, if that case is

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1 affirmed, because then you've got the precedence  
2 that is set, and it's merely being affirmed. If  
3 it's reversed, then the precedence is a Supreme  
4 Court precedence. And that's the trigger, it  
5 seems to me.

6 But I guess what I'm telling you is, if  
7 you want to argue the point with me, I need to  
8 give you that opportunity and you may have some  
9 case support for it, so I need to consider it. So  
10 you go back and regroup and talk about it, and if  
11 you want to raise it -- shall I put a deadline on  
12 you guys, too?

13 MR. ROBERTS: On us?

14 THE COURT: Yes. A couple weeks to tell  
15 me.

16 MR. ROBERTS: Yeah, a couple weeks would  
17 be fine, Your Honor.

18 THE COURT: Okay.

19 MR. JONES: Your Honor, before we leave  
20 Ruhd, could we discuss the confidentiality  
21 agreement?

22 THE COURT: Okay.

23 MR. JONES: Lon, you had an addition, I  
24 think, you wanted to make.

25 MR. DALE: Well, Steve is going to --

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1 he's our additions man.

2 MR. ROBERTS: We discussed that, and I  
3 think we're in agreement on that.

4 MR. JONES: Well, let's just make a  
5 record. As I understand the FFR attorneys'  
6 proposal, we are limiting the disclosure of what's  
7 identified as confidential information. The  
8 healthcare providers and the FFR attorneys, quite  
9 rightly, want to include rehab providers to do  
10 perhaps employability assessments or a possible  
11 perm-total type issue. Liberty has no objection  
12 to allowing the confidential information to go to  
13 rehab providers, and I did mention this to Steve,  
14 but I'd like to recommend that they be CRCs and we  
15 limit people who can receive this confidential  
16 information as defined in the agreement to CRCs,  
17 and at least we're in agreement on that part. But  
18 I believe the FFR attorneys would rather have just  
19 a more general generic designation of healthcare  
20 providers and experts, and I would object to a  
21 phrase of experts. I want that specific type of  
22 person identified.

23 And then I would ask that the Court grant  
24 leave to the FFR attorneys to include additional  
25 experts by just filing a motion or contacting me  
26

1 first. And if we can't agree, then we could  
2 expand it, because given the nature of the issue  
3 in the Ruhd case, I believe the only relevant type  
4 of experts would be healthcare providers and rehab  
5 providers. And because we deal with CRCs in the  
6 Act, I'd like to have that level of expertise,  
7 Your Honor.

8 THE COURT: Well, why don't we do this:  
9 Why don't we limit it to healthcare providers and  
10 CRCs for the time being, and if any specific need  
11 arises that you think you need to furnish that  
12 information to anyone else, you can let me know  
13 and we can always go back, revisit it and amend  
14 the order.

15 MR. ROBERTS: And by healthcare  
16 providers, we're referring to nurses and --

17 MR. JONES: Your Honor, I believe that's  
18 a term of art in the Uniform Health Care  
19 Provision, I believe it will cover anyone under  
20 that act.

21 THE COURT: Yeah, actually, your interest  
22 is getting to be in getting the impairment awards  
23 from a doctor, so --

24 MR. ROBERTS: And we were thinking just  
25 in reviewing the files. We would want some input.

26

1           MR. JONES: Yeah. Your Honor, it might  
2 be a PTD case, which the FFR attorneys think is  
3 perm total and we would need the rehab on that.

4           THE COURT: Yeah. I think with regard  
5 to, if we go with the CRCs, then I think you need  
6 to get a separate confidentiality agreement from  
7 them. And maybe we need to put the provision in  
8 there saying that, at least as to nonhealthcare  
9 providers already under an obligation of  
10 confidentiality, that the confidentiality  
11 agreement has to be signed by them to disclose.

12           MR. JONES: And, Your Honor, that's  
13 already on our computer. If the FFR attorneys  
14 agree, I can revise it along the lines you've  
15 discussed and send it to them Monday.

