

1 A P P E A R A N C E S (CONTINUED):
2 APPEARING FOR THE RESPONDENT/INSURER, LIBERTY
3 NORTHWEST INSURANCE CORPORATION:

4 MR. LARRY W. JONES
5 Attorney at Law
6 700 SW Higgins Ave., Suite 108
7 Missoula, MT 59803-1489

8 ALSO PRESENT:

9 MR. LAWRENCE ANDERSON
10 Attorney at Law
11 P.O. Box 2608
12 Great Falls, MT 59403-2608

13 MS. LAURIE WALLACE
14 Attorney at Law
15 P.O. Box 2020
16 Columbia Falls, MT 59912-2020
17 MS. CAROL GLEED
18 MR. JAY DUFRECHOU

19
20
21
22
23
24
25

TRANSCRIPT OF PROCEEDINGS

Page 4

1 Whereupon, the following proceedings were
 2 had:
 3 * * * * *
 4 (Ms. Wallace not present)
 5 THE COURT: The first matter up --
 6 matters, I guess -- are both Wild versus Montana
 7 State Fund, and Matthews versus Montana State
 8 Fund. And let's start this out by having
 9 everybody identify themselves, starting with
 10 Larry.
 11 MR. JONES: Larry Jones, Liberty
 12 Northwest.
 13 MR. ANGEL: Geoffrey Angel. I represent
 14 Mark Matthews.
 15 MR. OVERTURF: Greg Overturf. I
 16 represent the State Fund.
 17 MR. LUCK: Brad Luck for the State Fund.
 18 MR. HARRINGTON: Tom Harrington, State
 19 Fund.
 20 MR. MARTELLO: Tom Martello, State Fund.
 21 MS. BUTLER: Nancy Butler, State Fund.
 22 MR. ANDERSON: Larry Anderson, Buckley
 23 and Miller.
 24 MR. HUNT: Jim Hunt, Kelly Wild.
 25 MR. FAUST: Luke Faust, Kelly Wild.

Page 5

1 MR. DUFRECHOU: Jay Dufrechou with the
 2 Court.
 3 MS. GLEED: Carol Gleed, Department of
 4 Labor.
 5 THE COURT: We didn't give Jim and Luke
 6 a place at the table here. Do you want to come
 7 over here?
 8 MR. HUNT: I'm fine here.
 9 MR. FAUST: I'm fine.
 10 THE COURT: I'm trying to figure out at
 11 this point where we're at in this case. One of
 12 the first things that we ought to take up is I did
 13 a draft of a notice to all insurers and Plan 1
 14 self-insureds, and I think I've gotten replies.
 15 Is everybody okay with that notice at this point?
 16 No dissenters?
 17 I talked to Carol, and Carol said that
 18 we can produce mailing labels, or the department
 19 can. Are we on board for that?
 20 MS. GLEED: Yes. All of the carriers
 21 and self-insureds we have on the system back that
 22 far. Once they became inactive, we didn't keep up
 23 to date on the addresses, so we may wind up
 24 getting some returns, get them back.
 25 THE COURT: We did this the last time we

Page 6

1 did this, and what was the case?
 2 MR. LUCK: Fisch.
 3 THE COURT: Fisch, Frost, and Rausch.
 4 So I guess when we get the mailing labels, I'll
 5 sign the order, and we'll generate copies of it.
 6 And who is doing the postage? I suppose we can
 7 lick the stamps, too.
 8 MR. OVERTURF: In FFR, I think we had
 9 the claimants' Counsel.
 10 THE COURT: I think probably they ought
 11 to absorb that. So can you guys get together.
 12 MR. HUNT: Yes.
 13 MR. ANGEL: Yes.
 14 MR. HUNT: We have a postage machine in
 15 the office.
 16 THE COURT: So maybe we could just
 17 deliver them to your office, if that's acceptable
 18 to everybody, and you can run them through and
 19 mail them out.
 20 MR. HUNT: That would work.
 21 THE COURT: Mr. Hunt will do that for
 22 us.
 23 MR. OVERTURF: One thing we did in FFR
 24 is we did mail them in the Court's envelopes, so
 25 the return address was back to the Court. I don't

Page 7

1 know if you want to do that in this case, just so
 2 the Court's able to keep track of who responds and
 3 who doesn't.
 4 THE COURT: Right. We'll do that.
 5 What we'll do is we'll generate the envelopes and
 6 we'll stuff them, so the only thing that Jim will
 7 have to do is run them through his postage machine
 8 and put them in the US mail box.
 9 That basically was the only thing on my
 10 mind, so I probably need a report from all of you
 11 as to the status. This is one of those cases
 12 where the State Fund was going to see what kind of
 13 data it wanted to accumulate, as far as whether
 14 this should be retroactive, number one; number
 15 two, whether this should be a common fund type of
 16 case. And where are we at in that process?
 17 MR. LUCK: I think the efforts so far,
 18 Your Honor, have been to focus on the factual
 19 setting of whether we can actually identify people
 20 who were denied on the basis of an independent
 21 contractor exemption. And we've exchanged some
 22 information with Claimants Counsel that show that
 23 it's very difficult to do that because the systems
 24 didn't classify denials on the basis of
 25 independent contractor exemptions.

Page 8

1 And we've sent them some draft
 2 affidavits, or some affidavits to that effect, and
 3 we need to get together, and work out, if we can,
 4 as we're working in Stavenjord, for a stipulated
 5 set of facts to be submitted, and we then brief
 6 all of the issues. And we've sent some things
 7 over and we haven't heard back, and we're just in
 8 the process of working on it. I suspect we need a
 9 little bit more time just to get that done.
 10 THE COURT: So the draft affidavits have
 11 gone to Jeff, and to Jim, and to Luke?
 12 MR. HUNT: I believe just you guys. The
 13 affidavits are showing me what they can produce
 14 and what they can't produce, or what they're
 15 capable of doing and not doing.
 16 THE COURT: That's right, because we
 17 have the common fund issue in your case, and we
 18 don't have that in Rausch -- or in Matthews, we
 19 just have an argument for a class.
 20 MR. JONES: Correct.
 21 MR. LUCK: And the end result will be
 22 that the facts will show that it's very difficult
 23 to identify because it's not coded that way, the
 24 people that were denied on that basis. We're not
 25 sure where we go from there. There's other

Page 9

1 arguments in terms of entitlement and
 2 retroactivity, and whether it's a proper case for
 3 all those kinds of entitlement and procedural
 4 issues; but that threshold issue of identification
 5 appears to be a very difficult one.
 6 THE COURT: I gave you my indication
 7 where I'm at as far as the retroactivity issue at
 8 least in Flynn. Is Flynn appealed? Does anybody
 9 know?
 10 MR. LUCK: We've got Flynn, too. Flynn
 11 I think there's a reasonable probability that that
 12 case will be settled.
 13 THE COURT: So we're not going to get a
 14 ruling on that in that case.
 15 MR. LUCK: You're not going to get --
 16 I think the odds are -- I mean we're still doing
 17 some things, but we have a kind of an agreed
 18 framework at this point. We're working on
 19 some documentation information. But I think
 20 there's a reasonable probability that case will be
 21 settled. And if it does, it means that you won't
 22 have the case to go up, and we would move on to --
 23 Stavenjord seems to be the one that may
 24 be the next one in line, because we're pretty
 25 close to having a stipulated set of facts there.

