In the

Supreme Court of the United States

THE BOEING COMPANY,

PETITIONER

V.

WILLIAM R. VAN GEMERT ET AL.,

RESPONDENTS.

No. 78-1327

Washington, D. C.
December 3, 1979

Pages 1 thru 45

Hoover Reporting Co., Inc.

Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

THE BOEING COMPANY,

Petitioner

v. No. 78-1327

WILLIAM R. VAN GEMERT ET AL.

Respondents.

Washington, D. C.

Monday, December 3, 1979

The above-entitled matter came on for argument at 1:00 o'clock, p.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:

S. HAZARD GILLESPIE, ESQ., 1 Chase Manhattan Plaza, New York, New York 10005; on behalf of Petitioners.

NORMAN WINER, ESQ., 230 Park Avenue, New York, New York, 10017; on behalf of Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Gillespie, you may proceed whenever you are ready.

ORAL ARGUMENT OF S. HAZARD GILLESPIE, ESQ.,

ON BEHALF OF PETITIONER

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

I speak for petition of The Boeing Company. This case is here by writ of certiorari to the Court of Appeals for the Second Circuit to review a 6-3 en banc decision of that court dealing with what it said it regarded as having unusual significance for the conduct of class action litigation. Specifically, whether attorneys for plaintiffs who successfully prosecute a Federal class action for money damages are entitled to look for their compensation to the total amount for which a defendant would be liable if all class members perfected their claims by filing proofs of claims or only from the amounts payable to those class members who do file proofs of claim and thus receive the benefits of the legal services rendered by the plaintiffs' attorneys.

The Court of Appeals decision here under review held that the plaintiffs' attorneys were entitled to be paid not only from money actually claimed by their client class members but also from unclaimed money which that court in an earlier decision in this very case held will never belong to or become

the property of any client of these attorneys.

Now, it is the position --

QUESTION: What would you think of the hypothetical situation that one of the members of the class wrote in to the Court and said, I think the court has been wrong in the decision, I don't think there is any money due me from Boeing Company, and therefore I refuse to accept it?

MR. GILLESPIE: Well, Your Honor, I think you have almost that situation right here. The brief that is amicus curiaed that has been filed by the Special Master appointed to administer this fund informs the Court that claimant, or rather holders of 128,000 face amount of these debentures have been identified, they have been in touch with and they have declined to file proofs of claim.

QUESTION: They haven't affirmatively renounced, however, have they?

MR. GILLESPIE: No, they have not, Your Honor.

But there is no question of their not being reached and told that they could do this.

QUESTION: My hypothetical is a person who affirmatively renounces on the grounds that he thinks --

MR. GILLESPIE: I think that is an an a fortiori case under those circumstances, if he renounces there is no reason why his share of that recovery should be utilized to pay the attorneys for the class members who have claims, under

this Court's decision.

QUESTION: You think there is no difference then between an affirmative renunciation and a passive, neglectful --

MR. GILLESPIE: Quite right, Mr. Chief Justice; quite right.

Now, it is our position, or the position of The Boeing Company on this appeal, and it was the position of a panel of the Second Circuit which decided this case prior to the en banc decision, that to allow plaintiffs' attorneys to be compensated for monies that are not claimed is two fundamental errors.

One, that it is requiring claiming class members, or it is entitling claiming class members to benefit from monies to which they are not entitled.

And second, that it would be a direct violation of this Court's holding in the Alyeska Pipeline Company case because the funds which are not claimed would revert to the defendant in the case and therefore if they had skimmed off of them sums to pay the claimants' attorneys, there would be a case of the defendants paying part of the legal expenses of the plaintiffs in violation of this Court's rule in Alyeska that each party should pay its own attorneys' fees.

Now, before proceeding to spell out the detail of that argument I would just take a minute to describe the background of the action against which this question comes to

Your Honors. This action is the consolidation of ten suits which were commenced in 1966 after Boeing, as part of its program to finance the construction of the 747 Boeing aircraft, called for redemption a $30 million convertible debenture issue which it had sold in 1958. Under the terms of the indenture pursuant to which these securities were issued, the holders had a specified period after a call for redemption within which to convert their debentures to Common Stock. Otherwise, the holder would be limited in the future to receiving only the face amount of his debenture and not any accrual that might have occurred in the value of the Common Stock at the time of the call.

In this instance on the day when the right to convert expired, March 29, 1966, Boeing Common Stock was selling for a price at which $100 of principal amount of debentures if converted would have been worth $316.25, or $216.25 more than its face amount. These convertible debentures were unregistered bearer debentures and after the call for redemption and after the time to convert having expired, 1,544,300 face amount of the 30 million had not been converted.

Boeing, faced with this problem of what it should do about those who had failed to claim, sought the advice of two law firms, whether in fairness to non-converting holders and also in fairness to its own shareholders, many of which had become shareholders by reason of converting in time, sought

the advice of two law firms as to what it should do under these circumstances.

I emphasize this because this is no case of fraud or impropriety on behalf of anyone. They were in a dilemma under the circumstances. The two firms advised them that they could not extend the time without violating the provisions of the indenture under which these securities had been issued. And under those circumstances Boeing followed the advice and very shortly along came these ten lawsuits. They were consolidated in the Southern District of New York and The Boeing Company moved for class action treatment under Rule 23, which the court granted.

QUESTION: What was the basis of jurisdiction in the Southern District of New York?

MR. GILLESPIE: Well, the basis of jurisdiction, there were claims made under the Trust Indenture Act and under the Securities Act of 1934.

