

ORIGINAL

In the

Supreme Court of the United States

WILLIAM E. BLOOMER, JR.,

PETITIONER,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
AS SUBROGEE OF CONNECTICUT
TERMINAL COMPANY,

RESPONDENT.

No. 78-1418

Washington, D. C.
December 4, 1979

Pages 1 thru 41

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM E. BLOOMER, JR., :
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 Petitioner, :
 :
 v. : No. 78-1418
 :
 LIBERTY MUTUAL INSURANCE COMPANY, :
 as subrogee of CONNECTICUT :
 TERMINAL COMPANY, :
 :
 Respondent. :
-----X

Tuesday, December 4, 1979
Washington, D. C.

The case in the above-entitled matter came on for
argument at 11:00 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ALAN C. RASSNER, ESQ., Rassner, Rassner & Olman,
15 Park Row, New York, N.Y. 10038; on behalf
of the petitioner.

DOUGLAS A. BOECKMANN, ESQ., 10 Rockefeller Plaza,
New York, New York 10019; on behalf of the
respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Bloomer against Liberty Mutual.

Mr. Rassner, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF ALAN C. RASSNER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. RASSNER: Mr. Chief Justice, and may it please the Court:

The question presented by this appeal arises out of a longshoreman's accident on board a ship. The longshoreman collected compensation benefits and medical benefits, pursuant to the Longshoremens/Harbor Workers Compensation Act, and at the same time proceeded to bring a third-party action against the ship owner.

The action against the ship owner was eventually compromised for the sum of \$60,000.

During that interim period, Mr. Bloomer had recovered compensation payments and medical benefits of some \$17,000.

The question therefore is presented whether the recovery in the third-party action, the compensation insurance carrier, the respondent herein, should share proportionately with Mr. Bloomer the costs of affecting the recovery.

Now, I don't think from the point of view of equity and just common justice, there can be no question but that there should be equitable apportionment. For example, the recovery in the third-party of, let's say, \$10,000, and the lien is \$3,000; therefore, \$7,000, or 70 percent of the recovery, inures to the benefit of the longshoreman, and \$3,000, or 30 percent of the recovery, inures to the benefit of the compensation insurance carrier.

And there is no--

QUESTION: Of course, that argument is--that argument rejects the notion that the stevedore, the employer was intended to be, by Congress, to be completely free of any kind of liability in connection with third-party actions.

MR. RASSNER: I don't think so, Your Honor, if I may--

QUESTION: Well, I know you don't think so. But there's an argument that compensation benefits were increased substantially in exchange for immunizing the employer from any kind of liability.

MR. RASSNER: Yes, but--

QUESTION: In connection with third-party actions.

MR. RASSNER: Yes, Your Honor, but this doesn't really expose the employer, the stevedore, to a new liability.

What is happening here is the stevedore, or the employer, is receiving back payments that it initially made out. Under our American system, if anyone--well, let's say if I lend my friend a thousand dollars, for example, and he must hire a lawyer to collect that thousand dollars back from me because of my failure to pay, my friend must still pay lawyers' fees to collect his own thousand dollars.

The stevedore here is recovering money, and there is no reason from an equitable point of view why he should not pay reasonable attorneys' fees for making that recovery.

QUESTION: By the way, is there something in the statute that says that the employer is entitled to get back his--

MR. RASSNER: No.

QUESTION: --statutory--his payment?

MR. RASSNER: No, Your Honor.

QUESTION: Isn't that--I think that's very strange that the--after going through this whole process again in '72, they left the lien to just judicial decision.

MR. RASSNER: Well--

QUESTION: Isn't that the source of the lien?

MR. RASSNER: Judicial decisions are the source of the lien. And the judicial decisions were based on equitable principles.

QUESTION: Let me ask you this hypothetical

question: How much net would this man get now? He got 60 gross, 17 from the Liberty Mutual, isn't that right?

MR. RASSNER: That's correct.

QUESTION: And 23 net after the lawsuit was over, is that right? 17 and 23?

MR. RASSNER: Well, no, Your Honor--

QUESTION: He started with--

MR. RASSNER: Oh, I see what you mean, Your Honor.

In other words, the compensation plus what he netted?

QUESTION: Yes.

MR. RASSNER: Yes.

QUESTION: He got 17 in installments while he was litigating and getting well in the hospital.

MR. RASSNER: That's correct, sir.

QUESTION: And then he got 23 net after he finished his lawsuit.

MR. RASSNER: That's correct, Your Honor.

QUESTION: Suppose there'd been no statute at all, and he was just suing on common law negligence. And he sued--which is what he was doing here--he sued, and got \$60,000.

MR. RASSNER: He would still recover \$40,000.

QUESTION: That would--he's exactly in the same position as he would have been without any--

MR. RASSNER: Yes, that is correct. However,

here the \$17,000 doesn't go into his pocket--well, all right, I see what you're driving at. You're saying that in effect there is some degree of double recovery, perhaps--

QUESTION: Well, he got the 17 one way or another, didn't he?

