

SHERRON K. WALSTAD, COURT REPORTER
Lesofski & Walstad Court Reporting
21 North Last Chance Gulch, Suite 201, Placer Center
Helena, Montana 59601 (406) 443-2010

TRANSCRIPT OF PROCEEDINGS

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1 WORKERS' COMPENSATION COURT

2 STATE OF MONTANA

3
4 ROBERT FLYNN,

5 Petitioner,

6 -vs-

7 MONTANA STATE FUND,

8 Respondent.

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) WCC No. 2000-0222
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10 TRANSCRIPT OF PROCEEDINGS

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14 On the 4th day of March, 2003, beginning at
15 10:00 a.m., the above-entitled matter came before
16 the Honorable Mike McCarter, Judge of the Workers'
17 Compensation Court, Helena, Montana. The
18 proceedings were reported by Sherron K. Walstad,
19 Court Reporter, Notary Public.
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A P P E A R A N C E S

THE HONORABLE MIKE McCARTER, JUDGE:
WORKERS' COMPENSATION COURT

APPEARING ON BEHALF OF THE PETITIONER:

REX PALMER
Attorney at Law
Attorneys Inc., PC
301 West Spruce
Missoula, Montana 59802

APPEARING ON BEHALF OF THE RESPONDENT:

THOMAS E. MARTELLO
GREGORY OVERTURF
NANCY BUTLER
Special Assistant Attorneys General
State Compensation Insurance Fund
P.O. Box 4759
Helena, Montana 59604-4759

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1 The following proceedings were had:
2 *****

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4 THE COURT: This is Robert Flynn versus
5 State Compensation Insurance Fund. This is on
6 remand from the Supreme Court.

7 Rex, you gave notice of an attorney's lien
8 basically asserting the Common Fund doctrine basis
9 for other claimants who might benefit from this
10 decision. I sort of wanted to meet with you and
11 talk about this a little bit. I've got a couple of
12 concerns.

13 The first thing is, have you guys talked
14 about this at all?

15 MR. MARTELLO: Not really.

16 MR. PALMER: Not really. We had early
17 conversations before we set up the initial phone
18 conference and decided we should start talking
19 about it.

20 THE COURT: Was the lien just extended
21 to the State Fund?

22 MR. PALMER: Well, I don't think so. I
23 haven't given notice to anybody else other than the
24 notice that's in this. I don't know what status
25 that has, but I would expect it to extend --

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1 that we're talking about here wasn't decided by the
2 Supreme Court.

3 MR. MARTELLO: Well, and when you look
4 at your decision, it's clear that when this issue
5 was being argued, and I can go into the Supreme
6 Court citation on it, too, it says, and this is a
7 quote from your decision, "Claimant is not seeking
8 attorney fees for others who may benefit by this
9 decision. Rather, he is seeking attorney fees with
10 respect to his own entitlement."

11 It's absolutely clear that the only fee
12 that was being sought and the only claim for common
13 fund was the common fund created in Flynn's case
14 itself. It was not for similarly situated people
15 such as like we had in Broecker and Muir and some of
16 these other cases. This is clearly a horse of a
17 different color.

18 THE COURT: Well, yeah, I mean, the
19 issue -- I understand what the issue is that was
20 litigated on. I guess the question is, once that
21 was litigated and the principle was established, is
22 he now entitled so some sort of Common Fund --

23 MR. MARTELLO: No, he's not. I don't
24 think he is. Number one, it needs to be pled,
25 first of all, as in all other cases that have been

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1 THE COURT: To everybody?

2 MR. PALMER: -- to everybody, yeah.

3 THE COURT: One of my concerns is, this
4 case is a little bit different. Maybe I ought to
5 ask the State Fund, Tom or Greg or Nancy, to --

6 MR. MARTELLO: I'd be happy to. We
7 have grand concerns. We think the lien is invalid,
8 and let me give you a little history why that is.

9 When you take a look at the petition for
10 hearing that was filed in this case, here's what is
11 alleged. It says that, "Claimant contends that
12 Respondent is responsible for a pro rata share of
13 attorneys' fees incurred to obtain the Social
14 Security benefits."

15 In the prayer for relief he asks for an
16 order requiring Respondent to pay a pro rata share
17 of attorneys' fees regarding Social Security
18 offset. That's how it's initially pled.

19 Then when you take a look at the briefs in
20 this case, the issues are, one, whether State Fund
21 should be required to bear a pro rata share of
22 attorney fees incurred by Flynn to establish his
23 Social Security claim. He argues that the Fund, if
24 you will, is the fund that Flynn established.

25 THE COURT: Right. I mean, the issue

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1 pled as a class-type action where you are bringing
2 this on behalf of similarly situated people. That
3 was never done. It's an after-the-fact attempt to
4 file a lien on an action that was not pled as a
5 common fund Muir or Broecker-type action.

6 THE COURT: We don't have any cases on
7 this either, because this is something that's been
8 developed by the Supreme Court anyway. So there
9 aren't any cases on it. I haven't asked either
10 side to brief that, so we'll probably have to brief
11 it. Basically, your position is that you're
12 resisting it because it wasn't pled.

13 MR. MARTELLO: Two bases; it was not
14 pled, and the decision of the Supreme Court is
15 clear in its indication that the Fund that they're
16 talking about is the fund that's indigenous only to
17 Flynn. So they're not talking about others
18 similarly situated.

19 THE COURT: Right. They didn't address
20 the lien. I know that.

21 MR. MARTELLO: Clearly. And I guess
22 what we'd like to do on this is, obviously, we need
23 to brief this and set forth our positions, you
24 know, for your determination; but one of the things
25 that runs clear to me in this is that in any case

3 (Pages 3 to 6)

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1 in which a claim is made for attorneys' fees, this
2 court has generally denied the claim for attorneys'
3 fees unless they're made initially at the time of
4 the pleadings.

5 An after-the-fact attempt to claim
6 attorneys' fees, which is what's being done here,
7 has generally been denied by this Court.

8 THE COURT: Rex, you're probably going
9 to want to respond to that. Let me ask another --
10 and I'm going to give -- Obviously, we haven't
11 briefed it. I'm just trying to tease out what's at
12 stake here. Obviously, that's one position that
13 you have.

