

TRANSCRIPT OF PROCEEDINGS

IN THE WORKERS' COMPENSATION COURT
OF THE STATE OF MONTANA

MARK MATHEWS,) WCC No. 2001-0294
Claimant,)
vs.)
LIBERTY NORTHWEST INSURANCE)
CORPORATION,)
Respondent/Insurer.)

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, that the proceedings in the
above-captioned matter was heard before the
Honorable Mike McCarter, at the offices of the
Workers Compensation Court, 1625 Eleventh Avenue,
Helena, Montana, on the 25th day of June, 2003,
beginning at the hour of 10:00 a.m., before Laurie
Crutcher, Registered Professional Reporter, Notary
Public.

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MR. PETER STRAUSS

1 Whereupon, the following proceedings were
 2 had:
 3 *****
 4 THE COURT: So let's talk about Mathews.
 5 And Brad informs me he wants to talk about a
 6 timing issue beforehand. And the State Fund isn't
 7 a party to Mathews, but since we've got timing
 8 issues in everything else, I'll let him start out.
 9 MR. LUCK: And only because you said you
 10 wanted to keep everything basically on the same
 11 track and all that.
 12 THE COURT: Right.
 13 MR. LUCK: This initial step of review
 14 and determination of what factual issues might
 15 exist that might need to be done, and the
 16 reporting, we talked about we had thirty days in
 17 Stavenjord, and we really pushed at having that
 18 one going. I think we'll be able to work with Tom
 19 Murphy and get some things done. We talked about
 20 moving to 45.
 21 But as I talked with the State Fund
 22 people, we talked about resources, and summer, and
 23 the fact that Counsel in each individual case is
 24 one set of Counsel. Except for this case, we're
 25 involved in everything as we do these processes.

1 This time situation is going to be very
 2 difficult in that initial stage because it's
 3 basically the same people being pulled off their
 4 regular duties in order to provide input in all
 5 different cases.
 6 And so without trying to delay anybody,
 7 I just wanted to make the point that even 45 days,
 8 as I understand, from a resource standpoint is
 9 going to be really difficult, especially as we're
 10 looking at the summer, when as we all know, people
 11 are coming and going, and we've got vacations and
 12 all that.
 13 If you could just keep that in mind as
 14 we go through the day and we try to get that first
 15 phase mapped out. Boy, it's going to be hard.
 16 THE COURT: I fully understand that, and
 17 what I expect is basically a good faith best
 18 effort, and if we get to the point where you know
 19 you're not to do it, at least collect together
 20 what you've got, and then we can come back and
 21 talk about how much more time do we need and
 22 things like that. So I fully understand that.
 23 And you need to keep the other Counsel informed,
 24 so they know what's going on, and they know what
 25 your problems are, and maybe they have some

1 suggestions.
 2 And I think the first part of it is
 3 really the identification part of it. What do you
 4 need, that's the initial stage of it; and the
 5 second part is how do you go about getting it, and
 6 what's involved in getting it, and how long will
 7 that take and those sorts of things. But I
 8 haven't written anything in stone, but we do need
 9 deadlines because that keeps us moving. If I
 10 don't put any deadlines, things tend to go -- they
 11 languish, and they don't go anywhere. So that's
 12 the reason for the deadlines.
 13 MR. OVERTURF: I guess what we didn't
 14 anticipate, Judge, is we're really going to have
 15 all these going at once, and that really puts the
 16 crush. Looking at one is easier than looking at
 17 five at once.
 18 THE COURT: Some of the stuff that you
 19 do may be common, and others may make the others
 20 easier. So we'll cross those bridges. I
 21 understand that. This conference is not the final
 22 conference we're having in any of these cases.
 23 We're going to have further conferences. We did
 24 it in Broeker, and we did it in Murer, and we'll
 25 do it in these. At least these are somewhat fun.

1 MR. OVERTURF: It's a change of pace
 2 from working at the office.
 3 MR. MARTELLO: It depends on how you
 4 define fun.
 5 MR. LUCK: You need more time out of the
 6 office.
 7 THE COURT: Larry, you came in a little
 8 bit late on Wild, and Geoff, you did, too. And
 9 were you here, Larry, when I sort of quickly
 10 summarized in a nutshell what we covered in Wild
 11 for Geoff? Had you come in by that point?
 12 MR. CADWALLADER: He came in part way
 13 through.
 14 MR. MARTELLO: He came in towards the
 15 tail end.
 16 THE COURT: Basically what we talked
 17 about is what kind of issues we've got in Wild,
 18 and the issues that we've come up with are, number
 19 one, the lien notices -- and we'll talk about that
 20 in this case. We figured out what we're doing in
 21 that case. And this case may be different on the
 22 lien notice.
 23 MR. JONES: Excuse me, Your Honor. This
 24 case has one element significantly different from
 25 Wild. And in the original proceeding, I raised an

1 affirmative defense of fraudulent inducement, and
2 that has not yet been ruled on.

3 MR. FOUST: Greg only wishes he would
4 have raised fraudulent inducement.

5 THE COURT: I think it probably has been
6 actually. I can give you a formal ruling on it,
7 but the way I read those Supreme Court cases --

8 MR. JONES: Your Honor, if you were to
9 reread them at paragraphs 21, 31, and 35 of the
10 Supreme Court decision in Mathews, there are only
11 three holdings, none that address that issue, and
12 certainly none of them expressly held that Mr.
13 Mathews was an employee, and was remanded for
14 proceedings of consistence.

15 And so I would like a formal ruling
16 because that is the defense that hasn't ever been
17 addressed in the context of an independent
18 contractor case.

19 I would note in your original decision,
20 Paragraph 6, you found Mr. Mathews was equitably
21 estopped.

22 THE COURT: Yes, I know. But see, the
23 problem is it went up on appeal to the Supreme
24 Court, and they went right through that. They
25 obviously didn't affirm me on that. So they

1 Your Honor, because it is a defense that has not
2 been ruled on in this case, and I don't believe
3 it's ever been raised in an independent contractor
4 case, and the work comp community needs some
5 guidance on that decision if it's going to be of
6 any benefit in the future.

7 THE COURT: So I need to --

8 MR. ANGEL: Would it help if I
9 responded?

10 THE COURT: Yes.

11 MR. ANGEL: I don't know how they're
12 ever going to claim that an employee tricked an
13 employer into controlling them, and giving him
14 tools, doing the things to make him an employee.
15 The Supreme Court in a 7-0 decision in Mathews
16 made that clear that it was their choice, all of
17 the choices made that turned the decision on the
18 independent contractor or employee are choices
19 made by the employer.

20 MR. JONES: That's not the basis for the
21 defense, Your Honor. The basis is he fraudulently
22 stated that he was not an employee, and then
23 turned around and claimed he was an employee when
24 he got hurt.

25 THE COURT: I know. I'll be honest with

1 basically reversed my finding of equitable
2 estoppel, whether they did so expressly or
3 implicitly.

4 MR. JONES: I understand that. But at
5 that paragraph, you found that his statements were
6 false and misleading, and that's the foundation
7 for our fraudulent inducement, and that is a
8 factual finding, Your Honor.

9 THE COURT: But the problem with that,
10 Larry, to be honest with you, I've got the case
11 back, I made that ruling, the equitable estoppel,
12 so basically those were based on the facts that
13 you're arguing the fraudulent inducement on, and
14 they essentially reversed me on that. Whether
15 they did so expressly or implicitly, there is no
16 question that they reversed me on it, because
17 that was one of the grounds for my decision. And
18 it went up on appeal, and they reversed my
19 decision. So implicit is a reversal on that
20 grounds as well as the other grounds.

21 MR. JONES: I don't think that the
22 Supreme Court would have the authority to reverse
23 that factual finding, they didn't make that
24 finding in their decision that he was false in
25 his statements. And so I simply raise the issue,

1 you. The way I read the Supreme Court, like I
2 said before earlier, it's a one way street. It's
3 a four lane highway down that one way. But I can
4 do a formal ruling, and certainly preserve for it
5 purposes of appeal, but that's likely where I'm
6 going to be coming out, just to let you know.

7 MR. JONES: I understand, but I thought
8 we were getting a little ahead of ourselves about
9 it.

10 THE COURT: Okay. Well, let's do that.
11 Do you want to file anything on that? Maybe I
12 should have you file briefs on it.

13 MR. ANGEL: I think we briefed it,
14 didn't we?

15 THE COURT: You briefed it originally,
16 but I suppose the first question is: Have you
17 briefed it subsequent to the remand?

18 MR. ANGEL: In response --

19 MR. JONES: No.

20 MR. ANGEL: In response to one of my
21 motions, he actually formally moved, because I
22 know I briefed it just in this last set we did a
23 month ago.

