

IN THE WORKERS' COMPENSATION COURT
STATE OF MONTANA

DALE REESOR,

Petitioner,

-VS-

MONTANA STATE FUND,

Respondent.

FILED

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WCC No. 2002-0676

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

COPY

TRANSCRIPT OF PROCEEDINGS

Held with the Honorable Judge Michael McCarter
in the Workers' Compensation Court
1625 11th Avenue
Helena, Montana
February 3, 2005
3:08 p.m.

CAROL HENDRICKSON WRIGHT, Court Reporter
Lesofski & Walstad Court Reporting
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Helena, Montana 59601 (406) 443-2010

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BE IT REMEMBERED, that a status conference regarding the above case was held with the Honorable Judge Michael McCarter in the Workers' Compensation Courtroom, 1625 - 11th Avenue, Helena, Montana, on the 3rd day of February, 2005, beginning at the hour of 3:08 p.m., pursuant to the Rules of the Workers' Compensation Court, before Carol Hendrickson Wright, Court Reporter, Notary Public.

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A P P E A R A N C E S
ATTORNEY APPEARING ON BEHALF OF
THE PETITIONER:

THOMAS J. MURPHY, ESQ.

ATTORNEY APPEARING ON BEHALF OF
OTHER PETITIONERS:

JIM HUNT, ESQ.

ATTORNEYS APPEARING ON BEHALF OF
THE STATE FUND:

TOM MARTELLO, ESQ.

BRAD LUCK, ESQ.

TOM HARRINGTON, ESQ.

GREG OVERTURF, ESQ.

ALSO PRESENT: Pat Kessner, Clerk

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1 WHEREUPON, the following proceedings were had
2 and testimony taken, to-wit:

3 * * * * *

4
5 THE COURT: We'll get started. This is
6 the matter of Dale Reesor versus the Montana State
7 Fund, and it's a status conference that we're
8 having. Tom Murphy is here representing the
9 Petitioner in the matter, and we have a host of
10 attorneys for the State Fund starting with Brad Luck,
11 Tom Harrington, Tom Martello and Greg Overturf. So
12 Tom, you're outnumbered again. You were outnumbered
13 the last time, I think.

14 MR. LUCK: It never seems to make any
15 difference, though.

16 MR. MURPHY: It doesn't. This is not
17 the numbers that you need. You need the numbers
18 someplace else.

19 THE COURT: I'm not going to go there.

20 MR. MURPHY: If you're really listening,
21 we should settle these cases, too, if you want to
22 take advice.

23 MR. LUCK: The important number is 4-3.

24 THE COURT: 4-3?

25 MR. MURPHY: That's what this was.

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1 THE COURT: Oh, yeah, and there's a
2 follow-on case. We've got to resolve the other part,
3 which is the permanent total disability case. That's
4 sitting out there, and I'm trying to get a status
5 conference going in that one because that case is
6 pending.

7 MR. LUCK: You know, you set a briefing
8 schedule in that, and we didn't talk about any
9 potential necessity for any factual determinations or
10 discovery or anything. I didn't know if you meant to
11 do that, but --

12 THE COURT: I think I sort of figured
13 you'd tell me if you needed it.

14 MR. LUCK: Yeah, and we're still talking
15 about that, but tomorrow the first brief is actually
16 due, and we were trying to -- I mean, there are
17 plenty of things that we could go discover, and we're
18 just trying to analyze the effect on the legal
19 arguments.

20 THE COURT: Well, we can extend that
21 schedule. Who's on that case? Is that Jim Hunt?

22 MR. MURPHY: Jim Hunt. Jim was going to
23 try to be here, and I've seen his rough draft so I'm
24 thinking he's intending on filing something tomorrow.

25 THE COURT: Okay, so he's --

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1 MR. LUCK: So he is getting help behind
2 the scenes. They are teaming up behind the scenes.
3 They just don't show up for the discussions.

4 MR. MURPHY: No, all I've done, I've
5 seen the fact that -- I have a copy. I haven't read
6 one word of it yet.

7 MR. LUCK: Because, Judge, before we
8 held an abeyance we had been working on a, like a
9 factual stipulation; but a lot of that was age and
10 whether they were hurt before or after they became
11 permanently totally disabled, and there's three or
12 four claims. There's a Zetalick (phonetic) and
13 Satterlee and I think Brown.

14 MR. HARRINGTON: Bowers is one.

15 MR. LUCK: Bowers, yeah.

16 MR. MURPHY: But they're all, they're
17 connected.

18 MR. LUCK: Yeah.

19 THE COURT: Yeah. Well, as I read that
20 Supreme Court case, they weren't looking at that. At
21 least in this case their decision wasn't factually
22 dependent. It was basically dependent on the
23 statute, so I don't know how they'll look at that.

24 MR. LUCK: And we've got -- We've been
25 talking with the other defense lawyers, trying to get

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1 some concensus on discovery issues; and part of the
2 problem is you have to send off e-mails, and we get
3 around and we just haven't been as efficient as we
4 should.

5 THE COURT: Off the record.

6 (Discussion off the record.)

7 THE COURT: Okay, Tom, you filed a
8 notice of lien, and that notice is in the Court
9 file. It hasn't been served on anybody, and I guess
10 I had about three questions that occurred to me
11 immediately. Number one is that we need to give
12 notice to all of the insurers about this.

13 Secondly, I want to know whether there's any
14 challenge to a common fund certification. I'm going
15 to call this common fund certification from now on.
16 I've talked about these common funds actions as being
17 back-door class actions, which I think is sort of
18 what they are. So if there's a common fund, I'll
19 call it common fund certification.

20 MR. LUCK: We should have had a naming
21 contest.

22 THE COURT: Yeah, we should have; but I
23 like the certification. It plays right along with
24 the class action certification.

25 Tom, I noted in your -- Too many Toms. Tom

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1 Murphy, I noticed in your notice that you had this
2 lien going to December 23rd, 2004, and the
3 Legislature barred the common fund as of July 1 of
4 2003. I think that was in the last Legislature that
5 they said no more common fund, but they only made it,
6 as I recall --

7 MR. MARTELLO: Actually, I think it's
8 April.

9 THE COURT: Is it effective
10 immediately?

11 MR. MARTELLO: I think it was effective
12 upon passing.

13 MR. LUCK: That was one of our
14 concerns.

15 MR. HARRINGTON: April 21st would be the
16 effective date.

17 MR. LUCK: Yeah, April 21st, 2003.

18 THE COURT: Okay, and what effect that
19 has, if any, other than just on the, maybe on the
20 common fund fees because this whole idea of the
21 common fund springs from an entitlement, so we still,
22 even though the fees might be cut off, it seems to me
23 that those people that are in that lapsed period,
24 April 21st actually until today, although after the
25 Supreme Court decision I assume the insurers are

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1 following the Supreme Court decision, so it doesn't
2 matter with respect to after 12/23 of '04, but at
3 least in that one period between April 21st and
4 December 23rd, we still have those claimants who
5 still need to be paid. So we probably need to figure
6 out how we handle them irrespective of the statute.

7 There he is.

8 (Jim Hunt entered the room.)

9 MR. MURPHY: Entitlement is there. Fees
10 may be challenged. Our position on fees is going to
11 be with regard to that statute that the statute says
12 that the insurance companies don't have to pay the
13 fees, which we would agree to. We think that the
14 common fund benefits, common fund claimants pay the
15 fees, and therefore we don't think the statute has
16 much effect on our right to fees.