MR. RASSNER: I follow; I follow. True, there is some degree of overlapping. He does not recover the full 17 again, but only one-third of it, in effect, if petitioner's position is sustained by this Court.

However--

QUESTION: That's one way of putting it. But he winds up in each of the situations I've described with precisely \$40,000 in his pocket, does he not?

MR. RASSNER: He winds up precisely with \$40,000 in his pocket, yet. However, there is a compensation statute, and we must deal with the situation as it does exist.

QUESTION: But as Justice White just pointed out, there's nothing in the compensation statute that tells us that this cost should be--

MR. RASSNER: Yes.

QUESTION: --taken off.

MR. RASSNER: That is correct. There is absolutely nothing in the compensation thstatute that does so.

QUESTION: But most compensation statutes are enacted as substitutes for an ordinary negligence action, are they not?

MR. RASSNER: You say as substitutes, Your Honor?

QUESTION: Yes.

MR. RASSNER: Well, I'm not exactly sure that the compensation statute was meant as a substitute for it. What it does, in effect, is--

QUESTION: I mean, against the man's own employer. Isn't the origin of workmen's compensation the idea that the man would get a fixed, quick, well-established and easily recoverable recovery against his employer rather than having to sue for negligence?

MR. RASSNER: That is correct. He is barred from suing for negligence against his employer.

QUESTION: And he gets these medical benefits, and installments, monthly or weekly installments, right away, doesn't he?

MR. RASSNER: Yes, he does, Your Honor.

QUESTION: So that he doesn't have to go out and borrow money or--

MR. RASSNER: That is correct. It's a remedial legislation; there's no question about it; for the benefit of the longshoreman.

If, as Your Honor pointed out--I want to deal

with this problem that Mr. Chief Justice, you raised a moment ago, about the double recovery.

There is admittedly a certain amount of overlapping. In other words, if petitioner's position is sustained by this Court, the longshoreman will recovery something more than he otherwise would recovery if he just sued directly.

However, as in so many questions, including-- that appear before this Court--this is a question of balancing the equities. Should the longshoreman be allowed some amount of double recovery, as opposed to permitting the employer-stevedore to recover back his lien with no effort, no expense and money, nothing whatsoever; he just sits back and lies on the back of the longshoreman who brings the action.

QUESTION: Yes, but he's paid out the money.

MR. RASSNER: Excuse me, sir?

QUESTION: He's paid out the money.

MR. RASSNER: Yes, he has. But as I pointed out a moment ago, anybody who has paid out money, once he's paid out this money, it's gone. The stevedore has paid it out.

QUESTION: Well, that helps solve your case by saying that.

MR. RASSNER: Well, somebody has to sue--

QUESTION: It isn't gone at all if there's going

to be a third-party recovery.

MR. RASSNER: If there's going to be a third-party recovery, yes. But the point I'm trying to make, Your Honor, is, once the money is paid out, unless somebody sues to get it back, it certainly is gone. Somebody has to sue. Somebody has to pay the lawyer for collecting that money back for the stevedore.

There is no equitable reason for it to be the longshoreman.

QUESTION: But if the longshoreman doesn't sue, but the employer does, then the statute does determine--then it does have provision for it.

MR. RASSNER: Yes.

QUESTION: And the employer is going to recover out of the--what he recovers from the third party, he's going to recover his attorney's fee.

MR. RASSNER: Yes, he will.

QUESTION: So recovery's going to be cost-free to him.

MR. RASSNER: Yes, it will. And that--under 933(e), the statute your Honor just referred to, the--when the stevedore sues, the stevedore gets his full lien back. He, in addition, gets an amount to cover any future compensation payments.

QUESTION: And his attorney's fee.

MR. RASSNER: And he gets the attorney's fee.

QUESTION: And?

MR. RASSNER: And one-fifth of the balance.

QUESTION: So he comes out--he comes out not only cost-free but a little ahead of the game.

MR. RASSNER: That's correct. And I think there is a reason for this, Your Honor. The stevedore is given a reward for bringing the action; he's given an incentive to sue. And in that--

QUESTION: Which he otherwise might not have?

MR. RASSNER: Excuse me, Your Honor?

QUESTION: Which he otherwise might not have?

MR. RASSNER: Which he otherwise would not have, because there are very few instances in the law that I know about where someone who sues gets his attorney's fees in addition to the proceeds of the lawsuit.

There are some, but not many.

Now--

QUESTION: Well, I know, but even if he didn't get his attorney's fee back, he might want to sue, because he's paid out a lot of money.

MR. RASSNER: If he did--

QUESTION: And he sues to get it back.

MR. RASSNER: If he did--

QUESTION: It's cheaper to get back 10 than

nothing at all. Of course, it's better to get back 17. And even more if you get back 17 plus your attorney's fees plus a little extra.