24 MR. JONES: The chronology, Your Honor,
25 is that prior to your decision was raised an

1 affirmative defense, and it was not reached by you
2 for some reason. On remand, when Geoff filed on
3 the common fund class action pleadings, I filed a
4 response stating that it was premature because
5 there was still an affirmative defense that had
6 not been addressed.

7 THE COURT: Okay. I see what you're
8 saying. I'll go back and read the decision. I
9 think one of the questions that I think needs to
10 be addressed at this point is whether or not I can
11 even consider that issue in light of what the
12 Supreme Court did. That would be the first
13 question. And I'll answer that one way or the
14 other, but I'll go on and try and answer the other
15 issue as best I can.

16 So why don't we go ahead and plan on
17 briefing that, at least initially. If for some
18 reason I look at it and decide it is something
19 that could bar this, then we'll have to figure out
20 what we do with it at that point.

21 And I say that because of my announced
22 intent to try to get all issues combined and then
23 up for appeal, and I still want to try to do that.
24 Even if I made that issue, I'd still want to try
25 to resolve all the other issues, too.

1 that, that's fine with me.

2 MR. ANGEL: I'm a glutton for
3 punishment.

4 THE COURT: So Larry, fax him your
5 brief.

6 MR. JONES: Yes. In fact, I may get it
7 there as early as Monday.

8 THE COURT: Okay. So we'll deal with
9 that.

10 Let's talk about the lien notice. My
11 intention at this point, as we discussed earlier,
12 is to go ahead and do a single lien notice to all
13 insurers that encompasses all these cases. So we
14 need to know what the scope of the lien claim is,
15 and we'll need to do a quick synopsis, assuming --
16 well, this may be different because of Geoff's
17 position in Ruhd.

18 MR. JONES: Yes, Your Honor. That's
19 what I was unclear about, because in Ruhd, if I
20 understood the decision --

21 THE COURT: He argued there's no global.

22 MR. JONES: Yes, Your Honor, and I
23 thought you ruled in the Ruhd case that the FFR
24 attorneys had a common fund claim only against the
25 State Fund, the named insurer; and so by

1 MR. JONES: So I should file a motion
2 renewing the affirmative defense?

3 THE COURT: Yes, and briefing it, and
4 then Geoff could respond. So what time frame
5 shall I put on that?

6 MR. JONES: It's essentially already
7 done, Your Honor, so we can move that along very
8 quickly, by perhaps next Wednesday I'll file the
9 motion and brief.

10 THE COURT: Okay. So Wednesday the 2nd
11 of July. So Geoff, how much time do you want to
12 reply to that?

13 MR. ANGEL: I'll do it by Friday.

14 THE COURT: By Friday? That's the
15 fourth. Are you going to work the fourth?

16 MR. ANGEL: It wouldn't do me a lot of
17 good. How about Thursday? I would prefer to get
18 it done right away.

19 THE COURT: I'll give you until the next
20 Wednesday.

21 MR. ANGEL: I probably won't work over
22 weekend anyhow.

23 THE COURT: You can file it early. You
24 can have Larry fax it to you, and you can kick
25 something out on Thursday. If you want to do

1 implication, in this case, doesn't Geoff only have
2 a common fund claim against Liberty?

3 THE COURT: Correct, unless he wants to
4 be inconsistent.

5 MR. ANGEL: Well, actually I think that
6 there is a consistent line there. And the
7 Court may deny the request to treat this as a
8 class of defendants, but Rule 23 specifically
9 provides for defense classes. And we could do a
10 separate claim, however you treat it, even if it's
11 an informal class in Wild and Mathews, and then
12 against any of the other insurers through a mass
13 mailing.

14 Again we would -- So the motion was
15 actually for a class of plaintiffs and a class of
16 defendants, so we can just have a special master
17 do the mini review of each case that's disputed.

18 THE COURT: Okay. But what I'm talking
19 about right now is I'm trying to figure out at
20 least as far as the attorney lien is claimed.

21 MR. ANGEL: Sure. So the lien may apply
22 to all these insurers if they're joined as party
23 defendants.

24 MR. JONES: Your Honor, I think the
25 preliminary question: Is Geoff claiming common

1 fund against the State Fund based on Mathews, or
2 just Liberty based on Mathews?

3 THE COURT: Yes.

4 MR. ANGEL: Since we're joined together,
5 it's obviously just Liberty; but it's a
6 distinction without a difference because
7 Co-Counsel is --

8 MR. LUCK: We opposed the motion to
9 consolidate these cases, and there's a pending
10 motion. And we haven't been served, although
11 they mention it in their brief. We've never seen
12 this class action briefing that's been done, which
13 we also want to participate in, because it relates
14 so closely to Wild.

15 But the motion has been made to
16 intervene, and I don't think either Liberty or the
17 State Fund want to have the cases consolidated.
18 The motion to consolidate cases has been made, and
19 we've objected to that, and I think Liberty has
20 objected to that. So we don't think we are
21 together. We don't want to be together.

22 And to the extent that there is that
23 issue of class action as opposed to common fund
24 that relates to both of them, we want an
25 opportunity to respond to their briefing that's

1 claims, and I want to preserve it for them. I'm
2 just preserving the issue at this point because
3 that issue is going to go to the Supreme Court.
4 I'm sure somebody is going to take it to the
5 Supreme Court, one of these cases at least.
6 And all we're doing is preserving that.

7 And actually it's to the benefit of the
8 insured to preserve it, because if I don't send
9 the lien notice, and they actually have notice
10 that there is a lien by some fashion or not, and
11 they go ahead and pay out, then they may be paying
12 out the money twice.

13 MR. JONES: As Geoff is stating, and
14 I've not heard this on the record yet, Geoff is
15 stating he's claiming against Travelers, Cigna,
16 and other comp carriers.

17 THE COURT: That's what I need to know.

18 MR. ANGEL: Yes. And it's consistent
19 with Ruhd, because Ruhd, the Court is going to --
20 there actually is an identifiable fund of money in
21 Ruhd.

22 In Mathews, as I think these folks have
23 pointed out clearly, this is just an
24 unidentifiable pool of people. Whether they're
25 treated and administered a remedy under the common

1 been done in Mathews.

2 MR. FOUST: The question I have, though,
3 is: Do we have to consolidate in order to notify
4 the insurers of the lien on the potential cases?
5 I don't think we have to consolidate to do that
6 yet.

7 THE COURT: No, and we've got two
8 separate things going here, I think. I'm just
9 talking about the lien notice, so I'm trying to
10 figure out what lien you're claiming under the
11 common fund doctrine, because if there's an
12 attorney fee lien, all we want to do is give
13 notice to those insurers that may be impacted by
14 the lien claim.

15 MR. ANGEL: I think the lien notice
16 should be the same as in the other cases, because
17 there is a potential that the Court will apply it
18 that way.

19 MR. JONES: Your Honor, again under
20 Ruhd, Geoff is restricted to making a common fund
21 claim against only Liberty, the named insurer.
22 So why are these other carriers being notified?

23 THE COURT: Yes, but what I'm going to
24 do in all these cases, because there's all these
25 different attorneys making all these different

1 fund or class action or what, there's an
2 identifiable pool of people that will be
3 administered a remedy through somebody being --
4 through some form of representation.

5 We're asking in this case that that be
6 us, that we be allowed to identify those people,
7 join them, and administer the remedy, so there
8 will be fees paid.

9 And here's the example why the lien I
10 think is important. If Travelers, while this is
11 pending, or even State Fund, goes out and
12 administers the remedy for people that had claims
13 back when Mark Mathews was hurt based on this
14 decision, those are essentially considered the
15 soft claims, because the insurer voluntarily
16 administers that remedy. They only did it because
17 of the theories under the common fund, because of
18 the case, and because of the litigation, and the
19 expenses, and all the energy that went into that.
20 The hard claims are the ones where they fight it.

21 THE COURT: But on the soft claims that
22 you are talking about, are you claiming a lien on
23 those cases?

24 MR. ANGEL: Sure, because the soft
25 claims fit to a "T" all of the elements of the

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1 common fund.

2 THE COURT: How is that consistent with
3 what your argument was in Ruhd?

4 MR. ANGEL: I'm not extending the
5 argument in this case. I'm agreeing with that.
6 The common fund should only apply to Liberty in
7 my case, to Liberty's people that they administer.
8 But the class claims that actually have to be
9 litigated in the future, those the class action
10 apply.

11 THE COURT: What are you requesting?
12 Are you suggesting that you want to join
13 additional insurers in this as defendants as a
14 part of the class?

15 MR. ANGEL: Yes. And the Rule 23
16 expressly provides for that, and the brief was for
17 certification of a class of plaintiffs against the
18 identifiable class of defendants.