14 One of my concerns -- Actually, the
15 concern that you just raised wasn't my big one, to
16 be honest with you. I'm not saying you're off base
17 on that. I just hadn't really thought about that,
18 because this Common Fund doctrine basically arises
19 because if somebody else benefits from it, then the
20 attorney who establishes the precedent is supposed
21 to get the fee. I don't know how far the Supreme
22 Court is going to extend that, whether they'll
23 extend that and say you have to plead it or you
24 don't have to, or it just becomes a lien on
25 everything that's out there once it's done. I

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1 But that's a big concern that I have,
2 because we're sort of going back in and almost
3 saying that these attorneys didn't do their job
4 because they should have made this claim on behalf
5 of their clients, and I'm wondering if they can do
6 that. Have you given any thought to that at all?

7 MR. PALMER: Yeah, I have. The same
8 thing happened in Muir. You have all of these
9 represented claimants out here whose attorneys were
10 not pursuing the increase in the benefits. And
11 when Allan McGarvey came in through Muir and
12 persuaded the Supreme Court that that should have
13 been done -- of course, all of those people
14 benefited -- I had many, many, many clients, and
15 the letters just came to me, or to my client, and
16 they called me up and said, "What does this mean?"
17 I said, "What it means is that another attorney did
18 some work that helped you out. It doesn't cost any
19 fee for me. He did the work so he gets the fee.
20 It would have never happened but for his work." I
21 had dozens of clients I told that to.

22 MR. MARTELLO: Judge, I have a
23 different take on it, though. I think it's clearly
24 different, and I think you enunciated it, and it is
25 this. The difference between Muir, Broeker, and

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1 suppose that's an issue we probably need to talk
2 about.

3 The primary concern I had is the fact that
4 attorneys are all involved in these cases. All
5 these claimants had attorneys, and I wanted to ask
6 Rex about that. I have trouble with that kind of a
7 thing in the Gonzales case, Gonzales versus Montana
8 Power; and Professor Patterson had very grave
9 concerns, and I basically validated his concerns
10 about attorneys coming in and basically foisting
11 themselves on claimants who were already
12 represented by attorneys.

13 Obviously, if Social Security benefits are
14 involved and attorneys' fees are payable, all these
15 claimants that you're seeking a Common Fund
16 doctrine for are claimants who are already
17 represented by attorneys. What do I do about
18 that? Don't we have problems with that? Have you
19 read Gonzales?

20 MR. PALMER: Yeah, I read the case that
21 you provided.

22 THE COURT: Okay, I did provide it. I
23 forgot I provided that. So I'm still thinking the
24 same today as I was thinking before, I guess, which
25 is great. That means I'm consistent.

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1 all these others is, clearly, what you're asking
2 for is an attorney fee out of benefits that the
3 attorneys representing the individual claimants
4 were involved in -- I mean, the very issue that
5 they were representing them for was the Social
6 Security entitlement. That's the very heart of
7 what they were representing them for.

8 So the relationship there that is being
9 claimed or attempted to seek a common fund from is
10 essentially claiming that the attorneys didn't do
11 their job.

12 THE COURT: What if they were just
13 representing them with respect to the Social
14 Security proceeding and not with respect to the
15 workers' compensation, and you just calculated --
16 you just took the full offset, and now the Supreme
17 Court is saying, "No, you can't do that. You
18 should have reduced it by whatever fees, the
19 proportion of fees that benefited you"?

20 MR. MARTELLO: Well, irrespective,
21 they're representing them with regard to the Social
22 Security. The attorney fee that the Court
23 indicated should be divied up is the attorney fee
24 for Social Security. Really, it becomes divied up,
25 if you will, because of the workers' compensation

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1 interplay with it, but it's the very fee that the
2 attorney is representing the client for that the
3 claim is being made for.

4 THE COURT: But, for example, Rex could
5 have a client and he represents them in a Social
6 Security hearing, and probably has, and hasn't
7 really done anything with respect to the workers'
8 compensation claim. He's been hired to represent
9 the fellow with respect to the Social Security
10 hearing.

11 When he gets paid, he's entitled to be
12 paid directly by the Claimant. That doesn't have
13 anything to do with the workers' compensation. All
14 you do then is the offset gets sent, or the amount
15 of the Social Security benefits get sent to you and
16 you determine the offset.

17 And what the Supreme Court said in this
18 case is that offset should have been reduced by a
19 proportionate amount of the attorneys' fees, which
20 means the claimant should be getting greater
21 benefits.

22 So in a way, that's a little bit
23 different. At least in those cases where attorneys
24 are only representing with respect to Social
25 Security, that complicates it a bit.

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1 MR. MARTELLO: Well, we haven't looked
2 at it because the position we've taken on this is
3 that this decision, like I said, applies to Flynn,
4 and then going prospectively into the future, it
5 will apply to others based upon the decision, the
6 precedent of the decision.

7 The difficulty that we're having, though,
8 Judge, is one of the things that we need to
9 determine is, it was remanded for a calculation of
10 the formula, how we determine what the insurer's
11 share is; and that really preliminarily needs to be
12 made before anything can be done as far as future
13 cases.

14 THE COURT: Yeah, we need to take care
15 of what the offset should be in this particular
16 case. You haven't had any discussions on that
17 yet?

18 MR. MARTELLO: No.

19 THE COURT: That's a good idea. We
20 should probably address that first so Rex can get
21 paid, or his client can get back at least what he's
22 due.

23 What are your suggestions as far as the
24 way we proceed here?

25 MR. MARTELLO: When you look at the

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1 MR. MARTELLO: I would agree. That is
2 a little different. But the heart of what they're
3 getting the attorney fees for is for the attainment
4 of Social Security benefits.

5 THE COURT: Let me ask another
6 question, and this is a frank question, and that
7 is, no matter which way I decide, is this case
8 going to go back up to the Supreme Court?

9 MR. OVERTURE: I think that's an
10 unknown right now. It's too early to know the
11 direction this is going to go. With the most
12 expansive position Rex could take saying it applies
13 to everybody all the way through respectively
14 forever, retroactively, if he takes the most
15 expansive view, more likely than not, it will go to
16 the Supreme Court.

