Attorney Fees in a 905(b) Action: The Lonsghoreman Comes Up Short

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ATTORNEY'S FEES IN A 905(b) ACTION:
THE LONGSHOREMAN COMES UP SHORT

William Bloomer, a longshoreman, was injured during the course of his employment and received compensation from his employer, a stevedore. After receiving compensation payments, Bloomer brought a third-party action against the shipowner pursuant to section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act. Under the LHWCA, the longshoreman's recovery is subject to a lien in favor of the stevedore in the amount of his compensation payments. Asserting that Congress had altered the equities when it amended the LHWCA in 1972, Bloomer contended that the lien should be reduced by an amount which would represent the stevedore's proportionate share of the expenses of the 905(b) action against the shipowner. The district court denied petitioner's motion, and the court of appeals affirmed. Acknowledging that the courts of appeals were divided on the issue of whether the stevedore should bear a portion of the legal expenses, the Supreme Court granted certiorari. The Court held that the language, structure, and history of the Act indicate a congressional unwillingness to create a liability on the part of the stevedore in the form of a charge for the longshoreman's legal expenses. Bloomer v. Liberty Mutual Insurance Company, 100 S. Ct. 925 (1980).

In order to appreciate fully the impact and significance of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, it is important to note, however, that the case and the following discussion apply with equal force to all maritime workers and maritime employers covered by the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C.A. §§ 901-50 (1978).

1. In the instant case, the parties involved are a stevedore and a longshoreman. It is important to note, however, that the case and the following discussion apply with equal force to all maritime workers and maritime employers covered by the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C.A. §§ 901-50 (1978).

2. 33 U.S.C.A. § 905(b) (1978) states:

   In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such persons, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Compensation Act, it is necessary to be aware of the situation that existed prior to those amendments. The Longshoremen's and Harbor Workers' Compensation Act of 1927 was enacted largely in response to the failure to provide coverage for maritime employees through existing state compensation systems. The Supreme Court had refused, on constitutional grounds, to allow state compensation systems to include persons injured on navigable waters.4 Although the 1927 Act had attempted to limit the liability of the stevedore-employer to the compensation and medical payments provided in the Act, the Supreme Court frustrated this congressional purpose5 in the Seas Shipping Company v. Sieracki6 and Ryan Stevedoring Company v. Pan Atlantic Steamship Corp.7 cases.

In Sieracki, the Court gave the longshoreman the benefit of a warranty of seaworthiness in suits against the shipowner. This warranty of seaworthiness facilitated the longshoreman's recovery since fault did not need to be proved; the warranty of seaworthiness amounted to imposing upon the vessel owner a "species of liability without fault."8 Then, in Ryan, the Court asserted that the shipowner could recover from the stevedore-employer whatever he had paid to the longshoreman by virtue of a breach of the stevedore's warranty of workmanlike performance.9 The Sieracki-Ryan system "violated the congressional intent in passing the Act [which was] to limit the employer's liability for compensation."10 Under the Sieracki-Ryan system, the injured maritime worker could recover full tort damages, as distinguished from the limited benefits provided under a compensation system. The 1972 Amendments eliminated both the longshoreman's unseaworthiness remedy and the right of the shipowner to shift the entire burden to the stevedore through the stevedore's warranty of workmanlike performance.11 One of the goals of the drafters of the 905(b) provision was to "con-

10. Id. at 1152.
sign the thousands of Sieracki-Ryan harbor worker cases to the scrapheap."\footnote{12}

Although the longshoreman may no longer bring an action against the shipowner based upon a warranty of seaworthiness, he still may bring a 905(b) action based upon negligence against the third party shipowner. Furthermore, the longshoreman need not choose between the receipt of compensation payments and the ability to recover damages for negligence.\footnote{13} Since 1959, these alternatives have not been mutually exclusive.\footnote{14} If the longshoreman successfully proceeds against the shipowner under section 905(b), portions of the recovery will be claimed not only by the longshoreman, but also by his attorney and the stevedore-employer. If the recovery is sufficient to pay adequately all of the parties involved, there is no difficulty. A conflict between the three parties arises only when the recovery against the shipowner is insufficient to cover both the maritime employer's lien and the attorney's lien or is barely sufficient, so that there is little left for the employee. An attempt will be made to highlight this conflict, to place it in perspective, and to suggest an equitable solution.