19 MR. LUCK: Wasn't that the holding in
20 the first Murer case, that you can't have class
21 actions on both sides, the plaintiffs and
22 defendants? You can't have a class of defendants
23 with a class of plaintiffs, that that's why they
24 didn't allow that there, because they were trying
25 to make that all the claimants then all the

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1 to notify other insurers that you're claiming a
2 lien on those.

3 MR. ANGEL: Other than the State Fund
4 and Liberty, yes.

5 THE COURT: Well, you're not going to
6 claim a lien on State Fund.

7 MR. ANGEL: No, but I mean Co-Counsel.
8 That's what I refer to him as now.

9 THE COURT: So your claim of attorney
10 fees is based on essentially your ability to
11 successfully add other insurers to this, or to
12 certify the entire -- the global insurers, all of
13 the insurers.

14 MR. ANGEL: Yes. And the reason why I
15 think this case is distinct from the others is
16 because they're actually -- and I think they
17 pointed that out there will be a need for a
18 special master to look at the A-B test for each
19 person, and you can't say they're entitled to
20 benefits until that's done. The people's medical
21 bills won't get paid unless they have that
22 opportunity.

23 MR. JONES: Your Honor, I think the
24 logic tree on this case is you're going to rule on
25 the affirmative defense, we anticipate you're

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1 insurers in one case?

2 THE COURT: I don't know that that was
3 the holding, but you may have a better
4 recollection than I do.

5 MR. ANGEL: They did find that to not be
6 an abuse of discretion to disallow it, but the
7 rule prefers --

8 THE COURT: Was it a class of
9 defendants they were looking at, or --

10 MR. ANGEL: They were trying to seek a
11 class of defendants in Murer 1, and the Judge at
12 that time -- not yourself -- didn't allow it, and
13 the Supreme Court said that it was not abuse of
14 discretion. And they are not even bound by Rule
15 23, but the rule still allows for it.

16 THE COURT: But let me ask this
17 question. Would not -- If you're seeking an
18 attorney fee based on class certification, then
19 would not the lien arise -- not arise until such
20 time as there is a certified class?

21 MR. ANGEL: Yes, for --

22 THE COURT: So at this point --

23 MR. ANGEL: -- these other insurers.

24 THE COURT: So at this point, if I
25 understand this correctly, it would be premature

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1 going to deny this as an affirmative defense, then
2 the next decision is whether it is going to be a
3 class action or common fund. We have not had a
4 chance to respond to the class action request
5 because we've claimed it's premature.

6 And then thirdly, if you're even going
7 to consider class action, don't you have to give
8 notice to all prospective defendants of the
9 defendant class, the 240 registered work comp
10 insurers, so they can come in and give their point
11 of view on whether they think it's an appropriate
12 class of defendants?

13 MR. ANGEL: No, that's never done. It's
14 not just as the class of plaintiffs.

15 MR. LUCK: That's because a class action
16 is against a defendant, and then you argue with
17 that defendant about whether you're going to have
18 a class certification, and then there's a
19 certification of a class after that. You can't --
20 I think that's why the Murer-I held the way it
21 did. You can't determine a class action against a
22 bunch of unnamed carriers, and then bring them in
23 after the fact.

24 MR. JONES: That's the point, Your
25 Honor, is they have to have due process. That's

1 notice and opportunity to respond whether they
2 think they are appropriate members of this
3 defendant class.

4 MR. ANGEL: You don't do that for
5 plaintiffs in a class action for the same reason.
6 It's a matter of equity -- or efficiency for the
7 Courts.

8 THE COURT: Well, it sounds like we just
9 added another issue to this class action thing.
10 That's a legitimate issue, I think. I think I'll
11 have to determine, before I even pass on whether a
12 class action is appropriate, whether or not I've
13 got to give notice to everybody. If I do, then
14 we're going to have to give a global notice.

15 MR. ANGEL: There's cases. It's not
16 like a new thing, so I don't think that's a
17 problem to pray for that.

18 THE COURT: So that's going to be an
19 issue that we're going to have to brief. Hold on.
20 I'm not as fast as you are, Larry.

21 MR. JONES: Your Honor, I thought about
22 this all the way driving over. I do my best work
23 at 80 miles an hour.

24 THE COURT: I'm still down there under
25 the speed limit.

1 fees.

2 THE COURT: Do I have a motion from you
3 at this point, Geoff, to treat this as a class
4 action and join all of the other insurers,
5 basically a global class? Do I have that?

6 MR. ANGEL: Yes. I filed a motion to
7 file the Amended Petition for Hearing, and so did
8 Wild. Our exhibits to that was -- They might have
9 excluded the exhibits, although they refer to
10 them, and I think they were filed, but you guys
11 might not have gotten them by today.

12 And with that is a copy of our proposed
13 Amended Petition that's a class of plaintiffs and
14 a class of defendants, and a motion for class
15 certification that talks about how it applies to
16 those, with a proposed mass mailing that would go
17 out to all the people. So it kind of walks the
18 process through to the end, just so the Court can
19 see what the plan would be for administering that
20 remedy.

21 THE COURT: So this case is really going
22 to differ because you're going to focus on class
23 action, we're going to basically forget about
24 common fund?

25 MR. ANGEL: Primarily because there is a

1 MR. JONES: If you're worried, Your
2 Honor, I do drive with the landing gear down.

3 MR. LUCK: You know, we might agree to
4 this defendant class action part if everybody has
5 the right to opt out, because the claimants always
6 have that right to opt out. And so if you let us
7 opt out, we're all for it.

8 MR. OVERTURF: That's why the plaintiffs
9 don't need due process is because they have that
10 option.

11 MR. ANGEL: Not always.

12 MR. JONES: Yes, always.

13 MR. ANGEL: There are -- There's
14 actually -- is it B-1, or B-2 where you don't have
15 a choice of opting out. It's when there's a
16 consolidated pool of money that's got to be
17 distributed, no matter what.

18 MR. LUCK: Let's talk about this case.
19 We don't have the condition that we all agree to,
20 and this isn't a common fund case. There's no
21 common fund. This is a precedent.

22 MR. ANGEL: It depends. If you guys go
23 out there and administer that for all the past
24 claimants, you've created a common fund based on
25 their precedent, and they're entitled to those

1 need for a mini review of the A-B test for each
2 person. So there's no way to get around the fact
3 that they'll have to come into court. The only
4 question is, is it more efficient to follow the
5 mass mailing up with a special master versus a
6 separate lawsuit.

7 MR. LUCK: We can't forget, too, that
8 that presupposes that we have retroactivity, so --
9 MR. ANGEL: Correct. It does.

10 THE COURT: Well --

11 MR. ANGEL: It's Docket 57.

12 THE COURT: I see it. I've got it in
13 the file. So the motion is filed. What I think
14 we need to do is I need briefs on whether or not
15 we need to give notice to all insurers to give
16 them an opportunity to brief that issue.

17 MR. JONES: Yes, Your Honor. And again
18 to get the logic tree on this, I think it's
19 important because the fourth point would be if you
20 deny the common fund -- I'm sorry -- if you deny
21 the class action, then you have this case postured
22 as a common fund.

23 THE COURT: No, not common fund. He's
24 going to claim common fund fees against you, but
25 not against the other insurers. As far as

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1 claiming fees against other insurers and
2 non-Liberty claimants, that will depend on his
3 ability to succeed in convincing me that there's a
4 class out there consisting of all insurers, and we
5 get them all in here.

6 MR. LUCK: Before we bring in the
7 industry again with 600 notices, don't we need to
8 make a determination whether the decision is
9 retroactive? Because if it's not retroactive,
10 then the question on common fund and class action
11 is moot, isn't it?

12 THE COURT: The problem is I'm going to
13 decide all those issues in the alternative,
14 because I want one single appeal. If I say it's
15 not retroactive, and it goes to the Supreme Court,
16 and they say it is, I don't want it coming back,
17 and then having to face the class action question
18 at that point in time. So I want to decide them
19 all in the alternative.

20 MR. LUCK: Sure. I'm on the logic bush.
21 And as I understand the way this is going to
22 progress as an outline is that we get this factual
23 information, we determine whether we're going to
24 have a factual hearing, we have that pre-process;
25 and then we're going to have the hearing, we have

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1 retroactivity. If I say it's retroactive, then I
2 have to go on and address the class question
3 anyway. If I say it's not retroactive, I'm going
4 to say if it were retroactive, then this would be
5 my determination, so that -- regarding the class
6 action, so all of that can go up to the Supreme
7 Court as a package, and they can sort it out.

