

1           IN THE WORKERS' COMPENSATION COURT  
2                   OF THE STATE OF MONTANA  
3

4   DEBRA STAVENJORD,                    )

5           Petitioner,                    )

6        -vs-                                )

WCC No. 2000-0207

7   MONTANA STATE FUND,                    )

8           Respondent/Insurer for        )

9   PRAIRIE NEST RANCH,                    )

10          Employer.                     )

11  
12                   TRANSCRIPT OF PROCEEDINGS  
13

14               On the 6th day of June, 2003, beginning at  
15   10:08 a.m., a status conference was heard at the  
16   Office of the Workers' Compensation Court, 1724 11th  
17   Avenue, Helena, Montana, pursuant to the Rules of  
18   the Workers' Compensation Court, before Lisa R.  
19   Lesofski, Registered Professional Reporter, Notary  
20   Public.  
21  
22  
23  
24  
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1 The following proceedings were had:

2 \* \* \* \* \*

3  
4 JUDGE MCCARTER: For the record, this is a  
5 continuation of the matter of Stavenjard versus  
6 the State Compensation Insurance Fund. This is  
7 on remand from the Supreme Court after it  
8 affirmed my decision holding it  
9 unconstitutional to deny claimants with  
10 occupational disease funds -- or with  
11 occupational diseases, denying them permanent  
12 partial disability benefits at least where the  
13 benefits are more generous under the Workers'  
14 Compensation Act. So we've basically got a  
15 common fee fund case going at this time, and  
16 since we have both attorneys representing the  
17 two parties in this case, Tom Murphy  
18 representing Miss Stavenjard and the State Fund  
19 being represented by multitudes and we've got a  
20 couple of onlookers, interested attorneys. I  
21 think what I'll do is I'll just let everybody  
22 introduce themselves and state who they're  
23 representing so that we have a record of that.  
24 I'll let you start, Tom, even though I've  
25 identified you.

1 representing the State Fund.

2 MR. HAWKINS: David A. Hawkins, member of  
3 the State Fund horde.

4 MR. MARTELLO: I'm Tom Martello, State  
5 Fund.

6 MR. JONES: Larry Jones, Liberty  
7 Northwest.

8 JUDGE MCCARTER: Just Liberty Northwest or  
9 Liberty Mutual too?

10 MR. JONES: Northwest only.

11 JUDGE MCCARTER: Okay. It doesn't really  
12 matter, I just thought I'd ask.

13 MR. GOE: I'm Oliver Goe here on behalf of  
14 the MMIA and MHA work comp trust.

15 JUDGE MCCARTER: The purpose of this  
16 conference is to figure out where we're at at  
17 this procedure, what issues are sitting out  
18 there, what potential issues are sitting out  
19 there and then figuring out some sort of plan  
20 of action on how we're going to attack those  
21 issues and how we're going to proceed in this  
22 case.

23 We do have other cases that are going that  
24 have presented some issues that may arise in  
25 this case. Tom Murphy mentioned one of them

1 MR. MURPHY: Okay. Thank you, Judge.  
2 This is Tom Murphy, I'm representing Deborah  
3 Stavenjard and the class of OD claimants that  
4 have potential PPD benefits coming as a result  
5 of the Stavenjard decision. We're at the  
6 current time still maintaining that that  
7 includes Plan 1, 2 and 3 claimants, although we  
8 are aware of the Court's decision in Ruhd,  
9 Rude, R-u-h-d.

10 MR. CADWALLADER: Mark Cadwallader for the  
11 Department of Labor and Industry, not a party  
12 but here at the request of the Court on behalf  
13 of the regulatory authority.

14 JUDGE MCCARTER: And the reason for the  
15 request from the Court is because of the  
16 potential of their involvement in identifying  
17 claimants of other insurers and self-insureds  
18 who may be entitled to what we would call at  
19 this point, I guess, Stavenjard benefits.

20 MR. OVERTURF: I'm Greg Overturf, I  
21 represent the State Fund.

22 MR. LUCK: Brad Luck representing the  
23 State Fund and those class of individuals  
24 looking for justice and enlightenment.

25 MR. HARRINGTON: Tom Harrington

1 when he was identifying himself, and that is  
2 whether or not a common fee lien extends to  
3 nonparty insurers, or rather claimants of  
4 nonparty insurers and whether we get them  
5 involved, and as everybody is aware I'm sure at  
6 this point, I've issued a decision in a case  
7 called Ruhd or Rude -- and I'm not sure either  
8 how it's pronounced, it is R-u-h-d -- in which  
9 I've said that the common fund doctrine extends  
10 only to claimants of the particular insurer in  
11 the case. So in this case that would be  
12 basically claimants of the State Fund and  
13 limited to that.

14 Because I recognize that it's an issue  
15 that needs to be decided by the Supreme Court,  
16 in fact, it's my desire that they reach that  
17 issue and give us some guidance given the  
18 breadth of the claim and the potential for  
19 basically oversight of the entire insurance  
20 industry in payment of what we call Stavenjard  
21 benefits and in these other cases different  
22 kinds of benefits but benefits that basically  
23 the Supreme Court has found to be due  
24 claimants.

25 I really am seeking some guidance as to

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1 whether or not the Common Fund Doctrine is  
2 going to extend that far and I think that's  
3 really a decision that the Supreme Court has to  
4 make and it's not a decision as I see it in  
5 reading their decisions that have been made.  
6 So I did issue the Ruhd decision and it's the  
7 precedent at the moment. I suppose in these  
8 other proceedings I can entertain arguments  
9 that I was wrong in that, but I guess I would  
10 point out that I've thought about it pretty  
11 carefully and probably will adhere to that  
12 decision.

13 In any event, I think that's going to go  
14 up to the Supreme Court whichever way I decide  
15 it in any event. It's probably more likely to  
16 go up the way I decided it because the  
17 attorneys in these cases have a pretty big  
18 stake in the matter, they probably have the  
19 most direct interest in it. That's not the  
20 reason I decided it that way, I decided it that  
21 way because basically it's an extension of  
22 precedent and when I read the decisions I  
23 didn't think the precedent could be extended  
24 that far. Although, to be honest with all of  
25 you, I'm not absolutely convinced that the

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1 reconsider that decision or, you know, I can  
2 enter a similar order in this case, it could be  
3 reargued or I could enter a similar order and  
4 that could be the basis of an appeal.

5 MR. MURPHY: I want to make sure I keep  
6 the issue alive, of course, and, yeah.

7 JUDGE MCCARTER: Do you want me to do the  
8 same thing I did in Ruhd and basically issue an  
9 order following Ruhd and bifurcate that issue  
10 and certify it, or we can just leave it  
11 uncertified and just lurking out there until  
12 they get up in the Ruhd case? Maybe you want  
13 to think about that.

14 MR. MURPHY: If Ruhd does not get appealed  
15 we wouldn't mind it being certified but we  
16 could ride that for a little bit. I think that  
17 would be fair, a fair way to say it.

18 JUDGE MCCARTER: Okay. Then I don't know  
19 what other issues are going to arise in this  
20 case.

21 Here's Nancy. Hi, Nancy.

22 MS. BUTLER: Hi.

23 JUDGE MCCARTER: Just for the record, we  
24 now have Nancy Butler from the State Fund.

25 So I think at this point I'm just going to

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1 Supreme Court will not extend it that far, but  
2 I think that's not their job and not my job to  
3 do that. So, in that sense, it narrows things.  
4 On the other hand, I think it affects all of  
5 these proceedings in the sense that we're not  
6 going to know until the Supreme Court decides  
7 it, so these cases will all hang as to that  
8 issue for quite some time, probably another  
9 year before the Supreme Court gets it. So we  
10 may be back here -- if they reserve that  
11 decision, we may be back here doing what has  
12 been requested in this Fisch, Frost and Rausch  
13 case, which is the identification of all of  
14 these claimants of other insurers, which in  
15 effect would put me in the position of at least  
16 issuing subpoenas and I suspect it would put me  
17 into a greater role because you have to enforce  
18 the subpoenas and then questions may arise as  
19 to whether or not they've adequately identified  
20 the claimants and what the procedures were that  
21 they used and things like that.

22 So, in any event, that will probably --  
23 that will be deferred and I guess I'm going to,  
24 Tom, you'll have to figure out whether or not  
25 you want me, you want to ask me to basically

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1 throw it back to you and tell me -- you know, I  
2 don't know whether there have been any  
3 discussions about this. I don't know what  
4 issues counsel intent to raise but let's talk  
5 about that a little bit and see where we are  
6 and maybe -- I know what you want, Tom, so  
7 maybe the thing to do, do you want to talk  
8 first?

9 MR. MURPHY: Could I follow up on one  
10 thing?

11 JUDGE MCCARTER: Sure.

12 MR. MURPHY: You know, it seems to me that  
13 maybe you want to do as you did in Ruhd to  
14 allow the other insurers to intervene. They're  
15 here and maybe if those other nonparty insurers  
16 want to intervene or interplead here so that  
17 they can move for that kind of thing and then  
18 you could rule on it, maybe that might be  
19 something we could entertain. Do you  
20 understand what I'm saying?

21 JUDGE MCCARTER: As far as the issue on --

22 MR. MURPHY: Whether they're going to be  
23 affected by it.

24 JUDGE MCCARTER: I suppose that would be  
25 an option for the other insurers. Do you have



1 any feeling about that Larry or Ollie?  
 2 MR. GOE: I'm just an observer.  
 3 MR. JONES: I would like to know what the  
 4 State Fund's position would be on Liberty  
 5 intervening.  
 6 MR. OVERTURF: In this proceeding?  
 7 JUDGE MCCARTER: For that purpose.  
 8 MR. OVERTURF: I guess I was thinking of  
 9 this more since Ruhd has been decided and  
 10 that's probably going to be the vehicle that's  
 11 going to decide the issue of whether you apply  
 12 it to all of the insurers, and I was thinking  
 13 does it make more sense for other people to  
 14 brief that than intervene in that proceeding.  
 15 JUDGE MCCARTER: In the Supreme Court?  
 16 MR. OVERTURF: In the Supreme Court.  
 17 MR. LUCK: And I guess our feeling was  
 18 with Liberty's request in terms of  
 19 consolidating and having everything being in  
 20 one pot, there seemed to be some universal  
 21 acknowledgment with everybody besides Liberty  
 22 that that wasn't a good idea. On first blush,  
 23 since you've decided Ruhd, I think our position  
 24 would go we'd like to move forward and get the  
 25 resolution of the action as between State

1 there, I thought there were seven and there are  
 2 actually nine in which there was common fund  
 3 fees other than Murer and Broeker, which are  
 4 essentially over or almost over, winding down.  
 5 There are actually nine of them sitting here  
 6 and some of them have common issues, and I was  
 7 thinking this morning that maybe we should have  
 8 had Schmill here too and talked about Schmill  
 9 at the time we talk about Stavenjord, even  
 10 though they're different types of benefits,  
 11 they both involve the State Fund and they  
 12 probably are going to have similar issues in  
 13 here and I apologize, I probably should have  
 14 put together a little bit broader conference on  
 15 that. But I think we do need to proceed at  
 16 least as far as the State Fund issues and we  
 17 can do that.  
 18 MR. LUCK: One of the things I think is  
 19 important too, Your Honor, is to remember that  
 20 these aren't just common fund issues. The very  
 21 difficult part of these cases is understanding  
 22 the scope and considering the implementation  
 23 not only legally but practically and the common  
 24 fund payments, to whatever extent they're  
 25 required, are going to follow along based upon

1 Fund --  
 2 MR. MURPHY: That makes sense also.  
 3 MR. LUCK: -- and Miss Stavenjord and see  
 4 where it goes from there because it's going to  
 5 be affected, I think, by other things that are  
 6 going on, including that order in Ruhd. But  
 7 the other preference I think would be that we'd  
 8 like to finalize the litigation and the process  
 9 and the resolution of the issues that we want  
 10 to raise, as it involves the claimant in this  
 11 case.  
 12 JUDGE MCCARTER: I think that makes sense.  
 13 MR. MURPHY: It does.  
 14 JUDGE MCCARTER: We can move forward on  
 15 all of the issues other than that Ruhd issue  
 16 bringing in everybody else. I think if -- I  
 17 mean, if Ruhd holds that the common fund  
 18 extends to all claims and all insurers, then I  
 19 probably will reconsider consolidating -- well,  
 20 I think probably at that point I'm going to  
 21 have everybody in or some mechanism to police  
 22 it but we can walk over that bridge.  
 23 The thing that I did when I rejected  
 24 consolidation was because they've got some  
 25 different kinds of cases that are sitting out

1 these other implementation decisions. So those  
 2 are the more difficult practical and legal  
 3 questions also, I think.  
 4 JUDGE MCCARTER: Yes, I know all of the  
 5 difficulties in these cases already, and I also  
 6 know that they can be worked through and they  
 7 can be worked through cooperatively and that's  
 8 the basis that I've done it on. What sort of  
 9 legal issues are going to arise in Stavenjord?  
 10 MR. LUCK: Well, I think -- Do you want me  
 11 to talk or Tom, are you okay with that?  
 12 MR. MURPHY: Have at it.  
 13 MR. LUCK: I think that's a good entry  
 14 into maybe just talking about several things.  
 15 In terms of an answer to your question, the  
 16 legal issues will relate to retroactivity and  
 17 the application of the common fund and the  
 18 issues that are inherent in both of those  
 19 larger issues. Starting from the beginning,  
 20 just so you get a sense of the concerns that we  
 21 have, Stavenjord may be unique in relation to  
 22 the scope and difficulty of implementation  
 23 because what Stavenjord requires is a  
 24 consideration in terms of retroactivity of  
 25 going back in cases where permanent partial

1 disability entitlement was not considered  
2 previously; therefore, the claim files don't  
3 particularly have the information and data that  
4 you need for permanent partial disability  
5 considerations. If this case is applied  
6 retroactively it requires first that we go  
7 through the administrative difficulties of  
8 identifying the claim files, then locating the  
9 claim files, but then the difficulty really  
10 begins at that point, because since the  
11 information is not in the claim files upon  
12 which some calculation can be made of  
13 entitlement, we need to sit down and consider  
14 from an impartial disability entitlement. Then  
15 we need to appreciate the fact that between '87  
16 and '91 and '91 and after we had different  
17 permanent partial disability entitlement  
18 statutes and during a period of that we had the  
19 rehabilitation panel.