17 THE COURT: So you're going to argue
18 statute interpretation on that.

19 MR. MURPHY: Correct, but only as to
20 that one-year period. So that will be an issue
21 probably to brief.

22 THE COURT: Okay. Personally I want to
23 sort out how we're going to proceed and also sort of
24 try to tease out what the issues are going to be in
25 this case. We have some issues in this case that are

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1 probably going to be resolved in Stavenjord and
2 Schmill. One of those issues is going to be the
3 retroactivity issue, although as I read Schmill,
4 non-retroactivity has almost become an impossible
5 task.

6 MR. LUCK: You mean Demsey?

7 THE COURT: I'm sorry, Demsey, as I read
8 Demsey.

9 MR. LUCK: Well, yeah, you've got to
10 meet all three of them.

11 THE COURT: Yeah.

12 MR. LUCK: You've had some trouble with
13 number two. We've got to work on that number two.

14 MR. MURPHY: It's going to be a tough
15 number two. Let's see, shall we give the money to the
16 insurance companies, or shall we unconstitutionally
17 withhold it or should we give it to the claimants?
18 It's difficult to beat that.

19 MR. LUCK: Well, you can rephrase the
20 issue in many different ways, Tom.

21 MR. MURPHY: I'm sure it's a phrasing
22 problem. It's a phrasing problem. That's right.
23 That didn't occur to me.

24 THE COURT: Does anybody have a clue as
25 to when Schmill and Stavenjord are going to come in?

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1 MR. LUCK: We've got an extension on the
2 briefing in Stavenjord, so that will slow it up a
3 little bit.

4 THE COURT: Is Schmill all briefed, does
5 anybody know?

6 MR. LUCK: It's briefed, yeah, briefed
7 and in.

8 THE COURT: Have they classified it?

9 MR. LUCK: I don't recall seeing a thing
10 on it, your Honor.

11 MR. HARRINGTON: We notified the Supreme
12 Court that we had intended to move to join Stavenjord
13 and Schmill when the Stavenjord briefing was done. I
14 don't know if that's affecting what they're doing
15 with it or not.

16 MR. LUCK: They originally said it was
17 premature, and so it may be that they're waiting for
18 the briefing to be, I don't know, maybe they're
19 waiting for the briefing to be complete and then join
20 them. Don't know.

21 THE COURT: Okay, so we have --

22 MR. LUCK: But typically, you're right
23 -- I'm sorry, I didn't mean to cut you off. You're
24 right, we would typically have heard about it with
25 the final brief where they've classified it and we

1 would have known, but we haven't heard that.
 2 MR. MURPHY: So answer brief is due
 3 March 7 in Stavenjord, and of course my brief is
 4 about 20 days later, so it's going to be end of
 5 March. So decision probably would be early --
 6 THE COURT: Next summer at the
 7 earliest.
 8 MR. MURPHY: Yeah.
 9 THE COURT: Depending on whether they
 10 ask for oral argument. My guess is they're not going
 11 to ask for oral argument.
 12 MR. MURPHY: That's my guess, too. I
 13 think these issues are pretty much hashed out now.
 14 THE COURT: Yeah.
 15 MR. MURPHY: Well, we'll see.
 16 MR. LUCK: I do, too, but for different
 17 reasons; and so maybe they will.
 18 THE COURT: You think they've been
 19 hashed out in your favor.
 20 MR. MURPHY: He doesn't, really. He
 21 just wants to think that he does.
 22 MR. LUCK: I just like the opportunity
 23 to discuss them with the Supreme Court.
 24 THE COURT: Okay, well, so what do we do
 25 here?

1 MR. LUCK: We've got a couple more
 2 issues, too, your Honor.
 3 THE COURT: Okay, Go ahead.
 4 MR. LUCK: The way Tom has written his
 5 lien, I think there's a question about whether it's
 6 overly broad, given the holding of Reesor. That may
 7 be affected by a determination later in Satterlee.
 8 He's including every claimant that has had 710
 9 applied to their claim since 1987; and based on --
 10 Ultimately that may be the determination, but at this
 11 point we believe it's overly broad.
 12 THE COURT: Are you trying to claim
 13 Jim's attorney fee?
 14 MR. HUNT: Yes.
 15 MR. MURPHY: Actually, Jim and I are
 16 probably going to be working together on Satterlee.
 17 We haven't formally filed anything with you yet,
 18 Judge, on that issue, but we've been talking about
 19 it. Just so that we wouldn't have a Ruhd FFR, you
 20 know, competition. We'd rather just work it out
 21 informally so we would not have to deal with that
 22 issue.
 23 THE COURT: Are you going to want to
 24 issue a lien notice in Satterlee at this point in
 25 time? Is that appropriate?

1 MR. MURPHY: I think that this lien
 2 notice is designed --
 3 THE COURT: To cover.
 4 MR. MURPHY: -- to put every claimant on
 5 notice that's been affected by 710. That's why it is
 6 broad.
 7 THE COURT: Do we want to --
 8 MR. LUCK: I guess it probably doesn't
 9 matter if you're overly broad so long as, I mean, we
 10 want to just call the Court's attention to the
 11 concern. If you're overly broad, it doesn't hurt to
 12 put people on notice; and the ultimate decision,
 13 then, even if it's somewhat restrictive, at least
 14 it's been properly noticed.
 15 THE COURT: Here's my suggestion because
 16 if the insurers read this notice and they also read
 17 Reesor, they're only going to look at it, or they
 18 could legitimately look at it as only affecting the
 19 permanent partial disability benefit. So my
 20 suggestion would be, let's broaden it out and make it
 21 explicit that it's covering permanent total
 22 disability benefits, and make it a joint notice in
 23 both Satterlee and this case, in Reesor.
 24 MR. LUCK: The tone, I guess, would have
 25 to be different, I mean it terms of the two. I mean,

1 it's been determined as to PPD and you can cite
 2 Reesor, but if you sent it out under the auspices of
 3 Satterlee, it's a --
 4 THE COURT: Okay, I've got a better
 5 idea. Why don't we do two separate notices, one for
 6 the permanent total under Satterlee, and one for the
 7 permanent partial under Reesor, and send those
 8 notices out jointly.
 9 MR. LUCK: And one is a more
 10 anticipatory one, and the other is, we've already got
 11 a decision.
 12 THE COURT: Right.
 13 MR. HUNT: Fine with me.
 14 THE COURT: Maybe you guys can work on
 15 the language and tighten up the language a little
 16 bit.
 17 MR. MURPHY: Okay. We're going to call
 18 those amended notices now.
 19 MR. LUCK: We're talking of the
 20 difference about, though, because since Ruhd you've
 21 been sending out the summons basically, we're talking
 22 about a lien notice as opposed to that more
 23 informative summons.
 24 THE COURT: One of the questions I had is
 25 whether we could combine it. I mean, that would be a

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1 possibility to combine sort of a summons. Are we
2 ready to do that? Is there any initial obstacle
3 before we do that? In Rausch there wasn't because
4 Rausch had already decided that it was global, so
5 that wasn't at issue. Those issues were pretty much,
6 I think, taken care of, dead and buried, although
7 some of them may be raised by some of the insurers.

8 MR. LUCK: I think we might prefer, and
9 I'm thinking outloud here, I think we might prefer
10 the summons in Reesor at the outset to invite the
11 participation of other carriers because we also have
12 the issue, we've got the breadth issue, is the first
13 one, the retroactivity issue, which might be
14 different now but it's still a legitimate issue, that
15 other carriers with a global lien might want to
16 participate in. We think that the Russett case
17 precludes common fund treatment for '91 to '95
18 because the Supreme Court found in that case that 710
19 didn't apply because of some wording problems. So we
20 believe that chunk is out; and if we don't agree to
21 that, that's another issue that's four full years.