17 THE COURT: We have a problem if we try
18 to add in other insurers, for sure. We're sort of
19 working through that in Rausch, Fisch and Frost,
20 because they had this broad global claim.

21 Well, okay, let me change gears here.
22 Have we pretty much enunciated the kinds of issues
23 we have to face? I suppose one more question is,
24 how many people are we talking about? Any clue at
25 all, as far as the State Fund is concerned?

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1 Supreme Court decision --

2 THE COURT: I just looked at it.

3 MR. MARTELLO: Here's what it says.
4 "The State Fund should contribute in proportion to
5 the benefits it actually received to the cost of
6 the litigation, including reasonable attorneys'
7 fees."

8 Now, on first blush I think you could say
9 that's, you know, 50/50. But at one time when I
10 was looking at this, I came up with a
11 one-third/two-thirds split, and I don't know --

12 THE COURT: You're going to pay the
13 two-thirds (laughter)?

14 MR. MARTELLO: We would have paid
15 one-third. I think I was thinking in terms of that
16 convoluted formula that came out of subrogation a
17 long time ago where the Supreme Court came up with
18 this formula for figuring out --

19 THE COURT: Can't we keep this simple?

20 MR. MARTELLO: Maybe that's the way we
21 should do it. Like I said, on first blush, I think
22 it could easily be split, whatever the Court
23 reasonably determines.

24 I don't know what your thoughts are on it,
25 Rex, as far as how you think it should be divided

5 (Pages 11 to 14)

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1 up.

2 THE COURT: He thinks two-thirds.

3 MR. PALMER: Well, the Social Security
4 Administration determines the amount of the Social
5 Security claimant's award.

6 THE COURT: Right.

7 MR. PALMER: Then the insurers use that
8 information to calculate their offset. Now, all
9 the Supreme Court has done is to say: You have to
10 go back and factor in attorneys' fees and costs
11 because you haven't done that before.

12 So what the Supreme Court decision has
13 done is created a class of claimants who were
14 represented in Social Security hearings who
15 prevailed.

16 Now, the Social Security Administration
17 also determines the amount of an award. It's
18 somewhat like Workers' Compensation Court. You
19 start off with a percentage and a cap, okay? The
20 percentage and the cap apply in the fee agreements
21 that you sign.

22 Then when you're done with the litigation,
23 you don't collect a fee until you get an order from
24 the administration saying, "Here's how much you can
25 collect."

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1 THE COURT: Well, this is the State

2 Fund so --

3 MR. PALMER: Yeah, that just came last
4 weekend. It's just a Social Security offset
5 worksheet. All the fields aren't used right now.

6 THE COURT: You're just talking about
7 how we would do this.

8 I need to step back just a little bit. If
9 we have a \$4,000 attorney fee the claimant has to
10 pay out of his benefits, and the offset is -- 50
11 percent of the benefits are offset against the
12 State Fund, doesn't that mean that the State Fund
13 gets half of the benefit and the claimant gets
14 half? So a 50/50 split really sounds like it ought
15 to be the way to go, to be honest with you.

16 So what that would do is you take that
17 \$2,000, and you'd have to recoup that \$2,000 out of
18 the otherwise amount that would be offset, but that
19 comes over time. If you get a lump sum, the
20 problem is they're paying benefits over time, so I
21 don't know how you figure that out.

22 MR. OVERTURF: My understanding of how
23 it works, Judge, is generally when you do a Social
24 Security hearing, because of the time it takes to
25 get there and the time the disability arose, by the

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1 Now, in my case and in most of the ones
2 that I've been familiar with -- Kris Foot does a
3 lot and I talk with these different ones -- we take
4 the cap because it avoids a certain amount of work
5 at the end of justifying hour by hour. Either way,
6 you have to have it approved by the Judge, but you
7 just don't have to justify it if you take the cap.

8 In this case, it was \$4,000. That was the
9 cap that we accepted. It might have been more
10 dollars -- Well, it would have been more dollars if
11 we would have taken the other method, but the
12 Social Security Administration establishes the
13 award and it establishes the allowable fee.

14 THE COURT: Generally in these Social
15 Security offset cases, half of what's awarded for
16 the Social Security gets offset against the
17 workers' compensation benefits.

18 MR. MARTELLO: Correct.

19 MR. PALMER: May I approach? I got
20 this over the weekend. This was another client.
21 This is what they send us when they're done. They
22 plug the numbers into a formula, and the State Fund
23 does that worksheet, and all they have to do is add
24 a field that shows attorneys' fees. In this case,
25 it would be --

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1 time you get the decision, there is a back-due
2 benefit, and generally that's where your fee comes
3 from.

4 So most of the time there is a lump of
5 money from which the attorney fee can come out of,
6 and also probably the State Fund could probably do
7 their reduction right then, because the State Fund
8 usually has a past-due amount on the offset too.

9 MR. MARTELLO: Right. In this case,
10 what was the total amount of the overpayment on the
11 Flynn case?

12 MR. PALMER: It was \$14,000 or
13 \$16,000.

14 MR. MARTELLO: So what you would do,
15 let's say it's \$14,000, just for the sake of
16 argument, then instead of offsetting the entire
17 \$14,000, using that, you would just use the lesser
18 number with the \$2,000 excluded, so it would be
19 \$12,000, and that's what you would then -- or that
20 would be your overpayment that would be spread
21 out. At least that's the way I think it would
22 work.

23 THE COURT: That makes sense.

24 MR. PALMER: In Social Security, there
25 is no fee to the attorney except on the past-due

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1 benefits, so it's a defined amount as soon as the
2 order is issued. It's not like workers'
3 compensation where we might take a percentage into
4 the future. So at the time of the order, there is
5 a defined amount of attorneys' fees.

6 THE COURT: That makes it easier.

7 MR. PALMER: It makes it quite a bit
8 easier when we know that there are worksheets and
9 calculations that the insurers already have in
10 place because they want the offset. All we have to
11 do is get the attorneys' fee amount from the same
12 place where they get the award amount and figure
13 that half of that benefited the insurer, but they
14 didn't recognize it before the Court's award,
15 before the Supreme Court rule, the insurers didn't
16 recognize that 50 percent benefit that they
17 received.