At the outset, it can be noted that the various circuits have resolved this problem inconsistently. Part of the reason for this lack of consistency is the fact that Congress has failed to specify how the recovery should be distributed when the 905(b) action is initiated by the longshoreman,\footnote{15} although section 933(e) of the LHWCA specifically provides a distribution scheme when the 905(b) action is initiated by the stevedore.\footnote{16} Under section 933(b) the longshoreman has six months

12. G. Gilmore & C. Black, supra note 8, at 437. Other changes affected by the amendments include an increase in the compensation benefits, an expansion of the geographical coverage, and the creation of a new system of adjudication for disputed compensation cases. Although the above mentioned changes are significant, the focus in this article will be upon the elimination of the warranties system and the remaining action against the shipowner for negligence. See Robertson, supra note 11, at 436.


16. 33 U.S.C.A. § 933(e) (1978) provides:

Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to:

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;
to assert his 905(b) action against the third party shipowner. Should the longshoreman fail to do so within this period, the stevedore is assigned the longshoreman's right of action.\textsuperscript{7} If such an assignment occurs and if the stevedore successfully asserts his claim, he is entitled to recover everything that he paid to the employee as compensation and all of his costs, including attorney's fees; in addition, he may retain one-fifth of the excess.\textsuperscript{8} The statute does not, however, provide such a distribution scheme when the longshoreman initiates the 905(b) action. Congressional silence in this area has led to a diversity of opinion among the various circuit courts.

The ninth circuit in \textit{Bachtel v. Mammoth Bulk Carriers, Ltd.}\textsuperscript{19} adopted the pro rata approach of the fourth circuit. The fourth circuit had determined in \textit{Swift v. Bolten}\textsuperscript{20} that "the stevedore should be taxed with that part of a reasonable fee for the longshoreman's counsel as is proportioned to its share of the recovery."\textsuperscript{21} Declaring that the pro rata approach was both easy to apply and equitable, the Bachtel court followed the reasoning of \textit{Swift}. Both courts recognized the fact that the prior conflict of interests between the longshoreman and the stevedore was practically abolished by the 1972 Amendments. Prior to 1972, the stevedore should not have been required to contribute to the attorney's fees when, due to the circuity of litigation, the stevedore himself eventually would be sued by the shipowner. After 1972 the triangular lawsuit that existed when the

\begin{itemize}
\item \textbf{(C)} all amounts paid as compensation;
\item \textbf{(D)} the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amount so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in the excess thereof to the person entitled to compensation or the representative; and
\end{itemize}

\textsuperscript{17} 33 U.S.C.A. § 933(b) (1978) states:

Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

\textsuperscript{18} 33 U.S.C.A. § 933(e) (1978).

\textsuperscript{19} 605 F.2d 438 (9th Cir. 1979).

\textsuperscript{20} 517 F.2d 368 (4th Cir. 1975).

\textsuperscript{21} \textit{Id.} at 370.
shipowner compensated the longshoreman, only to recoup the compensation from the stevedore, was no longer possible. Thus, both the longshoreman and the stevedore now have a common interest in obtaining a recovery from the shipowner. It was this reasoning that led the Bachtel and the Swift courts to apportion the attorney's fees between the stevedore and the longshoreman.

In contrast to the pro rata scheme, the second circuit employed the "fund rule" to distribute the amount recovered from a third party. The court was faced with a curious situation in Valentino v. Rickners Rhederei, G.m.B.H.; the recovery from the shipowner was less than the amount of the stevedore's lien. Recognizing the equitable principle that a lawyer who creates a fund for another is entitled to compensation for his work, the court found that the attorney's lien had priority over the stevedore's lien. The same court had previously held, in Fontana v. Grace Line Inc., that the stevedore's lien took priority over the attorney's lien. The Valentino court reconciled its decision with Fontana by noting that prior to the 1972 Amendments, the stevedore's lien should have had priority, for to have held otherwise would have been to "charge the stevedore for the privilege of being sued." The Valentino court merely changed the priority of liens in those situations in which the award is insufficient to satisfy both the stevedore's and the attorney's liens. Valentino, however, does not disturb that portion of Fontana which asserts that when the total recovery is sufficient to satisfy both liens, the stevedore's lien will not be diminished, and the longshoreman will remain solely responsible for the fees of the attorney.