MR. RASSNER: That's correct, Your Honor. But if he did--I'm sorry.

QUESTION: If the stevedore sues, he's suing his customer.

MR. RASSNER: Yes, and they don't often do that, as a practical matter.

But to deal with Your Honor's question, the--as I mentioned a moment ago--excuse me--the stevedore is, in effect, being given a reward for bringing the lawsuit, something he would not ordinarily get. Now, when the longshoreman sues, if the lien is repaid in full, aside from that little one-fifth excess, the stevedore is reaping the same reward; when he sues--when the stevedore sues, he must take some initiative. He must get himself a lawyer, and risk the loss of lawyer's fees. He must suffer the discomfiture of being an active litigant, appear in discovery proceedings, worry about witnesses for trial.

He is exposing himself to a risk of a judgment against himself for costs. For all of these things, for taking these initiatives, Congress has rewarded him, given him an incentive to bring the action for the benefit of the longshoreman, hoping there'll be something left over for

him at the end.

However, when the longshoreman sues, the Second Circuit's opinion in this case puts the stevedore right back in the same beneficial situation that he would be when he sues, pursuant to 933(e). And that, I say, is totally inequitable; the statute did not intend that.

QUESTION: Well, isn't there an element of *expressio unius* in there.

MR. RASSNER: I'm sorry, Your Honor?

QUESTION: Isn't there an element of *expressio unius* in there.

MR. RASSNER: I don't understand what you mean.

QUESTION: Well, the statute has made very specific provision for what shall happen when a stevedore sues, and all of the consequences which you have described; and it has made none for the apportionment of attorney's fees when the longshoreman sues.

MR. RASSNER: That is a--Your Honor is correct, there's a void in the statute. Congress has always left the distribution of the recovery, when the longshoreman sues, to the courts. And the courts have always ruled on it whenever necessary.

Equitably, before the 1972 amendment, there were cases such as Russo and Ballwanz, which are cited in the brief, which did not allow equitable apportionment of the

attorney's fees between the stevedore and the longshoreman on the theory that when you had the third-party case allowed under the Ryan decision, the stevedore was ultimately paying the longshoreman judgment.

So it would be inequitable for the stevedore, in effect, to have to pay twice. He's paying the judgment, and in addition to that, he's paying fees on what he recoups to the attorney who sues him.

This could not be tolerated. And so it was disallowed.

However, when the '72 amendments came in, and the stevedore is now insulated from the third-party suit, he cannot be sued, now the courts, Fourth Circuit, the Ninth Circuit, the Fifth Circuit to some degree, have overruled those prior decisions; and now, because the equity favors the longshoreman, have allowed the recovery of the lien.

The court--

QUESTION: Well, Congress certainly didn't expressly, or even impliedly--well, I'll say expressly--did not attempt to overturn or to reject the no-allocation approach that the cases on the books indicated.

MR. RASSNER: I'm sorry, Your Honor.

QUESTION: Well, there were cases, as you say, in 1972 there were cases on the books that said, no allocation of the attorney's fees.

MR. RASSNER: Yes.

QUESTION: And Congress made no effort to reject that approach. Even though it did overturn Ryan.

MR. RASSNER: Yes. I would respectfully submit that Congress never gave it a thought. There is nothing in the legislation, there is nothing in the legislative history, there is nothing anywhere that I know of, at least, to indicate that Congress even visualized this problem arising.

It was only after the '72 amendments were in effect, and the courts were faced with the problem of distributing longshoremen's recoveries, that the inequity became apparent.

Even a legislative body as sophisticated as the Congress of the United States can't visualize everything that might arise in the future. And they didn't in this case, either purposefully, or unintentionally, I don't know which. But the fact remains, they did not legislate on it.

And there is absolutely no Congressional intent expressed or implied that the lien should not be equitably apportioned.

Failure to equitably apportion the lien can result in very serious inequities. Going back to my \$10,000 example, which is easy for me from the sake of mathematics, the recovery being \$10,000; assuming the lien

works its way up to \$6,000, and the lawyers' fees are one-third, or 30 percent or 40 percent, it gets down to the point where the longshoreman recovers nothing on his third-party action.

QUESTION: Well, but the figures--the hypothetical figures I gave you, he's much much better off than that. He's got \$40,000, hasn't he?

MR. RASSNER: I--I'm--

QUESTION: He's got \$40,000 on the hypothetical that I gave you.

MR. RASSNER: Yes, he got \$40,000 and--

QUESTION: With or without this act.

MR. RASSNER: Right. If equitable apportionment is allowed--all right, let me take another tack if I may, your Honor.

Under 933(e), if a stevedore sues, he is given a reward for bringing the lawsuit. I don't think there can be any doubt about it. Congress gave it to him purposely as an incentive.