18 So it's out of that 50 percent additional
19 dollars; and in most cases it will be the \$4,000,
20 except now I think it's been raised to \$5,300. But
21 for a period of time, it will have been \$4,000
22 caps. Some will be higher and some will be lower,
23 because there's a percentage cap as well. But when
24 we know what that number is and we say Flynn or
25 whoever it is went out and got their attorney and

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1 beneficiary benefiting from the work that Rex had
2 done.

3 THE COURT: I understand that.

4 MR. MARTELLO: If you look, though, at
5 the law governing third-party beneficiaries and
6 their rights and duties, we're in a very similar
7 position to the claimant, and there are duties that
8 Rex owes to us in order to protect our interests,
9 particularly because of the fact that we're paying
10 an attorney fee.

11 And I'm thinking, I guess, just off the
12 top of my head, some of the ramifications from that
13 down the road could be if the attorney is not
14 diligently pursuing the claim, the attorney doesn't
15 obtain the benefits that, as a third-party
16 beneficiary, would benefit us also, I think it
17 creates some problems that may not be apparent when
18 you first look at this decision.

19 THE COURT: All of which are beyond the
20 scope of this proceeding, and judges always say, "I
21 don't have to decide issues not before me."

22 MR. MARTELLO: You don't.

23 MR. OVERTURF: I think it is a factor
24 in considering whether or not it makes sense that
25 this particular case expands beyond the scope of

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1 accomplished this result, it benefited the Fund by
2 two of those \$4,000, and they simply owe a fee on
3 that \$2,000. The claimant, who never would see any
4 of the \$4,000 --

5 THE COURT: In almost all of these
6 cases, because of the delay with the proceedings,
7 there will be an overpayment by the State Fund. It
8 will be more than enough to absorb the attorney
9 fees.

10 MR. MARTELLO: Just as an aside, Judge,
11 because we're talking about what we're going to be
12 paying; of course, we believe it should just be
13 limited to Flynn, but just the principle that was
14 enunciated by the Supreme Court puts us in a
15 third-party beneficiary position which, when you
16 look at it, I think really can create some problems
17 for prospective attorneys who are representing
18 Social Security claimants, because as a third-party
19 beneficiary, we have certain rights, and
20 particularly since we're going to be paying for
21 part of the attorneys' fees, and I don't know --

22 THE COURT: I'm not tracking you.

23 MR. MARTELLO: Well, what the Supreme
24 Court said is that the State Fund in Flynn is a
25 third-party beneficiary. We are a third-party

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1 Flynn itself. It's one of the arguments we'll
2 make, to limit this decision to this case.

3 We came here today, I guess, to look at
4 what kind of issues we have, and I guess seeking
5 some sort of ability to brief the issues. Probably
6 the primary thing for us is, how are we going to
7 figure out what the fee is?

8 I agree that it seems straightforward to
9 do a 50/50 split. Probably the biggest issue for
10 us is the scope of who this applies to. We will
11 argue fairly strenuously that this should be
12 limited to Flynn himself.

13 One of the reasons for that is, as you
14 say, whenever you have a decision that creates some
15 sort of a precedent, you can always make the
16 argument that there's some sort of common fund
17 created both backward and forwards.

18 The question is, where do you draw that
19 line? If it's something as subtle as you've
20 changed the law on how you determine which insurer
21 is liable or, I mean, there's all kinds of
22 decisions that you make throughout the year that
23 set some degree of new precedent that, the Common
24 Fund taken to its illogical extreme, the attorney
25 bringing that case could always argue that because

7 (Pages 19 to 22)

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1 of that change in the law, he should be entitled to
2 a piece of every case forward and back. Where do
3 you draw the lines on that?

4 THE COURT: Well, that's the problem.
5 The problem is that the Supreme Court really hasn't
6 drawn that line. It's established the broad rule
7 where you establish a precedent to an additional
8 entitlement to benefits that the insurer was
9 previously denied.

10 MR. MARTELLO: I think it would have to
11 be pled that way, Judge, because if you allow this
12 to happen after the fact, then what's to prevent
13 someone from filing a lien a year after a
14 decision? Do you see what I mean? I mean, if this
15 thing is filed after the Supreme Court decision, it
16 puts us in an untenable position to try to figure
17 out if -- Like Greg said, just about any decision
18 that comes out of this court has some precedential
19 value, and how do you ferret out: Okay, do we have
20 to start withholding money because a lien may be
21 claimed at some point? It really presents an
22 impossible position for us.

23 THE COURT: Or even, extending that,
24 what's to stop the attorney from saying it's
25 self-enforceable and mailing out notices of liens?

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1 So, anyway, I'm sort of in this box right
2 now with respect to all these cases because of the
3 doctrine, and I guess I just have to work out of
4 that box as best I can on a case-by-case basis.
5 This case is a little bit different because it
6 wasn't pled initially.

7 We're actually dealing with two different
8 Common Fund doctrines. We're dealing with the
9 Common Fund doctrine that was established in Muir,
10 and this is a new Common Fund doctrine applied to a
11 specific proceeding, so they're really two
12 different Common Fund doctrines, although you can
13 apply the same logic to the two.

14 MR. MARTELLO: Well, the other thing
15 that's a little different on this case is I don't
16 really think it involves an interpretation of
17 statute. I think this thing involves essentially
18 an equitable sort of a remedy that was -- I mean,
19 it's something that --

20 THE COURT: But what difference does
21 that make as far as the Common Fund doctrine, the
22 Muir type of Common Fund doctrine?

23 MR. MARTELLO: Well, it may well have
24 some very important implications as to whether it
25 runs backwards, retroactivity, I think, and that's

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1 I don't know what the answers are because the
2 Common Fund doctrine is something that's been --
3 it's a judicially created animal, and it's been
4 created by the Supreme Court, and I don't have much
5 guidance on it other than the broad statements that
6 they've made.

7 The pleading issue is one issue, for
8 sure. Then the question of the scope and all that
9 is another issue. Those are two separate and
10 distinct issues. That's why I asked: Is this
11 something that's headed back to the Supreme Court?