20 So what we do is after the administrative  
21 problem of identifying all of these cases that  
22 this might apply to if it's retroactive, we  
23 then have to get the files and get into each  
24 file and determine what information is there  
25 that might bear on the issue of permanent

1 partial disability, remembering that we would  
2 have to go in and make a determination whether  
3 someone is entitled to more benefits under  
4 Section 405 of the Occupational Disease Act as  
5 opposed to Section 703 of the Workers'  
6 Compensation Act.

7 So the rehab won't be there, the  
8 impairment ratings won't be there, the workup  
9 in terms of wage loss won't be there. So, in  
10 effect, every single case needs to be worked  
11 up. Now that's important for two separate  
12 reasons. One, it's important because it bears  
13 on this whole question of is Stavenjord  
14 retroactive, but it also bears on the whole  
15 idea of is this an appropriate case not just  
16 for retroactivity but for the common fund,  
17 independent of the fact that it wasn't, we  
18 don't believe, properly pled in the first  
19 place.

20 JUDGE MCCARTER: In other words, is a  
21 common fund created by this decision?

22 MR. LUCK: Yes, and some practical  
23 considerations in deciding whether the Court  
24 decides to have a common fund outside of the  
25 procedural part is because every single one of

1 these cases is going to be different. Most of  
2 these claimants are represented by counsel  
3 already. There is going to be a lot of workup,  
4 determination, discussions, you know,  
5 everywhere where you get an impairment rating  
6 or a vocational workup there might be an IME,  
7 there might be treating physicians, there is  
8 going to be some give and take.

9 I don't know what the numbers of cases are  
10 and I can't recall, I think we've done some  
11 work on that, but there is thousands of cases,  
12 if we're going back several hundred OD cases if  
13 we're going back to 1987, and in virtually each  
14 one we have to have a full workup that's not  
15 there, that will also be adversarial, which  
16 puts Mr. Murphy as counsel for the common fund  
17 folks in a position of possibly being adverse  
18 or interrelating with personal counsel, not to  
19 mention the difficulties in workup and the cost  
20 and expenses that are associated with that.

21 JUDGE MCCARTER: Okay. There is a couple  
22 of things that have occurred to me and I  
23 appreciate the problem, I've already thought of  
24 it. The first thing that occurs to me is the  
25 language in I think it's Fisch, Frost and

1 Rausch about the duty that arises as a result  
2 of the precedent, it sounds like it's an  
3 affirmative duty to go out there and identify  
4 these claimants in any event. That language is  
5 pretty strong language, I think, so it seems  
6 like there is a duty to try and go out and  
7 identify those people, and we can brief that,  
8 that can be something that can be briefed as  
9 far as that duty. But that sort of affects --  
10 it seems to me that that may interplay with the  
11 Common Fund Doctrine.

12 The second thing is it occurs to me  
13 that some of the benefits may be readily  
14 ascertainable almost along the line of Murer  
15 and Broeker. If you've got impairment awards,  
16 I mean, most of the time the impairment awards  
17 aren't contested, every once in a while they  
18 do. And I think it's fairly rare when you get  
19 an impairment award where the argument is at  
20 zero, that arises but I'm not sure it occurs in  
21 all that many cases, and once you've got an  
22 impairment award and you tie into some of the  
23 other things like the loss of labor and  
24 capacity and your education level, some of  
25 those things are going to be fairly readily

1 calculable, whereas, wage loss is going to be  
2 the big problem, I think.

3 MR. LUCK: Without interrupting, could I  
4 speak to the impairment award issue?

5 JUDGE MCCARTER: Yes.

6 MR. LUCK: If you'll recall too, Your  
7 Honor, in the normal course of claims handling  
8 from '87 forward there wouldn't be typically an  
9 impairment -- or you wouldn't be interested in  
10 it. It may be there but it wouldn't have been  
11 something that would be sought, so it's not  
12 necessarily true. And that's complicated also  
13 by the fact that in these OD cases where you  
14 wouldn't normally have an OD or have an  
15 impairment rating because an impairment award  
16 wasn't available, if we now go back  
17 retroactively to try to determine an  
18 impairment, on what basis is it calculated, at  
19 what point in time is it calculated, were there  
20 intervening events, were there intervening  
21 injuries, claims?

22 JUDGE MCCARTER: But I know, I know all of  
23 those things can arise but, on the other hand,  
24 impairment is probably the easiest thing that  
25 we're going to get our hands around and it's

1 something that if I'm reading the decision  
2 correctly, that you've got to notify them and  
3 give them that opportunity to get the  
4 impairment award no matter what. It may be  
5 difficult in some cases, in other cases it's  
6 not going to be too terribly difficult and a  
7 lot of cases you may find that there actually  
8 is an impairment award, it just hasn't been  
9 paid out, there may be some of those.

10 MR. LUCK: As an aside too, again, just  
11 the practical day-to-day claims handling, if  
12 there becomes a dispute over whether there is  
13 an impairment, that becomes pretty important.  
14 I think if we're thinking about hundreds of  
15 cases, each individual one then could get very  
16 complicated by the fact that there could be a  
17 dispute over whether there is an impairment  
18 because that would be critical to determining  
19 whether that is even a PPD entitlement to  
20 determine whether the PPD entitlement is  
21 greater than the 405 entitlement.

22 JUDGE MCCARTER: Yes, that I understand,  
23 but is that potential not inevitable unless we  
24 find that there is no duty to notify them and  
25 tell them that they should get an impairment

1 award? If we have that duty to tell them, I  
2 mean, those are going to arise naturally as a  
3 result of doing that no matter what and then  
4 the question becomes how do we handle them, do  
5 we handle them in this action or do we leave it  
6 up to them, tell them it's disputed and they'll  
7 have to bring their own action, because at that  
8 point that's not a readily ascertainable thing,  
9 how do we handle those and that seems to me to  
10 be almost a separate question.

11 MR. LUCK: Or we can get bogged down in  
12 the fact specific in the claims handling thing  
13 but in response to the original question,  
14 that's part and parcel of some of the issues we  
15 want to raise and argue in relation, first, to  
16 whether it ought to be retroactive and,  
17 secondly, whether it's appropriate to be a  
18 common fund situation.

19 JUDGE MCCARTER: So we need to talk, we  
20 need to brief that, so retroactivity and is  
21 there a common fund, I've got those issues.  
22 I'm just throwing out some thoughts here.  
23 Those are things that I think we need to  
24 address when we're going through the briefing  
25 process and arguing on this.

1 MR. LUCK: Also, it seems --

2 JUDGE MCCARTER: Tom, did you have  
3 something to add?

4 MR. MURPHY: I just wanted to add a point  
5 as someone who, like Brad, has been involved in  
6 the older type of a common fund cases like  
7 Murer and Broeker, and what really is readily  
8 apparent to me in the Stavenjord case is that  
9 it is very distinct from all of the other types  
10 of cases for the reasons that we've been  
11 talking about but most particularly because  
12 it's not a rote type of calculation, and on all  
13 of these other cases you could have some  
14 disputes with regard to the main issue. For  
15 example, on Broeker, the average weekly wage,  
16 it's a mathematical calculation, but with  
17 Stavenjord it's multitudes of disagreement that  
18 you could have over each of the factors that  
19 would go into 703.

20 This court is inundated, if it looks at  
21 its history, on just the issues that have to do  
22 with cases that are 703 and disputes with  
23 regard to the multiple factors that come into  
24 play. What becomes even more difficult, as  
25 Brad has pointed out, is when you try to go



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1 back and recreate what it would have been at  
2 the time, I think it just adds to the normal  
3 difficulties that you'd have in doing a 703  
4 assessment. So I think that Stavenjord really  
5 is in kind of a unique situation as compared to  
6 some of these other cases that involve  
7 particularly one issue that is more of a  
8 mathematical determination than would be in  
9 this case.

10 JUDGE MCCARTER: And I think we'll all  
11 acknowledge that. It is a step removed from  
12 Murer and Broeker because those were purely  
13 mathematical computations, although that's not  
14 exactly entirely true because questions arose,  
15 a number of questions arose as far as  
16 entitlement and things like attorneys and  
17 settlements and all sorts of other things, so  
18 we had to go through and exclude those out.  
19 And it may well be that some Stavenjord, some  
20 occupational disease claimants may be closer to  
21 the Murer model, the ones that have impairment  
22 awards and things like that, and others not  
23 and, in fact, others may not be in there at all  
24 if there is an actual dispute. I just don't  
25 know, but those are the kinds of things that we

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1 need to address, I agree with you.

2 MR. LUCK: Two comments.

3 MR. MURPHY: I'd like to make one, if I  
4 could.

5 JUDGE MCCARTER: Go ahead.

6 MR. MURPHY: I don't necessarily agree  
7 with the rehab. I think there will be rehab in  
8 every one of these files because, of course,  
9 what they needed to prove is that the person is  
10 employable and so they generally do have rehab  
11 on it and they might have settled for just a  
12 simple job, like I'm sure we're going to see a  
13 lot of parking lot attendants and we're going  
14 to see a lot of that stuff, so it will be fun  
15 to see them in a different light. But there  
16 will be rehab on these cases. I agree with you  
17 about the impairment, I don't think we're going  
18 to see a lot of impairment ratings.

19 JUDGE MCCARTER: Yes, we're going to have  
20 to send them back and have them -- My response  
21 is if there is a duty to do that they're going  
22 to come back anyway and if there is no dispute  
23 about it, it's easy. That's more akin to our  
24 simple calculation and some of those factors  
25 will fall into place but others won't and what

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1 do you do with those others, and we're not even  
2 close to talking about that at this point.

3 MR. MURPHY: It sounds like we've already  
4 got a layer here. Brad wants to raise his  
5 retroactivity and common fund and then the  
6 second thing that happens is does the State  
7 Fund have affirmative duties to notify  
8 claimants to tell them to get impairments and  
9 that could be the second go around.

10 MR. LUCK: That's tied to the issue of  
11 retroactivity though, don't you think?

12 MR. MURPHY: I don't, no. I think if the  
13 Court is going to apply it retroactive -- you  
14 could address the questions if it does  
15 retroactively apply, what do they have to do  
16 then as a result of your decision of  
17 retroactivity?

18 JUDGE MCCARTER: Let me ask this, a really  
19 simple and straightforward question, and that's  
20 what happened after Henry? Obviously -- who  
21 prosecuted Henry?