If the longshoreman sues, the stevedore is in the same position. If there is some small overlapping of longshoremen's benefits, as a result of equitable apportionment, let it be the longshoreman's reward.

QUESTION: Mr. Rassner, what if the longshoreman has a medical policy of his own, so that a good deal of

hospital costs and that sort of thing are--come from a collateral source? Now, isn't--may there not be an occasion where the longshoreman is motivated to sue not by his own desire to recover, but by his own insurer's desire to recover as subrogee?

MR. RASSNER: Most of the time, Your Honor, a private insurance policy is not subrogated to the rights of the injured person, because the injured person is paying a premium for the policy.

QUESTION: That depends on whether a state follows a collateral source doctrine.

MR. RASSNER: That's correct; that's correct.

I don't know--it's hard for me to guess as to whether an insurance company could pressure a longshoreman to sue because of the insurance company wants to recover back its funds. I would say that the longshoreman should have this initiative himself, and the desire to recover compensation for his pain and suffering, and for general damages which he doesn't get under workmen's compensation laws.

As--there is a distinction I could make if the longshoreman had to go out, let's say, and borrow money, and owed a debt to the debtor--owed a debt to the creditor who lent him the money, and somehow the creditor reduced the debt to judgment, and got a lien on the longshoreman's

third-party case, then I would say there should be no equitable apportionment because the longshoreman still, no matter what happens in the third-party case, he would still owe the money to the creditor.

In the case before the Court, the longshoreman does not owe the money to his employer; the employer cannot sue to recover back the compensation benefits, not through the longshoreman. The only one who might possibly owe these compensation benefits is the shipowner. And someone, in order to collect this, has to sue the shipowner.

And what I'm saying to this Court is that it would be inequitable to cause the longshoreman to have to pay the attorney's fees, collect the money from the shipowner, which inures to the benefit of the stevedore.

QUESTION: Well, he may have to--may have to make some kind of a judgment about whether to sue at all like most people do, whether it's worthwhile to sue. And it may be he'll just decide to leave it to the--leave it to his employer.

MR. RASSNER: I'm sorry, I didn't--

QUESTION: He may just decide to leave it to his employer.

MR. RASSNER: Well, he may.

QUESTION: It's going to be subject to--

MR. RASSNER: If he does--

QUESTION: Is it \$10,000? I may only recover \$10,000. I'll owe my attorney so much, and I'll owe the--I'll have to pay my benefits back. It isn't worth the effort.

MR. RASSNER: If he does leave it to the employer, and the employer sues, fine. Then the employer takes the risk--

QUESTION: The employer may never sue.

MR. RASSNER: The employer may never sue. That's not the case before the Court, if I may, respectfully. If the employer does sue and takes the risk and recovers, he's entitled to the benefits of 933(e).

QUESTION: But if he goes to a lawyer and the lawyer says, "Gee, I don't think you could ever recover more than \$5,000, and frankly, mister, my fee would never warrant the time it would take." So he may never get to sue anyway.

MR. RASSNER: That's correct, sir.

But as I say, if the employer does sue, and does collect, then he's entitled to those 933(e) benefits. But he's not entitled to those 933(e) benefits when the long-shoreman is the one who does the suing.

QUESTION: Of course, that's just the issue, I suppose. If he--

MR. RASSNER: I'm sorry, Your Honor.

QUESTION: I guess that's really the issue?

MR. RASSNER: Yes, it is the issue. That is the

nub of the issue.

QUESTION: Even in your example, where we just went through it with Mr. Justice White, of a \$10,000 recovery and a \$6,000 paid in advance, and maybe \$4,000 go for expenses and litigation.

What it all boils down to, I suppose, is, there's really no incentive to bring a lawsuit in that case.

MR. RASSNER: There would--

QUESTION: Maybe that's a pretty good idea; we just don't have incentives for lawsuits that aren't very valuable.

MR. RASSNER: There would not be an incentive-- there would be less of an incentive to bring a lawsuit, certainly. Because--

QUESTION: Under the Second Circuit rule.

MR. RASSNER: Under the Second Circuit rule, yes. And one of the things that Congress did intend, I believe, is to preserve to the longshoremen their right to bring these third-party cases.

That was specifically provided for, and that should not be discouraged.

QUESTION: Well, the right is there, but you don't particularly want to encourage lawsuits that are not going to benefit the economy as a whole. I mean, just--the only beneficiary of your hypothetical case, really, is the lawyer.

MR. RASSNER: Well---

QUESTION: He's going to get the \$4,000.

MR. RASSNER: Not really, Your Honor. The longshoreman benefits as well, because the longshoreman is entitled to retain two-thirds of the net recovery after the lien is paid.

Otherwise, he would wind up with nothing.

QUESTION: Well, in our hypothetical, there won't be anything after the lawyer is paid and the \$6,000 is reimbursed to the stevedore, or the stevedore's insurance carrier.