12 One of my problems is, I'm seeing a lot
13 more of these actions, and a lot of these actions
14 where the insurer has interpreted the statute one
15 way and the claimant is asserting it another way,
16 they're going to turn those all into class actions,
17 which I'm turning into Common Fund doctrine actions
18 because I don't do class actions.

19 If you read my latest decision, I'm trying
20 to avoid the strictures of that rule. Although, I
21 suspect if this Common Fund doctrine were to get
22 dumped, the Supreme Court might say that I have to
23 put things into a class-action context, put the
24 attorney fees in a class action. I can see that as
25 one of the possibilities.

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1 something that obviously we'll have to brief; but
2 what little I know about retroactivity tends to
3 hinge on whether we're talking about an
4 interpretation of a statute and whether this could
5 be reasonably foreseen. This is a case that really
6 is built on equitable sorts of remedies that could
7 not have been anticipated.

8 THE COURT: Well, I don't think this
9 decision was reasonably foreseeable, to be honest
10 with you. There were two descents on it, but it's
11 breaking brand new ground.

12 Well, let's do this. I think the first
13 thing we need to do is to figure out what's due the
14 claimant, Mr. Flynn. That's the first thing.

15 The second is, I think, Rex, I need from
16 you some sort of statement, and maybe you can file
17 it, some sort of statement of lien claim that tells
18 me the scope or tells us all the scope of the
19 claim, whether you're seeking it against claimants
20 who have already benefited from Social Security
21 proceedings, whether you're seeking it just from
22 the State Fund or from all insurers. If it's all
23 insurers, we've sort of got another animal there.
24 And then whether or not you're seeking it
25 prospectively on future proceedings that attorneys

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1 may represent.
 2 MR. PALMER: Is anybody doing that? I
 3 hadn't even thought of that.
 4 THE COURT: I don't know. That's why
 5 I'm asking. That's why I need you to define your
 6 scope and tell me that. I mean, I'm not aware of
 7 it.
 8 Anyway, give me a statement that tells me
 9 the scope of what claims you think you're due fees
 10 from.
 11 MR. OVERTURF: I think that's one
 12 difficulty we're going to having. Until we know
 13 what Rex is asserting, what he thinks he's entitled
 14 to, we're not quite sure how we need to respond.
 15 THE COURT: So do those two things
 16 first. Why don't we try to do those within the
 17 next couple weeks. Can you guys put your heads
 18 together and figure out what's due Mr. Flynn within
 19 the next couple weeks?
 20 MR. MARTELLO: Yeah, I think Flynn
 21 shouldn't take long.
 22 THE COURT: I think Flynn is easy.
 23 That's the easiest part of this.
 24 Then, three, why don't I have the State
 25 Fund file your objections and the grounds for your

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1 objections to the lien. I mean, obviously you're
 2 objecting to it, unless you don't want to object to
 3 it. That's okay. You can tell me that too.
 4 MR. MARTELLO: To which lien? Once he
 5 does the statement of the lien?
 6 THE COURT: Yeah. And outline with
 7 some particularity what those grounds are.
 8 Obviously, I hear the pleading argument. It wasn't
 9 pled. It's on remand. It's expanding the scope of
 10 the proceeding. I hear that one; and then the
 11 arguments I've sort of heard in some form, that the
 12 lien shouldn't be expanded so far to this kind of a
 13 case.
 14 Then why don't you go ahead and brief
 15 that, too, and have Rex file a response to that.
 16 So I need some time frames, objections and
 17 briefs. What do you think? Rex will give you his
 18 lien claim within two weeks, so then who is doing
 19 the briefing? Tom or Greg?
 20 MR. MARTELLO: Probably both of us, but
 21 probably I will be the main person.
 22 THE COURT: So what do you think?
 23 MR. MARTELLO: I'd like to have three
 24 weeks after the --
 25 MS. BUTLER: Probably three or four

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1 weeks.
 2 THE COURT: Why don't we put it at a
 3 month after the statement. Then, Rex, you'll need
 4 to respond to that. What do you think you need?
 5 Do you want a month to respond to that?
 6 MR. PALMER: Yeah, and if I get it done
 7 quicker, I get it done quicker.
 8 THE COURT: Sure. Then five weeks for
 9 a response. I guess in the interim, if anybody
 10 wants me to do anything else other than just wait
 11 for this to come in, you need to tell me that too.
 12 MR. OVERTURF: We have the same issue
 13 we're going to face in the Fisch case in that when
 14 we get into these cases, the State Fund has to
 15 figure out what they're going to do in the interim
 16 while we get a decision.
 17 I don't know if there's any direction you
 18 can provide us with on that, but we're going to
 19 have claimants in between now and whenever we reach
 20 a decision who are getting Social Security, that
 21 we're taking offsets, you know.
 22 I guess it can be remedied after the fact,
 23 you know, or maybe that's an internal decision we
 24 just have to make. Are we going to not offset a
 25 certain amount to be withholding for the attorney

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1 fee and then claim an underpayment later if we
 2 prevail?
 3 MR. MARTELLO: What would be nice is to
 4 have a maximum, if you will, that will be claimed,
 5 because if we decide we're going to start paying
 6 these out, then we can withhold the maximum amount
 7 that would be claimed with the proviso that that is
 8 not any admission that there is an entitlement to
 9 it, because we don't want to, by any of our
 10 actions, create a fund that we don't think is out
 11 there.
 12 THE COURT: I understand that. Let's
 13 think about this just a little bit. Let's make the
 14 assumption that Rex's Common Law fund extends to
 15 other claimants who have to pay attorneys' fees.
 16 First, there has to be a determination of the
 17 amount of that, and then there has to be a
 18 determination of what the amount claimed is.
 19 But, secondly, how would that work, you
 20 know, assuming there was a claim of 25 percent of
 21 attorneys' fees? With respect to those claims, if
 22 all of these claimants were in overpayment
 23 situations, it probably doesn't make a difference.
 24 I assume what you would do is -- Well, how
 25 would you do that? How would you do that, Rex,

9 (Pages 27 to 30)

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1 assuming -- Let me ask this to Rex first.
2 Okay. The State Fund share of attorneys'
3 fees is \$2,000. They got an overpayment of \$6,000,
4 so they're going to credit \$2,000. How would you
5 recoup your attorney fee out of the \$2,000 they're
6 offsetting against the overpayment? Would you go
7 collect that from the claimant out of his benefits
8 that he's getting? See the problem?