8 MR. LUCK: I understand. I thought I
9 heard you to say that we were going start briefing
10 and giving notice now before we develop that
11 factual --

12 THE COURT: No, the only issue that
13 we're going to brief is whether or not notice has
14 to be given to all those insurers concerning the
15 request for class action, so they can participate
16 in that argument. And I suspect we have to do
17 that. In fact, if Counsel agree that we have to
18 do that, that's what we'll do.

19 MR. JONES: Can we take a poll?

20 THE COURT: Well, I could. This is
21 actually you and Geoff at this point, and I guess
22 Luke has an interest in that, too.

23 MR. FOUST: Absolutely, stepping in
24 Jim's position and my position together on the
25 Wild matter. And I believe everybody needs to be

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1 stipulations, and get that done; and then we're
2 going to brief retroactivity, because all of that
3 is relative to that.

4 And I'm just wondering. We have so many
5 carts, and so many horses here, it's hard for me
6 to envision how we're going to give notice to the
7 carriers, if that's the first thing; and be
8 briefing the class action situation when we don't
9 know about the factual and retroactivity record
10 and argument. I'm just confused.

11 THE COURT: The factual record you're
12 going to develop, as I understand it for purposes
13 of retroactivity, is going to be similar to the
14 factual record that you're going to want to
15 develop for purposes of opposing the class action.
16 So those two sort of go together, and dovetail.

17 So what I'll have you do is we'll get
18 that factual record developed to the extent that
19 you desire to do that, and then we'll brief both
20 retroactivity and the class action; but probably
21 when we do that, we probably -- if there's due
22 process issues and I have to give notice, I'll
23 give notice to the other insurers so they can come
24 in and brief that, too.

25 Then I'll make a determination on

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1 provided notice under these circumstances, if
2 nothing else, just notice. I mean it's not saying
3 how you're going to rule on this eventually, but
4 at least notice that they can participate, and
5 obtain some level of due process in this entire
6 picture.

7 THE COURT: Geoff.

8 MR. ANGEL: I don't believe under the
9 rule they're entitled to it, but I have no
10 objection to it. I don't have any problem.

11 MR. FOUST: We have a lot of lawyers in
12 Montana.

13 THE COURT: I think probably we ought to
14 give them notice, and rather than -- We can go
15 through this whole briefing thing. Let's scrap
16 the briefing and let's give them notice, and that
17 way there's no harm done in it.

18 MR. ANGEL: There's no harm, and that's
19 the safest possible road. I see no problem doing
20 that.

21 MR. JONES: Your Honor, is this notice
22 that Geoff Angel, attorney of record in the
23 Mathews case, is claiming attorney fees, or he's
24 trying to create --

25 THE COURT: He's trying to create a

1 class that his attorney fees would flow from the
2 creation of that class. That's the way I
3 understand it. Am I right, Geoff?

4 MR. ANGEL: Yes, and the work I do if
5 there's anyone there to help.

6 MR. JONES: And also on the Wild case?

7 THE COURT: The Wild, we have both --
8 They're pursuing in the alternative, both as a
9 class action or a common fund. In the end, the
10 only thing that -- the difference is there may be
11 a different standard for going forward under
12 common fund as opposed to class action.

13 Common fund is going to be more
14 difficult in these cases, and in fact, I think we
15 pretty much agreed this really -- we really have
16 to look to the class action to determine if we can
17 get these other people in there. And then the
18 question is: Is the class action criteria more
19 lenient than what I would have to look to for the
20 common fund, and can we get them in on that?

21 So we're proceeding along class action
22 lines, at least for purposes of determining
23 whether or not we're going to ride herd over the
24 payment of these other claims, the identification
25 of these claimants, etc. And then of course, the

1 THE COURT: Ours goes back to '91 or
2 even further. I think our list right now goes
3 back to 1991.

4 THE CLERK: I think so.

5 MR. FOUST: I think obviously, Your
6 Honor, that post dates the change in the statute
7 regarding the conclusiveness of an IC exemption.
8 So we can go back to 1991 at least, and if there's
9 any way to obtain the remaining list from the
10 DLI, or whoever it might be, or the State Auditors
11 Office, between 1987 and 1981, we would possibly
12 need to notify them as well.

13 THE COURT: When did the exemption come
14 into effect?

15 MR. ANGEL: I thought it was 1987.

16 MR. CADWALLADER: Conclusiveness came in
17 in 1995 with the "C" portion of 120, is my
18 recollection. Then in 1997, the "C" portion was
19 dropped. However, the conclusiveness language in
20 401(3) remained.

21 THE COURT: If I'm mistaken on that
22 date, I apologize. We need to do some legislative
23 history on exactly when it came into effect.

24 Let's find out when it came into effect,
25 and see how far back we go, because the list

1 attorney fees may flow from that.

2 I think in Wild they're claiming a class
3 -- common fund fees, so we're going to give the
4 lien notice on them. This looks like this is --
5 we don't have the alternative in this case.

6 MR. JONES: Your Honor, for purposes of
7 clarification, in the Mathews case there will be a
8 notice to work comp carriers in the state of a
9 request for certification of a defendant class in
10 Mathews, correct?

11 THE COURT: Right.

12 MR. JONES: And --

13 THE COURT: Actually I think we'll issue
14 that that will cover Mathews and Wild, because the
15 request is by both sets of attorneys.

16 MR. LUCK: How far back does the claim
17 go?

18 MR. JONES: In other words, you're --

19 MR. LUCK: How many years worth of
20 registered carriers do we need? What's the scope
21 of the lien.

22 MR. JONES: They come in and out of the
23 state for a variety of good reasons.

24 MR. LUCK: This kind of litigation would
25 be one of them.

1 should only go back that far because that's all
2 we're dealing with in this case. But it sounds
3 like we've got a list that's sufficient.

4 MR. ANGEL: You just associate major
5 changes like that with 1987 all the time.

6 THE COURT: I know it didn't come in in
7 1987. For awhile there, there was a provision
8 that said that if you don't have an IC exemption,
9 you're not an IC, you're an employee.

10 MR. CADWALLADER: That's the "C"
11 provision that came in in 1995, I believe.

12 MR. ANGEL: And I just heard 1983 back
13 here. I think I looked at a 1987 version and it
14 was already in there. I couldn't find the 1983,
15 which is what it looked like the history said.

16 MR. CADWALLADER: There has been
17 provision under 401 sub (3) for independent
18 contractor exemption long before there was the
19 120(c) requirement of "A," "B", and you have to
20 have the exemption in order to be considered as an
21 independent contractor.

22 THE COURT: Well, we'll make that
23 determination and then --

24 MR. CADWALLADER: I have some history
25 notes back in my office.

1 MR. LUCK: Judge, doesn't this relate to
2 the scope of need? One of the things they need to
3 file I don't think they have, which would relate
4 directly to this, is the scope of the lien that
5 they're claiming for fees.
6 THE COURT: They're not filing a lien
7 because they're going to proceed solely on class
8 action.
9 MR. LUCK: Against the other carriers?
10 THE COURT: Against the other carriers.
11 The only lien that they have, the only common fund
12 lien that they're claiming is against the Liberty
13 claim.
14 MR. LUCK: But the time frame that would
15 determine what we're concerned about would be the
16 same for a common fund lien as it would be to
17 claim of attorney fees for potential class action.
18 THE COURT: Correct. And that's
19 dependent on when the statutes came into effect.
20 What's the section we're dealing with?
21 MR. CADWALLADER: Exemption 40. The IC
22 definition is 120, the exemption process is
23 401(3).
24 MR. ANGEL: I think 401 sub (3) is what
25 I was looking at.

1 THE COURT: It's not in the 1997 act.
2 MR. ANGEL: They moved it around in the
3 numbering, as I recall, way back.
4 MR. JONES: Your Honor, isn't this case
5 based exclusively on the conclusive element of
6 that statute, and that's the effective date that
7 we would be focusing on, which is easily
8 ascertainable by reference to the codes?
9 THE COURT: Right.
10 MR. CADWALLADER: The conclusive
11 provisions of 401(3)(e), I think.
12 THE COURT: The question is which year
13 did that come into effect.
14 MR. CADWALLADER: And that was the same
15 year that the "C" portion of 120 came into effect.
16 That was part of Senator Forrester's contractor
17 registration.
18 THE COURT: It's in 1991. It's in
19 there in 1991, (3)(c).
20 MR. JONES: Is the conclusive language?
21 THE COURT: Yes. An application as
22 approved by the department is conclusive as to the
23 status of an independent contractor, and precludes
24 the applicant from obtaining benefits. So that's
25 in 1991. So we know it's in 1991.