MR. RASSNER: If the--under the Second Circuit's opinion, the longshoreman would get nothing under that hypothetical, that's correct. But under the--let's say the Fourth Circuit's opinion in Swift v. Bolten, or the Ninth Circuit's opinion in Battell, the longshoreman would recover. The longshoreman would get two-thirds of \$4,000.

QUESTION: But it's still true in your hypothetical that using the example the Chief Justice put to you, the longshoreman would come out about the same as if there'd never been any compensation statute; the \$10,000, he'd get a net of about \$6,000 out of the recovery.

MR. RASSNER: Yes. He would come out about the same as if there had never been any compensation.

However, I should point out also that compensation

comprised not only a payment that goes directly to the longshoreman, but also comprises medical and hospital payments which the longshoreman never sees, which goes to effect his recovery.

They are charged to him; they are charged to him.

QUESTION: And he gets the benefit of them.

MR. RASSNER: He gets the benefit. I say, they are charged to him. But he never sees the dollars.

QUESTION: Could I ask, we keep talking about the stevedore, but isn't it his insurance carrier that's on the hook?

MR. RASSNER: The insurance carrier is the real party of interest. That's why Liberty Mutual is named as the respondent.

QUESTION: And I suppose the--I suppose the result of this case may affect the employer's insurance rate.

MR. RASSNER: I don't know. It may.

QUESTION: Well, I would suppose the employer's insurance company is getting back full recovery by one rule, and wouldn't be getting back full recovery in another.

MR. RASSNER: True.

QUESTION: In which event, his doing business costs him more.

MR. RASSNER: It might very well cost him more,
Your Honor.

QUESTION: And what about a state system?

MR. RASSNER: Excuse me?

QUESTION: Aren't there some state systems? Are there some state funds, or is it all private insurance coverage?

MR. RASSNER: So far as I know, it's private. Stevedores are private enterprises in business to make money.

QUESTION: Well, I know but--

MR. RASSNER: And they have their own insurance.

QUESTION: They never operate through any state insurance firms?

MR. RASSNER: Well, they do; I believe they do sometimes finance their insurance through--in New York through the State Insurance Fund.

QUESTION: All right. And so the State Insurance Fund is, or is not, going to get full recovery; under your rule, they won't.

MR. RASSNER: Under my rule, they will have to pay a reasonable fee for making their recovery.

QUESTION: So your rule would tend to deplete the state funds.

MR. RASSNER: Well--

QUESTION: Well, it would not only tend, it would.

MR. RASSNER: All right.

QUESTION: To that extent.

MR. RASSNER: To that extent, right.

I think we're talking here about a comparatively limited extent because--

QUESTION: Well, in your \$10,000 case, you're talking about two-thirds of the attorney's fee.

MR. RASSNER: Well, I'm talking about--well, yes. If the lien is that high, yes, it does amount to that. That's correct. But I say a comparatively limited amount because the 1972 amendments have done away with a great number of longshoremen's cases. And in view of the amendments, the stevedore and the longshoreman are in effect on the same side of the fence. They both want that shipowner to pay.

Because if the shipowner pays, then the stevedore stands to recoup part of its liens, and it can never be exposed to any third-party liability.

QUESTION: But can't you extend that statement you just made still further? If the 1972 amendments just, as a general matter, tended to cut down on the number of lawsuits that there were in this area. And in that sense, the very notion of a third-party action is--runs contrary to the notion of a compensation system.

We have them both in the statute, but they point in two alternative legal theories.

MR. RASSNER: I'm not really sure I understand your Honor's question; I apologize.

QUESTION: Well, it's perfectly possible that you could have a system of workmen's compensation which authorized no third-party actions whatever; there wouldn't be any lawsuits.

MR. RASSNER: There wouldn't be any lawsuits.

It's conceivable. Congress can pass such laws as it sees fit. But I know of no state laws, state compensation cases, state compensation laws--schemes or the Longshoremen's Act, which prohibit the longshoreman, or any injured worker, from suing a third-party who may have negligently caused his injury for full damages.

QUESTION: But most of them prohibit an employee from suing his own employer.

MR. RASSNER: They all prohibit an employee from suing his own employer. That's the nature of workmen's compensation, as Your Honor---

QUESTION: To substitute for a lawsuit.

MR. RASSNER: A substitute for a lawsuit against the employer. It does not substitute for a lawsuit against a third party.

QUESTION: But is there any reason, as suggested by my brother Stevens, to encourage in any way additional litigation in this area?

MR. RASSNER: I don't think it's a question of encouraging litigation, if I may say so respectfully. If a person is injured by virtue of negligence of some individual or company, he always has had the right under common law to sue that individual to recover full compensatory damages.

The compensation law wasn't meant to limit an injured man's rights. It was meant to give him something in addition.

QUESTION: Well--

MR. RASSNER: It was meant--

QUESTION: Under common law, he has the right to sue his own employer for negligence.