QUESTION: But did -- were those the actual bases of decision in either the District Court of the Second Circuit or was it a principle of New York law?

MR. GILLESPIE: Well, are you referring to the compensation decision or the original decision under which the District Court dismissed this action on the ground that the indenture had been fully complied with; are you referring to that decision, Your Honor, or are you referring to the

compensation decision which is here before the Court?

QUESTION: Both.

MR. GILLESPIE: Well, I think on the first decision, on the merits it is very clear that they went on the Trust Indenture Act and the Federal Securities Act.

On the compensation question which is here, I think they went as a matter of general Federal law. They did not utilize New York law, although New York law in every respect as we see it is the same as Federal law with regard to this question.

QUESTION: This was not in any sense then at any stage of the proceedings a case of pendent jurisdiction.

MR. GILLESPIE: It was not, Your Honor.

Now, the District Court after trial dismissed the complaint here, as I said a moment ago, holding that the indenture had been complied with and that there was no basis for these debenture holders recovering.

Appealed to the Second Circuit and the Second Circuit agreed that the indenture had been complied with but concluded that the indenture provisions with regard to notice to these debenture holders did not provide, as they said, "reasonable notice." And said that these debenture holders were entitled to recover the difference between the $100 and the $316.25. They then sent the case back. That first appeal was known as Van Gemert One. They sent the case back, the District Court

entered a judgment for $3,283,359, which was taking the face amount of the debentures, $1,544,000, and multiplying it by the $216 as to which each of these people were entitled, and said they were entitled to receive that amount of money if claimed. And that judgment provided specifically that each member of the class who had not redeemed his debenture, upon surrendering it would get $316 per debenture less his share of the attorneys' fees required to collect this judgment.

Now, if that judgment had stayed the way it was we never would be here today. We were satisfied with it as a procedural matter and ready to proceed. However, the plaintiffs appealed a second time. They were not happy. And they raised a very important, significant point that is involved in this appeal here at the present time. They argued in the Second Circuit that the people who claimed were entitled not only to their own $216 over the $100 face amount but also to any amount that was not their share of any amount that was not claimed by one of their fellow class members, called a fluid class recovery. And --

QUESTION: Am I right in thinking this is not -- was not an opt in, opt out type of class action?

MR. GILLESPIE: You are quite right, Mr. Justice Rehnquist. This was 23 -- I think it is 1 or 2 -- there was no right to opt out. That is quite right.

So they made that argument to the Court of Appeals

for the Second Circuit, that they were entitled to get not only that $2.16 but whatever -- on top of that whatever anybody else their share did not claim.

The Court of Appeals struck that down. They further struck down a second request which was, that even if we can't get something for our pockets with regard to this, we at least ought to get the attorneys' fees paid from that unclaimed portion as well. And the Court of Appeals for the Second Circuit three-judge panel held, no, you are not entitled to that because that itself would be an infringement on our rejection in the Eisen case of the fluid recovery doctrine. Furthermore, said the court, that would be a violation of the American rule on attorneys' fees as propounded in the Alyeska case because we would be taking money from -- that might go back to Boeing and using it to pay -- help pay the class members who do claim their attorneys' fees.

So --

QUESTION: Mr. Gillespie, at that point, you just said money that might go back to Boeing.

MR. GILLESPIE: Yes.

QUESTION: Is it your position that any unclaimed portion does in fact go back to Boeing?

MR. GILLESPIE: It certainly is, Your Honor, but that has not been decided as yet.

QUESTION: So that you would oppose any theory of

escheat.

MR. GILLESPIE: We certainly would, Your Honor.

QUESTION: Let alone as to which State it would escheat.

MR. GILLESPIE: That would certainly be a tremendous problem, but we would oppose that vigorously, Your Honor.

Now, when this decision was rendered by the Second Circuit, my brethren here, did they petition for rehearing en banc of that? No.

Did they petition for review in this Court? No. That was the decision.

It went back to the Southern District of New York and lo and behold, the judgment -- this was Van Gemert Two is now out of the way -- the judgment which was proposed to the court followed the same procedure as previously with regard to the $3,280,000 which it claimed these debenture holders would get.

But then it went on and said this: And it is further ordered that the members of the plaintiffs' committee of attorneys be awarded their fees and expenses and disbursements as fixed by the court to be paid out of said total amount of this judgment.

Now, we regarded this to be in direct violation of what the Second Circuit had done in Van Gemert Two and, moreover, we were astounded because at that time the plaintiffs' attorneys

were asking for $2 million in counsel fees in this action.

So for the first time The Boeing Company took an appeal to the Second Circuit. And when we went up there and argued in that deal before the panel, the panel of three judges agreed with us and said under our prior decision we said there cannot be any respect for the -- or acquiescence in a fluid class recovery and to allow the class members to get something from the non-claimers would be a violation of that. And furthermore it would be a violation of Alyeska.

Petition for rehearing en banc for the first time and we get the decision 6 to 3, which is under review here.

Now, before I proceed to give you very quickly the three reasons we think that decision en banc is wrong, I want to just report very briefly the status of the distribution of this fund at the present time.

On July 8, 1977, just a few days following the decision of Van Gemert Two, Boeing deposited in an escrow account -- not a judgment but an escrow account -- as established by the District Court's judgment the $3,289,359 which I have been referring to and $2,459,646 of pre-judgment interest, which combined sum together with other deposits currently accruing interest is today over $7 million. As a result of published notices and two years of beating the drums and the work of this able Special Master Mr. Solleder, 46 percent of the fact amount of the debentures unconverted on March 29, '66

have filed claims. To date the remaining 54 percent of potential claimants have either not been identified or having been located, Mr. Chief Justice, have to date declined to perfect their judgments.