22 THE COURT: Oh, okay, so they weren't
23 implying 710, basically.

24 MR. LUCK: Right.

25 MR. MURPHY: '91 through '95?

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1 MR. LUCK: Yeah, I think so; and then
2 the statue was changed in '95, I guess.

3 MR. MARTELLO: Russett was the decision
4 where Trieweiler had indicated that when 710 -- or
5 when we went from the wage supp to the cookbook
6 formula, if you will, 703, percentages, they never
7 changed 710 language until the '95 Legislature
8 changed it.

9 MR. LUCK: It kept saying "wage supp,"
10 so they didn't apply 710 for that period. So it
11 would seem like on its face, those four years would
12 be out of the calculation. Oh, and we mentioned the
13 statute, which you already did, your Honor, in terms
14 of everything after April 23rd. Oh small point, I
15 guess. Tom, our detail guy, says in Tom Murphy's
16 lien it says June 30, 1987, and perhaps that should
17 be July 1, '87.

18 MR. MURPHY: I tried to run this down.
19 In the Stavenjord case, you used June 30.

20 THE COURT: I did?

21 MR. MURPHY: Yes, '87.

22 THE COURT: I could have been mistaken.

23 MR. MURPHY: I don't think so. You said
24 there was a reason for it, and I couldn't remember
25 it. I couldn't find it in my notes what the reason

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1 was.

2 MR. LUCK: All the Murer stuff,
3 remember, everything went up to June 30th and then
4 July 1, and I think we went through all the date
5 stuff.

6 THE COURT: It's a question of whether I
7 said ending on June 30th or beginning on June 30th.

8 MR. MURPHY: I thought it was -- You
9 know, I wanted to use July 1. I actually went back
10 and changed it all because your ruling had talked
11 about June 30 and I couldn't figure out why; and I
12 knew that you had said something about it, but I
13 couldn't find out what. I hadn't written it down
14 fast enough.

15 MR. LUCK: But all those '87 amendments
16 were effective July 1, '87.

17 THE COURT: Yeah. There's like one year
18 in there where some of the statutes were effective a
19 different date.

20 MR. MARTELLO: Well, that's Murer.
21 There was about a 14-day period in Murer, and --

22 MR. LUCK: In a special session.

23 MR. MARTELLO: Yeah, exactly.

24 MR. LUCK: It wasn't renewed, or
25 something; and the special session came in and passed

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1 that same limitation, and there was a couple-week
2 period that those statutes, the limitation on the
3 benefits didn't apply. There was no law on it.

4 MR. MURPHY: Well, I guarantee we can
5 stipulate that one and this problem away, but I just
6 couldn't write it down.

7 THE COURT: Okay, we'll have to go find
8 my Stavenjord decision. Could you find the
9 Stavenjord decision, the original one? Was it in my
10 original Stavenjord decision or this latest one,
11 again?

12 MR. MURPHY: I think the original.
13 Let's hope I'm right about that.

14 THE COURT: We'll see if we can track it
15 down. It might be my mistake.

16 MR. MURPHY: It may be my mistake. I
17 wanted to go with 7/1. It doesn't matter to us.

18 MR. LUCK: I don't know how it could be
19 otherwise.

20 THE COURT: Why don't you and Jim go
21 ahead and get the notices drafted up and circulate
22 them.

23 MR. LUCK: Are you talking -- Are you
24 going to treat them both, is one a notice and one a
25 summons?

1 THE COURT: One will definitely be a
2 notice, and let's talk about the other one. The
3 permanent total, which will be Satterlee, that will
4 definitely be a notice. What about the summons?
5 Shall we go ahead? The only problem is if you think
6 there's going to be a whole bunch of issues that are
7 going to rise, like the retroactivity re-emerging and
8 that sort of issue, we might want to restrict what we
9 request them to do on the summons. In Rausch, I
10 ordered him to cough up the information as to the
11 claimants with the expectation, I think, that they're
12 going to come back and say we can't do it this
13 quickly, or things like that that I'll have to deal
14 with.

15 MR. LUCK: I think that was kind of
16 unique, given the circumstances of it. My impression
17 would be that we would give them notice, tell them
18 that at this point these kinds of issues have been
19 raised and you're invited to make an appearance and
20 participate and maybe have something that says
21 regardless, you'll be provided further information.

22 THE COURT: Okay, maybe ask them to
23 respond as to the common fund claim, something along
24 those lines?

25 MR. LUCK: Common fund and

1 retroactivity.

2 THE COURT: That would be part of the
3 common fund.

4 MR. LUCK: Yeah. If it's not
5 retroactive, it won't be a common fund.

6 THE COURT: Okay, you think that's a
7 good way to go, Tom?

8 MR. MURPHY: Yeah, I think we should go
9 forward. I like the summons idea. I don't see why
10 we shouldn't do it with both. I mean the more, the
11 merrier, right now, all at one time, raising every
12 issue under the sun.

13 THE COURT: Well, I don't want to do it
14 with Satterlee yet because we haven't even
15 adjudicated the basic stuff. Although if it would be
16 global, should we invite him in on that?

17 MR. OVERTURE: One thought I had, Judge,
18 is, is there any problems with, when you've got a
19 case that we know going forward is going to be a
20 common fund ultimately as it prevails, are there
21 due-process problems if the other insurers don't have
22 notice and the opportunity to participate in the
23 proceedings?

24 THE COURT: Well, there aren't. I
25 suppose they can come and challenge the precedent and

1 ask the Supreme Court to overturn the precedent.
2 That would be about all they could do.

3 MR. HUNT: What would be the harm in
4 doing a summons?

5 THE COURT: I'm not sure that there
6 would be any.

7 MR. MURPHY: I don't see any harm.

8 MR. LUCK: It just strikes you as
9 pre-judging the issues. I mean, the way we've
10 developed, and I guess we're learning as we go along,
11 but that has been developed on the basis that first
12 we had the common fund determined, and then we found
13 out after Ruhd that we had this global lien. So
14 you're inviting everybody in to participate in the
15 adjudication of the global lien because the
16 obligation to pay has already been established; and
17 maybe it's more form over substance, but like with
18 Satterlee, we're still briefing the issues. We
19 haven't even started briefing the issues --

20 MR. HUNT: It's due tomorrow.

21 MR. LUCK: Yeah, but maybe inviting --
22 There isn't anything wrong with inviting people to
23 participate at this stage because we've come down the
24 road far enough with the way these cases develop that
25 we know that sooner or later, as long as there's

1 entitlement, you're going to be asking everybody to
2 come in and participate, and there's no problem with
3 doing it earlier than later.