MR. RASSNER: Yes.

QUESTION: And the compensation law removed that.

MR. RASSNER: Yes, that is correct. A judgment was made by the legislatures--I would assume of every state--that it is better for the individual to get some recovery quickly, and to insulate the employer from being sued, than it was to have the employer be sued by the individual.

QUESTION: Better for both, and probably better for society as a whole.

MR. RASSNER: That is better for society as a whole. But the legislature--the legislature of no state

that I know of has taken away the common law right to sue a third party. Because why should that third party, who pays no premiums to the workmen's compensation carrier, who gives nothing, be allowed to injure someone and get off, totally scot free?

The statute just doesn't--it allows that common law right.

MR. CHIEF JUSTICE BURGER: Your time has expired.

MR. RASSNER: I'm sorry, Your Honor. I apologize.

MR. CHIEF JUSTICE BURGER: That's all right.

ORAL ARGUMENT OF DOUGLAS A. BOECKMANN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BOECKMANN: Mr. Chief Justice--

MR. CHIEF JUSTICE BURGER: Mr. Wagner.

MR. BOECKMANN: Boeckmann, Your Honor.

MR. CHIEF JUSTICE BURGER: Oh, excuse me,

Mr. Boeckmann.

MR. BOECKMANN: Mr. Chief Justice, and may it please the Court:

We contend that the stevedore should be allowed to recoup its entire lien. And the statute, the legislative history, and the construction by this Court since the 1972 amendments were passed all point in that direction.

The statute that has been mentioned in various questions brought up by the Court is a remedial one, and it

is the result of political forces in the Congress.

The employers resisted for quite some time an increase in benefits under the statute, and the benefits were quite low up until 1972 because they were being hit both ways up until that time by virtue of the Seas Shipping and the Ryan decision. So that the employer usually wound up as a third party paying both compensation and being hit with a judgment or settlement for liability, after having been impleaded by the shipowner.

As a result of negotiation in the legislative process, the longshoring companies, the stevedoring companies, agreed to an increase in benefits, but as price for that increase, they were to be insulated from being impleaded in these third-party actions.

And--but because of the power of the longshoremen's union, Congress saw fit as part of the compromise package to allow the stevedores, the longshoremen-employees, to bring third-party actions.

But when you look at the legislative history, and you look at the provisions of the statute itself, it is quite clear that it is intended to be a compensation statute, and the third party recovery aspect of it is given a lesser degree of attention.

The--for one thing, as I mentioned, the benefits are quite high. They are 200 percent of the average

national weekly wage, and they are computed annually in order to adjust for inflation.

Whenever an attorney is involved in the compensation portion of securing payment, the Deputy Commissioner of Labor is empowered to oversee any fees that are awarded to the attorney. And it is usually only in the case of a contest over the amount of compensation, and that the employer turns out to be wrong in resisting, that an attorney is awarded a fee; and only on the excess that he brings to his client as a result of that contest.

And in all cases, the Deputy Commissioner is empowered to look at the fees awarded to attorneys.

All of this seems, to my mind, manifestly intended to preserve the employer's assets for the payment of compensation.

And, as has been pointed out, the statute itself lays out a very specific formula for if the employer wishes to recoup his compensation lien, encouraging him to do so, awarding him not only the fee, but his expenses, his attorneys' fees, and a portion of any excess over this amount.

The--I would also like to address myself to the equity of this particular situation. It is argued that equity would not--does not permit the recovery of a fund without rewarding the person who is responsible for

securing that fund.

But it seems to me applying it to this kind of situation, it is--you have to go one step deeper. Namely, that the attorney did not create the fund, the fund that consists of the compensation lien. The compensation lien is there by virtue of the fact that compensation has been paid.

QUESTION: You're speaking now of the \$17,000?

MR. BOECKMANN: Yes, I am, Mr. Chief Justice.

QUESTION: It took no lawyer to produce that fund?

MR. BOECKMANN: Yes, it is there; like a mortgage on a house, in the sale of the house. It is there. And whether or not a suit will be brought, an attorney or a claimant will have to look--he will have to consider that fact in determining whether or not he has a viable suit. And there is--

QUESTION: Is there provision in the Act for the payment of an attorney's fee by the employer to the employee if the employee must sue for his compensation?

MR. BOECKMAN: There is no such provision.

QUESTION: Is it payable? Suppose the employer--suppose he claims that his compensation, that he's been injured in the course of his employment, and the employer denies it. And the employee has to bring action to get his compensation.

Suppose he wins.

MR. BOECKMANN: Then, when there is a contest between employer and employee within the context of the compensation--

QUESTION: Yes?

MR. BOECKMANN: --then there is an attorney's fee allowed, yes.

QUESTION: Well, that's for the--isn't that under the statute?

MR. BOECKMANN: Yes, but that is not--has no reference to the third-party action.

QUESTION: I understand that. But it does provide for the payment of attorney's fee to the employee in certain circumstances.