QUESTION: Now, let me get that clear. Is it 46 percent by number or 46 percent by amount?

MR. GILLESPIE: By amount, Your Honor. Forty-six percent of the face amount of the debentures which were not converted and 54 percent which were not converted have not claimed, 54 percent.

QUESTION: What were the terms of the escrow account?

MR. GILLESPIE: It is just -- well, I will --

QUESTION: That question is suggested by my Brother Blackmun's earlier question as to --

MR. GILLESPIE: Right.

QUESTION: -- there would be ultimate escheat.

MR. GILLESPIE: Well, -- just one moment -- the paragraph, Mr. Justice Stewart, of the judgment reads: Ordered that within 15 days after the entry of this judgment the defendant shall deposit the amount of this judgment, plus interest at the rate of 6 percent per annum to the date of such deposit in a commercial bank, and so forth, upon which interest shall accumulate until disbursed. And that such money shall be so held in escrow pending the further order of this court.

Then in the final paragraph of the order, the Special Master is given instructions that he shall pass on the validity or invalidity of the claims.

Now, we say that that therefore leaves the unclaimed funds up to further order of the Court at a later time.

QUESTION: Of course it does speak of a judgment, doesn't it.

MR. GILLESPIE: It does, Your Honor; it does speak of a judgment. But after all, that is the judgment of liability which, as I understand it, in class actions is preliminary to whatever may be done by individual class members.

Now, without repeating here the arguments and the analysis of authorities -- by the way, I would just say that you can see that 46 and 54 percent of $7 million, that the funds that are being dealt with here are not de minimis.

Without repeating our arguments on the brief, there are three principal reasons that we believe the Court of Appeals en banc was in error.

The most egregious error we believe is in the underlying premise which the majority advances to support its stated desire to avoid, and I quote, "unfairness to claiming class members" and to permit them to enjoy, and I quote, "the spoils of victory."

Now, the court, which is its right to recognize those elements, by saying that its decision is sustained by

longstanding precedent. Now, the two decisions of this Court which the Court of Appeals rely on are Trustees v. Greenough and Sprague v. Ticonic National Bank. I am sure Mr. Justice White is familiar with these, because they are dealt with in the Alyeska case and the very question that was before the Court of Appeals for the Second Circuit was dealt with in that opinion.

QUESTION: But that wasn't the main question in Alyeska.

MR. GILLESPIE: No, no. But the contentions were made -- and I have the briefs here, Your Honor -- that those cases warranted the Court reaching a decision of imposing on the losing party the counsel fees. And the Court rejected it and explained the corollary to the American rule of attorneys' fees, that those cases embody and limited it. That corollary is to the effect that where a prevailing litigant has conferred benefits on other parties that can be identified, that those parties before participating in the benefits of the litigation must share their part of the cost of the litigation. This corollary to the American rule on lawyers' fees is founded on the common law principle against unjust enrichment. In other words, if somebody -- and it is on this very basis that the claimants who come into this case and collect -- the 46 percent who collect -- must obviously pay their share of the attorneys' fees, and with that we have no question.

But that is the principle of those two cases that I just mentioned, Sprague and the Trustees v. Greenough.

QUESTION: Mr. Gillespie, before you go on, and perhaps this has already been asked, but in your view of the case will all the fund be distributed at the same time or will the 46 percent get their share before other people make claims?

MR. GILLESPIE: Well, Your Honor, I think that in the first place we have had two years when the effort to locate these potential claimants has gone forward, claims have been filed, they have been reviewed. And as the Special Master reports in his little amicus brief, I think of the claims that have been filed, I am not sure of this, but there is about 30,000 which is still under review. Now, as soon as this question has been decided those will be paid off at once. And then the District Court has stated it will consider again how much longer it will extend --

QUESTION: Well, in other words the 46 percent would be paid before you know for sure how many of the 54 percent would come in.

MR. GILLESPIE: That is correct, Your Honor.

QUESTION: Now, what will they be paid? Assume you are right on fees and assume say a certain percentage I take it would be withheld out of the 46 percent.

MR. GILLESPIE: Well, no, I think what would be done

is that the Court would determine what was a fair attorneys' fees in this situation. It would then assess against the claiming class holders who came in who are now there with their 46 percent --

QUESTION: Right.

MR. GILLESPIE: -- and assess that against them.

QUESTION: All right. And assume that --

MR. GILLESPIE: If thereafter someone else comes in and makes a claim, the same percentage as applied to each of the claiming ones previously would apply to the new claimant. And the plaintiffs' attorneys would receive that percentage at that time.

QUESTION: So that your concept of the fee is not a dollar figure but a percentage figure that would be based on what is now available plus a guess as to how much more may become of it.

MR. GILLESPIE: Well, I don't think that is quite right, Your Honor. I think what the Court will do, it will take that 46 percent and then they will say, what is it that the plaintiffs' attorneys are entitled to here based on their services, the difficulty of the case, etc.

QUESTION: Say they come up with a figure of a million dollars.

MR. GILLESPIE: Then that is applied --

QUESTION: And then you apply that across the board

of the 46 percent and say that amounts to 25 percent of each person's --

MR. GILLESPIE: Correct.

QUESTION: But then if more people come in, they would get more than a million dollars in fees.

MR. GILLESPIE: Yes, they would, Your Honor.