16           MR. ROBERTS: Okay.

17           THE COURT: Okay. Have we got everything  
18 else ironed out on that?

19           MR. JONES: I don't have any more  
20 wrinkles, Your Honor.

21           THE COURT: Okay. Let's see. Oh, just  
22 a matter of advice, and I probably ought to send  
23 this out to everybody. When we're doing the  
24 e-mailings, when you send me anything, or I send  
25 you something back or one of the attorneys send

26



1 you something back and I'm copied on it, be sure  
2 when you hit that e-mail button about "reply," to  
3 reply to all so everybody who is on that list gets  
4 the same message and not just the individual to  
5 whom you're specifically replying. That way,  
6 everybody is kept in the loop.

7 Then I have -- let's see.

8 Okay. I think we are down to some Flynn  
9 stuff, specific Flynn stuff, the representation  
10 issue.

11 I had a conference with Rex and Larry,  
12 and I don't remember who else was on that call, we  
13 gave notice of it, but I don't remember who was on  
14 it. But Rex indicated that he's receiving some  
15 calls from some of the Flynn claimants in which  
16 they've actually asked him to represent them, is  
17 that the deal?

18 MR. PALMER: They've inquired about  
19 representation, but I haven't gone there yet, the  
20 rate issues and things like that.

21 THE COURT: It's an issue that could  
22 arise in any of these cases and I don't know, have  
23 any of the FFR attorneys received similar calls?

24 MR. BECK: We haven't talked to any of  
25 them. They haven't called our office.

26

1           THE COURT: I guess the question is, and  
2 I don't know the answer off the top of my head, is  
3 what does Rex do, what's his obligation in this  
4 case? Can he represent them, or is there any sort  
5 of prohibition from him taking them on as clients  
6 if they contact him as opposed to him contacting  
7 them and soliciting them? Any thoughts on this?

8           MR. LUCK: Well, we had that problem in  
9 Murer, but it was reversed.

10          THE COURT: Yeah, we don't have that  
11 problem here. It's where the claimants initiate  
12 the contact.

13          MR. LUCK: You might want to give them  
14 the names of three competent workers' compensation  
15 lawyers.

16          MR. PALMER: Are there that many?

17          MR. HARRINGTON: Your Honor, we've had  
18 conversations with Rex and I think we participated  
19 in that conference call. And in our discussions  
20 with him, we didn't see a problem if they were  
21 calling him now. We can't prevent him from  
22 representing them.

23          THE COURT: Do any of the insurers see a  
24 problem with it, any insurance counsel see a  
25 problem with it?

26

1 MR. DAVENPORT: No.

2 MR. JONES: No.

3 MR. DAVENPORT: We view that as an issue  
4 between whoever the attorneys are that are  
5 involved.

6 MR. PALMER: See, in our case, we are  
7 going to be affirmatively contacting the claimants  
8 as we find out which ones actually retained an  
9 attorney to get their Social Security awards or  
10 retain some other representative. That's all  
11 contemplated within our settlement agreement. But  
12 otherwise, we'll just have the State Fund do a  
13 bunch of contact work and I think they wanted us  
14 to do that. So we're going to be making contact  
15 with them by letters that we're going to filter  
16 through the State Fund.

17 Some of the attorneys have called in  
18 those cases, and it's easy to contact, communicate  
19 with the attorneys who are still representing  
20 those people, then I just run it through them and  
21 it makes it simple. But when we're contacting the  
22 claimants individually, we're wanting to give  
23 initial salvos off to the State Fund's attorneys  
24 so they can see if they have any objections. But  
25 we will be expecting comments back or responses to  
26

1 these requests we're sending out.

2 THE COURT: Yeah, and there's no problem  
3 with that. The only problem that could arise is  
4 if you're soliciting them, which you shouldn't be  
5 doing. And, you know, if in responding to you  
6 with the information that you've requested, they  
7 come back and say, We want you to represent us, I  
8 guess I don't see a problem with it. None of the  
9 attorneys see a problem with it. If you think  
10 there might be an ethical issue on it, you might  
11 get an ethics opinion. The other thing I could do  
12 would be to chat with Professor Patterson and see  
13 if he had a feeling about it, if you want me to do  
14 that.