Page 10

1 We're just a few away. So that may be the next
 2 one actually that you'll have an opportunity to
 3 decide.
 4 THE COURT: Jim, have you looked at
 5 their draft affidavit?
 6 MR. HUNT: Of proposed facts?
 7 THE COURT: Proposed facts.
 8 MR. HUNT: Yes. I don't think that
 9 we're going to have much problem working that out.
 10 Do you guys?
 11 MR. LUCK: No. And I think one of the
 12 things, too, as I relooked at that in preparation
 13 for coming today, is we need to expand -- That
 14 kind of focused on some of the recent computer
 15 data. You're going back to 1983. We need to fill
 16 in those blanks. It will be the same thing, but
 17 it will be with different systems and different
 18 reasons, but basically the same point.
 19 So I wouldn't anticipate that we'd have
 20 much problem with it. I think we just need a
 21 little bit more time, and we'll get it done, and
 22 maybe then we'll have the affidavits and a
 23 stipulation, and then we get into a briefing
 24 schedule on the entitlement issues.
 25 THE COURT: Do you want me to set some

Page 11

1 deadlines on that, or should I rely on the two of
 2 you getting together and doing it, and just
 3 providing them to me?
 4 MR. HUNT: Either way. I don't care.
 5 THE COURT: Do you have sort of a time
 6 frame in mind?
 7 MR. LUCK: No. We're trying to
 8 coordinate all these different things, and it gets
 9 to be logistically a little bit difficult, but
 10 this one is pretty simple.
 11 So I think we could get together, decide
 12 how we want to present it, and maybe suggest
 13 deadlines.
 14 MR. HARRINGTON: Judge, in Stavenjord,
 15 you gave us a deadline to file a status report.
 16 That makes some sense here, too. If we come to an
 17 agreement by the date the status report needs to
 18 filed, we can let you know. Otherwise we'll let
 19 you know on the date you set for the status report
 20 deadline where we're at, and how much more time we
 21 might need.
 22 THE COURT: Let me ask this question.
 23 How long do you think it will take you to get
 24 together and figure out whether you're going to go
 25 ahead with the stipulated facts and set a briefing

Page 12

1 schedule?
 2 MR. LUCK: A couple weeks I think would
 3 be okay.
 4 MR. HUNT: Okay.
 5 THE COURT: So two weeks for a status
 6 report.
 7 MR. HUNT: You'd better make it three.
 8 I've got two pretty tough weeks coming up here.
 9 MR. OVERTURF: I'm really trying to
 10 think of what else we can really try to establish
 11 beyond what we've done. It's pretty limited.
 12 MR. LUCK: I think we need to talk to
 13 Jim and get his perspective on this, and then
 14 when we decide what we need to do, fill it out.
 15 I do know we need to get some additional facts in
 16 relation to that back to 1982, because most of
 17 that stuff focused on 1997 forward. We need the
 18 same and stronger probably the farther back we go.
 19 THE COURT: Do you want four weeks?
 20 MR. LUCK: That would be okay. If we
 21 get it done sooner, we're happy to do it. We'll
 22 work with Jim based on his schedule.
 23 THE COURT: Let's do four weeks for a
 24 status report, which will tell me the status of
 25 the stipulated facts, and setting a briefing

Page 13

1 schedule.
 2 MR. HUNT: One of the thoughts that I
 3 have had is -- There's an argument here, too, that
 4 there were people who didn't even make a claim
 5 because of the independent contractor exemption.
 6 Those are never going to be identified by this
 7 process. So from reading the affidavits, we may
 8 find ourselves in a situation where we're never
 9 going to identify all of the people who made
 10 application also.
 11 So it may make more sense to head toward
 12 getting all the independent contractor exemption
 13 addresses, names of people who had independent
 14 contract exemptions, as we had discussed before,
 15 and sending everybody a notice.
 16 THE COURT: I think what you ought to
 17 do, at least in the briefing process, is identify
 18 all of the alternatives; and if you need some
 19 backup on the alternatives, you can maybe do that
 20 by way of the stipulated facts, "This is what
 21 would have to happen. This is the process we
 22 would have to go through," that sort of thing.
 23 And that way, we'll have laid out all of the
 24 alternatives and all of the possibilities, and
 25 then I can factor those things in.

Page 14

1 MR. LUCK: Each one of these cases is
 2 just a little bit different, although you've
 3 spoken on some of your thoughts in relation to
 4 retroactivity are pretty broad, but --
 5 THE COURT: We've got to treat these
 6 cases individually. I think this case is probably
 7 the most difficult case for getting into a common
 8 fund and class action type of situation, just
 9 because of the nuances of it. We've got people
 10 who haven't filed, we've got -- we may have
 11 independent contractor questions. Those you're
 12 going to lay out in your brief, you know, what is
 13 the commonality, what are the differences
 14 between --
 15 MR. LUCK: And each one may be a
 16 separately litigated issue. That's the
 17 fundamental problem, is going back to find the
 18 information, and then making a factual
 19 determination. This isn't like reviewing a file
 20 and coming up with an answer, because each one is
 21 -- we can't make the A/B Test, and it may have
 22 already been accomplished in a lot of cases, which
 23 we think it probably has.
 24 THE COURT: So those are the kinds of
 25 things you've got to address, and then Jim has to

Page 15

1 respond to.
 2 MR. OVERTURF: Are you thinking of a
 3 stipulation, Jim, we can work on -- I guess the
 4 biggest issue is people who never filed anything,
 5 and look to some agreement what you would have to
 6 do to find them, different ways you could do that;
 7 because then later there's going to be legal
 8 argument on whether or not it's appropriate to do
 9 that, whether that would actually be part of the
 10 common fund, etc.
 11 MR. HUNT: Right.
 12 MR. OVERTURF: Because I think what
 13 we've identified so far has kind of gone to the
 14 scope of what we're able to identify as denied
 15 claims with people who had independent contractor
 16 exemptions, and it does look very, very limited
 17 right now. So maybe the biggest issue is going to
 18 be people who didn't file anything.
 19 MR. LUCK: The problem you have with
 20 that, though, is you spend a lot of time trying to
 21 figure out those facts, and get that data, with
 22 the question still to be presented on statute of
 23 limitations, retroactivity, all the implementation
 24 issues. And I'm not sure what the best process
 25 is, but if you spend a lot of time developing all

Page 16

1 those things that presuppose a ruling, it seems
 2 like that's a little misdirected.
 3 THE COURT: I think the only thing that
 4 we want to do now is firstly, it's sounds to me
 5 like what you're in the process of doing is
 6 showing the difficulty of, number one, identifying
 7 the people who may be benefited by the Wild and
 8 Matthews decisions -- that's one issue -- then
 9 the second issue is what is the commonality? Is
 10 there essentially enough commonality among all
 11 those individuals to create a class or to create a
 12 common fund? That's another question.
 13 The first question may go more towards
 14 retroactivity more than anything else; may also go
 15 toward the question of the common fund and class
 16 action. But the second one, what is the
 17 commonality, a lot of that is going to be legal
 18 argument, just based on what all of us know.
 19 If there are facts that needed to be
 20 developed on that -- some things we know, and we
 21 probably know that a lot of those people haven't
 22 filed. We could probably agree to that. Maybe
 23 that's something that you want to put in an agreed
 24 set of facts, that there are people out there who
 25 never filed because of the statute.