1 MR. ANGEL: When I did the legislative
2 history, I think before 1991 it was actually like
3 (3)(f) or something. It was a different numbering
4 system at one point.
5 THE COURT: Yes. I've got 1989. It's
6 in 1989, too. In fact, it looks like it was
7 probably enacted in 1989. Maybe it's in 1987. I
8 take it back. It is in 1987.
9 MR. ANGEL: When I looked at that
10 history, I think it was enacted in 1983.
11 THE COURT: I think it goes back to
12 1983.
13 MR. ANGEL: When I heard the comment
14 in the back, I think that's what I found.
15 THE COURT: Let's see what 1985 says.
16 MR. OVERTURF: Don't you have to look at
17 both 120 and 401, though?
18 MR. CADWALLADER: My recollection is
19 that until 1995, when 121 sub (1) sub (c) went
20 into effect, there was a provision to obtain an
21 independent contractor exemption, but the
22 requirement having the exemption in order to be
23 considered an independent contractor was not
24 there. The statute said you should, but there was
25 no penalty for not having the exemption.

1 MR. OVERTURF: So until 1995, there was
2 no requirement under 120 that unless you have the
3 exemption, you are an employee, which lended
4 itself to the conclusive nature of the exemption.
5 THE COURT: Well, no. The language is
6 here going way back, in fact all the way back to
7 1985. It's in there, too. It says if you have an
8 exemption, it is conclusive as to the status of an
9 independent contractor and precludes the applicant
10 from obtaining benefits under that chapter.
11 MR. ANGEL: It's 1983.
12 THE COURT: What changed -- I didn't
13 realize it was that far back. Boy, that
14 complicates our lives. What changed is, I think
15 what Mark is saying in 1995, they had this little
16 provision that says unless you have an IC
17 exemption, you're deemed an employee, which is the
18 opposite impact of what we're talking about here.
19 MR. MARTELLO: Judge, I'm thinking back
20 of cases that I had way back when. And the
21 determination as to whether an insurer utilizes
22 that statute I think is important, because if
23 that's not being utilized as a defense -- and I
24 don't recall that being utilized as a defense
25 until fairly recently. And whether a common fund

1 or class action, that would I think hinge on
2 whether that statute was utilized as a defense to
3 a claim of --

4 MR. ANGEL: I think if you look at the
5 Wild and Mathews decision, it's very clear that
6 what happens with the conclusive language is it
7 provides the employee, independent contractor, an
8 opportunity to opt out of the system. The Wild
9 and Mathews decisions referred specifically to the
10 statutes that precludes people from opting out of
11 the workers compensation system.

12 So I don't think it needs to be raised
13 as a defense, it merely has to be if they were in
14 any way impacted by it, and attempted to opt out
15 of the work comp program.

16 THE COURT: If it wasn't used as a
17 defense, if somebody who had an exemption applied
18 for workers compensation benefits, and you paid
19 it, that's great, it doesn't come in anyway, so it
20 doesn't make any difference.

21 MR. OVERTURF: But also if you look at
22 the old cases, the old cases, the exemption never
23 comes up. They're always defended just on the
24 basis of the tests. And if it was defended on
25 the basis, the test to be given with that was

1 accepted or denied. That's no different than
2 where we're at today.

3 MR. ANGEL: That's great because we give
4 20,000 notices, or however many it is, and because
5 all these people were treated fairly, none of
6 them come forward, and then the class is a
7 small --

8 MR. LUCK: They are going to come
9 forward if they think they've got some money
10 coming to them.

11 MR. ANGEL: If they got the benefits, it
12 wasn't used as a presumption.

13 THE COURT: The question is that -- the
14 problem is that I don't know --

15 MR. JONES: Your Honor, if I can
16 interrupt you for just a second. I know you've
17 indicated your desire to reach alternative
18 holdings to package all this up, but this
19 discussion is really pointing out the pivotal
20 nature of the retroactive application issue.

21 And another wrinkle on this is that the
22 Mathews and Wild Court relied on the public policy
23 statement as one of the drivers of that case. My
24 recollection is that was effective July 1 of 1987
25 with the whole package of reforms. So --

1 THE COURT: That was just one of the
2 bases of Wild and Mathews.

3 MR. JONES: But would that be a limiting
4 factor on retroactivity? And another companion
5 issue to that would be eventually the statute of
6 limitations for filing claims based on the
7 denials, and that impacts retroactivity.

8 And so I'd like to suggest that you
9 reconsider this idea of packaging everything up,
10 because your retroactivity analysis, whatever it
11 is, is going to drive all these other issues, it
12 sounds like to me.

13 THE COURT: Well, to be honest and blunt
14 about it, irrespective of what decision I reach on
15 retroactivity, I think probably the Supreme Court
16 is going to make it retroactive, and --

17 MR. JONES: But how far, Your Honor?
18 That's the driver here.

19 THE COURT: Once it's retroactive, it's
20 retroactive all the way back. There's no
21 distinction. They don't say it's retroactive two
22 years, four years, or whatever. The retroactivity
23 doctrine is it's retroactive or it's not
24 retroactive, period. That seems to me to be a
25 clear bright line.

1 MR. JONES: We like bright lines on the
2 logic tree, Your Honor, to mix a metaphor, I
3 guess. But even if it is --

4 THE COURT: So that's one of the things
5 that's driving me, because I think that's probably
6 where it's going to end up. At least I think
7 there's a significant possibility that it's going
8 to end up -- I think it's at least 50/50 that it's
9 going to end up there.

10 And the only reason we're even arguing
11 about it at this point is because we have Porter,
12 and then all of a sudden we've got this other
13 decision which goes back and applies the Conoco
14 decision, which seems to be almost a reversal of
15 Porter, but they don't overrule Porter, what they
16 said in Porter. And so I think that's created
17 some confusion.

18 But my take is at least a 50/50 chance
19 that it's going to be retroactive, and that's why
20 -- that's one of the reasons that's driving me, to
21 say we've got to bind up all these issues and get
22 them all up at once rather than --

23 MR. JONES: I'm suggesting, Your Honor,
24 if you were to do it first, that issue could be
25 an interlocutory decision that is subject to

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1 appeal, and then you could package up the rest of
2 them. It may be that your ruling on retroactivity
3 does put some limitation on the scope of what
4 we're going to do. That's a suggestion.

5 For example, we're going to raise the
6 statute of limitations as part of the
7 retroactivity issue.

8 THE COURT: That's not a retroactivity
9 -- I mean the resolution of the retroactivity
10 issue does not resolve affirmative defenses that
11 may arise under statute of limitations, and I
12 recognize that those are going to come forward.

13 And if you were here earlier, one of the
14 scenarios that I envision is no claim was filed,
15 for example, within the one year period or within
16 the occupational disease limitations period, but
17 the claimant comes in and argues that there's a
18 mutual mistake of law, or some manner of avoidance
19 of that.

20 And I'm not suggesting that that's a
21 good defense, but I'm suggesting that I could see
22 all sorts of defenses, and I can see all sorts of
23 replies to these defenses. None of those are
24 going to be affected by the retroactivity issue, I
25 don't believe. I think those are separate issues

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1 can work that out. Have you got the data base
2 that you're talking about, or is this a State Fund
3 data base?

4 MS. GLEED: It's a State Fund data base.

5 MR. MARTELLO: It's the same data base
6 as for Murer. The DB02 system was the old system
7 that was in place.

8 MR. LUCK: I thought that in Murer that
9 the original notice was like 1600 or something.
10 It was a huge notice. It sure caused an uproar.

11 THE COURT: Insurers --

12 MR. LUCK: It caused an unbelievable
13 uproar in the system, I can tell you that. We
14 were getting hundreds and hundreds of calls. But
15 it's more than 400.

16 THE COURT: Our list is 600.

17 MR. LUCK: I thought it was more than
18 600.

19 MR. JONES: Excuse me, Your Honor.
20 Perhaps the Auditor's Office or the Commissioners
21 Office should be brought in. In the various
22 legislative hearings, I've heard different numbers
23 as to the number of carriers as opposed to
24 registered work comp carriers. We would obviously
25 only need work comp carriers.

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1 that I have to address.

2 MR. JONES: It was a thought on the
3 logic tree, Your Honor.

4 THE COURT: And none of this is easy.
5 Well, I guess the immediate question that we're
6 facing if we give notice to insurers is how far
7 back do we go. If we go back to 1999, we're
8 pretty much going to probably scoop up most of
9 them.

10 MR. JONES: Did you say 1999?

11 THE COURT: 1991. But if this goes back
12 to 1983, if they're potentially impacted, I
13 suppose --

14 Carol, do you know -- Are you familiar
15 with the insurer list?

16 MS. GLEED: Yes.

17 THE COURT: Can we pick up the -- I know
18 we've got it locked clear back to 1991. Can we go
19 back and pick up the others that are out there
20 between 1983 and 1991?