MR. BOECKMANN: Yes, it does.

QUESTION: And the Commissioner supervises that?

MR. BOECKMANN: Yes, the Commissioner does supervise that.

And the Act provides--the Act contemplates, it seems to me, that the employee, the injured employee, can proceed in compensation without an attorney. It is only where there is some kind of contest, and he chooses to employ an attorney, and as a result, wins the contest, that he is--achieves his attorney's fees.

QUESTION: And also when the employee--

QUESTION: Is that true in every case? Excuse me.

QUESTION: Go ahead.

QUESTION: Is that true in every case? Or does the Commissioner have some discretion to say, "Well, in this case, it was pretty close, and while you did prevail, I'm not going to allow attorney's fees."

MR. BOECKMANN: I don't know what the actual practice--day-to-day practice is before the Deputy Commissioner. But the Act provides for it.

QUESTION: Authorizes him to award attorney's fees to the claimant?

MR. BOECKMANN: Yes, it does.

QUESTION: And when the employer sues the third party and recovers, and wants an attorney's fee, the Commissioner must approve that, too?

MR. BOECKMANN: Yes. But he has authority to check into its reasonableness.

QUESTION: Well--certainly I--what was the--will you tell us again what you just told my brother?

MR. BOECKMANN: The--when the employer sues--

QUESTION: The third party.

QUESTION: Right.

MR. BOECKMANN: The third party--he is entitled to recover his lien, and he is entitled to an attorney's fee out of the recovery.

QUESTION: --out of the award, under the statute?

MR. BOECKMANN: Yes. And the Deputy Commissioner has the authority to approve the reasonableness of that fee.

QUESTION: He not only has the authority, but the employer can't deduct it without getting that approval, can he?

QUESTION: He's required to.

MR. BOECKMANN: I believe that's true, yes.

And it seems to me to defy logic to say that if the employer is entitled to a fee in that situation, he is not entitled to--he is required to pay a fee where the employee sues.

And also, the employer really has to take a back seat for the first six months, because the employee has the primary option of proceeding during the first six months.

And therefore, you really would penalize the employer by requiring him to pay a fee. And as you pointed out before, Mr. Justice White, the paying these fees, and not being able to recoup the full compensation lien, does diminish the resources of the employer.

It may, in the instance of an individual employee, have him wind up with a greater recovery. But that is at the expense of the other injured employees who don't have recourse to a third party action, where the accident, for

example, is due 100 percent to the longshoreman's own negligence.

QUESTION: Well, I don't know--all that requires is higher insurance premiums.

MR. BOECKMANN: Yes, but fees--

QUESTION: The employee--no other employee really's going to not get his compensation payments.

MR. BOECKMANN: But--

QUESTION: Just that they're going to be more costly to the employer.

MR. BOECKMANN: Yes. But in effect, the insurance premium payment, the higher payments, come out of the employer's pocket.

QUESTION: Sure.

MR. BOECKMANN: And if he's going to have to pay higher insurance premiums, he may have to shrink his business, or employ less employees. So that it is--

QUESTION: May lower wages?

MR. BOECKMANN: Yes, yes.

QUESTION: Or not increase them as much.

MR. BOECKMANN: And it is--it winds up being a tax on the economy, which we--my contention is that Congress did not intend to occur in this case.

It--I would also like to suggest that it's part of my equitable argument here that inevitably in a court is to

look into the amount, the pro rata allocation of an attorney's fee out of the lien recovery, that the stevedore employer will inevitably be drawn into the litigation; he will have to appear in court; he will have to argue for a maximum recovery. And the statute itself appears to me to contemplate keeping the stevedore employer out of court as much as possible.

Inevitably, if a judge has the authority over dispensing of the proceeds of the funds, there's going to be--the stevedore is going to be involved in the settlement negotiations, the drawing up of a settlement package. The shipowner contributes so much, the stevedore employer to reduce his lien, or even perhaps to make--

QUESTION: I take it that the most frequent third party defendant is a shipowner?

MR. BOECKMANN: Yes.

QUESTION: In these cases.

MR. BOECKMANN: Because normally the accident happens aboard ship.

QUESTION: And if you know, is it characteristic that the same insurance companies may be insuring shipowners as who insure stevedores, or do they specialize?

MR. BOECKMANN: Generally, it's my experience that shipowners are insured by P&I clubs, which are generally foreign insurance companies. And most stevedoring

companies are insured by domestic companies.

QUESTION: So there is then--there's a fight between a certain kind--one kind of insurance company and another kind of insurance company in these cases?

MR. BOECKMANN: They are--they are usually adversaries. And if the shipowner sees a potential partner for contribution to settlement, he will look in that direction.

And it seems to me that Congress, by using the language that the employer shall not be liable directly or indirectly, intended to obviate this very thing.