QUESTION: So that the determination of a reasonable fee would really be less than the amount they would actually receive.

MR. GILLESPIE: Well, I don't know whether the Court would take that into consideration or not. But the way the Court of Appeals for the Second Circuit when it sent this back in Van Gemert Two envisaged this being carried out was that just as I have explained to Your Honor at this time. And if the plaintiffs' attorneys thereafter, if other people came in and got the benefits of it, then they would owe the plaintiffs' attorneys a fee. And that fee would be measured as it had been measured in the case of those who had previously claimed.

QUESTION: But in essence the fee would really be fixed as a percentage of the --

MR. GILLESPIE: I think as in all of this kind of case that the percentage would certainly be a very important --

QUESTION: Well, it is the sole criterion after the order is entered, isn't it?

MR. GILLESPIE: Well, unless as Your Honor suggested,

I think -- it is hard to say how the District Court will actually do this determination. I think it is fair to say that they will certainly give great weight to the services rendered and then I think they will give weight to the result achieved and thereby bring into effect a percentage which of course would be the same percentage that was ultimately applied on the other claims.

QUESTION: With respect to this $128,000 you more or less have seemingly at least waived their claims. Can you tell us from this record if we can find out if those are small claims where people just didn't want to take the trouble, or what is the explanation?

MR. GILLESPIE: Well, Your Honor, I -- there is nothing in the record with regard to this, I would say first. But from my considerable experience in this type of case where claims are not filed, very often a potential claimant has completed a tax year and does not want to go back and reopen by reason of additional income the entire tax picture, or has made some other arrangement.

QUESTION: Well, I would infer from that then that they were fairly modest amounts.

MR. GILLESPIE: I would think they were fairly modest amounts, Your Honor. But it is $128,000 face amount of the $1,544,000.

Well, now, I see just five minutes and I quickly say

there are three specific grounds which we urge --

QUESTION: That five minutes is the five minutes that you perhaps wanted to reserve for rebuttal.

MR. GILLESPIE: I would like to reserve two minutes, so I will get this off my chest in three minutes if I may, Your Honor. It is just so if any questions come up I could be able to answer them after the Respondents have completed.

First, we believe that the decision of the Court of Appeals en banc violates the common fund principle of Trustees v. Greenough, as applied in Alyeska, in the opinion in Alyeska.

Second, we believe that no judgment as far as an individual is concerned comes into being until a claim is filed, so that there is no common fund within the principle of those cases until a claim is filed.

And last, and most important, we believe that any decision which encompasses using some of the unclaimed fund to benefit the claiming members is a clear violation of what is called the fluid class recovery, the rule that if it is a small amount perhaps, it may be fairly large, but it is allowing the claiming members, in effect, to benefit from those who do not claim from that fund. And that has been not only in the Eisen case, in the Court of Appeals for the Second Circuit was that ruled out, but in this very case it was ruled out.

And for these reasons, Your Honor, we believe that this Court should reverse the en banc decision of the Second Circuit.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Winer.

ORAL ARGUMENT OF NORMAN WINER, ESQ.,

ON BEHALF OF RESPONDENTS

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

May I begin by saying to you that Mr. Gillespie's figures are somewhat out of date, not grossly, but as of last Wednesday the claims filed amounted to 49.25 percent of the original face amount of the bonds. And may I add one other statistic which is in my brief, namely that 96.4 percent of these bonds were redeemed by Boeing and by the Special Master.

QUESTION: Mr. Winer, let me ask you the same question -- or at least I think it is the same question Mr. Justice Blackmun asked your opponent, and that is: What is your position as to the disposition of the unclaimed funds?

MR. WINER: Your Honor, my position must be in accordance with the decisions of the courts up to now. There are decisions in the Third Circuit and in the Eighth Circuit holding that the depositor of the amount of a judgment has no right to reclaim the funds.

QUESTION: Then what happens?

MR. WINER: What happens must be escheat. But this has not been decided here and was not decided in those two cases in those words.

QUESTION: What I am asking is what your position as a lawyer is.

MR. WINER: My belief is, sir, is that they would escheat, the funds would escheat.

QUESTION: Would it be your view the recipient of the escheats have been benefited by the services rendered.

MR. WINER: Right, Your Honor. I feel that the recipient of the escheat would acquire the rights of the parties whose money escheated.

QUESTION: Would not the same result take place if it went back to Boeing?

MR. WINER: I think perhaps it should. I think it should, yes, Your Honor, if it should. But there is no basis which I can find in law and no case cited in either of the briefs of Mr. Gillespie to the effect that the money goes back to Boeing. He has made that assertion and I don't know positively that it will escheat, so I wish to be cautious. But in my opinion, sir, whether it goes back to Boeing or whether it escheats to the State, the recipient of that money should take it subject to the fees.

QUESTION: If you take a position as to which State

it would escheat to --

MR. WINER: No, sir, that --

QUESTION: -- the State of Washington would be in here in a hurry.

MR. WINER: That is right. That is another question.

I should say to you the State of New York is claiming all of it. They filed briefs in the Court of Appeals, they did not file a brief here.

QUESTION: But the issue isn't before us just now.

MR. WINER: Sir?

QUESTION: The issue is not before us.

MR. WINER: No, sir; no, sir, and that is why I feel -- I don't know the answer. I know that the Third Circuit said it escheats.

QUESTION: You can afford to be indifferent because the lien follows, I suppose.

MR. WINER: Right, I feel that is so, sir.