22 MR. OVERTURE: Steve Fletcher.

23 JUDGE MCCARTER: There was no request for  
24 a common fund fee --

25 MR. MURPHY: No.

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1 JUDGE MCCARTER: -- and that decision was  
2 issued and that was the end of it, but then you  
3 come along and you get -- I think it is in  
4 Fisch, Frost and Rausch which talks about this  
5 affirmative duty. Did anything happen as a  
6 result of Henry or just --

7 MR. HAWKINS: Mr. Henry never even took  
8 advantage of his rehab benefits.

9 MR. OVERTURE: I think -- I believe the  
10 State Fund has been providing rehab when people  
11 have requested it.

12 MR. MURPHY: I think there was some  
13 retroactive application then. Isn't that what  
14 you're saying? If you had an open OD claim,  
15 those people got rehab if they asserted it. I  
16 know that I got, I worked on it for a number of  
17 claimants that are going to school and  
18 finishing up now.

19 MR. OVERTURE: Yes.

20 JUDGE MCCARTER: So you've already got  
21 some internal precedent for retroactive  
22 application.

23 MR. LUCK: Sometimes it's just easier to  
24 do some things as opposed to getting involved  
25 in the proceeding.

1 MR. MURPHY: I think it's going to be  
2 difficult -- just to put my little plug in  
3 here -- to say that you're not going to have  
4 retroactive application of a Supreme Court  
5 decision finding an unconstitutional statute.  
6 This is not your Flynn case where I just saw --  
7 I read your brief yesterday or today -- where  
8 you've got a common fund application, you know,  
9 in that context. This is based on a  
10 constitutional finding of the Supreme Court  
11 saying the statute is unconstitutional and,  
12 generally speaking, then I think your judicial  
13 decision is going to be retroactively applied.  
14 But I'm arguing the retroactive issue and I  
15 don't want to do that.

16 MR. LUCK: And I know you look at that as  
17 objectively as possible. But it gives rise  
18 too, Your Honor, to the one other point that I  
19 think we need to make. Just as an aside, I  
20 think what I meant in terms of rehab work was  
21 broader, that there is going to be medical,  
22 vocational data, new medical and vocational  
23 data that's needed in order to just figure out  
24 what people are entitled to.

25 But one thing all of this underscores and

1 one thing that we want to make sure is clear  
2 from a procedural standpoint is prior to any  
3 briefing schedule and prior to any briefing on  
4 whatever issues the Court wants to take briefs  
5 on, we'd like to have an evidentiary hearing,  
6 because we'd like to make a record concerning a  
7 lot of these concerns that we have and not just  
8 do it on the basis of affidavits and  
9 assertions.

10 JUDGE MCCARTER: Okay, the retroactivity  
11 issue though seems to me that's a matter of  
12 law, that's not really a matter of evidence.

13 MR. LUCK: If the Chevron test is still  
14 the test for retroactivity, it seems to us that  
15 it takes into account having some information  
16 upon which one, two or three of those elements  
17 of retroactivity can be determined as a matter  
18 of law. Certainly there are arguments, a lot  
19 of that stuff can be taken in terms of legal  
20 considerations for shadowing, but the second  
21 and third elements I think take into account  
22 elements of hardship, difficulty, equity and  
23 the process, and that's what we'd like to be  
24 able to present some evidence on so we're just  
25 not everybody talking about how difficult they

1 are, we'd like to test it with evidence.

2 JUDGE MCCARTER: Has Chevron been applied  
3 in the constitutional context? I have this  
4 vague recollection of reading a couple of some  
5 Montana Supreme Court's fairly recently, the  
6 last couple of years, basically where they've  
7 come down fairly strongly on retroactively  
8 applying constitutional rights.

9 MR. MURPHY: Right.

10 JUDGE MCCARTER: And I wonder if Chevron  
11 is applicable in a constitutional setting.

12 MR. LUCK: We think it should be.

13 JUDGE MCCARTER: One of my questions is  
14 going to be if the -- I've got to decide the  
15 retroactivity issue first because that  
16 determines where everything goes it sounds to  
17 me like. Is everybody in agreement on that?

18 MR. MURPHY: Agreed.

19 MR. MARTELLO: Yes.

20 JUDGE MCCARTER: And if that issue is  
21 going to end up being the pivotal issue before  
22 we go anywhere else and that issue is going to  
23 go to the Supreme Court, then we ought to be  
24 getting down the track on that issue and  
25 focusing on that issue and get that resolved on

1 a fairly expedited basis so that we can --  
2 because if that's an issue that's going to the  
3 Supreme Court, we can't really move forward  
4 until that's resolved by the Supreme Court, so  
5 I think we ought to get that going. So that's  
6 where --

7 MR. LUCK: Also, Your Honor, we seem to  
8 have a lot of these cases and a lot of these  
9 overlapping issues and it might be that the  
10 Court might want to fashion a Montana rule  
11 particularly related to the extreme difficulty  
12 that this system has with common fund and  
13 retroactive fees and the problem with the  
14 everchanging landscape in terms of legal  
15 entitlement in workers' compensation.

16 MR. MURPHY: I didn't follow that at all  
17 but I will say this, it would be my --

18 MR. HAWKINS: But I'm going to argue  
19 anyway.

20 MR. MURPHY: Actually, no, I'm just going  
21 to say wow. I am going to say this, I agree  
22 with the Court on the issue of retroactivity as  
23 primary, but it would be nice if we could be  
24 moving the case forward too on some of the  
25 identification of other claimants. I think



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1 they could be doing some internal work in that  
2 regard while you're --

3 JUDGE MCCARTER: You mean as far as the  
4 initial groundwork focusing on what would need  
5 to be done, that sort of thing?

6 MR. MURPHY: Yes.

7 MR. MARTELLO: That's sort of anticipatory  
8 though.

9 MR. MURPHY: It's like at the start of  
10 Brad's little talk he started with the word  
11 thousands, then I noticed he dropped to  
12 hundreds and I'm wondering how many it is. It  
13 may be just a few hundred. I think that's  
14 something they could find out and you could  
15 probably ask them to do so.

16 JUDGE MCCARTER: That might be one of the  
17 evidentiary things that Brad is talking about.

18 MR. LUCK: I was trying not to overstate  
19 it. We're all part of the system, we're  
20 talking about '87 forward, how many  
21 occupational disease claims do you suppose  
22 there were during that period?

23 JUDGE MCCARTER: I haven't a clue.

24 MR. LUCK: It's a lot.

25 JUDGE MCCARTER: I suppose the Department

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1 is to know what issues might arise in terms of  
2 entitlement from all of these people that  
3 didn't appear that they were entitled to  
4 anything?

5 MR. CADWALLADER: If I may, there will  
6 also be at least some OD claims where benefits  
7 were never paid because the person was not  
8 totally disabled; nevertheless, they've had  
9 long-term problems that they may have been  
10 dealing with through occupational changes that  
11 they're doing. My wife can't be a computer  
12 programmer anymore because of her arms, she's  
13 back in school. She's never collected any wage  
14 loss benefits but arguably now has an  
15 entitlement.

16 JUDGE MCCARTER: It sounds to me like two  
17 things. Firstly, you've requested an  
18 evidentiary record and my inclination is to go  
19 ahead and lay the evidentiary record so that  
20 everything is there so we don't have the  
21 situation where I say you can't have an  
22 evidentiary hearing, I think it's a matter of  
23 law. We don't have an evidentiary hearing and  
24 it goes up to the Supreme Court and they say  
25 you're entitled to that evidentiary hearing.

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1 of Labor could tell us.

2 MR. MARTELLO: Off the top of your head,  
3 Mark.

4 MR. CADWALLADER: Lots.

5 MR. MURPHY: No, we looked at it. Right  
6 now they're saying that 5 percent of the claims  
7 are OD claims and so what number of that  
8 percentage go on to have permanent problems,  
9 very few. Just like there is 30,000 actual  
10 injury claims filed every year, very few of  
11 them go on to representation. I don't know if  
12 we're talking the large numbers that everybody  
13 is talking about.

14 JUDGE MCCARTER: Yes, I think the other  
15 problem is under the OD Act, at least until  
16 Stavenjord, you didn't have permanent partial  
17 disability benefits so they had to go after  
18 that \$10,000 fund under 32-72-405. And I don't  
19 know how many people actually did that, but  
20 short of that we may not know --

21 MR. LUCK: How do we know of all those  
22 filed -- and back to this review of a file  
23 claim by claim, but what concerns me is how do  
24 we know until we look at the file and maybe  
25 even contact the claimant what their situation

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1 Although in Stavenjord they said we don't need  
2 an evidentiary hearing, but that's a little bit  
3 situation, I think. I think that the argument  
4 for an evidentiary hearing maybe is stronger,  
5 it probably is stronger for identifying what  
6 people fall into the common fund or does nobody  
7 fall into the common fund. So my inclination  
8 is to go ahead with the evidentiary hearing.

9 My second inclination is there is these  
10 other cases in which the retroactivity is being  
11 raised, I assume Schmill, and we may have some  
12 of the other cases out there that may have it.  
13 I've ruled on that in Miller, didn't I?

14 MR. JONES: Yes, Your Honor.

15 JUDGE MCCARTER: And I dumped it, I said,  
16 "You're stuck."

17 MR. JONES: You did, Your Honor.

18 MR. MURPHY: Can I say something about  
19 that?

20 JUDGE MCCARTER: Yes.

21 MR. MURPHY: This is the first time I've  
22 seen the State Fund ask for an evidentiary  
23 hearing. As you know, Brad Luck just filed a  
24 brief in Flynn last month and you attached  
25 affidavits, they were simple affidavits, they

1 were uncontested type facts. I would think  
2 that --

3 MR. MARTELLO: Flynn is a lot different.

4 JUDGE MCCARTER: Yes, Flynn is a simpler  
5 case.

6 MR. MURPHY: I know, it's simpler in a  
7 way. But the point that I'm making is the  
8 kinds of facts that they want to put before  
9 you, we probably all know them already. And  
10 I'm thinking that if they have affidavits  
11 before you and I contest them it would be more  
12 appropriate, I think, for them to get their  
13 affidavits to you and if I do contest them then  
14 I could ask for the evidentiary hearing, but  
15 I'm worried about the delays here.

16 As you already said, we're going to get a  
17 decision on retroactivity and then we're going  
18 to be looking at an appeal to the Supreme  
19 Court. That puts us down -- the evidentiary  
20 hearing itself might be six, eight months just  
21 to get that all figured out and get all of  
22 those witnesses there and then a decision on  
23 that and then an appeal on that. I would think  
24 that if they could put forth their affidavits,  
25 they have all of these people in-house and if

1 we contest them and if it's really important  
2 then I might have to fall back and ask for an  
3 evidentiary hearing.

4 JUDGE MCCARTER: Well, some of this we  
5 probably can agree on, some of it's probably  
6 common knowledge among all of us, and your  
7 knowledge is probably more extensive than my  
8 knowledge because I sit up here in this little  
9 tower and I only see what you guys give me.  
10 But some of that you may be able to agree to it  
11 and streamline it for sure.

12 But I think, you know, I do think we need  
13 to go ahead and allow them to develop some sort  
14 of factual basis. How that's done really  
15 doesn't matter to me, although I think we ought  
16 to do it as quickly as we possibly can.

17 MR. MURPHY: If you can put a time limit  
18 on it, you know, give them a reasonable amount  
19 of time to develop it and then give us some  
20 time to respond if we don't agree with it all  
21 basically.

22 JUDGE MCCARTER: Let me throw out one more  
23 idea for you and I'll come right back to that  
24 but it may have some impact on that and that is  
25 the retroactivity issues arising in these other

1 cases, and I wonder for purposes of briefing,  
2 because we're going to have some common legal  
3 elements whether those cases should be  
4 consolidated for purposes of the retroactive  
5 issue only. Because, otherwise, I've got  
6 briefs in other ones and so the legal standards  
7 are going to be the same. In Schmill --  
8 actually Schmill may not be as complicated as  
9 this case because that's going to be, those  
10 people may be more readily identifiable. The  
11 other cases evidentiary-wise are going to be  
12 completely different. I think there is a  
13 request for common funds in Wild and Matthews.  
14 Am I right?

15 MR. MARTELLO: Yes.

16 MR. OVERTURE: Yes.

17 MR. LUCK: Yes.

18 JUDGE MCCARTER: But Wild and Matthews may  
19 raise some very similar common fund fees, as  
20 this case does, but with a little different set  
21 of facts.

22 MR. LUCK: If there is any merit to our  
23 concern about implementation issues to be taken  
24 into account for retroactivity purposes and any  
25 vitality to the Chevron Oil standards, each

1 case is a little bit different. The law is out  
2 there, it's the application of that law to the  
3 particular circumstance, I think, we hope,  
4 would be a determination of relative or  
5 retroactivity, which would speak against  
6 joinder. The law is all relatively the same  
7 but the individual circumstances are not.