Page 17

1 We know that there's going to be
 2 arguments as to whether or not some of these
 3 people who may come forward and claim benefits
 4 under Wild and Matthews are in fact independent
 5 contractors.
 6 I don't know whether you're going to
 7 argue Larry's argument that I shot down in a blaze
 8 of glory about fraudulent inducement.
 9 MR. JONES: We're not going to raise
 10 that again, Your Honor.
 11 THE COURT: Well, we'll see if they
 12 learn from your lesson. I don't know. They can
 13 reraise it if they want to. I don't know whether
 14 that will be reraised.
 15 But you might think through some of that
 16 stuff, and decide whether or not those are things
 17 that you need to stipulate to or agree to, whether
 18 they need any further factual development. To
 19 some extent, we know all of this. It's almost --
 20 Some of it may be almost within the realm of
 21 judicial notice, but it would probably be better
 22 if everybody agreed on them and we don't have any
 23 arguments about those kinds of things.
 24 MR. LUCK: Would you take judicial
 25 notice of the fact that if you were an independent

Page 18

1 contractor, and had an injury, and didn't have
 2 coverage, and we asked you now, "Do you want some
 3 money?," that most everyone would say yes? That's
 4 the other side of the coin.
 5 THE COURT: I don't know. Yesterday we
 6 had this conference, and I think Joe Maynard is
 7 biggest cynic, don't you think, Tom?
 8 MR. MARTELLO: I would agree with that.
 9 THE COURT: He's 100 percent cynic.
 10 MR. ANGEL: If I may, I would agree that
 11 most of the people that would fit within this
 12 class probably never filed a claim; and I think if
 13 you start with that presumption, and the number of
 14 defense insurance carriers involved, it's dead
 15 simple to administer it, because you do get a list
 16 of all the IC folks.
 17 You have a disputed -- or an application
 18 that is reviewed by both parties, and then
 19 approved by the Court, it's mailed out to all the
 20 people, and it's up to the Plaintiffs Counsel,
 21 Claimants Counsel, to then collect the bills, the
 22 records, and all of the documents that support the
 23 argument in favor, and then each one of them is
 24 administered through a Special Master that
 25 reviews.

Page 19

1 I think trying to go through the
 2 carriers, from what I received from Larry, and
 3 what I hear from the State Fund, is a pretty
 4 circuitous and really unfruitful process because
 5 you know most of them didn't apply. It seems more
 6 direct to just mail it out to people with the IC's
 7 and --
 8 THE COURT: That may very well be true.
 9 I think, to be frank with you, I think the real
 10 issues are the commonality, and whether or not
 11 there's enough in common among the potential
 12 claimants out there to essentially certify it as a
 13 class, or say that there's a common fund that's
 14 been created.
 15 There's statute of limitations problems,
 16 although -- that I think there's an argument on
 17 the other way that once that's resolved, that
 18 you're either through the door or you're not
 19 through the door, and so you're either limiting
 20 the class or expanding the class.
 21 So there's arguments and counter
 22 arguments, but there's lots of different issues,
 23 the greatest of which probably is whether or not
 24 they're indeed a true independent contractor.
 25 Another potential issue out there is

Page 20

1 interpreting the Supreme Court decisions in these
 2 cases as to: Do you reach the independent
 3 contractor issue, or do you only examine whether
 4 or not the employer made a significant enough
 5 inquiry into the status? In other words, could
 6 you have a true independent contractor, but the
 7 exemption still be valid because the employer
 8 basically made an inquiry and was satisfied that
 9 he was an independent contractor.
 10 MR. LUCK: Or the employer's insurer?
 11 THE COURT: Or the employer's insurer.
 12 And I don't know the question of that. It
 13 leaves -- Wild and Matthews, when I read it, left
 14 an open question in my mind as to whether or not
 15 there were two different standards. The problem
 16 is in a lot of cases, it may not make any
 17 difference, but in some cases, it could. I think
 18 that issue is probably the biggest one that we
 19 have to talk about and focus on, is that
 20 difference, those kind of inquiries. Is that
 21 going to distinguish all of these cases such that
 22 we really don't have a class, or we don't have a
 23 common fund. That's where I think your focus
 24 probably is going to want to be.
 25 (Ms. Wallace enters)

Page 21

1 MR. ANGEL: Just so I can be clear about
 2 that, it's true employees that still can't get
 3 benefits because the employer or its insurer did a
 4 good faith investigation, and that opts them out
 5 of work comp insurance? I mean that's the idea?
 6 THE COURT: Well, that's the question
 7 that's left in my mind after reading Wild and
 8 Matthews is that, and I don't know the answer to
 9 that. I suspect in most cases, it's going to be
 10 pretty clear whether or not -- if they've done a
 11 full investigation or a full enough investigation
 12 of what -- how much do they have to do, that's
 13 another question. I just don't know.
 14 One of the problems is it's so easy to
 15 be an employee, and what burden. I sometimes joke
 16 that there is no such thing as an independent
 17 contractor in Montana. I think there is such an
 18 thing as an independent contractor, but in a lot
 19 of situations where there are close calls, they're
 20 going to probably go in favor of the employment
 21 status, and in those close call cases, is there
 22 another standard that we apply that would deny a
 23 true employee benefits. And that's the question
 24 that's open, I think.
 25 MR. LUCK: The true independent

Page 22

1 contractor is uninjured.
 2 THE COURT: You're getting close to
 3 Maynard.
 4 MR. LUCK: I have a question. In the
 5 Wild case, we're focusing on the common fund
 6 issues, and in the Matthews case there's the
 7 additional issue of class action. Even though
 8 we're treating these cases together for some of
 9 the common issues, we're not treating them
 10 together for those two fundamental handling
 11 issues.
 12 THE COURT: That's true, but I think --
 13 and this is another thing that you can address in
 14 the briefs. I think that whether or not there's a
 15 common fund in great part depends on satisfying
 16 the criteria for a class action, or at least
 17 there's some overlap there. If you can't have a
 18 class, can you have a common fund -- maybe that's
 19 one thing that you ought to put in there -- and if
 20 you can, under what circumstances?
 21 You can sort of see where I'm going. I
 22 think there's a great deal of overlap in whether
 23 or not you can answer those questions differently.
 24 I don't know. And that's one thing we'll have to
 25 look at.