The fifth circuit has taken another approach, as evidenced by Mitchell v. Scheepvaart Maatschappy Trans-Ocean. The court rejected any hard and fast rule which would create a "purposeless symmetry" and adopted a balancing approach, designed to determine whether it is reasonable for the longshoreman to bear alone the entire costs of the recovery. Before the stevedore would be re-

22. 552 F.2d 466 (2d Cir. 1977). The longshoreman recovered from the shipowner a sum of $5,000. The stevedore had a lien in the amount of $15,488.31. Id. at 467.
23. 205 F.2d 151 (2d Cir. 1953).
24. 552 F.2d at 470.
25. Id. The second circuit, in Landon v. Lief Hoegh and Co., Inc., 521 F.2d 756, 761 (2d Cir. 1975), has referred to the longshoreman as a "statutory trustee of an express trust for the benefit of the employer." In Landon, the second circuit determined that the stevedore should be fully compensated for his compensation payments when the recovery exceeds the compensation lien.
26. 579 F.2d 1274 (5th Cir. 1978).
27. Id. at 1282.
quired to contribute a portion of the longshoreman's attorney's fees, a determination would be made to see if the longshoreman already had been amply reimbursed. Such an inquiry would prevent the longshoreman from receiving an "unearned bounty." 28

It is thus obvious that the courts of appeals have developed disparate solutions to the problem arising out of the lack of congressional guidance as to the proper distribution of the longshoreman's recovery in a 905(b) action. Although the Court in Bloomer referred to a well-settled judicial rule, 29 it is submitted that no such rule existed after the 1972 Amendments. 30

In the instant case, the amount of the longshoreman's settlement with the shipowner was sufficient to recompense both the attorney and the stevedore. Relying upon the "language, structure, and history" 31 of the LHWCA, the Court held that the stevedore should be reimbursed for all of his compensation payments and that his lien should not be reduced by a proportionate share of the longshoreman's attorney's fees. In its analysis the Court noted: "[T]he unambiguous provision that the stevedore shall be reimbursed for all of his legal expenses if he obtains the recovery does ... speak with considerable force against requiring him to bear a part of the longshoreman's costs when the longshoreman recovers on his own." 32 Finding no reason to believe that Congress intended a different distribution of the expenses of suit merely because the longshoreman brought the action, the Court rejected any apportionment of such expenses. 33

Justice Marshall, writing for eight members of the Court, found that an apportionment of attorney's fees would result in a double recovery by the longshoreman. 34 Emphasis was placed on Congress's failure to "alter, the uniform rule [of pre-1972 jurisprudence] that the longshoreman's legal fees would be paid by the longshoreman alone." 35 In light of congressional inaction, the Court expressed a reluctance to change that rule judicially. 36

The Bloomer opinion reflects an awareness of a congressional in-

28. Id. at 1278.
29. 100 S. Ct. at 931.
31. 100 S. Ct. at 927.
32. Id. at 928.
33. Id.
34. Id. at 932.
35. Id. at 931.
36. Id.
tent to eliminate the pre-1972 situation in which "much of the [stevedore's] financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs."  

Recognizing this congressional intent to conserve the stevedore's resources, the Court determined that an apportionment of legal fees would be inconsistent with this intent. The result was a denial of the petitioner's assertion that the "common fund" doctrine required the stevedore to contribute to the expenses of litigation.

The common fund doctrine represents the proposition that one who obtains a benefit from a lawsuit should contribute to its costs, preventing the beneficiary from being unjustly enriched at the litigant's expense. Reflecting the traditional practice in courts of equity, the Court previously has recognized that a litigant or a lawyer who obtains a fund which benefits another should secure a reasonable attorney's fee from the fund as a whole. According to the Bloomer Court, the merits of the "common fund" doctrine were outweighed by the "language, structure, and history" of the LHWCA. The Court did not, however, discuss the merits of the equitable "common fund" doctrine.