QUESTION: Yet to a certain extent one can't decide the basis on which attorneys' fees are to be recovered in a case like this without having some feel for the disposition of the unclaimed funds. It would be one thing to say that the persons who claimed not only got what they were entitled to but a portion of the unclaimed funds; and quite another thing to say it is escheated, I would think.

MR. WINER: Sir, we do not think that the plaintiffs

are entitled to any part of the unclaimed funds.

QUESTION: In ghat case, they hardly have standing to be here, do they?

MR. WINER: I don't know --

QUESTION: Aren't you their lawyer?

MR. WINER: I don't know whether they have standing to be here, sir, but I think that Boeing has no standing here, in my opinion.

QUESTION: Insofar as Part II of your brief that point depends entirely upon the fact that Boeing has no further interest in these funds.

MR. WINER: That is correct, sir.

QUESTION: That they will escheat or something else will happen to them --

MR. WINER: Absolutely.

QUESTION: -- they will never come back to Boeing.

MR. WINER: Absolutely. And if --

QUESTION: So whether or not they will escheat is a factor in this case, isn't it?

MR. WINER: That could be a factor.

QUESTION: Because your whole Part II depends upon that, I think, doesn't it?

MR. WINER: No, sir, I think not. If I may develop the point a bit, let me put it to you this way.

Number one, the money paid by Boeing does not belong

to Boeing. Therefore wherever it belongs, the claimants should have the same right to pay only one fee rather than two fees.

Let me put it to you this way: There is no shifting of fees here. Nobody has asked Boeing to pay one cent more than what it owes. A shifting of fees as in England would be if the plaintiff wins the fees of his counsel are thrust upon the defendant and there is a shifting of fees.

QUESTION: But there is a certain element of windfall. It is either a windfall to the plaintiffs' counsel or a windfall to Boeing.

MR. WINER: It may -- if it should ever be determined on some basis which has not been vouchsafed that the money goes back to Boeing, then it would surely be a windfall for Boeing. Why Boeing, of all people, the one that did the wrong? As Mr. Gillespie talks, you may think that these innocent plaintiffs did Boeing a wrong. But the only wrongs done here were by Boeing and if the money goes back to Boeing it would surely be a windfall of the worst sort.

Now, as -- sir?

QUESTION: Could you help me with the same question I asked your opponent. Assume your view of the case prevails.

MR. WINER: Yes, sir.

QUESTION: Is it not correct that we will reach a point in time when your fees will be determined, they have not yet been determined.

MR. WINER: That is correct, sir.

QUESTION: Now, if the judge should determine whatever a fair fee is, then how would he pay it to you? Would he pay it in the same way that your opponent described, as a percentage of the recovery?

MR. WINER: According to a decision of the Court of Appeals on that point it stated specifically that it would be taken off the top as in Trustees v. Greenough. The money would come off the top and the consequence of that would be that it would be allocated to each and every debenture ratably.

QUESTION: In other words, you claim that the amount of your fee should be entirely unaffected by the estimate of how much money will actually be paid to former debenture holders.

MR. WINER: Yes, sir. And conversely, I feel that no plaintiff should be required to pay two fees simply because other people have not filed claims.

QUESTION: But I don't understand how anybody would pay two fees.

MR. WINER: Under the American rule, sir, the victim of a breach of contract must be a loser. All he can get in damages is what the law says a victim of a breach of contract is entitled to get. So that when he pays one fee he cannot come out whole, he comes out with his righteous amount minus a fee. Now, if he is going to pay two -- what in this case I

am calling the 49.25 percent a half -- so if the people who file half have to pay the total fee, they obtain double fee.

Now, under the decisions of both the Second Circuit and --

QUESTION: The fee is fixed. How do you know that?

MR. WINER: May I answer that. In the Lindy case in the Third Circuit and the Greenough case in the Second Circuit the court specifically rejected percentages of recovery for fees. They set up 12 different criterion, the hours spent, the quality of the work, the difficulty of the case, this, that and the other; and among other things was the amount of the recovery.

QUESTION: Mr. Winer, let me pursue my line with you so you answer it.

MR. WINER: Right.

QUESTION: Supposing, based on your theory of the case, the district judge now should conclude that a million dollars is a fair fee. If I understand your analysis, that money would be paid to you forthwith --

MR. WINER: Right.

QUESTION: -- and you would go home. And whatever else money came in, that would be taken out of the fund right now.

MR. WINER: That is correct.

QUESTION: All right, having taken it out, would there then be distribution to the people who have already filed their claims?

MR. WINER: Immediately.

QUESTION: And they would bear the full --

MR. WINER: Well, according to my feeling they would bear one-half the amount and the other half would be taken out of the funds which are not claimed.

QUESTION: So that everybody's share would be reduced by some percentage, roughly a sixth of the fund.

MR. WINER: Absolutely -- everybody -- plaintiffs would pay their fees and --

QUESTION: And you would have all that you would ever get.

MR. WINER: That is all we would ever get.

QUESTION: Now, under his view of the case, if he made the assumption you are entitled to a million dollars, as I understand him you get a million now out of the right percentage; and then you continue to get more as more people came in. It seems to me it is entirely possible that if he wins, you get a larger fee than if you win.

MR. WINER: Well, sir, it is possible. But really, sir, I think the people who are getting lost here are the plaintiffs. I really don't care --

QUESTION: Well, let me tell you very candidly, I

am lost because I am not sure you have a final appealable judgment on the issue you seek to argue.