4 THE COURT: The only question would be
5 how to phrase the summons. I mean, a summons
6 basically orders them to appear and be heard,
7 otherwise they're going to lose all their rights.
8 The problem with Satterlee is we haven't adjudicated
9 the basic legal principle that would give rise to the
10 common fund. Once that principle is adjudicated,
11 then they have to come in because we're going to
12 enforce it assuming that there is a common fund.
13 That's the only question; but before that --

14 MR. LUCK: But I'm wondering, though,
15 based on our experience, if we couldn't just word it
16 a little bit differently and say a common fund has
17 been requested. In the event that the issues are
18 determined as requested by the claimant, a global
19 lien will be enforced against all carriers. You're
20 invited if you choose to come in and participate at
21 this point. If not, after the decision, if it
22 affects you, you'll get further notice, and give
23 everybody a certain amount of time to come in and so
24 then they'd be in on the ground floor; and I don't
25 think there's that many people that would

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1 participate, but it's not a bad idea to give the
2 carriers the opportunity to do that.
3 Then, Jim, maybe even though it delays it a
4 little bit at the outset, it might move it along
5 better once we get going if it goes in your favor.
6 MR. MURPHY: I don't see much of a
7 delay. What are we going to give them, 20 days, 30
8 days?
9 THE COURT: I'm giving them 30 days.
10 MR. MURPHY: Okay, that's fine.
11 MR. LUCK: And then just hold off filing
12 your brief for 30 days?
13 MR. HUNT: I can file it now.
14 MR. MURPHY: He could get it started.
15 If somebody appears and wants to file a brief --
16 THE COURT: A brief afterwards, we could
17 let them do that, except the process is taking so
18 long.
19 MR. OVERTURE: I'm just thinking, Judge,
20 if I'm another insurer out there who's not a part of
21 the underlying proceedings that ultimately sets the
22 precedent and I don't have an opportunity to make my
23 argument initially, I guess that's the problem with
24 the whole common fund thing, whether it extends to
25 everybody; but I think that's the complaint from

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1 the --
2 THE COURT: Well, that's probably the
3 difference between, maybe the difference between the
4 common fund and the class action; but since the
5 Supreme Court's ruled, it becomes the law of
6 Montana. So the only way that you can change that is
7 to request them to overturn their prior decision,
8 which you could do.
9 MR. LUCK: Have we mentioned that we
10 didn't agree with the common fund concept?
11 MR. HUNT: Have we mentioned that we
12 don't care?
13 MR. LUCK: No, I haven't heard it from
14 you, but I've heard it from the Supreme Court a
15 couple of times.
16 MR. HUNT: Well, I care for you
17 personally; but professionally, I don't care.
18 MR. MURPHY: So we decided to do
19 summonses in both cases, then?
20 THE COURT: Yeah, let's go ahead and do
21 it. Do we send the lien notice as a separate
22 document? I think we probably need to do that.
23 MR. LUCK: Could it be an attachment to
24 the summons?
25 THE COURT: Exactly. Let's do a summons

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1 with that attached; and it sounds to me like if we
2 want to give the insurers in Satterlee an opportunity
3 to come in, we ought to get the summons done quickly
4 and get it out because I'm a little bit concerned
5 because these things are stretching out and they're
6 going to stretch out for years anyway, but it would
7 be nice to get some answers on this, and it would be
8 especially nice to get an answer on this other part
9 of 710 because I think -- Well, I have no idea.
10 Anybody have any idea how many claimants are going to
11 be affected by this?
12 MR. LUCK: That get life-long benefits
13 if it applies?
14 THE COURT: Yeah.
15 MR. LUCK: The significance might be in
16 numbers and certainly in potential value. No, as far
17 as I know, we haven't, the State fund hasn't done
18 anything in terms of trying to establish that.
19 THE COURT: So we don't have a clue on
20 either the permanent total or the permanent partial
21 at this point.
22 MR. MURPHY: No. It can't be that
23 many. Just not that many PTD cases every year.
24 THE COURT: But a permanent partial was
25 the question, but it would only be people who are

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1 near retirement age who get injured or get injured
2 after retirement age, and I have no idea what those
3 numbers are.
4 MR. OVERTURE: You know, we did look at
5 numbers of permanent total people in FFR, and I'm
6 trying to think if that would apply here, if we could
7 use some of those same numbers.
8 MR. MARTELLO: Yeah, but it --
9 OVERTURE: I don't know that we
10 couldn't. They wouldn't be applied because there was
11 different criteria. Under FFR, we were looking
12 specifically for perm-total people who hadn't had
13 impairments. We probably don't have any idea on
14 numbers.
15 THE COURT: We have no clue.
16 MR. LUCK: Do we, when it says "or
17 entitled to under 710," do you consider that only to
18 be 65? We never take into account the potential of
19 early retirement at 62, or do we?
20 MR. MARTELLO: I think there's some
21 language about full retirement.
22 MR. LUCK: Okay, because it seems like
23 it wouldn't be very hard to have a computer search
24 because the information is in the system on people's
25 ages. I mean, if you're looking for the entitlement

1 date as being just age 65, the birthdates.

2 MR. OVERTURF: It changes, though.

3 MR. HUNT: At age 65?

4 MR. LUCK: Yeah.

5 THE COURT: I know. For us old folks
6 it's already up for us.

7 MR. HUNT: Like 65 and 8 or 10 months
8 now, something like that.

9 MR. MURPHY: I'm 66.

10 THE COURT: I'm 66, too. I know that.

11 Some of these other people are going to be way out
12 there because they're so young, like Harrington.

13 MR. HARRINGTON: I was going to say, I'm
14 at 85.

15 MR. MURPHY: I think it's 67, but they
16 are going to start raising it. President Bush is in
17 our home town right now talking about that very
18 thing.

19 THE COURT: Okay, so why don't you work
20 on a summons, and let's see if we can do that within
21 a week. Can we try to do that?

22 MR. MURPHY: Yes.

23 THE COURT: Along with the attached lien
24 notice, so I'll put the monkey on your back, Jim, and
25 on Tom Murphy to do that, to get the draft out; and

1 e-mail that to Brad and to Tom Harrington and Tom
2 Martello. Greg, do you want a copy?

3 MR. OVERTURF: No.

4 THE COURT: And also to myself, and then

5 --

6 MR. LUCK: Do you want us to work on it
7 first before we give it to you?

8 MR. MURPHY: We're going to work on it
9 first before we send it to you.

10 THE COURT: Yeah, why don't you work on
11 it first before you send it to me. That's a good
12 idea.

13 MR. MURPHY: If we run into any snags,
14 we'll send you what we got.

15 THE COURT: Okay, and then we're going
16 to have to drag up the list, so we're dealing with
17 July 1 or '87, with the possibility of a carve-out
18 period.

19 MR. LUCK: And the possibility of an
20 earlier end point.

21 THE COURT: And the possibility of an
22 earlier end point. You know, whether or not there's
23 common fund fees in this, though, I just wonder.

24 MR. LUCK: But you wouldn't routinely
25 give notice to any other -- about any other precedent

1 if -- If that statute applies, it's no more than any
2 other decision of the Supreme Court for the period
3 from the applicable date forward.

4 THE COURT: Yeah, but we know -- In this
5 case it is a little bit different than other
6 precedents because it's declared a statute
7 unconstitutional; and we can presume, I think with a
8 fair degree of certainty, that the insurers have been
9 following the statute rather than the ruling of the
10 Court, so we know that whichever claimants were out
11 there prior to the Court decision, that they weren't
12 being paid those benefits. We know that, again with
13 fair degree of certainty; and the problem I have is
14 the Supreme Court in those decisions, including
15 Murer, talks about an entitlement of the claimants to
16 get that, so there's an affirmative duty on the
17 insurers, it seems to me, to go back, find those
18 claims and pay those claims, irrespective of common
19 fund fees.

20 If that's so, I think it's probably better
21 to make sure that gets done because otherwise we're
22 going to have claims popping up here and there, and
23 we may have penalty claims and we may have even bad
24 faith claims if we don't get those people paid. If
25 we go ahead and give them notice and tell the

1 insurers in this whole process, "Yeah, maybe no
2 common fund fees, but you still have to identify
3 those people," I think we'll be doing everybody a
4 service.