15 MR. PALMER: Well, I'm open to that.  
16 That's one of the reasons we've put off  
17 commenting, you know, sending out our letters to  
18 any of the claimants yet, because we've gotten  
19 four or five of these calls and we haven't even  
20 sent anything to them from our office, it's all  
21 from the Court. So I'm thinking that when we send  
22 out letters, that we may get a lot of people  
23 wanting to see what other benefits --

24 MR. MURPHY: Well, there's a potential  
25 attorney fee lien if this potential claimant has

26

1 counsel already, worked on a case to establish  
2 liability, for instance, you might have a fee lien  
3 coming at you from that former attorney.

4 MR. PALMER: Yeah, but we haven't run  
5 into that either yet because we haven't done any  
6 of the follow up, but we intend to do that  
7 hopefully this week.

8 MR. MURPHY: Well, the ERD is pretty good  
9 about policing up. If you sign up a potential  
10 claimant, they won't let you come on board, they  
11 won't approve your fee agreement unless the former  
12 attorney signs off on a letter or something, so  
13 that would be a catch, you know.

14 THE COURT: The claimants probably asking  
15 for representation are probably ones that aren't  
16 represented.

17 MR. MURPHY: Yeah.

18 MR. PALMER: Yeah, that's what it has  
19 been so far.

20 THE COURT: Yeah, if they're represented,  
21 then you're going to have to deal with that  
22 because they're already represented and so you may  
23 want to walk away.

24 MR. PALMER: I would walk away from that  
25 probably.

26

1           THE COURT: All right. Well, I'll give  
2 Dave Patterson a call and see if he has any  
3 feeling about that and thinks that maybe he would  
4 have an ethics opinion or something like that.  
5 But off the top of my head, I don't see a problem  
6 and nobody else does in this room.

7           All right. The summons and the  
8 confidentiality agreement, I guess we can  
9 postpone that a bit. We'd have to go back and  
10 look at the summons. None of us were prepared to  
11 talk about that, but let's get that hammered out.  
12 I've got that in my notes.

13           So that brings us to Reesor and the dates  
14 of the lien and the dates for affected insurers.  
15 What's the status of -- I think we've got a  
16 summons circulating in Reesor. Where are we on  
17 that?

18           MR. HARRINGTON: This is Tom Harrington.  
19 We sent you a letter on St. Patty's Day indicating  
20 that the broad language that you had used in your  
21 summons seemed acceptable to us, although I think  
22 there's a couple of follow-up points that we want  
23 to raise.

24           MR. LUCK: Your Honor, in looking at it  
25 more closely, a couple things relate to dates and  
26

1 possible confusion the insurers might have when  
2 they get that summons. And our concern is that,  
3 for instance, in the summons where you talk about  
4 the scope of the claims affected, that it be  
5 limited, you mentioned after July 1, 1987. And as  
6 we were reading back through this, we felt that  
7 everywhere you said July 1, 1987, you should say  
8 through December 22nd, 2004, the date of the  
9 decision, so it was clear to the carriers that  
10 injuries after that time are not going to be  
11 affected by it.

12 THE COURT: Okay. That's certainly --  
13 that's not a problem. Through December, what's  
14 the date?

15 MR. LUCK: December 22nd, 2004. And that  
16 happens at both paragraph 2 and 3 of your -- of  
17 the latest draft.

18 The other thing was a question in  
19 relation to your reference to summoning people to  
20 file up an answer, and it seems like a lot of the  
21 carriers were confused about maybe what the  
22 contents of that would be. Or you should give  
23 more detail concerning it, what kind of input you  
24 want, just a notice of appearance, or do you want  
25 somebody to make a substantive response to the

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1 allegations in the petition?

2 THE COURT: Yeah, actually, I want a  
3 substantive response.

4 MR. LUCK: So maybe just clarifying that  
5 and what would be included or some sort of  
6 clarification would be a good idea.