MR. WINER: Well, I understand that point and I must say that whether I didn't go into the appealability of it but I certainly argued that it was premature and I certainly do think it is premature. But it is here and apparently nobody --

QUESTION: It wasn't even in the Court of Appeals.

MR. WINER: Sir?

QUESTION: It is not here because it wasn't even in the Court of Appeals.

MR. WINER: Right.

QUESTION: It wasn't final.

MR. WINER: I argued there that it was premature but I did not succeed. And I am not sure -- I am not saying that as from a point of view of appealability it is not final because this is a matter for argument. But I am saying that I think they should have waited until the fee was fixed and then brought the whole thing here at once, because this case is only 13-1/2 years old, and now when we go back and the fees are fixed I don't know whether I will out live it.

QUESTION: But it is possible that you could get a higher fee if he wins than if you do?

MR. WINER: Yes, sir, it is possible.

QUESTION: What we are fighting about is that one of the factors that the judge will take into account when he

ultimately reviews the 12 different factors you have described and finally fix a dollar amount. That is what this case is all about.

MR. WINER: Well, I haven't thought of it that way but I do not dispute that.

QUESTION: One thing you say, you are here to represent the plaintiffs, are you not? And yet you say one thing to you is clear, and that is that each individual plaintiff is not entitled to any overide.

MR. WINER: That is correct. Nobody is entitled to more than the amount of his judgment; and he has got to pay out of his judgment a counsel fee, so he is going to come out with less.

QUESTION: Is that the kind of argument one would normally expect from a plaintiffs' attorney who was doing the very best he could to assure the success of his clients, so to speak, even though the Court might reject the argument, for the plaintiffs' attorney to simply say, "Well, certainly the plaintiff isn't entitled to this." Wouldn't you at least reserve judgment on the question?

MR. WINER: I am afraid, Your Honor, I do not understand the question. Are you talking about the non-claiming plaintiffs?

QUESTION: No, I am talking about the claiming plaintiffs, whether it is conceivable they might have any

entitlement to more than their prorated share after a certain point in time when there is a large part of the funds still unclaimed.

MR. WINER: Well, sir, the case was decided in Eisen v. Carlisle & Jacquelin that there should be no fluid recovery, under no circumstances could a plaintiff get more than his personal damages; and so I have taken that to be law. This Court remanded on entirely different ground but it seemed to me approved that holding of the Second Circuit, that there should be no fluid recovery.

Now, if I may continue then with what I said about the distribution. Professor Dawson of the Harvard Law School in the Harvard Law Review has written three articles covering this subject very fully. And he takes the view, or I will quote his words, to the effect that the question here is distributing the loss, distributing the loss which accrues to these plaintiffs by having to pay a fee to get back their money.

And I think when it is presented in that way it is a very clear and correct analysis. What we have here is a question of who is going to take the loss of paying a counsel fee for getting back what was due to these people 13 years ago.

Again, I want to say to you that Mr. Gillespie in going over quickly the question of benefit and unjust enrich-

ment and so on has not quoted accurately or fully, I should say, the statement of this Court in Trustees v. Greenough which was when the acting plaintiff recovered the judgment for the benefit of the class of bondholders, he said two things. He said it would be unjust to the plaintiff if he were not reimbursed as well as enriching the other members of the class unjustly.

Now, Mr. Gillespie has some justification for pounding only the second part of that sentence, because the courts have frequently done that. But the true fact is that what Greenough did was to follow the old English cases. A creditor came in with a creditor's bill to save certain property for the benefit of all creditors. Somebody who was interested in a charitable trust brought an action to save a charitable trust. Or a creditor brought an adverse petition in bankruptcy. Now, in all of those cases in England 200 years ago, and in this country ever since, anybody who produced a fund for the benefit of a number of people received reimbursement from that fund for all of the expense of the litigation and the net proceeds of the recovery were distributed among the class.

Now this, as Judge Kaufman said, is the unbroken line of precedents in this country. This case has nothing to do with Alyeska. Alyeska involved a case -- involved a situation where there was no fund, there was no fund there,

there was a public interest. And the doctrine of a private attorney general was adopted by the Court of Appeals in this Circuit and this Court said that that was a different question than the production of a fund and went on to say that the rule which has persisted in this Court since Greenough, which was 1881 -- getting close to a hundred years -- is still the rule in this Court.

Now, --

QUESTION: In Alyeska the Court dealt both with the common fund and the common benefit theory, did it not?

MR. WINER: It distinguished the two, right.

QUESTION: But it had made the same statement as to both of them, that they were the English rule and not the rule in this country.

MR. WINER: No, sir, I believe that the Court was very careful and that the statements in the footnotes where these statements occur, where the only place common fund and common benefit are put in the same sentance, is very careful to distinguish the two.

Now, the Court did not say that there is no such thing as a common benefit. In taking up for example the case of Mills v. Electric Auto-Lite, the Court did find that there was a shared benefit and that -- you recall that in that case stockholders brought suit to enjoin a proposed merger between a company which owned 54 percent of the stock and

of the merger and that company. Now, in that case this Court held that although there was no specific fund the benefit was for the benefit of all -- was granted to all stockholders because they saved this corporation from a bad merger.

Now, that I believe is the first real common benefit case decided by this Court.

And then it went on to the Hall v. Cole case where it was decided that it was for the benefit of all the members of the union that the protagonists had provided freedom of speech for all members of the union.

Now, those to the best of my knowledge are the only two common benefit cases decided here.

QUESTION: Wouldn't you say that you would be better off without the footnote which you referred to in Alyeska?