8 JUDGE MCCARTER: Well, it's a question of  
9 giving the lawyers in all of the cases the  
10 opportunity to brief the law, because I think  
11 one question we have is the viability of the  
12 Chevron case, that's one question is is the  
13 Supreme Court really going to follow Chevron or  
14 are they going to follow what they said in --  
15 what was it?

16 MR. MURPHY: Porter.

17 JUDGE MCCARTER: Porter. It's shifting  
18 back and forth. I'm not sure that there isn't  
19 some confusion and maybe it hasn't been thought  
20 through up there but that's one of the  
21 questions. Then you've got the question of  
22 applying the Chevron test, how they apply, and  
23 then you've got the question of what do you do  
24 with the constitutional issues and almost all  
25 of these cases are constitutional issues. Wild

1 and Matthews aren't constitutional issues.

2 MR. MURPHY: Flynn isn't.

3 JUDGE MCCARTER: Yes, Flynn isn't either.

4 MR. LUCK: And my point that Tom indicates  
5 went over his head was maybe given the  
6 particular circumstances of this system and the  
7 issues involved in retroactivity, this court or  
8 the Supreme Court would want to fashion its own  
9 Montana rule in terms of retroactivity in these  
10 kinds of cases.

11 JUDGE MCCARTER: Yes, and I'm not going to  
12 have the final rule on that, all I can do is  
13 take an initial stab at it because the Supreme  
14 Court is obviously going to make the  
15 determination ultimately, unless everybody  
16 agrees with me. If everybody agrees with me,  
17 and that happens sometimes, sometimes everybody  
18 agrees with me. I've been surprised at some of  
19 the cases that have not been appealed from my  
20 case and I just assume that my logic is so  
21 powerful that it's overwhelmed all of the  
22 parties.

23 MR. LUCK: We'd stipulate to that, Your  
24 Honor.

25 MR. OVERTURF: I think, Judge, in terms of

1 have to take place for that to go along the  
2 same plan so that I'm deciding all of the cases  
3 about the same time so that they're all going  
4 up together. They've consolidated Frost and  
5 Ruhd but those were identical, but at least  
6 they're facing similar issues in all of these  
7 cases and that's more of the lines I'm thinking  
8 along.

9 MR. OVERTURF: I agree, certainly it  
10 simplifies life but isn't it the case that you  
11 can have the Supreme Court come back and say  
12 this case, yes, because of the test it goes  
13 retroactive, this one doesn't?

14 JUDGE MCCARTER: It's possible for me to  
15 do that too. But what I'm suggesting is it  
16 just seems to me that I ought to be proceeding  
17 along the same time line and in the same  
18 fashion in all of these cases.

19 MR. MURPHY: How many retroactivity briefs  
20 do you have already?

21 JUDGE MCCARTER: I don't know.

22 MR. MURPHY: I know that Brad just filed  
23 one in Flynn.

24 JUDGE MCCARTER: Okay, we've got Flynn.

25 MR. MURPHY: There is nine cases, this is

1 having other people brief the retroactivity in  
2 this case it only makes sense in the sense that  
3 we have Ruhd out there, and maybe the other  
4 insurers would be impacted with this case if  
5 Ruhd were overturned and it does apply to all  
6 of the insurers. However, as far as  
7 consolidating all of these cases and uniformly  
8 briefing retroactivity, I don't think that  
9 works because if the Chevron case does stand,  
10 it does turn on the unique facts of each case.  
11 So it's kind of a different argument in each of  
12 the different cases, particularly when you look  
13 at the hardship, you look at the foreshadowing  
14 and those sort of things, they're different in  
15 each of the cases.

16 JUDGE MCCARTER: I'm trying to make my  
17 life a little bit easier, because I have to  
18 resolve the issues in these other cases and if  
19 it is fact specific, all of these cases are  
20 probably going to end up upstairs for them to  
21 consider and it makes sense to have them all  
22 going at the same time together. Now maybe it  
23 doesn't make sense to consolidate them per se  
24 but it makes sense to me to have the briefing  
25 done and if there is evidentiary things that

1 one and we haven't done it here. Schmill  
2 hasn't done it. Matthews and Wild have not.

3 JUDGE MCCARTER: I don't think that's been  
4 done there either.

5 MR. MURPHY: I have some of the pleadings  
6 from Rausch and Broeker.

7 JUDGE MCCARTER: Rausch we're not going to  
8 get it because that's taken care of.

9 MR. MURPHY: Okay. Broeker is kind of  
10 taken care of too.

11 JUDGE MCCARTER: Miller is the other prong  
12 of Broeker, but that's just with Liberty  
13 instead of the State Fund.

14 MR. MURPHY: That's almost the nine. It  
15 sounds to me like we're only having two cases  
16 and Schmill.

17 JUDGE MCCARTER: Yes, so there is four  
18 cases it sounds like, five cases.

19 MR. MURPHY: Five cases on retroactivity,  
20 it would be Stavenjord, Schmill, Miller, Lee  
21 Miller that is, and I'm forgetting another one.

22 JUDGE MCCARTER: Who's on the other side  
23 in Miller? It's Larry Anderson, isn't it?

24 MR. JONES: Yes, Your Honor.

25 JUDGE MCCARTER: I decided those issues



1 and I don't know where we're at in Miller. Did  
2 I certify them?

3 MR. JONES: No, Your Honor.

4 JUDGE MCCARTER: It's probably  
5 inappropriate to talk about that here since  
6 Larry is not here.

7 MR. MURPHY: What are the other two that  
8 I'm forgetting?

9 JUDGE MCCARTER: Stavenjard, Schmill,  
10 Flynn, Matthews and Wild. Matthews and Wild  
11 are both State Fund cases, aren't they? One is  
12 Liberty.

13 MR. JONES: Yes, Your Honor, and the issue  
14 of retroactive application will arise in Ruhd.

15 JUDGE MCCARTER: But we haven't gotten  
16 that far?

17 MR. JONES: We have not, Your Honor.

18 MR. OVERTURF: That was one question I  
19 had, Judge, is in Ruhd was your order regarding  
20 application to the other insurers, is that an  
21 appealable order at this point?

22 JUDGE MCCARTER: I sure hope so because  
23 basically I bifurcated that issue entirely and  
24 certified it for purposes of appeal, and I hope  
25 they'll respect it because everything else on

1 what you're talking about.

2 In Ruhd what they're talking about is  
3 bringing in all claims from all insurers, in  
4 other words, 600 insurers, and I'm only talking  
5 about the parties to these particular actions  
6 as having an opportunity to have some input.

7 MR. MARTELLO: And I understand it with  
8 regard to legal issues but with respect to the  
9 factual differences, which really may  
10 ultimately determine whether the legal issues  
11 are --

12 JUDGE MCCARTER: We're on the same page.

13 MR. MARTELLO: Okay.

14 MR. OVERTURF: I think I understand what  
15 Tom is saying though. It's difficult for me to  
16 understand how you brief the retroactivity  
17 issue on all six or nine of these cases when  
18 you have different factual circumstances in  
19 each individual case and those factual  
20 circumstance go to the legal argument.

21 JUDGE MCCARTER: Well, the legal criteria  
22 are going to be the same in all of those cases,  
23 it's a question of how the facts fit. So in  
24 one sense you can brief what the legal criteria  
25 are, but what I think I want to do is set up --

1 the other side can go forward without any  
2 problem without it. So I sure hope so.

3 MR. MARTELLO: Judge, I'm having some  
4 difficulty with understanding. With Ruhd, as I  
5 understand your decision, it's applicable only  
6 to Liberty and not broad-based to the other  
7 insurers. But what the Court is considering  
8 here is essentially lumping all of the insurers  
9 in for a determination. To me it seems  
10 inconsistent.

11 JUDGE MCCARTER: No, no, no, they're not  
12 inconsistent. What I'm trying to do is I've  
13 got a legal issue that's arising in all of  
14 these cases, six cases that's common, and a lot  
15 of that -- the legal issue, the legal criteria  
16 that it establishes is basically going to be  
17 common. There may be some different facts so  
18 what I want to do is I want to make sure that  
19 when I do this case all counsel in all of these  
20 cases have at least an opportunity to address  
21 the legal issues and, if necessary, hold  
22 evidentiary hearings if evidence is needed so  
23 that I can decide all of these cases basically  
24 at the same time so that they're all decided  
25 and I'm not joining anybody or anything like

1 if we're going to take evidence in any of these  
2 cases is find out in these other cases whether  
3 or not evidence is necessary and basically set  
4 these up so that we're doing back to back so  
5 that I get the evidentiary hearings all held at  
6 the same time, the briefing schedule set for  
7 the same time so that I have everything coming  
8 at once. Then I'll have the legal issues  
9 briefed and I'll have the factual differences  
10 briefed and then I can sort it out and I'll be  
11 sorting it out all at one time and all of these  
12 cases and then, you know, if any of the parties  
13 think I'm wrong about that we can get it up to  
14 the Supreme Court and get it decided without  
15 delaying this case.

16 MR. MURPHY: I would really reiterate my  
17 thinking on the evidentiary issue. If you  
18 offer evidentiary hearings lawyers are going to  
19 take them and then all of a sudden you've got  
20 two weeks of hearings that you don't need  
21 because we could do this by affidavit.

22 JUDGE MCCARTER: And I agree with you. I  
23 think insofar as we can do that I think I'm  
24 going to encourage everybody to do it. Flynn  
25 doesn't seem to me to be an evidentiary

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1 hearing, although possibly I need to talk to  
2 counsel. Matthews and Wild is really the  
3 only -- that's the wild card. Ruhd, we've got  
4 a retroactivity thing in Ruhd?  
5 MR. JONES: Yes, Your Honor, it hasn't  
6 been filed.  
7 JUDGE MCCARTER: That's right, because we  
8 had a different insurer. We don't have the  
9 retroactivity raised in the original Fisch,  
10 Frost and Rausch. But Stavenjord and Schmill,  
11 we've got the same -- Stavenjord and Schmill  
12 seem to me that we could put those together for  
13 purposes of evidence. Flynn I don't know  
14 about. Matthews is a completely separate  
15 matter.  
16 MR. MURPHY: Could you issue an order in  
17 each case asking for motions on retroactivity  
18 by a set date?  
19 JUDGE MCCARTER: Yes.  
20 MR. MURPHY: You're going to consider this  
21 issue one time and you want my motion at this  
22 time?  
23 JUDGE MCCARTER: That's what I'm thinking  
24 about. I'm thinking about trying to get these  
25 things so that they're all going.

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1 MR. MURPHY: You could even ask for  
2 affidavits in advance of the motion deadline  
3 and if there is contested issues of fact that  
4 counsel for the opposing side could ask for the  
5 evidentiary hearing. If not, then we can  
6 proceed with the briefing.  
7 JUDGE MCCARTER: Well, I think probably  
8 one of the things we can do is have counsel sit  
9 down, because I think if you and Brad sit  
10 down -- you need to get another attorney on  
11 your side because you're outnumbered.  
12 MR. MURPHY: I see that. But Jay is over  
13 there on the other side, he's impartial and  
14 you've got, you know, I'm doing good on the  
15 corners but in the middle here it's hot, it's  
16 hot.  
17 JUDGE MCCARTER: I think one of the things  
18 you can do is sit down and talk about it and  
19 figure out what you can agree to and then I  
20 suppose we can do some affidavits as to stuff  
21 that you don't agree to and then if you think  
22 there is an evidentiary hearing we can follow  
23 that procedure. I think the idea is get the  
24 facts that you want before me in some fashion,  
25 and it doesn't make any difference to me what

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1 fashion they come to me, but get those facts  
2 here so that we've got them and they're part of  
3 the record.  
4 MR. MARTELLO: Judge, with respect to  
5 Stavenjord and Schmill, I think you're being  
6 presumptuous that Laurie Wallace would want  
7 Schmill part of Stavenjord, because the -- Hear  
8 me out.  
9 MR. MURPHY: Well, we ask for that.  
10 MR. MARTELLO: But I think what you're  
11 saying is that you feel that Stavenjord and  
12 Schmill could be put together for purposes of  
13 retroactivity and really, flipping sides here  
14 and being on the claimant's side, Schmill is  
15 simply a determination as to a mathematical  
16 calculation on an occupational disease. It's  
17 vastly different than what you've got in  
18 Stavenjord, which is ultimately a determination  
19 of 703 benefits. If I was Laurie Wallace I'd  
20 be saying, "Wait a minute, you're making an  
21 uncomplicated case complicated."  
22 JUDGE MCCARTER: No. Again, I know, and I  
23 apologize for not inviting Laurie, I think I  
24 probably should have invited Laurie because  
25 these are both occupational disease cases --