5 MR. LUCK: Yeah.

6 MR. MURPHY: Yes.

7 MR. HUNT: And that's from the time of
8 the common fee statute to the decision.

9 THE COURT: Yeah, from that April. So
10 my druthers, unless somebody can convince me
11 otherwise, would be to go ahead and notify them that
12 there's this entitlement that goes prior to the
13 Supreme Court decision all the way back.

14 MR. HARRINGTON: Yes.

15 THE COURT: And then we can worry about
16 how we're going to sort that out; and if some of the
17 insurers object to that -- You know, I don't know why
18 they would object to it because they're going to have
19 to do it anyway, it seems to me, unless I'm reading
20 those cases wrong; and the State Fund has do it
21 anyway, so you can't squawk.

22 MR. LUCK: Nope.

23 THE COURT: So let's do that. Do we
24 want to do anything else, or do we want to wait and
25 get the responses in and then sit down and sort out

1 the issues? Do we want to try to identify all the
2 issues that may be raised? I suppose we could get
3 your list, Brad, at this point.

4 MR. LUCK: Yeah, and I think I guess in
5 terms of the long run, if other people are going to
6 participate, it would be nice to have them. If any
7 of the carriers are going to hire counsel and
8 participate, it would be nice to wait until then to
9 come up with the final list.

10 THE COURT: Oh, yeah.

11 MR. LUCK: But I'll just tell you the
12 list I have, and I think we've covered them all. We
13 thought it was overly broad because Reesor is just a
14 PPD case; not retroactive active; Russett precludes
15 '91 to '95; the statute precludes it after the April
16 21st, 2003 date; and then the fifth was how to
17 coordinate Satterlee with Reesor, and that kind of
18 goes in the first one.

19 THE COURT: Yeah, we sort of solved that
20 one.

21 MR. LUCK: Yeah. Do you guys have
22 anything else?

23 MR. MURPHY: Tom has the 6/30 or 7/1.

24 MR. LUCK: Yeah, but I think we just
25 took care of that, didn't we?

1 I think Stavenjord and Schmill are going to answer
2 the question. If the answer comes out the way I
3 think it will, then we're going to be -- we won't
4 need any discovery.

5 MR. OVERTURF: Maybe it does. I think
6 that's generally going to answer the question; but
7 even if it's held retroactivity, if they still left
8 the door open to Chevron, you'd potentially have a
9 different result depending on different facts with
10 the different cases.

11 THE COURT: Well, the question is going
12 to be whether or not it advances the rule. I think
13 that's the number two test, the second part of the
14 test; and my suspicion is the Supreme Court is going
15 to say it does as a matter of law because it benefits
16 the claimants and it advances the constitutional
17 principle as being applied. I think that's where
18 that's going to end up.

19 I think it's going to be a rare bird that's
20 going to be applied prospectively. In fact, the one
21 advantage of that test is it leaves it open for some
22 exceptions, whereas the Supreme Court rule doesn't
23 leave open for any exceptions; and that's always
24 bothered me because I think there ought to be at
25 least one exception to a flat rule of retroactivity,

1 MR. MURPHY: Yeah, I think we did.

2 THE COURT: Anything else? Tom?

3 MR. MARTELLO: Nothing.

4 THE COURT: Greg?

5 MR. OVERTURF: No.

6 MR. MURPHY: I don't know if we're going
7 to need the facts this time; but my sense on the
8 factual background for the Chevron Oil analysis is,
9 this time I'd like to do discovery rather than the
10 stipulation.

11 THE COURT: Oh, on the Satterlee part of
12 it?

13 MR. MURPHY: Either one, the Satterlee
14 or --

15 MR. LUCK: The retroactivity part.

16 MR. MURPHY: If they're going to raise
17 retroactivity, as you know, they're going to want to
18 present you with the record to evaluate the
19 three-part Chevron Oil test; and I'd like to
20 establish those facts through discovery rather than
21 stipulation. The stipulation was way too slow last
22 time. I think we can do it faster with discovery and
23 affidavits because this is all affidavit stuff
24 anyway.

25 THE COURT: Well, part of the problem is

1 and the one exception is where the Supreme Court
2 overrules its prior decisions. I think there's a
3 fundamental due-process question about doing that
4 because people have governed their conduct by the
5 Supreme Court decisions, where the law of the land or
6 the law of Montana you've governed your conduct by,
7 you've entered into relationships based on that, your
8 actions have been predicated on it, and to come back
9 and say, "Oh, by the way, we've decided that our
10 decision was wrong and so we're going to penalize you
11 for acting in accordance with our prior decision,"
12 seems to me to be not only an outrage, but
13 fundamentally fraud from a rule-of-law,
14 basic-due-process standpoint; and if you read the
15 Supreme Court decision and you apply a per se rule,
16 that's what you would have to do, and I think there's
17 got to be an exception there. At least what the
18 Supreme Court's done in -- What's the name of that
19 case?

20 MARTELLO: Demsey.

21 THE COURT: Demsey. In Demsey, it
22 leaves that door open for at least that. Now what
23 other kinds of cases that it might apply to, I don't
24 know.

25 MR. LUCK: I think, though, your Honor,

1 you're in exactly the same place even with Demsey
 2 when they say we need to have all three standards of
 3 the Chevron Oil test because as Tom indicated, the
 4 second standard, if you phrase the question in terms
 5 of who should get the benefit of an unconstitutional
 6 statute, an insurance company or a citizen of the
 7 state of Montana, if that's the question and that's
 8 what the second standard becomes, you're never going
 9 to answer that question in favor of the insurance
 10 company. So you've effectively got exactly what you
 11 just said. Everything is retroactive and there is
 12 never an opportunity in an unconstitutional statute
 13 to do anything but apply it retroactively. So it
 14 really is an exception.

15 THE COURT: Yeah, I suppose. I can see
 16 that argument. The difference there, though, is that
 17 it's just a matter of the Supreme Court hasn't
 18 addressed it, similar to the Supreme Court hasn't
 19 interpreted a statute.

20 MR. LUCK: Well, except when you, as
 21 part of that second statute, you consider the
 22 history; and you recall in this situation if we
 23 consider the history, the Court itself, in an
 24 unappealed ruling, had decided in Black that the
 25 statute wasn't unconstitutional.

1 THE COURT: But I also gave warning that
 2 it might be, in that case.

3 MR. MURPHY: What I think, is that your
 4 concern is more addressed by the Demsey decision when
 5 they talk about the finality of the case. Once it's
 6 been finalized, it can't be re-opened. I think that
 7 pretty much cures most of the problems that you have
 8 with non-retroactive application, or the
 9 non-retroactive exception.

10 MR. LUCK: The problem with the third
 11 case is, though, the bulk of them are never final.

12 MR. MURPHY: That's what really opens up
 13 the common fund actions in comp cases; but in most
 14 cases, and even the comp cases that aren't closed,
 15 and I guarantee you this time I'm going to make them
 16 tell us how many of these cases are closed because I
 17 think a lot of those Stavenjord cases are closed,
 18 too; but anyway, those cases that are closed, they
 19 can't be re-opened. So we're just talking about the
 20 ones that are active, open and not settled, which is
 21 far fewer than the numbers that we've been talking
 22 about, I think.

23 MR. LUCK: When they decided Demsey,
 24 they were thinking in terms of, in my mind, personal
 25 injury cases and first-party contract cases that you

1 know have a statute of limitations; and in workers'
 2 compensation, you make a claim and they're all
 3 sitting out there. So if finality was closing files,
 4 we'll go close a bunch of files, but that doesn't
 5 make any difference.