MR. WINER: No, sir; no, sir, I should not. I should say that the footnote in Alyeska is perfectly consistent with the longstanding rule of this Court. I don't know anything --

QUESTION: On common funds, right.

MR. WINER: On common funds, right.

And I think it was -- well, the rest --

QUESTION: This case doesn't involve a shifting to another party.

MR. WINER: Not at all. In Alyeska, Alyeska was asked to pay the counsel fee of the Wilderness Society which had presumably protected the beauty of Alaska for the benefit of the whole American public.

QUESTION: Where was the counsel fee going to come from in the Hall case and in the Mills case?

MR. WINER: The counsel fee in Hall v. Cole came out of the union treasury.

QUESTION: And in the Mills case it came from the corporation.

MR. WINER: From the corporation.

QUESTION: So it was not a spreading of the loss, it was an avoidance of any loss.

MR. WINER: That is right. It was for the benefit of everybody concerned, plaintiffs and defendants; they shared. Just as I say to you that this fee should be shared by all those who have a judgment.

Now, anyone of these people may come in. With respect to the question of what will happen in the future, we don't know. But we do know that when the Court of Appeals wrote its opinion only 20 percent had filed claims. And as of last Wednesday, 49.5 percent had filed.

Now, I should like -- and trust that I am not rude in saying that as far as letters, whether they are hypothetical or real, I have never heard. And Mr. Gillespie later said

that this is not in the record, that $128,000, they rejected their claims. But I do feel from my experience with this case and with Boeing that I should be very careful whether those letters were written by Boeing employees or people who are beholden to Boeing. Anybody can write a letter and say, I reject it. And maybe for very good cause.

QUESTION: Well, would it not be irrelevant entirely if your theory is, as I understood it to be, that your action has benefited someone and it is now merely a matter of 49 percent going to one group and perhaps 51 percent going to Boeing or New York or Washington? Someone will have benefited from it.

MR. WINER: That is correct, Your Honor.

QUESTION: So then would it make any difference who these $128,000 are?

MR. WINER: Not according to my theory, not at all. Not at all.

And I may say to Your Honor that I doubt that anybody has benefited more than Boeing. Boeing has held -- in the first place, Boeing is the one that moved to consolidate these actions, who made it into a class action. When I first heard of this case is when the motion had already been made by Boeing under Rule 23(b)(1) to consolidate into New York, the Southern District of New York four cases which were brought by individuals. This is not a case where

the amounts of money are too small to fight about. These four of the ten cases which had been brought and consolidated were brought by individuals. We represent people with $50,000 worth of bonds individually who are entitled to $175,000. And I myself have a client with $20,000 worth of bonds, an old client of mine; and we have 60,000-odd. I would not wait looking for a class action, I wouldn't have brought a class action. But the thing was already made a class action by Boeing.

QUESTION: You are not relying here on any statutory provision for attorneys' fees in addition to the recovery of the principal, are you?

MR. WINER: In addition to?

QUESTION: I mean you are simply saying that you are going to collect from your client, in effect.

MR. WINER: Oh, no; no, no. I say that our clients are the class -- made the class by Mr. Gillespie's motion. We represent the class under 23 and I think Your Honor is the one who pointed out before that there is no way to opt out. And Mr. Gillespie created that situation for the benefit of Boeing so they wouldn't have to defend all these cases around the country.

QUESTION: And does this particular class action section that we have been discussing provide for an award of attorneys' fees in addition to the substantive recovery?

MR. WINER: No, sir; no, sir. The only provision in Rule 23, it occurs in Rule 23(d) where it is provided that the court may make such orders as are -- as in its discretion seem to be proper in the case.

QUESTION: So a court couldn't award an attorneys' fee over and above the actual substantive recovery.

MR. WINER: I can't believe that, I can't imagine that it could. I know no basis, none has ever been suggested to my knowledge, that the court could award a fee above it. I don't know -- oh, you mean out of --

QUESTION: Take your typical case where it says and in addition to the recovery the plaintiff shall be entitled to attorneys' fees. This isn't that kind of a case?

MR. WINER: No, sir. To the best of my knowledge, at least as far as New York law is concerned, that could happen only if a statute provided -- so provided. And there is no such statute here.

QUESTION: You are claiming that the attorneys' fees are going to come off the top of the recoveries?

MR. WINER: Yes, sir.

QUESTION: And if there is escheat and the States say, well, where is the rest of my escheat, what is your answer?

MR. WINER: My answer is the benefit received by the

State of New York was due to the work of the attorneys and is subject to the counsel fee earned by the attorneys.

QUESTION: Now you are talking about New York.

MR. WINER: Yes, sir.

QUESTION: Only New York?

MR. WINER: Yes, sir. I don't know if it should escheat somewhere else --

QUESTION: Well, that prompts me to ask about these other cases that you say were consolidated or brought in.

MR. WINER: Yes, sir.

QUESTION: Were they also venued in the Southern District?

MR. WINER: Originally?

QUESTION: Yes.

MR. WINER: I don't believe any of them was. One came from Michigan, one came from Florida, two came from the District of Columbia.

QUESTION: Well, they might claim escheat, too, then.

MR. WINER: You are right, they might claim escheat. But it seems to me clear that whether it escheats, wherever it escheats the benefit of the escheat should pay a sum which any plaintiff would pay, whether that plaintiff is one who claimed or whether that plaintiff is one of those who did not claim, and by virtue of his non-claiming --

QUESTION: But if you happened to lose on your escheat point and Boeing got it back, then a lot of your argument is considerably damaged, isn't it?