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1 MR. MURPHY: You did invite Laurie, you  
2 did. You wrote her a letter, right here.  
3 JUDGE MCCARTER: I know, but I think I  
4 could have done both cases at the same time, I  
5 could have done the same sort of conference,  
6 although it might be a little more complicated  
7 and technical.  
8 MR. JONES: Your Honor, I talked to Laurie  
9 about this and invited her to attend and she  
10 had a conflict and she couldn't make it today.  
11 JUDGE MCCARTER: Okay. But you're right,  
12 you're absolutely right about Schmill, but it  
13 seems to me it's the State Fund that's going to  
14 determine whether or not an evidentiary hearing  
15 is required in Schmill. I think Schmill is a  
16 completely different case and you may not want  
17 one. But insofar as we're going to end up with  
18 some sort of evidence that's being taken, it  
19 seems to me that they can proceed along  
20 parallel tracks. I mean, you've got the State  
21 Fund in both, it's going to have to evaluate  
22 both. I'm just --  
23 MR. OVERTURF: State Fund is not in  
24 Schmill.  
25 JUDGE MCCARTER: Oh, that's right, it's



1 Larry.

2 MR. MARTELLO: We've asked to be in.

3 MR. MURPHY: No, you don't want to be.  
4 I'm going to file the Schmill case against the  
5 State Fund.

6 MR. MARTELLO: I think we've asked.

7 MR. HARRINGTON: You have allowed us to  
8 intervene.

9 JUDGE MCCARTER: Laurie didn't have any  
10 objection to it?

11 MR. HARRINGTON: No.

12 JUDGE MCCARTER: So I've got both you guys  
13 in there. Well, yes, I mean, we're going to  
14 have to -- each of these cases you're going to  
15 have to look and figure out whether or not  
16 there is evidentiary evidence that needs to be  
17 presented or you want to present to be part of  
18 the record and it may differ in every case, I  
19 agree with that. But I guess my feeling is  
20 that we ought to get these going in parallel  
21 tracks along the same type of time frame.

22 MR. OVERTURF: I'm really struggling with  
23 how I square that approach with the Ruhd  
24 decision. With the Ruhd decision saying it  
25 only applies to the named insurer, then if that

1 MR. OVERTURF: Which makes perfect sense,  
2 and I think something along the lines of amicus  
3 makes sense. It gets really complicated, as  
4 Tom says, if you're inviting four different  
5 insurers or eight different insurers into this  
6 and everybody wants to get in their evidence,  
7 you know, that's a little different than if the  
8 named parties do but everybody else is invited  
9 to brief it basically as an amicus.

10 JUDGE MCCARTER: That maybe makes more  
11 sense. But I think in these cases really what  
12 I'm talking about is proceeding in tandem, and  
13 as far as Schmill goes, we can figure out  
14 whatever status everyone is agreeable to.

15 MR. MURPHY: You want to see everybody's  
16 brief on retroactivity and then you want to  
17 make a decision, that's how I'm kind of hearing  
18 what you're saying.

19 JUDGE MCCARTER: Basically that's right.

20 MR. MURPHY: So why don't you just issue  
21 an order saying everybody brief retroactivity  
22 by this date.

23 MR. OVERTURF: Except it can be different  
24 in the different cases depending on the  
25 underlying fact.

1 is upheld then does the State Fund even need to  
2 be involved in Schmill then? Until you find  
3 out what happens with Ruhd and whether it  
4 applies to everybody, I don't know if everybody  
5 else knows that they have an interest in  
6 participating in joint decisions of cases they  
7 weren't named in.

8 JUDGE MCCARTER: Well, there may be an  
9 interest insofar as the legal precedent that's  
10 established, because irrespective of whether or  
11 not you're party to a common fund proceeding in  
12 Schmill, if Schmill applies retroactively and  
13 there is a duty to seek out those other  
14 claimants you may have to do that so you've got  
15 a legal interest to do that.

16 MR. MARTELLO: Isn't that like an amicus  
17 though?

18 JUDGE MCCARTER: It may be more like an  
19 amicus and we could deal with it on that basis.  
20 From my perspective I don't care how it gets to  
21 me, it's just a matter that I want everybody to  
22 have a say in it and be able to speak their  
23 part and be able to make their arguments before  
24 I make a determination and I want them to all  
25 be consistent too.

1 MR. MURPHY: Well, if they don't want to  
2 brief it they waive it.

3 MR. LUCK: You know, you're putting the  
4 cart before the horse.

5 MR. MURPHY: Why?

6 MR. LUCK: You have to have some record  
7 upon which you're making your legal arguments  
8 if there is any merit at all to our --

9 MR. MURPHY: Affidavits, man, you can do  
10 it with your affidavit and your brief.

11 MR. LUCK: But each litigant has the  
12 right, has got the right to be able to try to  
13 present the case that they think is the best.  
14 We'll work with you to try to get stipulated  
15 facts and affidavits and all of those things,  
16 but the fact of the matter is you can't brief  
17 anything until you get in whatever fashion the  
18 information in the record that you want the  
19 Court to make the determination on. We're  
20 happy to work with you on trying to put it  
21 together and something can be stipulated to and  
22 reduce the amount that we need testimony for.  
23 Delay is not a process here, it's making a  
24 decent record upon which we can have this  
25 decided and we know, regardless of how good the

1 logic is, that there is a reasonable chance  
2 that these cases are going to go to the Supreme  
3 Court so we want to make sure that the record  
4 is clear.

5 MR. MURPHY: Can I ask a question then?  
6 Basically you want an evidentiary hearing to  
7 establish the third leg of the Chevron Oil  
8 case, right, the equitable part of the test, if  
9 Chevron Oil applies?

10 MR. LUCK: Well, I think it may go beyond  
11 that. But it certainly relates to applying the  
12 standards of the Chevron Oil and --

13 MR. MURPHY: So you need the evidence.

14 MR. LUCK: Excuse me and, frankly, we also  
15 need to develop all of this stuff internally to  
16 determine how much detail goes with the  
17 concerns that we have.

18 MR. MURPHY: May I follow up on this?

19 JUDGE MCCARTER: Yes, and then I'm going  
20 to have to let Larry talk, too.

21 MR. MURPHY: I know, the poor guy, he's  
22 boiling back there.

23 JUDGE MCCARTER: He's pretty patient  
24 though.

25 MR. MURPHY: Yeah, he is. He's doing

1 it simultaneously to do it on several cases  
2 then.

3 JUDGE MCCARTER: I'll give you until next  
4 week.

5 MR. MURPHY: Hey, he's doing way better  
6 than me because Deborah Stavenjord wants to get  
7 some braces and she's been writing to me about  
8 that for two months now, "When am I going to  
9 get paid here?"

10 JUDGE MCCARTER: As far as Stavenjord  
11 herself is concerned, you guys resolve that and  
12 ought to be working on getting that resolved,  
13 that doesn't have anything to do with any of  
14 these issues.

15 MR. MURPHY: That won't make this entire  
16 proceeding moot?

17 JUDGE MCCARTER: No.

18 MR. MURPHY: Thank you. I didn't think so  
19 either.

20 JUDGE MCCARTER: We've got the precedent  
21 that she's owed those benefits and they ought  
22 to be paying them.

23 MR. LUCK: I agree, and just to throw in  
24 one more thing -- I think you're right -- but  
25 one more thing to throw in there that's related

1 good.

2 If the State Fund wants to develop  
3 evidence couldn't you set a deadline for them  
4 to develop the evidence and then have them  
5 submit it to me by affidavit or some written  
6 form, stipulated form, and if we oppose it then  
7 we can avoid the -- if we don't oppose it we  
8 can avoid the evidentiary hearing and get this  
9 thing on track?

10 JUDGE MCCARTER: I'm going to make  
11 everybody happy. Basically that's what I'm  
12 going to do. I'm going to give everybody a  
13 full opportunity and I'll establish a procedure  
14 like what you're talking about to see if we can  
15 do it in a simplified form. But my  
16 contemplation, in answer to your own question  
17 and issue, is I'm going to try to do that same  
18 thing on the same schedule with these other  
19 cases.

20 MR. MURPHY: Yeah.

21 MR. LUCK: Understanding that even though  
22 it seems like a large group, we're all involved  
23 in all of those cases and the speed at which  
24 you'd like to get it done, that's certainly  
25 material to that because you're going to want

1 to that, we haven't yet because we haven't made  
2 a substantive filing here, but we've got this  
3 idea, this request for the Court's direction in  
4 terms of prospective application that needs to  
5 be attended to also.

6 We're going to brief and litigate the  
7 issue of retroactive but we're having trouble  
8 defining what prospective is. The decisions  
9 need to be applied, of course, prospectively  
10 but we're not sure from what date, from what  
11 entitlement date and in this case and in Flynn  
12 we need to know that.

13 MR. MARTELLO: And Schmill.

14 MR. LUCK: We briefed that and in Flynn I  
15 think it was in relation to jurisdiction  
16 because you were concerned about whether you  
17 had that kind of jurisdiction.

18 JUDGE MCCARTER: I misunderstood what you  
19 were asking me to do.

20 MR. LUCK: See, we want to apply it  
21 prospectively, we just don't know which claims,  
22 what's the beginning point.

23 JUDGE MCCARTER: Did I issue an order in  
24 Flynn?

25 MR. HARRINGTON: It was in Miller, Your

Honor, and there has been no order yet.

JUDGE MCCARTER: But I understand what you're asking and that is when is the prospectivity date from, that's a legal issue, that is a legitimate issue because it involves application of that particular case. I understand that. So prospectivity I need to resolve and I don't know the answer to that, by the way, and I haven't a clue and I haven't read the brief so I don't know. Larry?

MR. JONES: I just have a question for the Flynn attorneys. There is a challenge in there to the resistance of the common fund, correct?

MR. HAWKINS: Yes.

MR. JONES: So if you were to find under the rationale of the Flynn attorneys that there was no common fund, then why would we in Schmill and Stavenjord where it wasn't pled in a similar way, correct, why would we then go through all of the other briefing and evidentiary hearing? So just as in the Ruhd case your order whittled out some issues and some parties and it would appear that a ruling on Flynn before anything else was done could whittle out some other cases.

MR. LUCK: And, Your Honor, that issue is present here but the argument, because of the implementation concerns of the common fund, it might be broader here. But that certainly is going to be a threshold issue in Stavenjord, as it is already briefed in Flynn.

MR. JONES: Your Honor, I simply raised it thinking that there is a certain logic that I think should be followed in the decision-making process and if it goes step by step you won't find yourself having done something that a later decision says you really didn't need to do.

MR. LUCK: So you have a bright line then?

MR. JONES: A really bright line.

MR. MURPHY: I have a bright idea. We should not have let him speak. No. No, I think those are good arguments but maybe you should put them together.

JUDGE MCCARTER: Okay, if that issue is going to be raised in this case then I want to give Tom an opportunity to brief it too, like I said. In a sense -- in Ruhd I had that issue and as I said when I started out, if somebody wants to argue that I was wrong in that case

JUDGE MCCARTER: Bring me up to date.

MR. MARTELLO: And I would agree with that. In Flynn what we argued was that a common fund was not pled and that the common fund that was pled was just indigenous to Flynn himself and did not extend beyond that. That has been fully submitted in conjunction, the retroactivity was argued on it and the reply brief has now been filed and it's fully submitted to you --

MR. MURPHY: And they did it with affidavits.

MR. MARTELLO: -- for decision. The retroactivity though is much more different than it is as far as the facts in Flynn than they are in Stavenjord, but the common fund issue was briefed.

JUDGE MCCARTER: So what you're saying there is if they don't raise it in their initial pleading then they can't raise it after the remand?

MR. MARTELLO: Correct. That was raised, I think, about two to three weeks after the Supreme Court decision came down on Flynn was the first time it was raised.

I'll let them argue that. But, in any event, that issue is going to the Supreme Court no matter what, I think. So I would probably want to give him an opportunity. Do we have the same problem?

MR. JONES: It's only present in Schmill, Your Honor.

JUDGE MCCARTER: What about Matthews and Wild?

MR. OVERTURF: It's present in those too.

MR. JONES: Matthews I'm not quite so sure about that, but Geoff Angel puts that it in every pleading I've seen him file.

JUDGE MCCARTER: That doesn't seem to me to be an evidentiary question, that seems to be a question that we can base on the record of whether or not it was raised initially and whether or not they can request common fund fees after remand despite the fact that they haven't pled common fund fees.

MR. LUCK: Again, I don't want to repeat myself, but understanding that our argument against common fund fees here is broader than that too, but we need to get through that threshold.