While perhaps placing too little emphasis on the merits of the equitable doctrine, the Court may have overemphasized the significance of congressional inaction. The majority asserts that, had Congress intended a different allocation scheme from that provided in section 933(e), Congress could have stipulated expressly its intent. On the other hand, it can be argued with equal force that, "[h]ad Congress intended rote application of the allocation scheme in 33 U.S.C. 933(e) to recovery in a 'longshoreman initiated' action, specification of this result would have been a simple task, and one would have expected Congress to say so." It is quite possible that

38. 100 S. Ct. at 932.
40. Boeing Co. v. Van Gemert, 100 S. Ct. 745, 749 (1980). The Court discussed the requirements necessary for an application of the "common fund" doctrine. Initially, the class of persons benefitted by the lawsuit must be "small in number and easily identifiable." Secondly, the benefits must be capable of being traced with some accuracy, and lastly, "there was reason for confidence that the costs (of litigation) could indeed be shifted with some exactitude to those benefiting." Id. at 749.
41. 100 S. Ct. at 927.
Congress chose not to deal with the allocation of the recovery when the longshoreman brought the suit. It is certain that Congress intended that the interests of all should be protected and that the equities should be balanced. It is submitted that the congressional desire was to allow the courts to discover an equitable solution. This supposition finds support in the fact that the stevedore’s lien was originally a judicial creation. Courts adopted the equitable lien as a means of preventing double recovery on the part of the longshoreman. It can thus be suggested that Congress was aware of the difficulties involved and chose not to adopt an inflexible statutory rule for fear that an inequitable solution might result.

The mere fact that Congress was silent in the face of many lower court decisions denying apportionment does not prove that Congress would accept this result under the present statutory scheme. The decisions relied upon by the Court in its analysis of legislative history were rendered prior to the elimination of the Sieracki-Ryan system. Congress observed that under the Sieracki-Ryan system, the stevedore was being held indirectly liable for damages to the longshoreman who sued the vessel under the unseaworthiness doctrine.

44. "The legislative history relied upon by the Court... fails to show that Congress delved into the intricacies of this judicial debate, or indeed that it did more than barely scratch the surface in consideration of fee allocations in actions brought by longshoremen." Id. at 935, Accord, Ashcraft and Gerel v. Liberty Mut. Ins. Co., 343 F.2d 333, 337 (D.C. Cir. 1965), "[i]t may well be that Congress has not anticipated these problems or made the conscious provision for them that such anticipation might have entailed."


46. "[C]ongress left the matter to the judicial process." 100 S. Ct. at 935, (Blackmun, J., dissenting). See, e.g., Chouest v. A & P Boat Rentals, Inc., 472 F.2d 1026, 1035 (5th Cir. 1973). ("It is our responsibility to divide third party recoveries in the manner we feel best accords with the purpose of the Congress in enacting the LHCAt)."

47. See The Etna, 138 F.2d 37 (3d Cir. 1943). See also Allen v. Texaco, Inc., 510 F.2d 977 (5th Cir. 1975).

48. See, e.g., Ballwants v. Jarka Corp. of Baltimore, 382 F.2d 433 (4th Cir. 1967); Haynes v. Rederi A/S Aladdin 362 F.2d 345 (5th Cir. 1966). Cf. Spano v. N.V. Stoomvaart Maatschappiy, 340 F. Supp. 1194 (S.D.N.Y. 1971) (the interest of the longshoreman in his lawsuit against the vessel owner attaches only to the excess after the stevedore had been reimbursed; the attorney for the longshoreman was not paid because his lien could only attach to an excess that did not exist in the case).

49. The end result is that, despite the provision in the Act which limits an employer’s liability to the compensation and medical benefits provided in the Act, a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel under the unseaworthiness doctrine.
At least one court recognized that the elimination of the Sieracki-Ryan system necessitated a reassessment of prior jurisprudence denying apportionment. In 1967 the fourth circuit determined in *Ballwanz v. Jarka Corp.* that the stevedore should not have to contribute to the longshoreman’s attorney fees. The court reasoned that because the shipowner may eventually sue the stevedore, it would not be proper for the stevedore to contribute to a recovery which would serve to expose him to further liability. Recognizing that the longshoreman’s suit against the shipowner no longer exposed the stevedore to additional liability, the same court in *Swift v. Bolten* held that, in light of the 1972 Amendments, the stevedore should contribute a pro rata portion of the fees involved in recovery.