Page 23

1 MR. LUCK: Well, the fundamental problem
 2 to both is the same, and that is going back and
 3 trying, claim file by claim file, to make these
 4 individual determinations, which works against
 5 both the common fund situation and the class
 6 action.
 7 THE COURT: That's the biggest problem I
 8 see, and that's the biggest problem that I think
 9 we have to address. The other problems may not be
 10 as great. The statute of limitations, that's a
 11 legal issue, and some of these other defenses that
 12 may arise may be legal issues, but what are the
 13 -- And I think legal issues probably are different
 14 when we're dealing with common fund and class
 15 actions than the factual issues.
 16 So the important things are what are the
 17 factual differences that are going to get us into
 18 trouble if we try to do this as a common fund or a
 19 class action, and those are the sorts of things I
 20 think you need to focus on.
 21 MR. OVERTURF: I think we do have a real
 22 threshold issue that goes to the scope and goes to
 23 people who haven't -- who never filed claims, who
 24 it appears from what we've gathered so far, that
 25 could be the majority of the people. We don't

TRANSCRIPT OF PROCEEDINGS

Page 24

1 know.
 2 But I think we need to go one of two
 3 ways here. It's either, as Jeff says, you first
 4 try to identify the scope by seeing the people who
 5 would file claims; or we can reach a stipulation
 6 that yes, there are some of those people out
 7 there, and then brief the legal issues about
 8 whether the statute of limitations are missed,
 9 whether that's part of the common fund, whether
 10 they have commonality, and how you deal with on a
 11 case-by-case basis the A/B Test.
 12 To me, it seems like it's easier to kind
 13 of deal with those legal issues first, and then
 14 before you go out and drag in a whole bunch of
 15 other people.
 16 THE COURT: There's two questions here:
 17 Number one, whether or not there's any common fund
 18 at all; and number two, is if there is any common
 19 fund at all, how limited is it? I think that's
 20 where the legal issues come in. The first thing
 21 you have to decide is whether or not there are so
 22 many factual differences among these cases that
 23 there is or is not a common fund.
 24 If there's no common fund, you never
 25 reach those legal issues, except in an individual

Page 25

1 case-by-case basis brought by an individual
 2 claimant. If those aren't insurmountable, if you
 3 can have a common fund, then the legal issues seem
 4 to me to be the things that might limit the scope
 5 of that common fund.
 6 So I think you address that other issue
 7 first, before we get into whether or not the
 8 statute of limitations is going to apply and that
 9 sort of thing.
 10 MR. MARTELLO: Judge, there's also
 11 something that has to be kept in mind here, too,
 12 is there is some disparity between -- potentially
 13 between how carriers handled the applicability of
 14 the statute that's in question.
 15 We may have in this case, similar to
 16 what we had in FFR, you may have a statutory
 17 construction that would lead to one result, but
 18 you have an insurer who does not apply that.
 19 That's a different standard. And the defense of
 20 such a statute of limitations I think are better
 21 arguments when you have an insurer who is not
 22 potentially denying someone coming forward as an
 23 independent -- or claiming they're an employee,
 24 and not asserting the statute as a defense.
 25 And that, I think, is something that of

Page 26

1 course will come out in the briefing. But for
 2 purposes of lumping Matthews and Wild together,
 3 that there has to be, I think, a differentiation
 4 in how that treatment potentially could be,
 5 depending upon whether the insured decides to
 6 assert that as a defense.
 7 THE COURT: Well, that's true. The
 8 statute of limitations is a defense that has to be
 9 raised affirmatively, and can be waived, and
 10 that's another issue that -- maybe give notice to
 11 everybody. That would have to be addressed.
 12 I think the fundamental issue is, first,
 13 are all of these individual cases so potentially
 14 different that we can't certify any class or
 15 common fund at all? That's really the guts of the
 16 case. That's the argument that Geoff and Jim have
 17 to make to persuade me that there is enough
 18 commonality, and that the differences are trivial
 19 enough that we can go forward with it.
 20 Once we're beyond that, then we'll deal
 21 with those other potential issues.
 22 MR. LUCK: Although, Your Honor, it may
 23 be in our situation, and what Tom is talking
 24 about, is with the State Fund, our position is
 25 going to be that the straight independent

Page 27

1 contractor exemption document was not the primary
 2 basis of reviewing these claims, and that the A/B
 3 Test was in fact applied, and that may
 4 differentiate us out significantly from the other
 5 carriers; and that even if the threshold --
 6 That certainly relates to the statute of
 7 limitations argument, but even in the threshold
 8 argument, should we be thrown into the same box as
 9 Liberty or any other carrier, because of the
 10 claims handling situation and approach to it all.
 11 It's a subset of the bigger threshold argument
 12 that you were talking about, I think.
 13 I'm not sure at this point how we're
 14 going to develop that, because that may take
 15 actually some presentation of testimony, because
 16 Jim may want to examine somebody, and look at some
 17 files, do some things, and we may not be in a
 18 position to stipulate, you know, to come up with
 19 some language that we can agree to. We may have
 20 to put on some claim supervisors who have done
 21 some file reviews and those kinds of things in
 22 order to get those facts before the Court.
 23 So I don't know how that's going to go.
 24 I just want to let you know that that's something
 25 that's important to us, is that the State Fund did

Page 28

1 do differently, and may separate them out on even
 2 the threshold issues.
 3 THE COURT: That goes to another issue,
 4 and that is an issue that I've already ruled on,
 5 and we're up on the Supreme Court on that already,
 6 which is -- and I limited the common fund doctrine
 7 to a particular insurer. I haven't ruled on that
 8 in a class action situation. But at least that
 9 one is, because if that -- then I don't have to
 10 worry about other insurers if that holds up. If
 11 it doesn't hold up, then I have to worry about
 12 the other insurers, but we're not going to know
 13 the answer to that for at least one year, if we're
 14 lucky.
 15 MR. LUCK: I just want to let you know,
 16 though, that it may be a little bit more
 17 complicated, depending on what we can put
 18 together.
 19 MR. OVERTURF: As Brad says, it is a
 20 little, I guess, sloppy, because you leave the
 21 genesis of the IC exemption, it was put into
 22 place, and it was treated however it was treated
 23 by different carriers, and then you decided Bolden
 24 which said it was conclusive, and then there's the
 25 question of how the carriers treat that situation

Page 29

1 after Bolden.
 2 THE COURT: So there may be a difference
 3 in treatment in time periods. I see what you're
 4 saying.
 5 MR. ANGEL: From my perspective, it just
 6 seems like this is dead simple, because as far as
 7 the idea of how an insurer treated a claim that
 8 was made, the bottom line is if that person was an
 9 employee, even if they adjusted the claim wrong,
 10 it doesn't -- I don't think it's any defense to
 11 them.
 12 I mean if a person did go to the State
 13 Fund or Liberty, and Liberty held up an
 14 IC exemption, and told them to walk away, or the
 15 State Fund reviewed their claim, and denied it, as
 16 long as they can demonstrate today that the A/B
 17 Test applied correctly would entitle them to
 18 benefits, I don't see that the State Fund benefits
 19 any more than Liberty just because they did an
 20 incorrect review.
 21 MR. MARTELLO: You can't make that
 22 argument, Geoff, because the basis for your
 23 lawsuit is the statute. You're claiming that the
 24 conclusiveness of the presumption is what forms
 25 your basis for claim for a common fund. Otherwise