1 JUDGE MCCARTER: But is Larry not right,  
2 if I say you can't raise it after remand if it  
3 wasn't pled in the first place, then how do I  
4 reach these other issues?

5 MR. LUCK: Well, if you say you can't  
6 raise it and there can't be a common fund, then  
7 we don't need to get to the more substantive  
8 issues.

9 MR. MURPHY: But I think you ought to ask  
10 for both of those briefs at one time. If you  
11 ask for your retroactivity and whether it's  
12 common fund and whether it's retroactive at the  
13 same time.

14 JUDGE MCCARTER: That's a different issue.  
15 The issue that they're raising is a pleading  
16 issue.

17 MR. MURPHY: I understand that but you  
18 might decide the case on their issue.

19 MR. LUCK: Tom is concerned about moving  
20 this along and I think we should get that issue  
21 on a real quick briefing schedule and get that  
22 done.

23 MR. OVERTURF: That would moot the rest of  
24 the questions.

25 MR. MURPHY: But every time you break it

1 MR. OVERTURF: And that one I think is,  
2 it's truly a question of law and I think the  
3 underlying facts it's just simply they didn't  
4 plead it initially.

5 MR. MURPHY: Like Murer didn't plead it  
6 initially either, so...

7 MR. LUCK: I don't know, I think they did.

8 MR. MURPHY: I think they asked for class  
9 action.

10 MR. MARTELLO: Well, class action is  
11 encompassing more than just Jack Murer, and it  
12 was pled as a multiple party too, it was not  
13 just pled as one individual.

14 MR. CADWALLADER: It was a double class  
15 fund.

16 MR. MURPHY: Which comes first, the cart  
17 or the horse? Can you plead common fund before  
18 you have the case or do you plead the case  
19 before you have the common fund?

20 MR. MARTELLO: How do you defend a common  
21 fund case though if you don't plead it?

22 MR. OVERTURF: Particularly if it has  
23 application to multiple insurers?

24 MR. MURPHY: As a matter of fact, the  
25 State Fund did defend this case as a common

1 apart, Judge, every time you break it apart  
2 you're talking three, four months, really.

3 JUDGE MCCARTER: But this part I probably  
4 could deal with. I guess I've got a basic,  
5 practical question. Is anyone aware in the  
6 last four to five years in which the Supreme  
7 Court has denied attorney's fees?

8 MR. MART: Yeah, I think the attorney's  
9 fees, this court I know has denied attorney's  
10 fees when they have not initially been pled.  
11 That was one of the arguments I made in Flynn  
12 is that denial of attorney's fees has not been  
13 allowed when they were initially pled and in  
14 Flynn there was no claim for common fund  
15 attorney's fees and that was consistent  
16 throughout the Supreme Court. This court even  
17 noted it in its decision that the claim had not  
18 been made for attorney's fees on a broad-based  
19 common fund.

20 JUDGE MCCARTER: Well, I'm going to have  
21 to decide that, but I think I'd better give all  
22 of these parties, all of these counsel in these  
23 cases an opportunity to brief it before I  
24 decide it. So I'll do some sort of briefing  
25 order on that.

1 fund case and tried to reopen evidence to, for  
2 instance, to put in how the financial impact of  
3 this large common fund case would impact all of  
4 the insurers. I saw figures of 50, \$60 million  
5 at issue. Those things didn't happen because  
6 Miss Stavenjord needs her braces, they happened  
7 because you defended it as a common fund case.

8 MR. JONES: No, Your Honor, that's just  
9 acknowledgment that it was a precedent moving  
10 forward.

11 MR. MURPHY: It was with retroactive --  
12 retroactive application was the substance of  
13 Oliver Goe's brief, for instance.

14 JUDGE MCCARTER: I think Tom has a point  
15 about deciding these other issues and I think  
16 no matter what I've got to reach these other  
17 issues, I think I've got to reach the --  
18 because I think we've got to get it buckled so  
19 that we only have Stavenjord 2 and not  
20 Stavenjord 3 and 4. So I guess my expectation  
21 would be no matter what I did with that I'm  
22 going to decide the retroactivity issue. I  
23 probably ought to decide what the prospectivity  
24 issue is and I ought to probably decide  
25 ultimately whether there is a common fund or

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1 can I take that out. Can I take that out  
2 separately from the retroactivity or does the  
3 retroactivity really get combined with whether  
4 or not there is a common fund? Has anybody  
5 thought about that?

6 MR. OVERTURE: It really doesn't. I mean,  
7 you really have two separate issues. If there  
8 a common fund you have to take into  
9 consideration of withholding attorney's fees,  
10 if it's retroactive and there is no common fund  
11 it simply means that you have we have to go  
12 find them and pay them.

13 JUDGE MCCARTER: Then the question becomes  
14 how far do I go down this tree. If I find that  
15 somehow this is barred by not being pled or  
16 that the decision is not retroactive do I still  
17 want to go ahead and decide the common fund  
18 issue so that's decided and they can look at  
19 that as well, or is that one that I leave off  
20 of this mass that we're going to send up?

21 MR. MURPHY: I'm hoping to put as big a  
22 mass as we can. That's worked for us, we can  
23 get it done. You can decide the issues, is it  
24 a common fund, if so, is it retroactively  
25 applied and, if so, when does the prospective

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1 MR. MURPHY: That's where the give and  
2 take of this, Brad, I think we should put them  
3 all together. I think the insurers need to  
4 know that answer so why don't we get it done at  
5 one time.

6 MR. LUCK: Well, because one is an easier  
7 question than the another.

8 MR. MURPHY: It's not that hard to get it  
9 all together, we can do it. You probably have  
10 already written the brief, you know.

11 MR. HAWKINS: The State Fund is trying to  
12 be considerate of the Judge's time and efforts  
13 and the Court's energy, if we can dispose of  
14 the easier issues first and make one of those  
15 dispositive --

16 JUDGE MCCARTER: Prospectivity is not  
17 going to be dispositive of anything, that's the  
18 one issue that isn't going to affect anything  
19 else and maybe that's the one issue that the  
20 insurers, that everybody may agree to, I don't  
21 know. But that is one issue that we probably  
22 can separate out and just have a separate  
23 briefing schedule on.

24 MR. LUCK: If nothing else you can decide  
25 it in Flynn and we can follow it in the other

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1 date start. If so, we can brief all of those  
2 issues for you and you can decide them and, as  
3 you said, then we don't have Stavenjard 3, 4  
4 and 5, this isn't a ten-year ordeal.

5 JUDGE MCCARTER: Doing all of that will  
6 probably extend our time line in this case out  
7 but it's going to save time in the long run.

8 MR. MURPHY: I think so.

9 MR. LUCK: One thing that Mr. Harrington  
10 reminds me is if there isn't a common fund then  
11 Mr. Murphy has no standing to be arguing about  
12 retroactivity, does he?

13 JUDGE MCCARTER: Well, yes, part of the  
14 problem is which comes first, the cart or the  
15 horse and I'm not sure. But I guess my intent  
16 is to decide everything and then let it go up  
17 and depending on what they decide on these  
18 issues they can determine.

19 MR. LUCK: One thing I would disagree  
20 with, Tom, I think prospectivity might be  
21 something just system-wise that would be a good  
22 idea to move it up to the head of the class,  
23 because I think all of the insurers want to be  
24 properly applying the decision from a  
25 prospective standpoint.

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1 cases whether it technically applies or not.

2 JUDGE MCCARTER: But I think probably I  
3 ought to give all counsel that are involved in  
4 these cases that may be affected an opportunity  
5 to brief it and maybe I do that by way of  
6 amicus in Flynn.

7 MR. OVERTURE: The other reason that we  
8 have concern about prospective application,  
9 Judge, is that's what's impacting the claimants  
10 right now. We want to be taking care of people  
11 going forward and we have a group of people  
12 that's kind of in this unknown time period that  
13 we don't know how to deal with and we want to  
14 be able to take care of them.

15 MR. MURPHY: What's the problem with them?

16 MR. OVERTURE: We don't know what is  
17 retroactive and what is prospective, it depends  
18 on...

19 MR. MURPHY: It depends on what, on the  
20 lien assessed or what?

21 JUDGE MCCARTER: What are the  
22 possibilities here, the possibilities of the  
23 date of the Supreme Court decision, the date of  
24 my decision?

25 MR. LUCK: And what is the entitlement



1 date, is it the date that they knew or should  
2 have known under the statute of limitations  
3 that they had an occupational disease, is it  
4 the date that they first go to a doctor and  
5 appreciate the fact?

6 JUDGE MCCARTER: That's an affirmative  
7 defense, I'm not going to reach that. You're  
8 asking me to determine what affirmative  
9 defenses are available.

10 MR. MARTELLO: But that's the  
11 determination as to when the OD comes into  
12 being.

13 JUDGE MCCARTER: I thought you were  
14 talking just about for prospectivity from what  
15 point does the Court decision become --

16 MR. LUCK: It's to what claims does it  
17 apply to. It has never been so important -- it  
18 hasn't been as important as it would be in this  
19 kind of a situation what the entitlement date  
20 for an OD is. Lots of times it's when the  
21 claim comes in, so somebody puts an entitlement  
22 date down. The idea is we have the precedent  
23 is the cases that were pending at that point,  
24 is the cases that arise after that point, is it  
25 a determination of an entitlement date, how do

1 you determine the entitlement date? And we  
2 only mention the statute because we're looking  
3 for some guidance that's already in the law in  
4 terms of what cases it applies to. Because the  
5 law -- if it's not retroactive, this presumes  
6 that we don't have a determination on  
7 retroactivity yet, so a pending claim with an  
8 entitlement date that predates all of the court  
9 decision, if it's not applied retroactivity it  
10 wouldn't apply to them. There is some body of  
11 people that unquestionably it begins to apply  
12 to all claims on such and such a date.

13 JUDGE MCCARTER: Okay, well, I'm going to  
14 have to look at this and see what your  
15 arguments are. Some of it, some of it may be  
16 answerable in the context of the Flynn  
17 proceeding or in this proceeding, some of it  
18 may not, that's what my concern is. I haven't  
19 read the briefs in Flynn.

20 MR. LUCK: We asked for the direction but  
21 I don't recall if we've briefed it. We've  
22 briefed the jurisdiction to consider it in  
23 Miller.

24 JUDGE MCCARTER: What did I say in Miller?

25 MR. LUCK: Nothing yet, I don't think.

1 You asked us to brief it for jurisdiction.

2 That's not Larry's Miller, that's Rex Palmer's,  
3 the Flynn related. You just combined two Rex  
4 Palmer cases involving Social Security.

5 JUDGE MCCARTER: He just filed another  
6 one.

7 MR. LUCK: Miller and Flynn and in Miller  
8 the question of your jurisdiction to determine  
9 prospective application was briefed.

10 MR. OVERTURF: Good old simple workers'  
11 comp.

12 MR. MARTELLO: I think that's submitted  
13 because I think Rex responded to that.

14 JUDGE MCCARTER: Let me look at that.

15 MR. MURPHY: Well, he had -- I'm looking  
16 at some of his documents that he sent to me and  
17 he was basically saying that the only reason  
18 the insurer wants to know this is because  
19 they're trying to figure out when to start  
20 paying, and they should be worried about that  
21 because if they don't pay when they should that  
22 could be subjecting them to bad faith claims.

23 MR. LUCK: That's why we're asking for  
24 help.

25 MR. MURPHY: But his objection to you in

1 the Flynn case, and I can't speak for him here,  
2 but it sounded like his objection was that  
3 you're asking for an advisory opinion.

4 MR. LUCK: And we briefed and the Judge  
5 wanted to know if he had jurisdiction so we  
6 briefed it.

7 JUDGE MCCARTER: That's what I was trying  
8 to find out in there. That's what I thought.

9 One of the suggestions that I had was that  
10 we put all of this stuff up on the Internet,  
11 and given the themes that are running through  
12 these cases, and I'd have to look at that and  
13 see if we can't get some of this stuff up on  
14 the Internet so everybody is seeing it and use  
15 that in lieu of copying everybody with  
16 everything. I've got this long list of people.

17 MR. CADWALLADER: And invite amicus briefs  
18 from the industry as a whole and I presume  
19 claimant's counsel collectively.

20 JUDGE MCCARTER: Well, I've got so many  
21 people involved in these cases here, I'm not  
22 sure I have to solicit industry-wide ones. I  
23 think I'm going to have a pretty good  
24 representation of the industry as well as the  
25 claimants, but at least I could let -- that's

1 something I'll have to make a decision. We  
2 were talking -- we were sort of sorting that  
3 around and trying to figure out who how to do  
4 it and looking at getting some PDF stuff to do  
5 it with. Our conference today is going to be  
6 of interest to everybody else in these other  
7 cases.