21 MS. GLEED: We should be able to off the
22 State Fund data base.

23 MR. LUCK: The earlier notice from
24 Murer-I would have gone back to 1987.

25 THE COURT: Well, why don't we see if we

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1 THE COURT: Can you -- Who at the State
2 Fund would be able to find out what we've got
3 here? Do you know what Carol is talking about?

4 MR. OVERTURF: Do you know what's on the
5 DB02 system?

6 MR. MARTELLO: I don't know. I know
7 the DB02 system was what was used in Murer. I do
8 not know what's on it.

9 THE COURT: Are you familiar with their
10 jargon, the DBO2?

11 MS. GLEED: Uh-huh.

12 THE COURT: What we're supposed to be
13 talking about?

14 MS. GLEED: Uh-huh. We used to have the
15 CICS system that changed in 1984 or something, and
16 then we went to DBO2. And when we separated from
17 the State Fund, we created what we call a WCAP
18 system. And so all of our history files and stuff
19 are still located on the DBO2 system.

20 THE COURT: Why don't we check and see
21 if we drag up that information.

22 MS. GLEED: And it had all carriers and
23 adjusters and insurers located on that system.

24 THE COURT: Tom, can you follow up and
25 see if that's a feasible, easy thing to do?

1 MR. LUCK: They'd have dated addresses
2 from that time.

3 MR. MARTELLO: How far back are we --

4 THE COURT: At least back to 1983. I
5 know. This is one of those cases where we just do
6 the best we can, and beyond that, we can't do the
7 humanly impossible. Our list is 600.

8 We had a number of insurers notices were
9 returned, and we've been able to identify those
10 addresses for most of those other insurers.
11 There's ten that we don't, so those ten are out
12 there. They're probably insignificant. They're
13 probably not worth our time even following up on.
14 So we have may have a similar situation.

15 So let's just see if we've got a data
16 base out there, and that we can gather these extra
17 insurers off. If we can, we'll address a few
18 other envelopes and send it, and we've taken care
19 of our issue at this point. If there's some big
20 problem with doing that, we can talk about what
21 the problem is, what we do, or whether we just go
22 back to 1987. We can talk about what we do.

23 MS. GLEED: What I'd like to do, Judge,
24 is check and see what our conversion files
25 contained. If we converted all information from

1 DBO2, it may be located on our WCAP system. It
2 may be easier to access since nobody is currently
3 using DBO2.

4 THE COURT: Do you want to confer with
5 Tom, and let him know what's going on, and let me
6 know?

7 MS. GLEED: Yes.

8 THE COURT: The purpose of this first
9 round in any event is just merely to decide the
10 class action issue, and make sure that they're
11 involved in that decision. So if we miss a few,
12 it's not going to be quite as important as if we
13 were down the line trying to bring them in and
14 adjudicate them.

15 MR. LUCK: So you anticipate determining
16 this notice situation, getting notice out, and
17 then giving them an opportunity to brief this
18 initial issue on class certification?

19 THE COURT: Right.

20 MR. LUCK: That's going to be down the
21 road a little bit.

22 THE COURT: Right. A lot of things are
23 going to be down the road a little bit. It's
24 inevitable.

25 MR. LUCK: Tom just asked me to keep

1 asking that question, when everything is due.

2 MR. OVERTURF: I'm confused here, but
3 I'm probably not unique in this setting. In Wild,
4 are we also doing the notice based on the common
5 fund to all of the carriers?

6 THE COURT: Yes. They're doing an
7 alternative common fund claim fee, and what you
8 call it. So we'll notify them of the lien, but
9 we'll also -- I mean the notice, as far as the
10 request for the class action certification of a
11 class of defendants, that will go out under both
12 Wild and Mathews.

13 MR. LUCK: So if Geoff is only claiming
14 a common fund against the immediate carrier under
15 the rationale of Ruhd, and the fee on class action
16 against everybody else, Jim can be inconsistent
17 because he's not Counsel in Ruhd, and claim a
18 common fund fee against everybody; is that the
19 reason?

20 THE COURT: Right.

21 MR. ANGEL: Jim is consistently
22 inconsistent.

23 THE COURT: He's got it in the
24 alternative.

25 MR. JONES: So the same group of

1 carriers are going to get two notices.

2 THE COURT: The same group of carriers
3 will get a notice -- Yes. Right. Two notices.
4 It's --

5 MR. LUCK: Is this being driven by
6 attorney fees or benefits to the claimant?

7 THE COURT: Well, the claimants get paid
8 before the attorneys.

9 MR. ANGEL: I think from my perspective,
10 I do want to bring up one thing, before we take a
11 lunch break, with Mathews. My understanding is he
12 needs surgery, and I don't want to complicate this
13 briefing thing, but if you're going to address the
14 issue of whether they can claim the only other
15 affirmative defense of fraudulent inducement, the
16 carrier is taking the position that the decision
17 didn't say he's an employee. Can I move for
18 summary judgment on that issue, so he can get his
19 benefits, get medical treatment?

20 MR. JONES: Your Honor, we have no
21 objection.

22 THE COURT: Actually if that becomes an
23 issue, and I decided -- either way I decide it, if
24 either of you want to appeal that, I'll bifurcate
25 that issue and certify it to the Supreme Court

1 immediately, because I wouldn't want that to delay
2 any benefits to which he may be entitled. So
3 that's no problem. Just let me know, and keep me
4 on track, would you?

5 MR. ANGEL: I should move, though. I
6 thought it was decided by the Supreme Court.

7 THE COURT: Well, I think that's going
8 to encompass in the briefs that you're filing.
9 If you want to just move for summary judgment on
10 it or whatever, but I think it's a question of
11 reading.

12 MR. JONES: Your Honor, I can simplify
13 this. If we don't prevail on the affirmative
14 defense, under the facts, you don't have any
15 additional facts, so Mathews would be found to be
16 an employee. We'll stipulate to that and expedite
17 that whole process.

18 MR. ANGEL: So we've just got the one
19 set of briefs.

20 THE COURT: Yes, just brief it, because
21 I think that's going to do it, and then if you
22 disagree and needed to go to the Supreme Court,
23 I'll bifurcate it and certify it, and we'll figure
24 out a way to get it there, because this other
25 process is going to take longer.

1 what I'll do in that case, I think I will draft
2 something up, and then I'll circulate it to the
3 attorneys, including the State Fund attorneys, and
4 Luke and Jim.

5 MR. OVERTURF: Who will be responsible
6 for getting this notice served on the carriers?

7 THE COURT: Well, we'll be responsible
8 for coordinating as far as cost of that. That
9 probably is the responsibility of the claimants to
10 split it. So we can talk about that. We didn't
11 pay for the last one. I suppose we could consider
12 doing that, but I think probably the claimants are
13 the ones that are supposed to bear that burden.

14 MR. JONES: Your Honor, are you
15 contemplating on notice on registered agents? Is
16 that the idea?

17 THE COURT: Yes. Whoever. Exactly. I
18 think we gave to the registered agents, wasn't it?

19 THE CLERK: I think so.

20 THE COURT: Whatever the list is. What
21 do we have on the list? If you need to know that
22 information, we'll look at it, and find out. I
23 didn't really get too involved in it because
24 the --

25 MR. JONES: The reason, Your Honor, if I

1 MR. ANGEL: My understanding is if you
2 get metal in your bone and it doesn't get removed,
3 it's bad. I've been being told that by my client
4 repeatedly.

5 THE COURT: Well, you've got a quick
6 track brief thing, and I'll make it a quick track
7 decision. So where are we?

8 MR. JONES: On Mathews, Your Honor,
9 you're going to rule on the affirmative defense;
10 we have that lined out. You're going to direct us
11 how to give notice to other carriers, and after --
12 I'm not clear who's identifying these other
13 carriers.

14 THE COURT: Carol is going to look at
15 their data base, and then if -- I assume if she
16 can do it from what she's got, she'll give us the
17 list going back; and if she can't, then the State
18 Fund will look to see what they can do, and Tom is
19 in charge of that. So they're going to confer,
20 but some way they'll get back to me, and let me
21 know what they can do.

22 MR. JONES: And then as to content of
23 the notice, how will that be decided, Your Honor?

24 THE COURT: That's going to be decided
25 -- Well, ultimately I'll decide it, and probably

1 may, is that my client is a wholly owned
2 subsidiary of another carrier that has a companion
3 carrier, and we would certainly want to make sure
4 they were properly noticed on this. That's the
5 reason I'm asking.