9 MR. PALMER: Right. That would be the
10 most unusual case. Since I've never run into it,
11 give me a chance to think about it. I mean, I've
12 done Social Security work for years and I haven't
13 run into a situation where there wasn't a back
14 payment.

15 The reason primarily is because it usually
16 takes a year to get the Social Security
17 determination, a year to two years, and workers'
18 comp monies come in quicker. I have not run into
19 that.

20 THE COURT: Well, I'm assuming that
21 there is this back payment, so the offset is
22 greater than what he's due, so there's some
23 overpayment from the State Fund. So he actually
24 owes the State Fund in these cases, and he actually
25 owes them even after they credit the attorneys'

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1 If you take that \$2,000 away, then there's
2 still an overpayment of \$4,000, so the claimant is
3 still in a debtor position, as far as future
4 benefits is concerned, to the State Fund. So if
5 you were claiming 25 percent of the \$2,000 that the
6 credit was, then that's going to be \$500 you're
7 going to claim that you're owed. How do you
8 collect that \$2,500 -- I'm sorry, the \$500 when the
9 State Fund is still offsetting -- is still owed
10 money from the claimant? Do you take that out of
11 the claimant's current benefits or what? How would
12 that work?

13 MR. PALMER: It would come out of the
14 offset that the State Fund is taking on a biweekly
15 basis, should they be taking it on a biweekly
16 basis.

17 Presumptively, there's an ongoing amount
18 that they're taking out. They would not be able to
19 take it out of the claimant's share. Let me put it
20 this way. They're taking it out of the claimant's
21 share anyway on a week-to-week basis. They would
22 take a portion of what they're taking out and say,
23 "We're not entitled to keep all of this. We'll
24 give part of it over here to the attorney that
25 created the Fund."

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1 fees.

2 So how do we pay attorneys' fees out of
3 that? With your client it's probably -- Well, I
4 don't know what you're going to do with your client
5 either.

6 MR. PALMER: Well, I wouldn't
7 anticipate having any interaction with the
8 claimants because the information and the money
9 rests with the insurer.

10 So as the insurer is making the payments,
11 it would be simply a mathematical calculation to
12 determine, once we know the amount of the
13 attorneys' fees, we'll know how much that saved the
14 claimant. We'll know the dollars that would have
15 gone directly to the insurer on a 50-percent offset
16 are no longer going to go there. So I would not
17 anticipate any contact with the claimants.

18 THE COURT: I know, but come back to my
19 scenario and make sure you understand my scenario.

20 My scenario is, there is an overpayment as
21 a result of the Social Security offset coming late,
22 an overpayment of \$6,000. The attorney's fee on
23 that was \$4,000. Whoever represented him got
24 \$4,000, so the State Fund benefited to the tune of
25 \$2,000.

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1 MR. MARTELLO: The only way that I
2 could see that it would work, Judge, prospectively
3 is essentially you're making a lien against the
4 attorney who has represented the claimant in the
5 Social Security proceeding, because the attorney is
6 being paid the money, okay? Let's just use this
7 example. Let's say the attorney got the \$4,000.
8 Then what the attorney would have to do is disburse
9 the \$2,000 less the claimed attorney lien to his
10 client. Then that money -- that's the only
11 practical way I can see -- that money then would
12 have to be transmitted to Rex somehow.

13 THE COURT: I don't think that's
14 right. I think all we do is give him credit for
15 the attorney fee that he paid, which is the \$2,000.

16 MR. MARTELLO: But the thing of it is,
17 who has the fund? See, the fund that that would be
18 coming out of is the fund of the attorney who is
19 representing the claimant.

20 The attorney gets the \$4,000. The State
21 Fund doesn't get it. The attorney gets the
22 \$4,000. The claim that's being made is that the
23 attorney now has to take \$2,000 of that and give 75
24 percent -- let's say it's a 25 percent fee -- 75
25 percent to his client, and then 25 percent to Rex.

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1 THE COURT: Well, I mean, technically
2 what should have been done is, theoretically, of
3 the \$4,000, you should pay the attorney \$2,000, in
4 which case the claimant would only have to pay the
5 attorney \$2,000 out of the other portion.

6 Technically, that would be the way it would work.

7 The problem is, that hasn't happened so
8 we'd have to go back and we'd have to offset the
9 \$2,000. So he gets the benefit of the \$2,000, but
10 Rex is claiming -- which reduces your offset by
11 \$2,000, but Rex is claiming \$500 is owed to him as
12 an attorney fee out of that reduction. I'm having
13 trouble figuring out how to do that.

14 MR. OVERTURF: I think it can be done
15 pretty easily. First of all, let's all recognize
16 we're all assuming that the decision expands beyond
17 the scope of Mr. Flynn.

18 THE COURT: Right.

19 MR. OVERTURF: Let's take your scenario
20 where you have a \$6,000 overpayment and the
21 attorney fee was \$4,000, so the State Fund
22 essentially owes \$1,500 to the claimant and \$500 to
23 Rex, and they still have an overpayment of \$2,000
24 -- No, they still have an overpayment of \$4,000.

25 It seems like the State Fund, you know,

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1 know, they've reduced their offset. But then as
2 far as Rex goes, you could, for the first three
3 payments or offsets or whatever, it needs to go to
4 Rex until you hit his 500 bucks.

5 MR. MARTELLO: Well, there's two
6 different offsets that are occurring on this. You
7 have the offset for the initial overpayment that
8 results because of Social Security entitlement, and
9 that is generally leached out over a period of
10 time to recover it.

11 Then you have the ongoing half of the
12 Social Security offset that you would be adjusting
13 the rate based on, but they're two separate things.

14 MR. PALMER: They show on the
15 worksheet. The break-out is on the worksheet.

16 THE COURT: Okay. It can be done.
17 It's complicated and messy, is what it is. All
18 right.

19 Let's just go with what we've got. Then,
20 I don't know, maybe you'll want to come back and
21 argue this orally when we get fully briefed. So
22 why don't you just let my staff know that and we'll
23 set something up when you're at about that stage.