6 THE COURT: My reading of the Supreme
 7 Court case at this point, subject to revision upon
 8 argument from attorneys, is when they were talking
 9 about finality, they were talking about cases that
 10 the statute of limitations had either expired on or
 11 had gone to judgment, and the appeal period had
 12 expired or they had been affirmed on appeal, and
 13 that's all they're talking about. They were applying
 14 basically a criminal analysis, and they sort of
 15 melded together the line of criminal cases dealing
 16 with retroactivity with the civil cases, which by the
 17 way the Federal Courts don't do, and I had looked at
 18 that a long time ago and the two didn't meet because
 19 in criminal cases you have a prosecution, and the way
 20 those things get applied retroactively is there has
 21 to be the prosecution in the first place. Well, if
 22 there's a prosecution and it's gone to finality and
 23 there hasn't been an appeal and the appeal period's
 24 expired, it's a final judgment; or if it's on appeal,
 25 it's still alive. So that's what they've talked

1 about. In the retroactivity decisions in the criminal
 2 cases, they've talked about cases that are still
 3 alive in the system; but as to those other cases, I
 4 mean there's no prosecution, nothing is happening.

5 In this case, we have potential actions that
 6 can be brought by people subject to the statute of
 7 limitations, so that line of decision really doesn't
 8 have any applications in the civil arena; but they
 9 got the two and they sort of melded them together,
 10 and I think that's where that finality language came
 11 from.

12 MR. MURPHY: Yeah. Well aren't the
 13 insurers going to claim that we have finality if
 14 there's been a petition for settlement and it's gone
 15 to the Department of Labor and the ERD's approved
 16 it? Aren't they going to say that's a final
 17 decision?

18 THE COURT: Well, Murer said that
 19 anyway.

20 MR. MURPHY: I was going to actually try
 21 to attack that issue, but I didn't. I mean, I let
 22 that go.

23 MR. LUCK: But they did say, independent
 24 of Murer, I mean again in Demsey they said that
 25 settlements -- they mentioned settlements

1 specifically.

2 THE COURT: Right. Well hopefully we'll
3 see Demsey applied in some fashion in Stavenjord and
4 Schmill, and that's a problem. What do we do? If
5 Tom wants discovery, do we proceed with that until
6 and unless that comes down?

7 MR. MURPHY: I think you just allow us
8 to start, and the reason is because as Greg said, the
9 State Fund's going to want to have you look at the
10 Chevron Oil factors with this case and with
11 Satterlee, also, so we might as well have the facts
12 set up for you.

13 MR. LUCK: I thought you enjoyed that
14 process of getting the stipulation.

15 MR. MURPHY: No, I did not. I didn't.
16 You guys just tell me what you're going to say and
17 tell me the, you know. We could have gotten the same
18 thing in discovery. It would have been quicker,
19 believe me.

20 MR. MARTELLO: We enjoyed listening to
21 the explanations, though, Tom.

22 MR. MURPHY: I'm certain. Well, I know
23 something now.

24 THE COURT: Well, why don't you
25 coordinate and talk about what you need and see if

1 you can't get it, and maybe you can talk about, Brad,
2 maybe you can identify where you're coming from as
3 far as what you're going to want to put in on the
4 three factors, and he can tell you what he wants.

5 MR. LUCK: I think actually the process
6 ought to be we should do some internal study, come up
7 with some points that we want to make that we have
8 been talking about in terms of a stipulation, if
9 we're going to do it that way, and then design our
10 discovery around it.

11 MR. MURPHY: I think that if you want to
12 set forth facts, you should do so by affidavit; and
13 that would give me the opportunity to close any of
14 those clients that I don't agree with. That's the
15 way I think it comes down.

16 MR. LUCK: That would be all of them,
17 then.

18 MR. MURPHY: No, no, it isn't. You
19 don't get to speak for me. You've got to break
20 yourself of that habit right now.

21 MR. HARRINGTON: We started the
22 Stavenjord stipulation in affidavit form; and at your
23 request, we moved it into the stipulated facts and
24 then we started working through it.

25 MR. MURPHY: No, at first we talked

1 about, in Stavenjord, we talked about whether we
2 should do it by discovery or stipulation. I pushed
3 for stipulation because I thought that would be a lot
4 faster, but it turned out to take a year and it
5 wasn't faster and there was no cross-examination to
6 check on stuff. So there was no people that I could
7 speak to. I only spoke to attorneys, which sometimes
8 gets you down if you're me. So this time I'm going
9 to talk to real people.

10 MR. LUCK: You got down a lot. We
11 noticed that.

12 MR. MURPHY: Come on now, Brad. I
13 wasn't that bad. So this time, I think I will take
14 them up on the idea that we do it by discovery; and
15 if they want to put Chevron Oil factors in front of
16 you, facts, they can do that by affidavit. It's all
17 their people, anyway.

18 THE COURT: That sounds like a good
19 idea. The State Fund can come up with whatever facts
20 that they they think that they need and give them to
21 Tom, and ultimately if you want to do that by
22 affidavit, that's fine, and then he can tell you what
23 he wants to do discovery-wise.

24 MR. LUCK: Okay.

25 THE COURT: Do we want to put any

1 deadlines on that at this point?

2 MR. MURPHY: I think they could be
3 fairly liberal, to be frank and to be fair to them,
4 but I think you could set them. I think three months
5 is enough time. They've been through this now
6 several times and they know what kind of facts they
7 want to talk about in a Chevron Oil analysis; and
8 then three months and then we decide whether we need
9 any discovery to check on any of those things.

10 MR. LUCK: Well now you've changed
11 courses, though. You want them to be accurate.

12 MR. HUNT: That's not necessarily true,
13 as long as they're beneficial to us.

14 MR. MURPHY: I don't agree with that. I
15 want them to be accurate. Yeah, I think that you
16 could set some of those things.

17 THE COURT: Three months? Okay, so
18 three months. Three months is May 3rd, so let's say
19 May 3rd. Is that a regular week day?

20 MS. KESSNER: If it's not --

21 THE COURT: We can adjust it. Then,
22 Tom, shall we require that you specify whether or not
23 you want discovery? I mean, maybe you'll just be
24 peachy-keen with whatever they give you.

25 MR. MURPHY: That is possible; and what

1 I would envision is, then I could have a little bit
2 of time to review those and I could alert the Court
3 as to which facts we want to do discovery on, and we
4 could probably clean it up really quick.

5 THE COURT: One month to review and then
6 another two months to do discovery?

7 MR. MURPHY: Yes.

8 THE COURT: Okay, we'll fill in the
9 dates.

10 MR. HUNT: Is it worthwhile combining
11 Satterlee with that because we're going to be looking
12 for the same things?

13 MR. OVERTURF: Not really.

14 MR. MARTELLO: I don't think you're
15 looking at the same things.

16 MR. OVERTURF: We're looking at two
17 different groups of claimants.

18 THE COURT: But what about the Chevron
19 factors, though? Are we looking at the same thing
20 with Chevron factors, or are they different, too?

21 MR. MARTELLO: I think they're
22 different, also.

23 MR. HUNT: How are they different?

24 MR. MARTELLO: I think the, yeah, impact
25 is dramatically different.

1 MR. OVERTURF: Impact, dollars,
2 certainly.

3 THE COURT: Yeah, because you're talking
4 lifetime benefits.

5 MR. LUCK: And until it's necessary,
6 we've got so many different remediation kind of
7 efforts going on at the State Fund and different
8 teams trying to do different things, until it's clear
9 that the right is there, I'd like to avoid the
10 manpower and cost problems of trying to figure them
11 out before the fact.