Page 30

1 what you're doing is you're claiming that anytime
 2 somebody brings an independent contractor, or we
 3 raise the defense of independent contractor, that
 4 somehow fits under your case. That doesn't make
 5 sense.
 6 THE COURT: I guess what I think, if I
 7 understand the State Fund's argument correctly, at
 8 least prior to Bolden, there are cases in which
 9 they got claims from persons who had independent
 10 contractor exemptions, but they did not deny them
 11 on that basis, they denied them because they did
 12 an independent review and determined that they
 13 were in fact independent contractors. So those
 14 cases might have a little bit different status,
 15 but it's not going to help as far as the unfiled
 16 claims, who didn't file claims because of the
 17 exemption, that they had the exemption, and they
 18 had the notice that this exemption was conclusive.
 19 So there may be -- Why do you have to
 20 complicate things? Brad always complicates
 21 things. I guess it's Martello.
 22 MR. LUCK: It works towards speedy
 23 resolution.
 24 MR. ANGEL: Keep them from being
 25 certified.

Page 31

1 THE COURT: Every time I do one of those
 2 things, I think this is going to be pretty
 3 straight forward, and then I have one of these
 4 conferences, and it gets more complicated.
 5 MR. ANGEL: It should be that simple to
 6 get the list of IC and send out an application --
 7 THE COURT: That's the easy --
 8 MR. ANGEL: This is the group of people,
 9 right, and dealing with the legal defense is --
 10 MR. LUCK: Some of that relates, though,
 11 to the impracticality under most circumstances of
 12 applying every new precedent retroactively or as a
 13 common fund. It's a shift in the manner in which
 14 we're practicing law, that's just -- in this Court
 15 that has a relatively new history, and we're still
 16 working our way through all the issues, because it
 17 is very different.
 18 THE COURT: We'll be working our way
 19 through until we get some more guidance from the
 20 Supreme Court, and I wish we could specially
 21 certify this, and say, "Can you give us a decision
 22 in two or three months," because that would make
 23 our jobs a little easier. And the other problem
 24 is we're probably going to get these decisions
 25 piecemeal. But we'll do the best we can.

Page 32

1 So anyway, you need to work on what you
 2 want in those factual things. And I don't know
 3 whether -- Jim, did they raise anything new you
 4 haven't heard before?
 5 MR. HUNT: Here today? Yes, they did,
 6 but I think --
 7 THE COURT: You can still deal with it.
 8 MR. HUNT: Yes.
 9 MR. LUCK: There's one other thing. We
 10 realize we have discussed stays over time; we've
 11 discussed implementation dates with you; and
 12 you've been concerned about our logic in even
 13 asking for that.
 14 But as we prepared for this, we realized
 15 there was no formal motion for a stay for
 16 prospective application in Wild and Schmill.
 17 There is one pending in Stavenjord which you
 18 haven't ruled on, and we fax filed with you -- and
 19 I can't tell by my file whether we faxed it or
 20 they just put it in the mail, and I'm afraid they
 21 just put it in the mail yesterday afternoon to
 22 Counsel.
 23 But we have asked formally now, and
 24 we've brought the subject up before, and we've
 25 asked formally in the Wild file for a stay on the

Page 33

1 prospective application; and again, guidance from
 2 the Court on what we use for an entitlement date
 3 for prospective application, so that we are acting
 4 with the advice of the Court in that regard.
 5 THE COURT: I can't stay prospective
 6 application because clearly --
 7 MR. LUCK: Well, I'm sorry, retroactive
 8 application, but tell us when prospective begins,
 9 because -- or we are asking you to tell us when
 10 prospective begins, because with the occupational
 11 diseases, it's easy with the date of injury,
 12 because you know that the law in effect on the
 13 date of the injury is what is applied.
 14 We're concerned about where prospective
 15 begins with the occupational diseases because we
 16 need to know an entitlement date, and we need to
 17 know whether that's going to be tied to the
 18 decision in this Court or the final decision in
 19 the Supreme Court in relation to when it became
 20 effective in terms of a change in the law.
 21 We're just asking. We've talked about
 22 that at some length before, but we're still asking
 23 for that guidance.
 24 THE COURT: Okay. I know you've talked
 25 about it before, and I kept getting confused, but

Page 34

1 I understand where you're coming from, but
 2 figuring it out may be a different story. I don't
 3 have a formal motion, looking at the file.
 4 MR. LUCK: We fax filed it yesterday
 5 afternoon, and I'm sure the hard copy is on its
 6 way. I apologize for the fact that I can't even
 7 tell you whether it was faxed to the other
 8 Counsel. It doesn't look like it was.
 9 MR. HUNT: I haven't seen it, but I
 10 remember the discussion we had last time. And
 11 whatever Brad suggested, we were pretty amenable
 12 to. What they were concerned about last time I
 13 think is penalties and --
 14 MR. LUCK: And people just saying
 15 we're doing it wrong.
 16 THE COURT: I understand. I think what
 17 we need to do is we need to get it briefed. I'm
 18 going to give a stay as far as retroactive
 19 application, just because we don't know the answer
 20 to some of this stuff. It's not written in sand.
 21 This case going to be more difficult.
 22 MR. LUCK: Could we stipulate to --
 23 Would you accept, if we got together and
 24 stipulated to a date upon which prospective
 25 application applies? For instance, if we

Page 35

1 stipulated that it would be consistent with the
 2 statute of limitations for an OD the day that you
 3 knew or should have known you had an occupational
 4 disease, or that it was first diagnosed as an
 5 occupational disease, something like that?
 6 THE COURT: If you can work out an
 7 agreement as to what you think is prospective,
 8 clearly prospective, I'll look at it, and if it
 9 looks reasonable to me, I'll approve it. If for
 10 some reason something jumps out at me and says,
 11 "No, that's not reasonable, there's others that
 12 should be encompassed," or whatever, maybe I
 13 won't. But I think if you're pretty much in
 14 agreement on that, then I'm probably not going to
 15 disagree with you.
 16 MR. HUNT: It seems to me, too, that all
 17 we're doing is stipulating to a date when they
 18 need to figure out how to handle the claims
 19 differently, and we're not giving up anybody's
 20 rights before that date, or giving anybody any
 21 special rights after that date. So it's a date we
 22 pick, like April 13, 2001, right out of the air,
 23 something like that.
 24 THE COURT: Don't do that.
 25 MR. HUNT: Not literally. I wouldn't