24 As far as anything interim, it sounds to
25 me, like most of these cases, there are going to be

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1 this puts more of a burden on the State Fund, but
2 it seems like they could still offset enough money
3 to pay Rex.

4 THE COURT: In other words, pay Rex the
5 \$500 out of that and then just reduce -- well, you
6 could do that. Then you just reduce --

7 MR. OVERTURF: The offset is going to
8 remain -- That's one other thing I wanted to
9 clarify with you. We're in agreement that the
10 extent of the State Fund's obligation is limited to
11 the attorney fee amount that's determined by the
12 Social Security Administration? If the case was
13 \$4,000 and we agree it's half and half, the State
14 Fund liability is just the \$2,000. There's not
15 some ongoing amount that needs to come out of
16 benefits?

17 MR. PALMER: Right, because the fee is
18 only awardable, in Social Security cases, it's only
19 awardable based on the past due. So it's a defined
20 amount as we sit here.

21 MR. OVERTURF: So it seems to me it's
22 fairly straightforward. The offset amount is a set
23 amount. We know that the claimant is going to have
24 to get \$1,500, we know Rex is going to get \$500.
25 As far as the claimant goes, they just don't, you

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1 overpayments that are going to absorb any attorney
2 fee that would be payable. So I'm not sure we need
3 to do anything out of that.

4 I think most of these are going to be the
5 \$6,000-minus-the-\$2,000 situation, unless there are
6 going to be some where there are no overpayments,
7 and then it would make a difference.

8 MR. OVERTURF: So we don't need to
9 worry about going forward because the State Fund is
10 still going to have "x" amount of dollars hanging
11 out there --

12 THE COURT: To offset it against down
13 the road.

14 MR. OVERTURF: -- down the road; and as
15 long as there is sufficient money there that we
16 could not offset it, to cover what's owed the
17 claimant and Rex, we're okay.

18 THE COURT: I'm assuming that's the
19 case. If it's not the case, then maybe we need to
20 do something once we know --

21 MR. PALMER: Right. It would be the
22 very narrowest few that would fit into the
23 assumption that you just gave us. By the passage
24 of time, the vast majority of claimants that I
25 think this applies to are going to be people who

11 (Pages 35 to 38)

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1 have long since been shorted their attorneys'
2 fees. They've been given no recognition of it, by
3 the passage of time. All their benefits have come
4 in and the State Fund or the other insurers are
5 simply holding money that, under Flynn, they were
6 not entitled to hold.

7 THE COURT: So you think there's going
8 to be a number of cases in which there is no
9 overpayment on the books?

10 MR. PALMER: Right.

11 MR. MARTELLO: If it's retroactive.

12 MR. OVERTURF: If we're going
13 backwards.

14 THE COURT: What do we need to do now
15 with regard to that? I mean, if we don't have an
16 order to pay those benefits at this point, then
17 nothing will be paid, so there's really nothing to
18 withhold from. I mean, you're not going to be
19 paying that \$2,000 out until you get an order
20 saying you've got to pay the \$2,000 out. It's only
21 at that point that we have to worry about what we
22 do with Rex's \$500.

23 MR. PALMER: And I can say, I have not
24 heard of, nor thought, nor do I intend to pursue
25 anything for claimants whose entitlement becomes

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1 something, let me know.

2 MR. OVERTURF: That clarifies it quite
3 a bit. It limits our issue very much.

4 THE COURT: Okay. Do you want to talk
5 about anything else?

6 Okay, we'll close the hearing.

7 (The hearing concluded at 10:53 a.m.)

8 * * * * *

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1 established, shall we say, after the date of the
2 Flynn decision. That's not claimants that already
3 had their entitlement, but let's say the day after
4 the decision, the attorney goes out and gets a
5 Social Security award. Then you're going to just
6 treat that right anyway. You're not going to have
7 to worry about holding it back. You know you have
8 to and you're going to, and I'm not going to get
9 anything out of it.

10 THE COURT: Well, that's why you need
11 to make a statement of what the scope of your claim
12 is, because that will take care of that issue.

13 MR. PALMER: If I have made it unclear
14 and you still feel uncertain, call me up and I
15 maybe will clarify it for you and get to your 14
16 days. I certainly could misstate it. I don't
17 intend to go beyond that date. Or maybe you see
18 something else that, "Do you really intend to go
19 here?" Call me, and maybe I don't. I'll try to
20 formulate it in a way that's clear.

21 MR. MARTELLO: I think once we get a
22 statement like the Court has put forth, then I
23 think we've got something definitive and we can act
24 on it.

25 THE COURT: Then if you think you need

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1 CERTIFICATE

2 STATE OF MONTANA)

3 COUNTY OF LEWIS AND CLARK)

4 I, SHERRON K. WALSTAD, Professional Court
5 Reporter, Notary Public in and for the County of
6 Lewis and Clark, State of Montana, do hereby
7 certify:

8 That the foregoing matter was taken before me
9 at the time and place herein named; that the
10 proceedings were reported and transcribed by me
11 with a computer-aided transcription system, and
12 that the foregoing pages contain a true record of
13 the proceedings to the best of my ability.

14 IN WITNESS WHEREOF, I have hereunto set my
15 hand and affixed my notarial seal this ____ day
16 of _____, 2003.

17
18
19 SHERRON K. WALSTAD
20 Court Reporter-Notary Public
21 My Commission Expires 11/1/06
22
23
24
25