12 THE COURT: Okay.

13 MR. HUNT: That's fine.

14 THE COURT: You'll be kept in the loop,
15 and maybe it might be something to revisit. If
16 there's stuff that seems germane to both of them,
17 maybe you could sit down and combine them up. Just
18 play it by ear, would be my suggestion.

19 Let me ask another question. Tom, you
20 mentioned settling. Can a case like this even be
21 settled at this point? Once we've got a Supreme
22 Court decision and we've got entitlement to all these
23 claimants, can we settle them out without giving them
24 notice and doing sort of a class-action type of
25 settlement?

1 MR. MURPHY: What I've proposed to the
2 State Fund on a number of occasions, and would do so
3 in each of the common fund cases that I'm involved
4 in, would be your settlement is that you identify and
5 notify every claimant.

6 THE COURT: Okay, well we have to do
7 that anyway.

8 MR. MURPHY: Right, they have to do it
9 anyway. The settlement is that they'd notify these
10 claimants of their potential right under this claim.
11 Claimants can either hire the attorney that
12 represented them or hire me or somebody like me and
13 pursue their rights. I think that's the settlement,
14 and you can work up the paperwork just like that.

15 THE COURT: But that may be where we end
16 up anyway.

17 MR. LUCK: Yeah, that doesn't sound like
18 a settlement. That sounds like what you want to have
19 happen as you work through the process. A settlement
20 would take into account some sort of compromise.

21 MR. MURPHY: The compromises are that we
22 don't go after people that are settled. We don't go
23 after people that -- Your terms would be, we don't go
24 after people that are dead. Me, I would take the
25 position that they have accrued benefits and they may

1 be entitled to them; but anyway, we would have some
2 negotiation. The notice would say whether it was
3 retroactive or not. If it was retroactive, we might
4 have consideration for their argument on Henry, and
5 so forth.

6 THE COURT: All right, but I think what
7 you can -- I don't know as I would call that fully a
8 settlement. We've sort of gone through that process
9 in a sense in these other cases, but it's more in
10 terms of issues being conceded, like the
11 retroactivity. Like in Rausch, the State Fund went
12 ahead and decided to go ahead and pay that, so the
13 retroactivity issue was basically conceded.

14 Then there was agreement on certain classes
15 that were not in, that were out, for example the
16 settled cases. Well, actually the settled cases
17 weren't agreed. I ruled on that. But in Broker and
18 in Rausch there was agreement as to who was included
19 and who wasn't included, but that had to come -- I
20 mean, the parties agreed with that, but I had to put
21 my imprimatur on that. I had to say, "Yeah, I agree
22 with you and so I approve that part of it."

23 So I think what you're talking about is
24 something that can be talked about as we go along in
25 these proceedings; and if there is agreement between

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1 the parties on those issues, we can basically, and I
2 agree with you that that's appropriate, then that
3 would resolve those issues as we go along. We'd just
4 be resolving those issues as we go along, and we can
5 do that.

6 MR. MURPHY: I'd be happy to do that not
7 only in this case, but in Stavenjard. I thought
8 their versatility in Stavenjard is much greater
9 before the Supreme Court makes its next ruling. I've
10 tried to tell the State Fund that in several
11 different ways. I said, "You have the ability to
12 negotiate claims prior to this next ruling that you
13 will not have after the Supreme Court rules again."
14 In other words, what is the value of the claims
15 before the Henry decision? Right now very little,
16 under your ruling; but maybe if there's consideration
17 given, there would be justification for settlement.
18 But when the Supreme Court rules, no offense, your
19 Honor, I think they're going to say it's fully
20 retroactive.

21 THE COURT: Yeah, I know, but that's a
22 tough one, though, because I think if we were to give
23 notice, for example if you reached a compromise and
24 said we're going to pay 50 cents on the dollar for
25 pre-Henry claims, based on my rule and the risk that

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1 the Supreme Court might overturn that, if we were to
2 do that, I think we would have to give notice to all
3 of the claimants, and any claimant could come in and
4 contest that and it's in the Supreme Court, anyway.

5 MR. MURPHY: And that's --

6 MR. LUCK: And the other side of the
7 story is the reason that we didn't feel like we could
8 settle it, even though we've tried at different
9 junctures, was exactly those kinds of concerns about
10 the ability to bind people and to get it properly
11 approved, and we analyzed them from many different
12 angles and we've had different sessions of trying to
13 do that.

14 MR. MURPHY: My comeback to that is that
15 it's pitched as a preliminary settlement agreement
16 whereby if you have so many people that opt out, the
17 insurer has the final say as to whether it wants to
18 go forward with it. So after notice, you have the
19 right, claimants have the right to step forward and
20 say we agree or we disagree. If too many disagree,
21 if the number reaches a certain number set forth in
22 the preliminary settlement agreement, then the
23 insurer says we're not proceeding, then.

24 THE COURT: Right; but the problem is,
25 what do we do with these people that opt out? If

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1 they opt out, then they could pursue it anyway. I
2 suppose you could bind the people that decide to opt
3 in, sort of like a class action.

4 MR. MURPHY: Everybody that doesn't opt
5 out is opted in.

6 THE COURT: Well, the question would
7 be -- Well, that's the other thing. We don't have
8 any rules. In class actions you have rules like
9 that. In common funds, we don't have any rules.
10 We're making them up as we go.

11 MR. MURPHY: I think that there's
12 justification to say, okay, let's say a hundred opted
13 out. We get 3,000 or a thousand of them resolved,
14 we've accomplished a lot.

15 MR. LUCK: Was that Paul Newman that
16 said, "If there aren't any rules..." Old movie.

17 THE COURT: What did he say? Oh, we
18 don't want to quote that on the record?

19 MR. LUCK: Yeah, I don't think so.

20 MR. MURPHY: Paul Newman was involved in
21 a movie where they said, "What we have here is a
22 failure to communicate." That was "Cool Hand Luke."
23 I'll just put that quote in to kind of cover up that
24 hole you left in the record there.

25 MR. LUCK: I think it was the same movie

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1 where...

2 THE COURT: Okay, some law clerk in the
3 Supreme Court is going to be looking up all the
4 movies to -- I'm just kidding.

5 MR. MURPHY: So that's a great start, I
6 think.

7 THE COURT: Okay.

8 MR. MURPHY: And then the summons will
9 be served by the Court, then?

10 THE COURT: Yeah, we'll have to get a
11 list. We'll just basically have to go back and serve
12 every insurer that's done business in the state since
13 July 1 of 1987. Am I right?

14 MR. MURPHY: And we have that list from
15 the FFR case, correct?

16 THE COURT: I think we have that from
17 '91, but I'll get it from '87. There might be a few
18 insurers.

19 MR. LUCK: One thing I wanted to ask
20 about is where does this leave, in the short run,
21 Satterlee and Zolick (phonetic)? Are you still going
22 to file your brief tomorrow?

23 MR. HUNT: I intended to. It's ready to
24 go.

25 MR. LUCK: Can we wait to see who, if

1 anybody, is going to appear additionally before we
2 file our reply brief?

3 THE COURT: Well, we could do that or
4 have you file your reply brief and then give them an
5 opportunity to read both sides of briefs and decide
6 whether or not they want to pile on or to raise
7 additional issues or whatever.