Page 36

1 think it would be hard to stipulate to a date.
 2 I'd just as soon not brief it.
 3 MR. LUCK: I think that's true, your
 4 Honor. We can work it out.
 5 MR. OVERTURF: The second issue related
 6 to that is in the lien that they filed, they
 7 extended it back to 1983, and then to prospective
 8 claims for a reasonable period of time. So I
 9 guess we need to be withholding 25 percent, and I
 10 think in some of these other cases, you issued an
 11 order authorizing the insurer to withhold a
 12 certain percentage of benefits paid, and --
 13 MR. LUCK: -- indefinitely into the
 14 future at this point.
 15 MR. OVERTURF: And we run into this same
 16 problem, particularly in this case where
 17 prospective is on which claims does it apply? Is
 18 it everybody involved in a claim who has an
 19 independent contractor exemption?
 20 THE COURT: I need something more from
 21 you, Jim. I'm hesitant to -- withholding from
 22 future claims in the future gives me heartburn.
 23 So I need some further specification as to what
 24 you're asking for, and why. And then if it
 25 appears that it's a legitimate issue to be

Page 37

1 litigated, then I'll authorize the withholding of
 2 it, but I need something further to authorize
 3 that.
 4 MR. OVERTURF: Because I foresee that
 5 probably is going to be another issue we're going
 6 to have to brief, and this ties again into the
 7 question of whether the State Fund was doing
 8 actual A/B Tests, because if you get a claim in
 9 now, the fact that the guy holds an IC may not be
 10 definitive because State Fund was going to deny
 11 the claim. And so the lien may or may not have
 12 application.
 13 THE COURT: The biggest problem is a
 14 legal issue, and that is whether common fund
 15 applies prospectively. And to be honest with you,
 16 and be honest with all Counsel, I think that's an
 17 uphill battle. You're going to have to convince
 18 me, Jim, that it is prospective, that it can be
 19 applied prospectively, because it seems to me the
 20 whole concept is that there's an existing fund out
 21 there, and with respect to prospective claims, I
 22 don't see how there is an existing fund.
 23 So anyway, work on that, and maybe you
 24 can work with them and sort of limit it and get
 25 back to me on that. Do you want a time frame on

Page 38

1 that?
 2 MR. LUCK: I think we need to do it
 3 reasonably quickly.
 4 THE COURT: Do you want a status report,
 5 put that in the status report, where you're at?
 6 MR. HUNT: Yes.
 7 MR. LUCK: In the interim, though, until
 8 we have that stipulation, you're comfortable with
 9 the stay? In terms of -- we need to define what
 10 retroactive application is, but you're comfortable
 11 with the concept?
 12 THE COURT: I'm comfortable with the
 13 concept of it, and I would say don't do anything
 14 until we get that bridge crossed.
 15 Geoff, do you need to be involved in
 16 that issue, the prospective issue?
 17 MR. ANGEL: No. I've waived that.
 18 THE COURT: That's sort of what I
 19 thought.
 20 I'm afraid to ask this. Next matter?
 21 Next issue?
 22 MR. LUCK: I think that's all we have
 23 for today, Your Honor.
 24 MR. HUNT: It's not.
 25 MR. JONES: I have one question.

Page 39

1 THE COURT: I'll let Larry question, and
 2 then we're going to come to Jim.
 3 MR. JONES: Can we return to the notice,
 4 this draft notice?
 5 THE COURT: Sure.
 6 MR. JONES: Just based on some comments
 7 I just heard, the light went off, I hope. This
 8 common fund claim is based on the statute 401(3)
 9 we discussed last time, and it was enacted in
 10 1993?
 11 THE COURT: 1983.
 12 MR. JONES: Then I don't have a question
 13 on it.
 14 THE COURT: That was easy.
 15 MR. HUNT: I want to talk out loud here
 16 for a second. We had talked -- or I had mentioned
 17 last time that we considered potentially
 18 advertising about this situation. And what occurs
 19 to me, as I sit here and listen right now, that
 20 we're a fair distance away from getting resolution
 21 of all of these issues, because it's a little more
 22 complicated, whether it's even common fund in the
 23 first place, or whether we can mail out
 24 independent contractor --
 25 I think Geoff is right in this sense.

Page 40

1 The only logical way to find out who is out there
 2 is to get the independent contractor list.
 3 THE COURT: You're probably right about
 4 that. The first question we have to answer,
 5 though: Is there is a sufficient basis to entitle
 6 you to get that list, and mail that notice?
 7 MR. HUNT: Right. And it also occurs to
 8 me as we sit here that even if we do mail out that
 9 list, who knows how many addresses are going to be
 10 correct or incorrect. We may go ahead and
 11 hopefully work with the Court on setting up some
 12 type of advertising situation. But if not, we can
 13 do it outside of the parameters of the Court. We
 14 just want to make you aware that we are
 15 considering that, and we'll keep you apprised of
 16 that. But I think we're allowed to do that under
 17 the circumstances, and that may be a way to
 18 handle the situation.
 19 MR. LUCK: I've had this happen in other
 20 litigation, and in a different context. I guess
 21 my first reaction would be we'd be concerned about
 22 the plaintiffs making, you know, getting like a
 23 class list, preclass, getting a common fund list,
 24 precommon fund. And although it's hard for me to
 25 verbalize exactly whether we have the right to

Page 41

1 fully object, because if there's a public record
 2 -- and I guess Counsel can write letters to who
 3 they want to --
 4 There's something, it seems, unseemly
 5 about the fact that we all admit that we've got to
 6 determine the threshold issues, while at the same
 7 time there's a -- not ex parte, but extra judicial
 8 notice going to all these people.
 9 THE COURT: He's not talking about
 10 getting the list and mailing. What he's talking
 11 about is one of those, sort like the TV
 12 commercials, except it would probably be in the
 13 paper, that says, "Have you been injured? Were
 14 you denied, or did you not file a claim because
 15 you had an independent contractor exemption? Call
 16 Hunt & Molloy Law Firm, 1-800," whatever.
 17 MR. HUNT: "You be hurt."
 18 MR. LUCK: If I can do the TV ad.
 19 MR. HUNT: The reason I -- I don't think
 20 that would be necessary if we got the list. If we
 21 could mail to everybody who had been an
 22 independent contractor since 1983, then on some
 23 level, you could almost determine whether there
 24 was a common fund after the fact, because you
 25 could start figuring out --

Page 42

1 THE COURT: Well, except --
 2 MR. HUNT: I don't hear anybody agreeing
 3 with that, and I think we're going to be in a
 4 briefing schedule, and I think then it could
 5 potentially go to the Supreme Court. If it does
 6 that, we're two years away from a resolution of
 7 this thing.
 8 MR. OVERTURE: I think the scope and the
 9 number of people who might respond to something is
 10 not relevant to the issue of whether a common fund
 11 exists. Whether there's 10,000 or them or two of
 12 them doesn't really impact whether or not you have
 13 enough commonality to establish a common fund.
 14 MR. HUNT: I would like to --
 15 MR. ANGEL: Even if there's no
 16 commonality, I think that Jim's correct. That
 17 doesn't mean that people can't come forward, and
 18 individually litigate their claim. And there's
 19 nothing ethically, in this state, wrong with going
 20 out and finding the people you know need a
 21 service.
 22 THE COURT: With the TV ad and the 1-800
 23 number.
 24 MR. ANGEL: Or a letter directly to
 25 them. If there's no commonality, it doesn't stop