7 THE COURT: I mean, the idea behind  
8 requiring a response is in that case we don't have  
9 a common fund determination at the Supreme Court  
10 level, so it's going to be up to me to make that  
11 decision. And if there are any defenses to the  
12 lien claim, we want to get them out, I think, at  
13 this point. So I'll work on some language and  
14 circulate that.

15 Shall I circulate that to everybody,  
16 since we've got insurers in here who are going to  
17 be representing, or counsel who are going to be  
18 representing insurers that are going to get  
19 involved in that case as well, I'm sure?

20 All right. I'll globally circulate it.  
21 I think one of the problems was, I didn't get a  
22 reply from someone, one of the -- who is the  
23 petitioner's attorney in Reesor?

24 MR. MURPHY: Me, Tom Murphy.

25 THE COURT: Maybe you didn't give me back  
26



1 a reply. Did you look at that?

2 MR. MURPHY: Yeah, we called, we called  
3 in, but we can file a formal reply, if you'd like.

4 THE COURT: Okay. Did you have problems  
5 with the more generic summons that I did?

6 MR. MURPHY: No.

7 THE COURT: Okay. All right. In that  
8 case, I'll put in those dates and I'll circulate  
9 it globally, and I'll clarify that if they have  
10 objections, they need to put them in their answer.

11 Okay. Is there anything else to talk  
12 about on Reesor?

13 MR. MURPHY: In Reesor, we had submitted  
14 to you a proposed summons.

15 THE COURT: Right.

16 MR. MURPHY: And then you drafted this  
17 one.

18 THE COURT: Right.

19 MR. MURPHY: So we kind of felt that you  
20 had considered our suggestions and that's why we  
21 didn't reply after that.

22 THE COURT: Okay.

23 MR. MURPHY: Because we did the first  
24 draft, basically.

25 THE COURT: Right. And you had sort of

26

1 drafted the summons along the lines of the Rausch  
2 case.

3 MR. MURPHY: Or Hiett. I think it was  
4 Hiett.

5 THE COURT: Was it Hiett?

6 MR. MURPHY: I'm not sure which one.

7 THE COURT: Yeah, I think it was Rausch  
8 because I think you were requesting specific  
9 information from insurers, and I thought that was  
10 a little bit premature until we know. Since we  
11 haven't certified, essentially, a class of  
12 claimants or a common fund of claimants, we need  
13 to get past that hurdle before I require them to  
14 provide that information.

15 MR. MURPHY: Okay.

16 THE COURT: Okay. Satterlee. I had a  
17 question about the dates of the liens and the  
18 dates for the affected insurers. Does everybody  
19 know what the Satterlee case involves?

20 MR. PALMER: No.

21 THE COURT: Basically, Satterlee is  
22 challenging 710 and the retirement age in its  
23 entirety, which would open up the, as I understand  
24 it, benefits for permanent totally disabled  
25 claimants would be payable ad infinitum.

26

1 MR. MURPHY: Well, until they died.

2 THE COURT: Right.

3 MR. MURPHY: Not infinitum.

4 UNIDENTIFIED SPEAKER: Just in Montana,  
5 they can do that.

6 MR. MURPHY: I'm not sure I'm going to  
7 stipulate to that, though.

8 MR. LUCK: We count that as a victory.  
9 You've got to take the wins where you can.

10 THE COURT: Anyway, Satterlee may be a  
11 bigger case than Reesor as far as its potential  
12 impact. And we decided in that case to go ahead  
13 and give notice and invite all of the insurers in  
14 the state to come in and to have their say as to  
15 the issue because whatever happens is going to be  
16 binding or at least -- well, it will be, it will  
17 be a sori decisis, at minimum, on the rest of the  
18 insurers and could lead to a common fund claim as  
19 well.

20 And I think common fund is actually --  
21 it's actually set up in the alternative as a  
22 common fund request or a class action request, so  
23 one of the two, so that's up front in the  
24 petition.