MR. WINER: You mean if the State is entitled to --

QUESTION: If Boeing is entitled to these unclaimed monies. I know you say they are not.

MR. WINER: May I answer that briefly. I believe not.

QUESTION: Believe not what?

MR. WINER: Because --

QUESTION: You believe not what?

MR. WINER: I believe that the money would not -- I believe that there would be no difference whether it went to Boeing or escheat. And the reason I believe that there is no difference is that Boeing would not be receiving that money back as defendant, in its role as defendant.

QUESTION: Right.

MR. WINER: It would be receiving it back because of a lack of some -- sort of a si prius doctrine, we can't give it to whom it belongs and therefore the next best class is Boeing.

Now, I don't believe that is ever going to be decided.

But in answer to your question as to whether the bottom would fall out of it if it went back to Boeing, I

should say no.

QUESTION: Well, you wouldn't be making the same argument though would you, about the basis for reducing the amount that went back to Boeing by the amount of the attorney's fee?

MR. WINER: I would be making my same argument, namely --

QUESTION: You mean Boeing is benefited.

MR. WINER: Boeing would benefit, certainly.

QUESTION: From your services in the suing.

MR. WINER: Right.

Now, may I just say --

QUESTION: Getting money back they never would have gotten back before, although they never would have paid it out if you hadn't sued them.

MR. WINER: Well, now here we have, Your Honor, Boeing taking the side of the non-claimant.

Now, has Mr. Gillespie any standing to come to this Court and say, don't take the money away from those non-claimants, when he knows that he wants those non-claimants not to get the money?

QUESTION: Mr. Winer, their brief refers to a $2 million claim for fees. Is the fee petition in the record; and does the record show the other factors such as the hours spent and so forth in computing the fee?

MR. WINER: The record has a complete listing of hours, nature of services, and all that, only up to the point of the third appeal.

QUESTION: Is it correct that the claim for the plaintiffs' fees amounts to $2 million?

MR. WINER: I am sorry.

QUESTION: Is it correct that you are claiming $2 million in fees and expenses?

MR. WINER: I am not claiming even $1 million.

QUESTION: Well, is it correct that the entire group --

MR. WINER: There are some lawyers in Chicago who have had virtually nothing to do with the case, and I think they are claiming a million dollars. If you put together all the claims in this case by people who had a remote relation to it, it does. I presume Mr. Gillespie is right. I didn't add it up.

QUESTION: Has there been any evidence or any hearing at all on the question of what a reasonable fee is?

MR. WINER: There have been only very lengthy affidavits, very lengthy; but no hearing.

I thank you.

REBUTTAL ARGUMENT OF S. HAZARD GILLESPIE, ESQ.,
ON BEHALF OF THE PETITIONER

MR. GILLESPIE: Your Honor, I just have one item that I would like to bring up.

By the way, the District Court specifically reserved decision on the matter of counsel fees until this question was determined by the appellate courts and filed an opinion which is --

QUESTION: Well, you agree, Mr. Gillespie, that if you win you might have to pay a larger fee than if you lose? It is entirely possible.

MR. GILLESPIE: It is entirely possible if the --

QUESTION: Why isn't this strictly an advisory opinion, then?

MR. GILLESPIE: No, no. Excuse me, Your Honor, then I haven't understood you.

If we prevail here, then no part of the attorneys' fees will be assessed against the non-claimant fund.

QUESTION: No, but it is entirely possible that the judge may think, based on what he knows, that the plaintiffs ought to get a million dollars in fees.

MR. GILLESPIE: Right.

QUESTION: And he could do it in one or two ways. He could give them a million dollars off the top, and that is the end of it. Or he could give them a million dollars, thinking there are going to be no more claims filed, and say that will come out to 20 percent of everybody's recovery --

I mean it is 20 percent against everybody and future 20 percents might be paid to increase that fee.

MR. GILLESPIE: Conceivably from each additional claimant. And that is why -- the one point I wanted to respond in this reply is to Mr. Justice Potter's question about the finality of this judgment.

The judgment which is appealed from here first says that the plaintiff shall recover their damages herein from the defendants the principal sum of $3,289,359. Then it goes on and says, ordered that the members of the plaintiffs' committee be awarded their fees, expenses and disbursements fixed by the court to be paid out of said total amount of this judgment.

Now, we were faced when we saw that judgment with the fact that unless we raised that point now this would be final. And when the time came in as to where those monies should come from it would be saying, well, you never appealed from this judgment.

QUESTION: Well, nonetheless the amount of the fees was not fixed. So something remained to be done in the District Court.

MR. GILLESPIE: But still the determination of where those fees won liability and where those fees should come from was imposed on the total fund which we claim, and still claim, if unclaimed belongs to Boeing. And as to that

extent it is final on that issue.

QUESTION: But there are lots of cases in which -- you know, bifurcated judgments -- liability is determined but damages aren't.

MR. GILLESPIE: Well, Justice Rehnquist, with due respect on this issue the point -- the clear point that re Loomis, as of this case have to pay part of the plaintiffs' attorneys' fees, whatever they may be fixed at, in due respect we believe was final. And if we didn't raise it and bring it up we would then be told we were bound by that determination. Right or wrong, that was our position. And it was raised in the Court of Appeals, not en banc, but earlier; and the court took the position and decided a res, the panel.

Thank you very much.

CHIEF JUSTICE BURGER: Thank you gentlemen is submitted.

(Whereupon, at 2:03 o'clock, p.m., the case in the above-entitled matter was submitted.)

- - -