Page 43

1 the people from coming forward and saying, "I was
 2 denied benefits as an employee," plus a piece of
 3 paper.
 4 THE COURT: The letter directly to them
 5 has a different status. There has to be some
 6 legal authority to do that, and I think the legal
 7 authority would be there is a common fund or there
 8 is a class. Short of that, I'm not sure there's
 9 legal authority for me to order that the
 10 department cough up that list.
 11 MR. HUNT: That's what I'm hearing.
 12 What I don't want to do is I don't want to walk
 13 out of here today, all of us sit down and decide,
 14 "Well, heck, these guys are going to do an
 15 advertising campaign," and everybody gets blind
 16 sided. So I want to be up front about that.
 17 THE COURT: You don't want to get a call
 18 at midnight from Brad who just saw the ad on TV.
 19 MR. HUNT: For some reason, I'm not
 20 worried about offending Brad. I'm convinced I'm
 21 going to do that no matter what. I'm worried
 22 about offending you, Your Honor.
 23 MR. LUCK: At least we know where we all
 24 stand.
 25 THE COURT: That's good. I think it's

Page 44

1 good to have all of this out. We all know the
 2 potential. There's certainly potential for all
 3 these individual cases coming forward, and there
 4 may be no way to avoid it in any event.
 5 MR. LUCK: In fact, that kind of proves
 6 one of my fundamental points, that if there is
 7 entitlement out there, they're all individual, and
 8 they're all individual cases, and this is the
 9 modern era of advertising for individual cases.
 10 MR. ANGEL: But doing -- And after we
 11 spoke last time, can you do a class of defendants,
 12 I went back in my set of books that I have on
 13 class actions, and there are numerous instances
 14 where the Special Master has to hear a little mini
 15 trial for each person. Having to prove through
 16 your own set of facts that you have a claim is not
 17 unique, and it never defeats --
 18 And actually when Congress enacted the
 19 modification to Rule 26, they talk about it's not
 20 a defense to say that each individual will have to
 21 prove their facts to show the amount of benefits
 22 they're entitled. That's normal.
 23 THE COURT: But the question is what
 24 sort of facts are to be proved. There can be a
 25 big difference. There is a line where they're no

Page 45

1 longer class actions. But those are the kind of
 2 cases that you're going to have to cite me to, and
 3 give me the factual situations, and I'm going to
 4 have to do the comparison to this case.
 5 MR. FAUST: Your Honor, if I could kind
 6 of summarize it here a little bit. I think the
 7 difference is are we going to have chaos or
 8 controlled chaos with this Wild decision in the
 9 future for the Court, and that's why I think
 10 that's the strongest argument in favor of
 11 certifying a class, or making this a common fund
 12 situation. We can have a method for processing
 13 all of these cases as efficiently as possible,
 14 provided there is sufficient commonality
 15 obviously. We think we can establish that.
 16 THE COURT: I understand that. I
 17 understand where you're coming from on that. But
 18 you still are going to have to meet the test that
 19 there is in fact a common fund, or there is in
 20 fact some sort of class.
 21 MR. ANDERSON: I don't really have a dog
 22 in this case. I'm just kind of sitting here. But
 23 I guess I'm hearing a situation where the first
 24 order of business has to be the definition of the
 25 class. Once you define the class, that's going to

Page 46

1 focus the analysis under Rule 23 in terms of
 2 typicality, commonality, whether those two
 3 elements predominate, etc., etc.
 4 And I'm just sitting here from that
 5 broad perspective, and think maybe if you start
 6 with trying to define the class, a lot of these
 7 collateral issues you have are going to fall away.
 8 THE COURT: Well, I think the class that
 9 they're trying to define, though, that Jim and
 10 Geoff are trying to define, is a class consisting
 11 of all individuals with independent contractor
 12 exemptions who have been injured since 1983. I
 13 think that's their starting point. They would
 14 like to have all those people in that class.
 15 MR. ANDERSON: Then you have to decide
 16 immediately if that's what the definition of class
 17 is, it seems to me, is whether or not that
 18 definition is too amorphous to satisfy the
 19 typicality and commonality requirements of Rule
 20 23.
 21 THE COURT: I agree with you. And then
 22 they can come back to me and give me some sort of
 23 a tighter definition, but I don't know how they're
 24 going to do that. That's what they're going to
 25 have to do, is try to defend that type of class

Page 47

1 that I just defined, or give me some alternative
 2 narrower type of class that may be more
 3 defendable.
 4 MR. OVERTURF: Our position likely is
 5 going to be that if there is a common class here,
 6 it's going to be people who held IC exemptions,
 7 filed the claim, and were denied on the basis of a
 8 claim, which is obviously much, much, much
 9 narrower.
 10 THE COURT: They have a darn good
 11 argument because -- especially after I issued that
 12 decision in Larry Bolden, that lots of people who
 13 were entitled were basically stopped from filing a
 14 claim because there was reliance on that decision.
 15 That's a pretty good argument on their part, and
 16 where that sorts out, I don't know. There's
 17 arguments on both sides.
 18 MR. LUCK: Did we mention that that was
 19 particularly well written?
 20 THE COURT: I don't know whether the
 21 Supreme Court said that. They certainly said that
 22 my decision in Hyatt was particularly well
 23 written, but then reversed me.
 24 MR. ANGEL: Our definition was each
 25 person -- this is the one I proposed -- each

Page 48

1 person injured due to industrial injury or
 2 occupational disease who was in fact then denied
 3 benefits because of an independent contractor
 4 exemption.
 5 THE COURT: Well, the problem, though,
 6 is we can't identify who those people are without
 7 making a factual determination in the individual
 8 case.
 9 MR. ANGEL: And I send them an
 10 IC exemption questionnaire, which I attached
 11 there, and they fill it out; and any of them that
 12 the insurer doesn't agree to, you have a mini --
 13 MR. OVERTURF: Even under your
 14 definition, if they never filed a claim, they were
 15 never denied benefits on the basis of the
 16 IC exemption.
 17 THE COURT: They were deterred from
 18 filing a claim.
 19 MR. ANGEL: Right.
 20 THE COURT: When you brief this, it
 21 seems to me that that's an attempt to limit the
 22 class, and one of the things you ought to do --
 23 Has that been exchanged? Do they have a copy of
 24 that?
 25 MR. ANGEL: Yes. That's attached to my

Page 49

1 motion to amend the petition, was the class
 2 petition and the application to go to employees.
 3 THE COURT: We ought to address that in
 4 terms of case law as to whether case law in class
 5 action allows that sort of thing. I don't know
 6 whether there are any cases --
 7 MR. ANGEL: Allows what?
 8 THE COURT: Basically allows you to take
 9 the broader class, which would be all individuals
 10 holding independent contractor exemptions, give
 11 them notice, let them fill out a claim, and then
 12 from that carve out a subclass consisting of --
 13 what would you call it -- the true class. I don't
 14 know whether there are any cases on that, but I
 15 think you've got -- if that's what you're trying
 16 to do, I think you've got to cite me some cases on
 17 that that would allow the Court to do that.
 18 MR. ANGEL: In the definition, I call
 19 them employees, because I think that they have a
 20 right to show -- if we propose somebody as a class
 21 member -- Well, number one, they're not an
 22 employee in the first place, so -- but it's a
 23 circular argument because it does get back into
 24 still reviewing the claim. But if it was denied
 25 just because they had the piece of paper, it