25 So we're going to do a summons to all of  
26

1 the insurers. I guess it will actually be not  
2 really a true summons, but a notice to appear and  
3 be heard on the issues that are in that case at  
4 this point in time. I don't contemplate  
5 certifying it as a class or certifying it common  
6 fund at this point because I think the substantive  
7 issues have to be resolved. And if they're  
8 resolved in favor of the petitioners in that case,  
9 then I'll have to take the next step. If they're  
10 not, then I wouldn't, although I would anticipate,  
11 if not guarantee, that that case will go to the  
12 Supreme Court. So we want to get that moving  
13 along so that we have an answer one way or the  
14 other at some time in the near future.

15 And I had a question about the dates. I  
16 think when we had talked initially, we talked  
17 about the claim going all the way back to the time  
18 that the retirement age was put into the statute,  
19 which I believe was in '74 or something like that.

20 MR. MURPHY: Jim Hunt, who is in Disney  
21 World, had filed something. I want that in the  
22 record, he's at Disney World. He's contending and  
23 we're contending that it starts in 1981 when the  
24 benefits incorporated term age.

25 THE COURT: Does anybody see any harm in  
26

1 giving notice to insurers going back to 1981 who  
2 appear on the substantive issues? One of the  
3 problems in the case is, I think we've got claims  
4 only going back to '91 or '93. And in light of  
5 the Reesor case, and what they talked about about  
6 the change in the way retirement was done, that  
7 there might be an argument that earlier periods of  
8 time are different for people-protection purposes  
9 than the time periods that we were dealing with in  
10 Reesor. But I don't know as I see any harm in  
11 allowing, in giving an opportunity to insurers to  
12 appear and argue the merits of that case. It will  
13 establish a precedent, at least for that period of  
14 time, and it may establish a precedent for the  
15 prior periods of times as well, based on what they  
16 say about it.

17 Does anybody see a problem with giving  
18 notice back to '81?

19 Okay. We'll do it. We're still working  
20 on that summons? I sent out a draft, didn't I?

21 MR. MURPHY: You sent out a draft. Both  
22 Jim and I have communicated with the Court that  
23 we're fine with it, and I think Brad has, too.

24 THE COURT: Okay. If that's the case,  
25 then we're ready to roll with the summons.

26

1           MR. HERINGER: Haven't you guys  
2 incorporated some changes, though? I mean, my  
3 understanding, unless I missed something, is you  
4 had a summons and, Brad, you guys came back and  
5 said you had some changes. And is that the  
6 agreed-upon one, the one with the changes? Is  
7 that the last thing --

8           MR. LUCK: Here's our historian.

9           MR. HARRINGTON: Actually, what happened  
10 is in Hiett, we had developed a pretty detailed  
11 summons that we were going to send out that listed  
12 the issues we talked about during our in-person  
13 conference. We sent that to Tom Murphy and Jim  
14 Hunt. They fashioned their summons and notice to  
15 appear based on that detailed Hiett summons, which  
16 you hand revised and turned into a blanket summons  
17 that had pretty broad, general language.

18           So while Tom and Jim and Brad and I were  
19 working through those issues, we were recommending  
20 that Tom Murphy make changes to his summons in  
21 Reesor. I think that's the letter that Mike  
22 Heringer is talking about. And then after we  
23 exchanged that letter with Tom Murphy, you then  
24 changed the Reesor summons and turned that one  
25 into a more broad summons.

26

1           So, really, all those issues have kind of  
2 been swept aside and we're looking at just a broad  
3 summons that we -- we sent you a letter on  
4 March 17th on Reesor and Satterlee saying they  
5 seemed generally okay to us.

6           THE COURT: You worked on March 17th?

7           MR. HARRINGTON: I know it should be a  
8 recognized state holiday.

9           MR. MURPHY: That's true.

10          THE COURT: Well, why don't I do this:  
11 On both Satterlee and Reesor, let me send out that  
12 summons to everybody again. And I'll put a  
13 deadline on it of probably about five days, that  
14 if you object to it, let me know what your  
15 objections are and I'll take them. If you don't,  
16 we'll just roll it out and we'll send them out.

17          MR. LUCK: And just for purposes of  
18 making sure ALPS understands, we've audited  
19 everything he did on March 17th, including his  
20 response to the Court.