And if this Court approves the allocation, pro rata allocation, of the attorney's fee out of the lien, as petitioner argues for, it is going to mean an indirect payment, some way or other, by the employer.

I would also like to point out that in the--the two recent cases decided by this Court on the 1970--the 1972 amendment to the Act, the Edmonds case and the Director, Office of Workers' Compensation Programs v. Rasmussen, in which the Court was called upon to review the intent of Congress in enacting the 1972 amendments.

And in both instances this Court, a majority, took the position that the Court should not rewrite what Congress had set forth. In the Edmonds case, it was a question of--

QUESTION: Congress hasn't written anything in

this area; I thought you both agreed to that.

MR. BOECKMANN: Well, I agree with that. But Congress, it seems to me, took the law as it existed at the time of the passage of the 1972 amendments--

QUESTION: Which was: No contribution.

MR. BOECKMANN: That's right; which was no pro rata allocation. And Congress, by not addressing this issue whatever in the statute, intended that the law remain the same.

And in essence, that was really the issue in the Edmonds case. And this--the majority of this Court took the position that since Congress did not address the issue in the remedial legislation, the Congress intended that the law continue to be the same; and this Court should not rewrite it.

In--also in, a lesser extent, in the Rasmussen case, the Court decided that since Congress did not speak on an issue of a limitation on death benefits, that the Court was not going to rewrite what Congress did not address.

I think the same--the Court should take the same position here, inasmuch as Congress intended to enact a remedial statute.

QUESTION: You--I take it you've found no trace in the legislative history of any attention being given to the lien?

MR. BOECKMANN: I have found--

QUESTION: Or making any kind of a specific provision for a lien which just rests in the case?

MR. BOECKMANN: I have found--I would like to have found something, Mr. Justice White, but I have found not a word.

QUESTION: As long as it's in your favor.

MR. BOECKMANN: I found not a word one way or the other.

But my feeling is, also, that Congress perhaps didn't address this issue at all because it really didn't want to tie the hands of the Court in making an allocation where the recovery was not sufficient to satisfy both the attorney's fee and the lien.

And we do not argue that the Court--that by affirming the Second Circuit here today that the Court would establish a rigid rule that there would still be room under the cases for a court to fashion an allocation where there was not a sufficient third party recovery to satisfy both the lien and the attorney's fee out of the recovery.

And that was considered in the--some of the cases that were cited pre-'72 law was that, yes, when there wasn't enough, that there could be a solution worked out.

QUESTION: But if there was enough, no allocation?

MR. BOECKMANN: Yes. Pre-'72, there--at a certain

point, until there was--the stevedore's lien came first out of the recovery, and then the attorney's fee. After--there are some cases--after 1972, which reversed the process, the attorney's fee is paid, then the lien.

And we contend that that is a sufficient accommodation to the 1972 amendments, and this Court doesn't need to go further in further readjusting, because of the change in situation wrought by the 1972 amendments. And it doesn't have to go to the extent of pro rata allocation.

And also, we contend that it would be a burden for the courts and for the employer, in each case, to have to have a hearing as suggested by the Court in Mitchell, I believe the Fifth Circuit case; because that again would draw the stevedore-employer into court unnecessarily, requiring him to employ a lawyer to defend his right to the lien recovery.

And we contend that it should be an automatic rule which would--which if this Court affirms the Second Circuit, would mean that the employer would, in every case where there is sufficient funds available, pay the attorney's fee and the lien, that that would mean that the stevedore-employer would automatically, without a hearing, without law, recoup the entire workmen's compensation lien.

QUESTION: But you suggest a different rule might be applicable where the recovery did not reach the amount of

the compensation award?

MR. BOECKMANN: Yes.

QUESTION: The Valentino case, which was recognized, I gather, by the Second Circuit.

MR. BOECKMANN: Yes. I believe the Valentino there was sufficient. But in a case where there was--there isn't sufficient to cover both, the courts would still have a free hand to make an allocation. But only in that kind of situation.

QUESTION: It's also suggested in the briefs, at least, that there might be some different rule where there's a settlement from what the rule would be where there was a recovery against a third party.

MR. BOECKMANN: There--the--the amicus brief, I believe--

QUESTION: It was the amicus brief, yes.

MR. BOECKMANN: --suggests that there be a distinction made where there is a settlement with out the employer's permission as opposed to one that was made with the employer's permission. And that--because the settlement made without the employer's permission cuts off any right to future compensation payments; whereas one with the employer's permission, the Deputy Commissioner is first required to ascertain any future liability for compensation. And--

QUESTION: In your submission, is that a valid distinction?

MR. BOECKMANN: I don't join the amicus in that. I feel that the rule should be uniform, whenever there is a third party recovery.

QUESTION: Whether recovery against a third party is either by way of recovery or by way of a negotiated settlement?

MR. BOECKMANN: Yes, that is our position.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:54 o'clock, a.m., the case in the above-entitled matter was submitted.)

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