6 MR. LUCK: I think you should tell them.

7 MR. JONES: I think this is in the
8 category of pass it up the chain of command.

9 THE COURT: We can -- You can even look
10 at that list. We actually have it on computer and
11 we can email it to you.

12 MR. JONES: That's what I'm asking, Your
13 Honor.

14 THE COURT: Why don't you email Larry
15 the list.

16 THE CLERK: Okay.

17 THE COURT: The existing list going back
18 to 1993.

19 MR. JONES: That seems to put that whole
20 process in motion. And then next would be the
21 common fund claim that Geoff has against Liberty.

22 THE COURT: Let's move back just a
23 little -- Well, okay, let's talk about that, and
24 then I've got to move back to the retroactivity
25 issue.

1 MR. JONES: What I was wondering, Your
2 Honor, we anticipate briefing those issues under
3 common fund.

4 THE COURT: Right.

5 MR. LUCK: After notice.

6 THE COURT: Well, he's talking about
7 common fund as pertains to Liberty, the same issue
8 that you have; is there really a common fund and
9 ultimately a class action, too. The State Fund,
10 if you were here, is going -- they want to present
11 some evidence basically for retroactivity purposes
12 under the Chevron case, and then for class action
13 in the common fund cases. And I guess the
14 question is: Do you want to do that?

15 MR. JONES: Yes, Your Honor. I attended
16 the Stavenjord hearing, and the same issue
17 developed there. Yes, Your Honor, we would like
18 to take a look and see factually what information
19 we have related to Chevron.

20 THE COURT: Can I put you on the same
21 kind of time track as I put them on, 45 days?

22 MR. JONES: Yes, Your Honor.

23 THE COURT: And the same deal in your
24 working with Geoff, is keep him in the loop and
25 talk to him about what you're doing, and what

1 you're gleaning, and where you're going.

2 MR. JONES: And how far back do I look
3 on this? I know the practicality issue is a
4 burdensome issue.

5 THE COURT: That shot I can't call for
6 you. It depends.

7 MR. JONES: I can go back as far as I
8 want, Your Honor?

9 THE COURT: You can go back as far as
10 you want. It may be, unless there's a difference
11 between the information for 1985 versus the
12 information for 1995, I suspect the same problems
13 are going to exist whatever year it is.

14 MR. JONES: Your Honor, my company
15 became registered to write insurance in Montana in
16 1987.

17 THE COURT: I can't make you go back to
18 1983.

19 MR. JONES: I hope not, Your Honor.

20 THE COURT: So we know it's limited.

21 MR. OVERTURF: Judge, if we're on the
22 track to look at the evidentiary stuff relative to
23 the common fund, both of these, on this about 45
24 day track, is that at all tied to getting notice
25 to the other carriers in the common fund case, in

1 our common fund, which goes to all different
2 carriers? Do they need some sort of ability to
3 brief that as well?

4 THE COURT: Well, yes, they're going to
5 -- we'll give them the opportunity to brief. I'm
6 going to give everybody in the world an
7 opportunity to brief. I guess I'm not going to
8 drag them in here at this point, and have them
9 develop an evidentiary record. I suppose in
10 response to this class action notice, if they want
11 to do something along that line, then I'll
12 entertain that at that point. I'll cross that
13 bridge when I come to it.

14 MR. LUCK: When does the 45 days begin
15 to run? Is that tied to notice or independent?

16 THE COURT: No, independent of the
17 notice. My suspicion is the problems that you're
18 going to encounter are going to be the same
19 problems that everybody is going to encounter,
20 considerations, the basic considerations that are
21 going to go into the retroactivity question under
22 Chevron and the common fund class action are going
23 to be ones that are shared. And what you're going
24 to give me is an example of the problems in some
25 sort of factual basis showing those examples are

1 accurate, that sort of thing.

2 So I don't think everybody is going to
3 need to develop a factual record. Now, maybe some
4 insurers out there see the need to do it, and if
5 they do I'll cross that bridge when I come to it.

6 MR. LUCK: For instance, I've talked to
7 carriers that say on any of these things that
8 they'd have to go back and do manual reviews, that
9 they don't have an ability to capture the kind of
10 information. And everybody has got a kind of a
11 different claims record situation. I don't know
12 ultimately how important that's going to be, but
13 that's where the rubber meets the road in terms of
14 can you really do it, and is it so hard that that
15 becomes a factor for the Court to take into
16 account.

17 MR. JONES: You may have answered this
18 question in that response. But if one of the
19 companion carriers with our parent company wrote
20 one year in 1991, and they ask, "Well, does this
21 go back one year to 1991, does it go back?," any
22 suggestions on how I could address that kind of
23 question?

24 THE COURT: I think the answer to that
25 is being alleged it does. It remains to be seen,

1 it remains to be determined. What I'm trying to
2 do is get this in a posture so I can decide all of
3 those issues, wrap them up, get them up to the
4 Supreme Court, either get a yea or a nay on that,
5 and then go forward from there. The answer is I'm
6 not sure.

7 MR. JONES: Your Honor, I'll relay that.

8 MR. LUCK: You haven't prejudged from
9 your standpoint, but you've prejudged from the
10 Supreme Court's standpoint.

11 THE COURT: On the retroactivity issue
12 I've given a fairly blunt take on that, and I'm
13 not afraid to do that because I think I'm on the
14 money. But again, that blunt assessment is
15 subject to revision, and reading all the briefs,
16 and rereviewing it. But I've done it once, and
17 you've heard everything I have to say about it,
18 and it's on the record, and the Supreme Court can
19 see what I have to say about it. They're going to
20 make up their own decision, no matter what, their
21 own minds eye.

22 My problem from my perspective is that
23 I've got essentially what are conflicting
24 precedents, which puts me in a difficult position
25 of guessing which one of those precedents is going

1 do that. Pat, why don't you look at about 55 days
2 out scheduling another round of conferences.

3 MR. OVERTURE: 60 is an even number.

4 MR. MARTELLO: Judge, I'm having a hard
5 time understanding the logistics of this, about
6 how this is all going to work as far as -- and I
7 understand the time frames for the 45 days. And
8 with this class action, and notice to the other
9 insurers, and your intent to try to wrap all this
10 up, how is that going to work?

11 I just heard you say that you may have a
12 determination on the retroactivity, but doesn't
13 there have to be some sort of notice to these
14 other potentially affected parties, and the
15 ability for them to have some sort of due process
16 with regard to the applicability?

17 THE COURT: Well, with regard to the
18 retroactivity and things like that, the answer to
19 that is no, because you can have a single case
20 that establishes a precedent for everybody that
21 everybody has to follow. We do that all the
22 time. So that's a precedential. As far as
23 dragging somebody in as a class member and
24 determining their rights, their specific rights,
25 that's a completely different story.

1 to prevail. But my gut tells me that probably the
2 Porter precedent will prevail rather than the
3 Chevron precedent.

4 But you guys are going to have an
5 opportunity to argue that, and so you know where
6 I'm starting from, and I've been argued out of
7 things before.

8 MR. JONES: Your Honor, next on Mathews,
9 and after the 45 days, where we've been talking we
10 have some information, and so then you will set
11 the deadlines for briefing?

12 THE COURT: Right. In fact, what we
13 might do is we might schedule another round of
14 conferences about the 45 day mark, and find out
15 exactly where we are and where we're going. And
16 maybe by that time I'll have a retroactivity
17 decision out, too.

18 MR. LUCK: In terms of scheduling, that
19 45 days, maybe like with Stavenjard, will trigger
20 an opportunity for us to talk with Counsel about
21 where we are, and make some agreements, and then
22 ten days later report to the Court, and so that
23 meeting might be following that report to the
24 Court.

25 THE COURT: Right. We could certainly

1 So the short answer is is everyone is
2 going to get an opportunity to brief the
3 retroactivity. I've got a global notice out
4 there, it's been sent to all the attorneys in
5 Montana. So all of the claimants bar, all of the
6 insurance defense counsel have notice of it, and
7 an invitation to brief the retroactivity issue.

8 So everybody is going to get a chance to brief it.
9 With the class action thing, it's a
10 little bit -- asking -- saying that they may be
11 made a member of the class is a little bit
12 different story. Then I have to give them notice
13 and some sort of additional opportunity specific
14 to them. That's what we'll do.

15 MR. MARTELLO: But with respect to those
16 in which a claim is made for common fund, if you
17 aren't going to look at the Chevron for purposes
18 of having a complete decision, are not the other
19 insurers able to put forth their evidence with
20 regard to those factors?

21 And if you've got 600 or 1,000 insurers
22 that potentially could come in, and each having
23 their own unique take on how it affects them, and
24 your desire to package this all up, I'm just
25 struggling with understanding how you can

1 accomplish that in any sort of foreseeable time
2 frame.