Page 50

1 should have -- the person should be entitled to a
 2 review even if it turns out they're not an
 3 employee. That's typical.
 4 THE COURT: In any event, if we're going
 5 to do that sort of thing, I need some case law on
 6 that. And I'm no class action expert, I'll
 7 concede that right off the top, but I'm a pretty
 8 quick study, but I sure would like some help.
 9 MR. ANGEL: And the idea of a Special
 10 Master, that you're bound to have people are
 11 broader than the true class that come to a Special
 12 Master hearing, and are told, "You're not a
 13 member." That's the whole idea.
 14 THE COURT: We need some case law, and
 15 need to know why that would apply in this
 16 situation.
 17 MR. LUCK: Our question is, to go back
 18 to what I asked before: Since class action is not
 19 an issue in our case, and even though there are
 20 some similarities in issues that give rise to it,
 21 are we to be briefing any of Geoff's arguments in
 22 relation to class action, or do we just deal with
 23 Jim?
 24 THE COURT: Technically you just need to
 25 deal with Jim, but I'm sure Jim will jump on

Page 51

1 Geoff's arguments insofar as he thinks that they
 2 would be helpful to him. And I think again, this
 3 sort of goes back to -- there may be differences
 4 between the criteria for class actions in common
 5 fund, but I think there's some overlap at least in
 6 the types of considerations in determining whether
 7 or not there's a common fund, and determining
 8 whether or not there's a class. So the class
 9 actions may provide us -- you know, the criteria
 10 used in class actions will probably provide us
 11 some pretty good guidance as to whether or not
 12 there's a common fund out there.
 13 MR. OVERTURF: It seems that common fund
 14 is fairly loosely defined under the Montana cases.
 15 Maybe what we need to do is look at class action
 16 criteria in the framing of our argument against
 17 the common fund.
 18 THE COURT: The question is: Is there a
 19 common fund? But whether or not there's a common
 20 fund depends on whether or not you can identify
 21 them, and the identification part of it really
 22 relates to the class action criteria.
 23 It may be that the common fund has
 24 tighter criteria or tougher criteria than does
 25 class action, and again, if that's so, then I need

TRANSCRIPT OF PROCEEDINGS

Page 52	Page 54
<p>1 to hear that, and I need to hear why. And if it's 2 not so, I suppose Jim may argue that it's looser 3 than the class action, and if you're going to make 4 that argument, I need to hear that, and I need to 5 hear why. 6 Jim? Any others? 7 MR. HUNT: I don't think so. 8 THE COURT: Geoff? 9 MR. ANGEL: No other issues. 10 MR. LUCK: I'm going to start watching 11 soap operas again so I can see their ads. 12 MR. HUNT: We're going to run them 13 during the day time. We want the guys who were 14 hurt bad. 15 THE COURT: I guess that will do it for 16 this hearing. 17 MR. ANGEL: I have a question because I 18 wasn't paying enough attention. The status report 19 in four weeks time is to address what issues? 20 THE COURT: It's actually to address the 21 progress on the stipulated facts; give us a 22 briefing schedule for briefing the issues that 23 we're talking about, which is basically in this 24 case is common fund case. Do we have any issues 25 that we need to brief in Matthews separately at</p>	<p>1 are some areas that we can agree in relation to 2 stipulation, we advise you at that time if we need 3 a hearing, and what we plan -- the general nature 4 of what we plan to produce. 5 THE COURT: And time frame for holding 6 that hearing, right. 7 MR. HUNT: So the stipulated facts and 8 the briefing schedule we're going to attempt to 9 set up will be around the issue: Is there a 10 common fund alone? That is the only issue we're 11 going to address at this point? 12 THE COURT: Right. Is there any basis 13 for proceeding down that road? 14 MR. HUNT: We're not going to worry 15 about statute of limitations or anything like that 16 at this point. 17 THE COURT: No. We're opening up a 18 whole new bag of worms on those kinds of issues, 19 because just off the top of my head, I hear the 20 affirmative defense, I hear the replies, I hear 21 the replies to the replies. I just dream about 22 that at night. 23 MR. ANGEL: So we're going to do the 24 same thing, Larry and I, as far as the set of 25 stipulated facts and briefing schedule; is that</p>
Page 53	Page 55
<p>1 this time? 2 MR. ANGEL: No. 3 THE COURT: So that's particularly 4 pertaining to Wild. And then they're going to 5 look at some sort of stipulation regarding what 6 constitutes prospective application, what they can 7 agree they should be processing now, and see if 8 they can reach a stipulation on that. Why don't 9 you send that to Geoff, too. 10 MR. ANGEL: So it sounds like any 11 affirmative defenses that are going to be raised 12 by way of briefing would be included in the status 13 report, as well as progress on the stipulated 14 facts; would that be fair to say? 15 MR. LUCK: No. 16 THE COURT: No. Things like whether or 17 not statute of limitations or things like that, 18 no, we're not going to mess with that right now. 19 We've got to determine first -- I'm going to work 20 at it from the perspective: Is there any class, 21 or is there any common fund? If there's not, then 22 I don't reach those issues. Those issues may rear 23 their heads in individual cases if there's no 24 common fund, but I'm not going to reach them. 25 MR. LUCK: And to the extent, if there</p>	<p>1 right? We won't have any trouble at all. 2 THE COURT: Do you want to work on that 3 same schedule, another four weeks to develop that? 4 MR. JONES: Yes, Your Honor. That's 5 fine. 6 THE COURT: So I need to hear back from 7 you in four weeks; and then if everything is going 8 smoothly, then we'll just go through the briefing 9 process. If we need a hearing, then we'll set 10 that up. And if either side wants a hearing, or 11 both sides want a hearing, we need to coordinate 12 that so that we have a single hearing rather than 13 two. So we can do that. Okay. 14 (The proceedings were concluded 15 at 10:10 a.m.) 16 * * * * * 17 18 19 20 21 22 23 24 25</p>

1 CERTIFICATE

2 STATE OF MONTANA)

3 : SS.

4 COUNTY OF LEWIS & CLARK)

5 I, LAURIE CRUTCHER, RPR, Court Reporter,

6 Notary Public in and for the County of Lewis

7 & Clark, State of Montana, do hereby certify:

8 That the proceedings were taken before me at

9 the time and place herein named; that the

10 proceedings were reported by me in shorthand and

11 transcribed using computer-aided transcription,

12 and that the foregoing -55- pages contain a true

13 record of the proceedings to the best of my

14 ability.

15 IN WITNESS WHEREOF, I have hereunto set my

16 hand and affixed my notarial seal

17 this day of , 2003.

18

19 LAURIE CRUTCHER, RPR

20 Court Reporter - Notary Public

21 My commission expires

22 March 9, 2004.

23

24

25