<p>A</p> <p>ability 22:5 42:13</p> <p>able 33:18</p> <p>about 3:11,14,19 5:1 6:16,17 7:17 8:2,6,10,17 12:24 17:6 20:11 23:17 26:2,3 30:13 31:11 37:23 38:9 39:21 40:7 41:5</p> <p>above-entitled 1:15</p> <p>absolutely 5:11</p> <p>absorb 20:8 38:1</p> <p>accepted 16:9</p> <p>accomplished 20:1</p> <p>act 40:23</p> <p>action 6:1,4,5 24:24</p> <p>actions 24:13,13,16 24:17,18 30:10</p> <p>actually 7:14 14:5 25:7 31:23,24</p> <p>add 12:18 16:23</p> <p>additional 19:18 23:7</p> <p>address 6:19 13:20</p> <p>adjusting 37:12</p> <p>administration 15:4,16,24 16:12 36:12</p> <p>admission 30:8</p> <p>affixed 42:15</p> <p>after 23:12,13,15 28:24 29:3,22 31:25 40:1,3</p> <p>after-the-fact 6:3 7:5</p> <p>against 16:16 17:11 26:19 31:6 34:3 38:12</p> <p>ago 14:17</p> <p>agree 12:1 22:8 36:13</p> <p>agreement 36:9</p> <p>agreements 15:20</p> <p>ahead 28:14</p> <p>Allan 9:11</p>	<p>alleged 4:11</p> <p>allow 23:11</p> <p>allowable 16:13</p> <p>almost 9:2 20:5</p> <p>already 8:11,16 19:9 26:20 40:2</p> <p>although 24:20 25:12</p> <p>always 21:20 22:15 22:25</p> <p>amount 11:14,19 15:4,17 16:4 17:18 18:8,10 19:1,5,11,12 29:25 30:6,17,18 32:12 33:17 36:11 36:15,20,22,23 38:10</p> <p>animal 24:3 26:23</p> <p>another 7:9 9:17 12:5 16:20 24:9 24:15 26:23</p> <p>answers 24:1</p> <p>anticipate 32:7,17</p> <p>anticipated 26:7</p> <p>anybody 3:23 27:2 29:9</p> <p>anything 11:7,13 13:12 29:10 37:24 38:3 39:25 40:9 41:5</p> <p>anyway 6:8 25:1 27:8 33:21 40:6</p> <p>apparent 21:17</p> <p>APPEARING 2:8 2:15</p> <p>applied 25:10</p> <p>applies 12:12 13:3 22:10 38:25</p> <p>apply 13:5 15:20 25:13</p> <p>approach 16:19</p> <p>approved 16:6</p> <p>argue 22:11,25 37:21</p> <p>argued 5:5</p>	<p>argues 4:23</p> <p>argument 18:16 22:16 28:8</p> <p>arguments 22:1 28:11</p> <p>arises 7:18</p> <p>arose 17:25</p> <p>aside 20:10</p> <p>asked 6:9 24:10</p> <p>asking 10:1 27:5</p> <p>asks 4:15</p> <p>asserting 3:8 24:15 27:13</p> <p>Assistant 2:18</p> <p>assume 30:24</p> <p>assuming 30:20 31:1,20 35:16 38:18</p> <p>assumption 30:14 38:23</p> <p>attainment 12:3</p> <p>attempt 6:3 7:5</p> <p>attempted 10:9</p> <p>attorney 2:10 4:22 5:8,9 7:20 9:17 10:2,22,23 11:2 12:3 17:9 18:5,25 19:25 20:8 21:10 21:13,14 22:24 23:24 24:24 29:25 31:5 33:24 34:4,5 34:7,8,9,15,18,20 34:21,23 35:3,5 35:12,21 36:11 38:1 40:4</p> <p>attorneys 2:10,18 4:13,17 7:1,2,6 8:4,5,10,12,14,17 9:3,9 10:3,10 11:19,23 14:6 15:10 16:24 19:5 19:11 20:17,21 26:25 30:15,21 31:2,25 32:2,13 39:1</p> <p>attorney's 3:7</p>	<p>32:22</p> <p>avoid 24:20</p> <p>avoids 16:4</p> <p>award 15:5,17 16:13 19:12,14 40:5</p> <p>awardable 36:18 36:19</p> <p>awarded 16:15</p> <p>aware 27:6</p> <p>away 33:1</p> <p>a.m 1:15 41:7</p> <hr/> <p>B</p> <p>back 9:2 12:8 13:21 15:10 17:8 23:2 24:11 31:13,21 32:18 35:8 37:20 40:7</p> <p>backward 22:17</p> <p>backwards 25:25 39:13</p> <p>back-due 18:1</p> <p>base 7:16</p> <p>based 13:5 36:19 37:13</p> <p>bases 6:13</p> <p>basically 3:8 6:11 7:18 8:9,10</p> <p>basis 3:8 25:4 33:15,16,21</p> <p>bear 4:21</p> <p>becomes 7:24 10:24 39:25</p> <p>before 1:15 3:17 8:24 13:12 15:11 19:14,15 21:21 42:8</p> <p>beginning 1:14</p> <p>behalf 2:8,15 6:2 9:4</p> <p>being 5:5,12 7:6 10:8 11:3 34:6,22</p> <p>believe 20:12</p> <p>beneficiaries 21:5</p> <p>beneficiary 20:15</p>	<p>20:19,25 21:1,16</p> <p>benefit 3:9 5:8 17:13 18:2 19:16 21:16 35:9</p> <p>benefited 9:14 10:19 19:13 20:1 26:20 32:24</p> <p>benefiting 21:1</p> <p>benefits 4:14 7:19 8:13 9:10 10:2 11:15,21 12:4 14:5 16:17 17:10 17:11,20 19:1 21:15 23:8 31:7 33:4,11 36:16 39:3,16</p> <p>best 25:4 42:13</p> <p>between 9:25 29:19</p> <p>beyond 21:19,25 35:16 40:17</p> <p>big 7:15 9:1</p> <p>biggest 22:9</p> <p>bit 3:11 4:4 11:22 11:25 17:8 19:7 25:5 30:13 41:3</p> <p>biweekly 33:14,15</p> <p>blush 14:8,21</p> <p>books 39:9</p> <p>both 22:17 28:20</p> <p>box 2:19 25:1,4</p> <p>brand 26:11</p> <p>breaking 26:11</p> <p>break-out 37:15</p> <p>brief 6:10,10,23 22:5 26:1 28:14</p> <p>briefed 7:11 37:21</p> <p>briefing 28:19</p> <p>briefs 4:19 28:17</p> <p>bringing 6:1 22:25</p> <p>broad 12:20 23:6 24:5</p> <p>Broeker 5:15 9:25</p> <p>Broeker-type 6:5</p> <p>bucks 37:4</p> <p>built 26:6</p> <p>burden 36:1</p>
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