3 THE COURT: It depends on how different
4 they claim to be, whether they want the
5 opportunity to do that. That's one of the
6 purposes of the web site, is to let them know
7 exactly what's happening, putting the transcripts
8 up, so we can keep a complete record, and they can
9 see what's happening.

10 On the retroactivity issue, no, and
11 insofar as that's developed in the factual basis,
12 I think the decision will be made, and a precedent
13 set. If there's something unique -- I don't see
14 how I can set a different retroactivity standard
15 for different insurers.

16 MR. MARTELLO: No, and I'm --

17 THE COURT: I'm going to say this is
18 retroactive or it's not retroactive, and it's
19 based on these considerations; and that's either
20 right or wrong, and everybody has to follow that.

21 When I start joining defendants as
22 insurers, then there are some additional
23 considerations, and I'm going to -- you're right.
24 I may have to give them some additional
25 opportunity, and I'll cross that bridge when I

1 And I'm not sure I'm going to get real
2 far down the line. I'm going to get the general
3 considerations, and get some general information
4 about it. But how detailed I get, boy, I don't
5 know.

6 So these are the lead cases on
7 retroactivity -- actually the Flynn case is really
8 the lead case -- but they don't have some of the
9 considerations that are in this case. So I'm
10 going to have to base it on this case, and they
11 can have their say in it.

12 And if there's something in one of the
13 briefs that says, "Hey, here's a different
14 problem," and it looks like it's something that's
15 a factual issue that, for example, the claimants'
16 attorneys dispute, that's not really a problem,
17 they say, then maybe I'll ask them to develop it.

18 MR. OVERTURF: But even from the State
19 Fund's standpoint, as you said, the Flynn case is
20 kind of the lead case right now. Retroactivity
21 has been briefed by us. Yet we're going to
22 probably the retroactivity decision, and that's
23 going to impact all these cases.

24 And I don't know that because of the
25 unique nature of the different cases, and trying

1 come to that.

2 But I see what your concerns are. I
3 agree with them. Hopefully the State Fund and
4 Liberty are going to do a bang up job at
5 presenting the class action difficulties that no
6 insurer will want to develop an additional record.

7 MR. OVERTURF: I don't think that's
8 Tom's point. I think more his goes to their
9 ability to develop the record in regard to the
10 retroactivity argument regarding the factors under
11 Chevron. They will not have that opportunity.
12 They may have a unique system that makes it
13 extraordinarily difficult for them as opposed to
14 us.

15 THE COURT: But we can only carry that
16 so far.

17 MR. MARTELLO: But isn't it a question
18 of due process?

19 THE COURT: Like I said, it's either
20 retroactive or not. If I don't make it
21 retroactive for the State Fund, and not
22 retroactive for somebody else. So you're going to
23 give me the general considerations as to how far
24 I'm going to go down that line. To look at the
25 little details is a different question.

1 to apply them retroactively, have we had an
2 opportunity to fully develop our arguments
3 relative to Chevron about the difficulties, say,
4 in the Wild case or a Stavenjard, as opposed to
5 just Flynn, which is already briefed.

6 THE COURT: That's what I'm saying.
7 That's what this whole process -- that's what the
8 45 days is for, for you to develop that evidence,
9 because I'm going to let you present that. And
10 even if I say in Flynn that the Porter standard
11 applies, the most recent United States Supreme
12 Court decision applies, which says every judicial
13 decision is retroactive, that's basically the
14 bottom line in those cases.

15 If I say that applies, I'm still going
16 to go on to give you opportunity to develop what
17 you want to do to make your argument under
18 Chevron, and I'll do a Chevron analysis. I'm
19 going to do a Chevron analysis no matter what. If
20 I decide it's a Chevron analysis, it's no problem
21 because I'm going to do that anyway in Flynn. And
22 in Flynn I'll do a Chevron analysis as well.
23 Whichever way I go, I'll do a Chevron analysis.

24 MR. MARTELLO: And see, Judge, that gets
25 to my point, is if you're going to do a Chevron

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1 analysis, don't you have to do that analysis for
2 every insurer?

3 THE COURT: No. Absolutely not.
4 Retroactivity is not that fact specific. I mean
5 there are some general considerations in there,
6 and you're going to make your best argument on
7 them, and that's going to set the precedent. It's
8 either retroactive or not. It's either
9 retroactive to everybody or not. And I've given
10 everybody their best shot by allowing amicus
11 briefs.

12 MR. MARTELLO: I understand that, and
13 maybe I'm just having a disconnect here. But if
14 you -- I understand that if you say that it's
15 retroactive, then really the Chevron analysis I
16 think goes out the window obviously.

17 THE COURT: No. I don't think the
18 Chevron analysis was intended to be defendant
19 specific. It is not a defendant specific thing.
20 And that's why I say how far the line -- down the
21 line I go in looking at the details is a good
22 question. I'll look at everything you've got, but
23 there may be some stuff that I say this is really
24 defendant specific, and really can't affect the
25 application.

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1 THE COURT: Well, in Flynn, all I'm
2 going to determine is whether or not the Chevron
3 test applies at all, and then I'm going to
4 determine as applied in Flynn to that specific
5 situation that specific legal precedent, how the
6 Chevron criteria would apply. But these other
7 cases may have different criteria, and so you'll
8 get the opportunity to do that in the context of
9 this case.

10 So the decision in Flynn will sort of
11 provide the guideposts of the things that I'm
12 going to consider under Chevron, and then we'll
13 see how that applies in this particular factual
14 situation.

15 But we'll give you that opportunity, and
16 hopefully you'll be able to develop out a
17 stipulated set of facts that you want me to
18 consider, or at least the considerations that I
19 should take up under Chevron. And I don't know
20 what those are. You get first crack at it to tell
21 me what you think they are, and to work that out
22 as you see fit.

23 MR. OVERTURF: I understand now. I do.
24 In Flynn, we'll see whether Chevron has anything
25 to do with it, and after we develop the evidence

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1 But if you'll notice, those
2 retroactivity decisions have all applied general
3 rules that are precedential for everybody, and
4 they've made that determination in the context of
5 a single case. So it's basically a precedent. So
6 they're going to -- I think that test looks at the
7 general considerations, it doesn't look at the
8 details.

9 The details may come into the
10 enforcement issue, if we get down to the
11 enforcement issue. Can we identify these
12 claimants, and then we're back to the Murer and
13 Broeker, and all those other issues. We do the
14 best we can type of thing. And procedurally with
15 hashing out the individual entitlements, like in
16 Murer, we do the best we can. And those are
17 different issues.

18 MR. OVERTURF: And I'm just looking --
19 we have the 45 day time line, and time line we
20 have in Stavenjord for us to look and establish
21 our evidence regarding some of the hardships.
22 Where will we have an opportunity to present that
23 evidence for you to consider when you look at
24 Chevron, if Flynn is already briefed and sitting
25 waiting to be decided?

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1 in the other cases when they are briefed, then
2 we'll say if it does apply, here are the facts we
3 would like to you to consider under Chevron.

4 THE COURT: Right. And if you think
5 you need some sort of evidentiary hearing if you
6 can't develop it out by stipulated facts or
7 something like that, or documents, then we'll
8 hold an evidentiary hearing.

9 MR. OVERTURF: Okay.

10 THE COURT: And the same with you,
11 Larry. In those two, I would expect those two to
12 piggy back. If we have a hearing on something
13 like that, we would have one hearing.

14 In fact, it might be beneficial for all
15 Counsel to confer as we go along on both cases.
16 It may be the kind of considerations that they
17 develop may be the same considerations for you,
18 and you may be able to package this up as one
19 single package.

20 MR. LUCK: So you're not consolidating,
21 they'll just move on a parallel track.

22 THE COURT: Right. These two cases
23 probably are cases that could be consolidated, but
24 for right now, I'm not going to do that. Let's
25 just proceed on parallel tracks, keep

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1 communications open, and if we need to consolidate
2 them, maybe down the road it would be
3 appropriate to consolidate them. Have I covered
4 everything?

5 MR. JONES: I believe you have, Your
6 Honor.

7 THE COURT: We'll close this one.
8 (The proceedings were concluded
9 at 11:25 a.m.)
10 * * * * *

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1 CERTIFICATE

2 STATE OF MONTANA)
3 : SS.

4 COUNTY OF LEWIS & CLARK)

5 I, LAURIE CRUTCHER, RPR, Court Reporter,
6 Notary Public in and for the County of Lewis &
7 Clark, State of Montana, do hereby certify:

8 That the proceedings were taken before me at
9 the time and place herein named; that the
10 proceedings were reported by me in shorthand and
11 transcribed using computer-aided transcription,
12 and that the foregoing -72- pages contain a true
13 record of the proceedings to the best of my
14 ability.

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

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

21 (Pages 72 to 73)