8 MR. MURPHY: I'm going to get a transcript  
9 and sent it to claimant's counsel.

10 JUDGE MCCARTER: Okay, that would be  
11 great.

12 MR. MURPHY: Maybe you can put the  
13 transcript up on the Internet, I don't know.

14 JUDGE MCCARTER: Because I will order a  
15 transcript. Can we do that, Lisa?

16 COURT REPORTER: Yes.

17 JUDGE MCCARTER: We'll put a transcript  
18 up.

19 MR. MURPHY: Then I won't order one.  
20 Sorry.

21 JUDGE MCCARTER: We'll pay for any of  
22 that.

23 MR. MARTELLO: So is the Court considering  
24 like an out-of-country sabbatical for about a  
25 year or two, do you think?

1 MR. LUCK: Or just an out-of-body  
2 experience?

3 MR. MURPHY: This is going to be on the  
4 Internet now, we've just established that, so  
5 you shouldn't make comments like that.

6 JUDGE MCCARTER: The thing that the  
7 readers of the transcript of this hearing have  
8 to realize is that there are a lot of humorous  
9 comments in the case, and I don't know whether  
10 the court reporter picks up our laughter or  
11 not. I've often wondered about that in the  
12 Supreme Court because we say some bizarre  
13 things and I assume that they're receptive  
14 enough to pick up the word that this is tongue  
15 and cheek.

16 MR. HAWKINS: Snide comment deleted.

17 JUDGE MCCARTER: Nobody has called me on  
18 the carpet yet.

19 Okay, let's talk a little bit about time.  
20 Let's start out from the -- it seems to me that  
21 if we're going to decide whether or not this is  
22 really a common fund and we're going to decide  
23 the retroactivity issue and those have  
24 evidentiary issues or evidentiary bases, that  
25 those we ought to probably proceed in tandem,

1 we ought to do both at the same time. And I  
2 guess the question is one of the things I want  
3 to do is I want counsel to sit down and see if  
4 they can't work out a set of agreed facts and  
5 then beyond that if there is evidence to be  
6 presented identify what that evidence is going  
7 to be and what the counterevidence is going to  
8 be and then let me know whether we're going to  
9 some sort of supplementary evidentiary hearing  
10 and then schedule that evidentiary hearing.  
11 And I think I'm going to make the same request  
12 in the other cases where we may need evidence  
13 and that's Matthews, Wild and Ruhd it looks  
14 like. I don't think in Flynn, and Schmill it  
15 doesn't sound like, although Laurie, I don't  
16 know. I guess you guys are going to have to  
17 tell me.

18 MR. OVERTURF: I think in Flynn  
19 potentially we could need -- if there couldn't  
20 be agreement as to the facts there is the  
21 potential that we could need it.

22 JUDGE MCCARTER: I think what I'll  
23 probably do is set the same schedule and if  
24 there is no evidence that needs to be taken and  
25 no agreed facts or anything like that, that's

1 fine, but at least get these all on the same  
2 time track.

3 So the time frame, I guess, let's talk  
4 about.

5 MR. OVERTURF: Judge, as far as my comment  
6 about Flynn, we don't need anyone in Flynn  
7 because it's already briefed and in front of  
8 you.

9 MR. LUCK: And if you want input from  
10 other people maybe you could put out an order  
11 in these other cases if you want to file an  
12 amicus on that, otherwise, it's fully submitted  
13 because that's fully briefed and ready to go  
14 and we don't need to supplement the factual  
15 situation. That is fully done on affidavits.

16 MR. MURPHY: Did I mention that you did  
17 that fully on affidavits?

18 MR. OVERTURF: Yes, that is a  
19 consideration because Flynn is kind of already  
20 sitting out there waiting to be decided, it's  
21 in the hold position.

22 JUDGE MCCARTER: Well, certainly as far as  
23 that prospectivity issue it looks like we can  
24 separate that out with the other issues. I'm  
25 not sure whether I'm going to do that with

1 respect to retroactivity and common fund  
2 without at least getting briefs.

3 MR. LUCK: That's what I'm saying, but  
4 since that's there and all you need to be final  
5 for Flynn being submitted is input from whoever  
6 else from other cases that want to, if you  
7 issued an order in Flynn, which is now  
8 Flynn/Miller and if anybody's got anything to  
9 file, file it by such and such, then it would  
10 be fully briefed and at least that one area of  
11 your concerns would be taken care of.

12 JUDGE MCCARTER: Okay.

13 MR. OVERTURF: That would handle both the  
14 common fund question and the retroactivity  
15 question.

16 MR. MURPHY: Could I get it confirmed on  
17 the record then that Deborah Stavenjord can be  
18 paid her benefits and this common fund action  
19 can proceed on without jeopardy of mootness or  
20 some other attack?

21 MR. LUCK: Yes, we've not changed our  
22 position in the last 15 minutes, that's  
23 correct.

24 MR. MURPHY: You agree to that?

25 MR. LUCK: Yes.

1 JUDGE MCCARTER: And the Judge agrees with  
2 that.

3 MR. LUCK: Which might be more important.

4 MR. MURPHY: Stipulation is way, way good,  
5 I think. So, Dave, can we get that paid?

6 MR. HAWKINS: I don't know, Tom.

7 MR. MURPHY: I'm just really happy for  
8 her. She writes me these notes and says, "What  
9 happens next?" and I'm going, "Well, you know."

10 JUDGE MCCARTER: Will you write her a  
11 check this afternoon?

12 MR. HAWKINS: On the other hand, your  
13 smile is your window to the world, so braces it  
14 is.

15 JUDGE MCCARTER: Well, it sounds like that  
16 check's forthcoming?

17 MR. HAWKINS: That check is forthcoming,  
18 Your Honor. Sarcasm aside.

19 MR. MURPHY: Thank you.

20 JUDGE MCCARTER: So I think in the Flynn  
21 case I've got to get the briefs up on the  
22 Internet quickly.

23 All right. Let's go back to this sit down  
24 and talk about developing a set of facts in  
25 this case and potentially in the other cases if

1 need be. What kind of time frame for the  
2 attorneys, for the State Fund basically to look  
3 at what they've got and to sit down with Tom  
4 and try to hammer out what they can hammer out?

5 MR. LUCK: I think the first step is that  
6 we're going to need to spend time with several  
7 people in the State Fund to get the information  
8 and then we have to put it together and put it  
9 in a format to try to pose to Tom, and that  
10 will take some time, I mean, without dragging  
11 our feet too long.

12 MR. MURPHY: Two weeks. Five of these  
13 people are in the State Fund. I mean, one,  
14 two, three, four, four of the seven here are  
15 there.

16 JUDGE MCCARTER: But they're not the ones  
17 that can get the information.

18 MR. LUCK: Here is the problem. First of  
19 all, there is a lot of other things going on  
20 that also need to be attended to in one respect  
21 in order to put this together in a  
22 comprehensive and professional fashion from a  
23 legal standpoint. The other things it takes  
24 into account is touching base with a lot of  
25 people in terms of adjusting and underwriting

1 and computer people to exhaust all of the  
2 different factual considerations that we would  
3 put together into a hearing if we had it. So  
4 it's not quite that easy. We'll do it fast but  
5 two weeks I think is pushing it.

6 MR. MURPHY: What did you suggest?

7 MR. LUCK: I didn't suggest anything.

8 MR. MURPHY: I think we should have a  
9 deadline, don't you?

10 JUDGE MCCARTER: Yes, I'm going to put a  
11 deadline on it.

12 MR. MURPHY: What is it?

13 MR. LUCK: I don't make them, the Judge  
14 does.

15 MR. MARTELLO: Tom, the Judge has some  
16 appreciation having worked with us in Murer and  
17 Broeker. It is just not a simple thing to just  
18 go and say, "Okay, we can figure out what we  
19 have in the way of numbers here." It does  
20 take, as Brad has indicated, it takes some time  
21 to talk with people to try to get a handle on  
22 this, but certainly it is something that we've  
23 done in the past and so we have an appreciation  
24 that it's not something that you can do right  
25 away.



1 MR. MURPHY: Wait a second. I didn't  
2 understand that you were going to undertake  
3 your affirmative duty to identify claimants.  
4 What I understood was that you were trying to  
5 figure out what evidence you need for the third  
6 leg of the Chevron Oil test.

7 MR. MARTELLO: That's part of it.

8 MR. OVERTURF: Part of it goes to the  
9 number of claimants that you have to deal with.

10 MR. MURPHY: So your evidence is going to  
11 contain that information?

12 JUDGE MCCARTER: And also the common fund.  
13 Well, firstly they've got to identify what  
14 information they need to gather, how they can  
15 gather that and that, I think, that seems to me  
16 to be the first prong and I think you ought to  
17 be a party to that in the sense that there is  
18 communication going back and forth and you know  
19 what's going on.

20 MR. LUCK: Can I say this? This isn't  
21 just a bunch of made up information by people  
22 sitting around a table. We want to identify  
23 some files, get them out of storage, print the  
24 files, examine the files and say what problems  
25 are really going to be associated with putting

1 retroactivity when, as the Court has already  
2 said in previous decisions, the Chevron Oil  
3 test probably doesn't apply in Montana anymore?  
4 So you're kind of delaying the entire case in  
5 order to develop a defense that might not even  
6 be applicable.

7 JUDGE MCCARTER: Well, let's do this. We  
8 have to go from where we're at, that's the  
9 problem. Why don't we within the next four  
10 weeks, why don't you try to get your hands  
11 around the neck of this thing and find out what  
12 kind of information, identify what kind of  
13 information that you want to present and,  
14 again, I'm putting together both the Chevron  
15 test and the common fee question, whether or  
16 not this is appropriate for a common fund so  
17 that we wrap up this whole thing, so that may  
18 complicate it a little bit. But what kinds of  
19 information you need, how you can obtain that  
20 information, if you can do some sampling to go  
21 ahead and do that.

22 Why don't you keep Tom advised on what  
23 you're doing and sit down within that one-month  
24 period and talk about where you're at and where  
25 you need to go, and then why don't you schedule

1 together this information and get enough of a  
2 representative sampling so that we can either  
3 by way of proposed stipulated fact or someone  
4 that's going to be subject to cross-examination  
5 have proper information. We are not taking  
6 this lightly and it is kind of complex. We  
7 might be surprised -- you might be surprised,  
8 Your Honor, what we're going to find when we  
9 get a reasonably representative sampling of  
10 these files, we go through them and then we  
11 start listing the kinds of problems that we're  
12 talking about. We're talking about them based  
13 on our assumptions and experiences but the test  
14 is going to be in the pudding and that's part  
15 of what we want to do.

16 MR. MURPHY: Certainly you've already  
17 begun that process.

18 MR. LUCK: No, we haven't.

19 MR. MURPHY: This case was decided by the  
20 Court a long time ago. It was argued almost a  
21 year and three months ago -- excuse me, I'm not  
22 quite done. You haven't done any of that  
23 evidentiary workup yet? That's preposterous.  
24 Why should we wait another six months for you  
25 to prepare your Chevron Oil defense on

1 that for one month from now and then five weeks  
2 from now let's get a report back to me or maybe  
3 even another conference about how this is  
4 going. If it appears -- if it's complicated,  
5 let's involve me. If it's something that  
6 everybody's got a pretty good handle on and you  
7 think you can figure out where to go and what  
8 kind of time table you need and you can agree  
9 on, let me know; otherwise, let's do another  
10 conference five weeks from now, which would put  
11 us about mid-July. And then based on that I'll  
12 set another schedule as far as getting the  
13 actual information, the agreed facts before the  
14 Court and any setup whatever, if we've got some  
15 contested facts that we want to present, then  
16 get a date for that.

17 MR. MURPHY: So in four weeks they're  
18 going to give me their proposed stipulated  
19 facts?

20 JUDGE MCCARTER: No, what they're going to  
21 do is identify what -- they're going to have a  
22 list of what information they want to identify  
23 to present, how they're going to do it, some  
24 samples of doing that and I think some sort of  
25 time table as to how quickly they can

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1 accomplish that so that they can have a set of  
2 facts.

3 MR. MURPHY: When would we get the  
4 stipulated facts?

5 JUDGE MCCARTER: That's what we'll  
6 determine at the end of that four weeks.  
7 That's what I want to determine. I don't know  
8 where they're going to be at, I can't tell at  
9 this point so that's why I want to keep my  
10 hands in it. So I want you guys to have sat  
11 down by the end of that four-week period. I  
12 would like to have them keep you informed about  
13 what they're doing too and then at the end of  
14 the four-week period sit down and go through  
15 that information and then the next week -- if  
16 you can agree on it, if you know -- it's going  
17 to take us two or three weeks to get these  
18 facts prepared and then we can have an  
19 evidentiary hearing and agree on it, fine. If  
20 you can't agree on that, then sit down with me  
21 and I'm going to figure out the next step.