8 MR. LUCK: It's such a significant
9 issue, I guess just as an idea, our preference I
10 think would be to be able to confer with the other
11 carriers that are interested in participating and
12 then file a brief.

13 THE COURT: I sort of figured
14 Harrington's already written it.

15 MR. MURPHY: Yeah, he's got it written.
16 I think you get it filed. I think they make their
17 reply --

18 MR. LUCK: Well, you're not even
19 involved in that case.

20 MR. MURPHY: Well, it's just a matter of
21 time.

22 THE COURT: Jim, what do you think? The
23 problem is, I'm not going to be ruling on it until we
24 give that opportunity to do it anyway. Really, it's
25 immaterial to me.

1 supplement, and you may want to supplement your
2 reply. So it makes more sense, probably, to just hold
3 off.

4 MR. HUNT: Okay, now I'm confused.

5 MR. LUCK: I understood it. That's
6 okay. I usually don't understand you, but that made
7 perfectly good sense.

8 MR. MURPHY: So the Satterlee brief is
9 due when?

10 THE COURT: Okay, Jim, and if you want,
11 we could give you some additional time. It's just a
12 question of whether you want it or whether you just
13 want to get it out of your --

14 MR. HUNT: Yeah, I'll take some
15 additional time.

16 THE COURT: Okay.

17 MR. MURPHY: Probably after the summons,
18 30 days after the summons, after they've been served.

19 THE COURT: Do you want to file it
20 before we get the responses in from them, or do you
21 want to wait until we get the responses in?

22 MR. HUNT: I suppose what we could do
23 is, I could file it when we send out the summons.

24 THE COURT: Which would be a couple
25 weeks from now?

1 MR. HUNT: Well, if you're going to
2 wait, then how long are we going to give other
3 insurers to --

4 THE COURT: Well, we'll give them 30
5 days from the time that we mail them the summons to
6 reply; but my guess is the earliest we could get them
7 out is two weeks, so we're probably 45 days down the
8 road before they come in. I suppose at that point,
9 if some of them reply that they want to be in and
10 they want to participate, then I could issue an order
11 requiring them to brief -- to identify their issues
12 and respond to your brief within a certain period of
13 time.

14 MR. LUCK: But if we're not going to get
15 a ruling until you give everybody that opportunity,
16 it doesn't seem like it makes any difference.

17 MR. MURPHY: It gets the briefing
18 schedule done.

19 THE COURT: Well, it doesn't because
20 then we're going to have to let them come in and
21 brief. So we're going to get another set of briefs,
22 and it may raise additional stuff for both sides to
23 address because if he does your brief, then your
24 reply brief is going to do and then we're going to
25 get these other briefs and then they may want to

1 MR. HUNT: Yeah.

2 THE COURT: And then send them a copy of
3 the -- Well --

4 MR. MURPHY: That's an interesting
5 idea.

6 MR. HARRINGTON: You could reference the
7 web site.

8 THE COURT: We could reference the web
9 site and put the brief up on the web site. That's
10 pretty much universal notice these days, isn't it?

11 MR. HUNT: Yeah. Fine with me.

12 THE COURT: Okay, so whenever we fix the
13 date to get that summons out, you'll have it in by
14 then. Let's shoot for a couple weeks to do that.

15 MR. LUCK: And then when will our reply
16 be due, then? Wait until after we get the notice --

17 THE COURT: Until after and see what
18 kinds of issues they're going to raise, see what kind
19 of contingents they're going to be raising; and then
20 I'll set probably a couple weeks after the deadline
21 to reply to his brief and raise whatever new issues,
22 and then we'll have to give you an opportunity to
23 digest whatever they come back with. So that means
24 you're going to want more than 10 days, and we can
25 talk about that and decide on what kind of schedule

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1 we want at that point.
 2 MR. HUNT: Well, and maybe I'm being
 3 simplistic, but I don't view it as a real complicated
 4 issue. I'm going to rely on Reesor.
 5 THE COURT: Yeah, I know; but you're
 6 going to have to reply to all these other issues that
 7 they raise.
 8 MR. MURPHY: Sounds good.
 9 MR. HUNT: Okay.
 10 THE COURT: If things really worked well
 11 with cases like this, we could just bypass me and go
 12 directly to the Supreme Court and get the answer.
 13 MR. MURPHY: I don't think they want to
 14 do that. Does the Court have a summons that it would
 15 like us to start with as a template, like the FFR
 16 summons?
 17 THE COURT: Well, you could take a look
 18 at the FFR summons and maybe spring off of that. You
 19 don't want to ask them those questions, but you
 20 probably want to put in there that, you know in
 21 Satterlee, that the challenge is being made, an
 22 additional challenge is being made to 710 and
 23 characterize what that challenge is. Let them know
 24 that they can participate in the proceedings with
 25 respect to that challenge. Let them know that

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1 there's also a claim of common fund, so that if that
 2 is decided in favor of the petitioners, they may be
 3 made parties in any event to proceedings to enforce
 4 the decision of the Court.
 5 MR. LUCK: And there may be other
 6 issues. I mean, they have the right, if they appear
 7 now, to raise other issues.
 8 MR. MURPHY: That's the only summons
 9 that we've got to work off of, though?
 10 THE COURT: Yeah, other than just a
 11 regular, ordinary summons.
 12 MR. LUCK: We're working on one in
 13 Hiatt, and I have a question about that because we're
 14 circulating a draft. Wouldn't you rather have there
 15 be some explanation at least generally of the issues,
 16 as opposed to just saying we've got this action going
 17 on and you can come in or not?
 18 THE COURT: Yeah, if you can agree on
 19 it; or if you can't, make it --
 20 MR. LUCK: Well, we're having a little
 21 trouble agreeing on it. We've suggested some and
 22 they've all got lined out, and I'm wondering just the
 23 concept that something be there as opposed to nothing
 24 be there; and if that's what you'd rather, we can go
 25 back to Sid and say, "Well, the Court would like us

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1 to work on some discussion of the issues."
 2 THE COURT: Let's set up a conference
 3 call and let's talk about it. I think that's the
 4 best thing to do.
 5 MR. LUCK: Okay.
 6 MR. MURPHY: Can you fax me your Hiatt
 7 example?
 8 MR. LUCK: I'll fax you the one that we
 9 proposed. We've got it lined through pretty well,
 10 but we'll give you what we proposed.
 11 MR. MURPHY: I'll start with that, look
 12 at the FFR summons and I'll get something back to
 13 you.
 14 MR. LUCK: Okay.
 15 THE COURT: Okay.
 16 (The status conference ended at
 17 4:10 p.m.)
 18 * * * * *

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1 CERTIFICATE
 2
 3 STATE OF MONTANA)
 4
 5 COUNTY OF LEWIS AND CLARK)
 6
 7 I, CAROL J. HENDRICKSON WRIGHT, Court Reporter,
 8 Notary Public in and for the County of Lewis and
 9 Clark, State of Montana, do hereby certify:
 10
 11 That a status conference in the foregoing matter
 12 was held; that the conference was then taken before
 13 me at the time and place herein named; that the
 14 conference was reported and transcribed by me with a
 15 computer-aided transcription system, and that the
 16 foregoing - 57 - pages contain a true record of the
 17 proceedings to the best of my ability.
 18
 19 IN WITNESS WHEREOF, I have hereunto set my hand
 20 and affixed my notarial seal this ____ day of
 21 _____, 2005.
 22
 23 CAROL J. HENDRICKSON WRIGHT
 24 Court Reporter-Notary Public
 25 My Commission Expires 2/9/06

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