21          MR. HARRINGTON: All my work was done on  
22 by noon on that day.

23          THE COURT: Brad realizes, of course,  
24 that while they make e-mails and what he says in  
25 e-mails may not be part of the record, this does.

26

1           MR. HARRINGTON: I hope he understands  
2 it.

3           THE COURT: Okay. That pretty much  
4 exhausts the itinerary that I have and probably  
5 just flat out exhausts me.

6           Has anybody got anything else they want  
7 to take up, just in general or anything they want  
8 to talk about at this point?

9           MR. DAVENPORT: I do have a question.

10          THE COURT: Okay.

11          MR. DAVENPORT: With all due respect to  
12 Larry Jones, while you're taking a tack on Rausch  
13 and Reesor with Liberty, are we setting precedent  
14 here that from this point forward, the FFR  
15 attorneys are going to expect the same kind of  
16 thing versus us providing them with detailed  
17 information regarding the claim without actually  
18 giving them the claim to look at?

19          THE COURT: I think the rule that we were  
20 talking about before is if you have identified  
21 claimants who are entitled to benefits, that you  
22 ought to go ahead and pay them. Insofar as we  
23 haven't identified and we're trying to do that,  
24 then we need to work together to do that. And I'd  
25 rather -- I want that to be by a cooperative

26



1 effort. I want to avoid, to the extent as  
2 possible, the "I do it this way" and then come  
3 back and say, Well, you did it wrong and we want  
4 you to redo it or we want to change the process or  
5 something like that.

6 So insofar as we have identification  
7 problems and identifying them and process problems  
8 about what do we do when we've identified them if  
9 they don't have an impairment award, those sorts  
10 of issues, I want to try to do that on a  
11 cooperative effort that involves everybody and we  
12 all agree on how to do it so that we only have to  
13 do it once.

14 MR. DAVENPORT: All I was asking is if we  
15 had to do it the same way that Liberty is doing  
16 it, because I'm not sure my clients would be as  
17 interested in saying, Here's the files as opposed  
18 to working cooperatively to provide the  
19 information on a case-by-case basis.

20 THE COURT: Yeah. Well, Larry is going  
21 to have to go back through the files and he's  
22 going to look at them and identify people, so --

23 MR. JONES: Your Honor, I believe what  
24 Rick is saying is that his clients may not like  
25 the procedure Liberty has adopted and may want to

26

1 do what the State Fund has historically done.

2 THE COURT: Oh, you mean just take off on  
3 their own and do it?

4 MR. JONES: Yes.

5 THE COURT: You're always free to do  
6 that. I mean, no, don't let me stop you. Anybody  
7 who has the capacity to identify them, and we've  
8 already required that they be identified, so they  
9 don't need to wait for the Court to do that.

10 The problem that the Court is going to  
11 address is going to be those cases where there's  
12 difficulties in the identification or there's  
13 controversies as to whether payment should be  
14 made, that sort of thing. Does that make it  
15 clear?

16 So, Rick is going to be --

17 Okay. Anybody else have any parting  
18 remarks?

19 MR. JONES: Thank you, Judge.

20 THE COURT: Okay. Well, thank you all  
21 for coming. And I'm sorry to do this to you on a  
22 Friday afternoon.

23 (Whereupon, the conference was concluded  
24 at 3:57 p.m.)

25

26

1                           C E R T I F I C A T E

2       STATE OF MONTANA            )

                                  )   ss.

3       COUNTY OF LEWIS & CLARK)

4

5                   I, YVONNE MADSEN, RPR, CSR, Freelance  
6       Court Reporter and Notary Public in and for the  
7       County of Lewis and Clark, State of Montana, do  
8       hereby certify:

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

15                  IN WITNESS WHEREOF, I have hereunto set  
16       my hand and affixed my notarial seal on this  
17       6th day of April, 2005.

18

19                               Yvonne Madsen, RPR, CSR  
                                  Freelance Court Reporter  
20                               Notary Public, State of Montana  
                                  Residing in Helena, Montana.

21                               My Commission expires: 8/6/2006

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25