22 MR. MURPHY: I guess I'm a little confused  
23 as to why they would need four weeks to figure  
24 out what subjects they would be needing to  
25 investigate further to develop further

1 information from which we could gather the  
2 information was a big deal. I mean, we started  
3 out trying to get that information from the  
4 Social Security Administration because we  
5 thought that would be easier. After two years  
6 of fighting with the Social Security  
7 Administration we abandoned that and did it  
8 ourselves. But there is all sorts of problems  
9 that can be run into and without -- I mean, I  
10 don't know what evidence they want to present  
11 at this stage and they need to develop it, you  
12 need to see where they're going and I need to  
13 see where they're going and we need to see how  
14 difficult it is and then we'll go from there.  
15 But I'll do what I've done in these other cases  
16 is we'll keep conferencing this and then we'll  
17 play it a little bit by ear.

18 MR. MURPHY: Yes. I guess, and maybe I'm  
19 missing something, but it seems to me that they  
20 could do what they did, and I've said this all  
21 along, do what they did in Flynn, if they have  
22 evidence that this is going to be a horrendous  
23 task, that it's going to be a hugely expensive  
24 ordeal for the State Fund, they can have  
25 someone write an affidavit that says that.

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1 factual --

2 JUDGE MCCARTER: That's not the only thing  
3 they're going to do, they're going to identify  
4 how they're going to get that information and  
5 they're going to do some preliminary stuff to  
6 actually try to go down, at least partway down  
7 the road.

8 MR. MURPHY: I'm going to basically defer  
9 because I don't understand why it would take  
10 that long, I really don't.

11 JUDGE MCCARTER: I do.

12 MR. LUCK: Your Honor, and we'll develop  
13 as much as we can by that point so it's clear  
14 and have a road map of what else needs to be  
15 done and we'll wait.

16 JUDGE MCCARTER: In part there will be a  
17 benefit down the road in part because in that  
18 process they'll probably identify the sort of  
19 information and how to gather that information  
20 that would be needed if we get to the common  
21 fund fee and have to identify all of these  
22 people. But some of this stuff -- in Broeker  
23 we ended up writing, I think they ended up  
24 writing a computer program that had to be run  
25 and firstly identifying the computer

1 JUDGE MCCARTER: They'll be able to do  
2 that, but what they're telling me is they don't  
3 know that yet.

4 MR. MURPHY: So they need four weeks to  
5 figure out what subjects they're going to have  
6 evidence on. That's how I'm hearing it but  
7 maybe I'm missing something.

8 JUDGE MCCARTER: I think they need to  
9 figure out exactly what kind of evidence they  
10 want to present, number one and, number two,  
11 how they would go about collecting the  
12 information, in other words, producing that  
13 evidence.

14 MR. MURPHY: And how long they would need  
15 to do that.

16 JUDGE MCCARTER: How long it's going to  
17 take them to do it and gather some samples of  
18 that so as least they know how it's going to  
19 work, or try to do that.

20 MR. MURPHY: All right.

21 MR. OVERTURE: And really begin gathering  
22 the evidence.

23 MR. MURPHY: All right. Well, I trust  
24 that you'll start that. That's good.

25 JUDGE MCCARTER: So get together, and what



1 we've done in the other cases is attorneys have  
2 met and they've actually been involved in  
3 looking at the information. For some of this  
4 stuff we probably need a confidentiality order  
5 as far as disclosure where we get claimants,  
6 specific claimants that are identified that are  
7 a party to the suit. We've done  
8 confidentiality orders in Broeker and Murer.

9 MR. MURPHY: This would allow me to see  
10 some privileged information from other  
11 claimants that I'm not currently representing?

12 JUDGE MCCARTER: Right.

13 MR. MURPHY: Can you enter that orally at  
14 this time or do you need to have something in  
15 writing?

16 JUDGE MCCARTER: Who's got the -- well,  
17 who put together Broeker? We've got one in  
18 Broeker and we've got one in Miller.

19 MR. LUCK: Didn't we do that in FFR too?

20 JUDGE MCCARTER: Yes, we did one in FFR  
21 too.

22 MR. LUCK: We'll circulate one. We'll get  
23 one to Tom.

24 JUDGE MCCARTER: And then you can  
25 participate in that whole process.

1 MR. LUCK: Your Honor, what about -- maybe  
2 you've covered this -- but with the prospective  
3 application, are you going to consider that,  
4 solicit information from people that are  
5 interested in Flynn and then try to get a  
6 determination at least on the prospective  
7 application part so that we can have that as a  
8 guide here?

9 JUDGE MCCARTER: Yes. Well, insofar as I  
10 have jurisdiction. I'm going to have to figure  
11 out the jurisdiction, how much can I answer,  
12 and I don't know at this point. I don't know  
13 exactly --

14 MR. LUCK: Since they're both as to  
15 occupational diseases, Flynn involves both  
16 injuries and occupational diseases, but your  
17 determination on prospective application as to  
18 the occupational disease entitlement in Flynn  
19 would certainly be a guide, even though not  
20 binding for the State Fund and other carriers  
21 in the other kinds of claims.

22 JUDGE MCCARTER: What I'll do is we'll try  
23 to get the briefs in that out there on the  
24 Internet and I'll invite counsel in all of  
25 these other cases to amicus it and anybody else

1 who wants to amicus it and I'll put a deadline  
2 on it and the prospective thing probably decide  
3 separately from this other stuff. But one of  
4 the things is there may be some advisory  
5 opinion aspects of it, there may not be  
6 advisory opinions aspects of it, so I've got to  
7 figure that out and right now I'm clueless  
8 because I haven't read the briefs and I don't  
9 know what exactly you're asking for.

10 MR. LUCK: We didn't take a position, we  
11 just said we need your direction and here are  
12 the possibilities.

13 JUDGE MCCARTER: And Rex probably said you  
14 were bad boys for not taking a position.

15 MR. LUCK: And other things.

16 MR. MURPHY: Rex Palmer's briefs made a  
17 whole lot more sense to me than yours did,  
18 Brad, just for the record.

19 MR. MARTELLO: Really?

20 JUDGE MCCARTER: Tom, do you have the  
21 briefs?

22 MR. MURPHY: I have some of them.

23 MR. LUCK: You need to concentrate more  
24 clearly on both your writing and listening  
25 skills.

1 MR. MURPHY: He said one thing clearly and  
2 succinctly today and I appreciate that. Well,  
3 that sounds like a plan.

4 JUDGE MCCARTER: Let's go with that and  
5 let's plan on getting together in five weeks  
6 unless you're fine and don't need me and can  
7 give me a reasonable time table for the rest of  
8 it. We'll get this transcript published on the  
9 Internet and I'll get all counsel notified in  
10 all of these other cases of this and probably  
11 I'm going to get scheduled, some conferences  
12 scheduled up in these cases and get them going  
13 and maybe I'll just set aside a day to get them  
14 in here to do that, I'll do one after another  
15 and get the issues done and going.

16 MR. MURPHY: Great.

17 MR. OVERTURE: Thank you.

18 JUDGE MCCARTER: Any parting shots? Ollie  
19 was so quiet back there.

20 MR. GOE: I am. I would just say that  
21 there is a lot of uncertainty from a lot of  
22 adjustors and, therefore, claimants on  
23 especially the issue of prospective  
24 application. You can take a whole lot of  
25 different impositions on it but I don't think

1 it's clear cut that the issues on prospective  
2 applications aren't going to overlap the  
3 retroactive applications and I'm not sure you  
4 can decide one without the other.

5 JUDGE MCCARTER: And the other problem is  
6 going to be that some of these things, there  
7 may be other defenses that are raised or other  
8 affirmative avoidances that are raised and  
9 stuff like that. That's one of the problems  
10 that I'm dealing with in this area and laying  
11 down a specific hard-and-fast rule is going to  
12 be difficult and that's why I'm troubled about  
13 it, and I'll have to read the briefs in Flynn  
14 and see what else we get as far as what other  
15 people see as the problems.

16 MR. MARTELLO: I think what the Court will  
17 find is that you can get a point at which you  
18 clearly don't have a retroactive application,  
19 there is going to be a gray area and I think it  
20 has to be reserved through determination of  
21 retroactivity at some point. But I think that  
22 you can reach a point going forward in which it  
23 is clearly prospective and would echo the  
24 comments that Oliver has made and that it is  
25 very difficult from an adjusting standpoint, we

1 want to recognize the precedent of a decision  
2 but not knowing where to really start it, it's  
3 very difficult.

4 MR. MURPHY: I might pipe in on that. I  
5 doubt claimant's counsel anywhere in any of  
6 these cases would oppose some sort of effort to  
7 give a stipulation. I mean, why would we? We  
8 want claimants to receive benefits, that's what  
9 we fight for every day. I don't know what  
10 efforts you've made to contact counsel on that  
11 issue but I think you ought to.

12 MR. LUCK: I'm not sure that the  
13 claimant's counsel speak with one voice on  
14 that.

15 JUDGE MCCARTER: That's why I want to give  
16 an opportunity to other counsel, other  
17 claimant's counsel in this case and perhaps  
18 other defense counsel who want to do it.

19 MR. LUCK: And you mentioned advisory  
20 opinion concern but just the discussion makes  
21 it clear, I mean, the point that we've made is  
22 this is basically a declaratory ruling involved  
23 in cases where the legal precedent has been set  
24 and you need to declare the parameters of it.  
25 So I don't think it's advisory at all, it would

1 end up being binding and inherent on the fact  
2 that the precedent has been set.

3 JUDGE MCCARTER: Except in declaratory  
4 rulings you usually have a specific claimant  
5 and a specific set of facts and one of my  
6 concerns would be whether or not we've got all  
7 sorts of different things that are going on out  
8 there that --

9 MR. LUCK: Well, we do and, for instance,  
10 in Flynn we have a particular claimant, we have  
11 a particular precedent, you make that decision  
12 and you can incorporate that by reference into  
13 other cases because in terms of that  
14 entitlement issue in an OD setting, the legal  
15 issue is absolutely identical --

16 MR. MURPHY: I have to object. He's  
17 basically making arguments in Flynn. I'm not  
18 counsel in Flynn, Mr. Palmer is. I would -- I  
19 feel uncomfortable in that context. I think  
20 his point is made.

21 JUDGE MCCARTER: Yes, I wonder if we ought  
22 to orally argue -- I wonder if we ought to have  
23 an opportunity for oral argument. Rex may want  
24 it in that case, other counsel may want it. I  
25 just don't -- all I know is that the flag went

1 off in my mind about whether or not it might be  
2 an advisory issue.

3 MR. MURPHY: And I believe he put that in  
4 his brief.

5 MR. LUCK: If it's so easy and subject to  
6 stipulation and since it's a legal issue, it  
7 doesn't seem like it would be that momentous of  
8 an occasion to have the determination.

9 JUDGE MCCARTER: Well, I don't know  
10 because I haven't read the briefs.

11 MR. MURPHY: And I didn't say it was easy  
12 to stipulate, but nobody has contacted me about  
13 any idea in terms of what, you know, what the  
14 solution to that problem may be.

15 JUDGE MCCARTER: On that issue, in any  
16 event, what I'll do is I'll get the briefs on  
17 the Internet, I'll get the transcript of this  
18 on the Internet and I'll get an invitation out  
19 with some deadlines to brief it and then we may  
20 just orally argue it and we'll put that on a  
21 separate track from the rest of the stuff.  
22 That's the best I can do today other than just  
23 ruling arbitrarily off the top of my head on a  
24 whole series of issues, but I don't think that  
25 would be satisfactory.

MR. MURPHY: Well, thank you very much,  
Judge.

(The hearing was concluded at  
11:50 a.m.)

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CERTIFICATE

STATE OF MONTANA )

: ss.

COUNTY OF LEWIS AND CLARK )

I, LISA R. LESOFSKI, Registered  
Professional Reporter, Notary Public in and for the  
County of Lewis and Clark, State of Montana, do  
hereby certify:

That the proceedings were taken before me  
at the time and place herein named, that the  
proceedings were reported by me and that the  
foregoing -99- pages contain a true record of the  
proceedings to the best of my ability.

I have hereunto set my hand and affixed my  
notarial seal this       day of       ,  
2002.

LISA R. LESOFSKI  
Registered Professional Reporter  
Notary Public  
Commission Expires 3/31/04.