In *Ballwanz*, the court dealt with a stevedore and a longshoreman whose interests clashed. By bringing a third party suit against the shipowner, the longshoreman was exposing the stevedore to liability beyond the scheduled compensation benefits. The opposite situation existed, however, in the post-1972 case of *Swift v. Bolten*. No longer did the longshoreman’s suit expose the stevedore to added liability; rather, both parties had a common interest in suing the shipowner. Even the *Bloomer* majority recognized that “the stevedore and the longshoreman now have a common interest in the longshoreman’s recovery against the shipowner.”

Despite the changes made by the 1972 Amendments, the *Bloomer* Court asserted that “there is no reason to believe that Congress intended a different distribution of the expenses of suit merely because the longshoreman has brought the action.” But at least

50. 382 F.2d 433 (4th Cir. 1967). The *Ballwanz* court stated that “[i]n that situation [where the stevedore and the longshoremen are adverse because the longshoreman has sued the vessel owner who brings a third-party action against the stevedore alleging breach of warranty of workmanlike performance], counsel for the longshoreman ought not to have his fee measured by or payable out of any incidental credit received by the stevedore as a result of the litigation.” *Id.* at 437.

51. *Id.*

52. 517 F.2d 368 (4th Cir. 1975).

53. 100 S.Ct. at 931. *But see Chouest v. A & P Boat Rentals, Inc.*, 472 F.2d 1026 (5th Cir. 1973). In *Chouest*, the court noted that:

“A conflict may persist as to the extent of the injured longshoreman’s disability. Section 33(f) of the LHCA, 33 U.S.C. 933(f) (1972), permits a longshoreman to assert a further claim for compensation after the conclusion of the third-party action if the recovery from the third party, together with the amounts already paid in compensation, falls short of the amount to which the longshoreman is entitled under the LHCA.”

*Id.* at 1032 n.8.

54. 100 S. Ct. at 928. (emphasis added).
two reasons can be discovered for believing that Congress may have intended a different distribution scheme in those instances in which the longshoreman initiates the 905(b) action against the shipowner. Under section 933(e) the stevedore is entitled to one-fifth of any excess recovery should he initiate the action.\(^5\) It was believed that "by giving the employer a reasonable [one-fifth] share in the net recovery an incentive is provided not to compromise a suit only for the amount of compensation but to protect the interests of the employee as much as possible."\(^5\) If Congress had the interests of the longshoreman in mind when providing for the 933(e) distribution of the stevedore's recovery, certainly the interests of the longshoreman should be taken into account in attempting to allocate the longshoreman's recovery. While it is clear that the Bloomer Court recognized the congressional intent to "assure conservation of stevedore resources,"\(^5\) it is unclear whether any consideration was given to the congressional desire to protect the interests of the longshoreman.

Secondly, it may be argued that the one who initiates the third party action should not be saddled with extensive attorney's fees.\(^5\) Because the statutory distribution scheme favors the stevedore when he brings the third party suit, parity of reasoning suggests that the longshoreman's expenses should be taken into consideration when he initiates the action.\(^5\)

The Bloomer majority asserts that an apportionment of attorney's fees between the longshoreman and the stevedore would result in a "windfall" or double recovery for the longshoreman. There is, however, no double recovery until the longshoreman has received funds fully commensurate with his injuries. Justice Blackmun, in his dissent, noted that

\[\text{the longshoreman would receive no windfall. Any costs or fees he must pay reduce his net recovery below the amount of his adjudicated injuries. . . . So long as the longshoreman's total com-}\]


\(^{57}\) 100 S. Ct. at 931.

\(^{58}\) 100 S. Ct. at 936 (Blackmun, J., dissenting).

\(^{59}\) It is interesting to note that should the stevedore decline to pay compensation, thus forcing the longshoreman to retain an attorney to prosecute his claim against the stevedore, LHWCA section 928(a) assesses reasonable legal fees against the recalcitrant stevedore. 33 U.S.C.A. § 928(a) (1978).

\(^{60}\) 100 S. Ct. at 932-33.
It is important to note that compensation systems do not fully compensate the victim. The longshoreman is by no means made whole. The very rationale behind the compensation scheme is to replace the uncertainty involved in an attempt to recover full damages with a certain, albeit partial, recovery. In certain cases the longshoreman's recovery against the shipowner is less than or barely greater than the stevedore's lien. In such a situation, a windfall will not occur if the stevedore is required to contribute to the longshoreman's attorney's fees. Allowing contribution will assure only that the proceeds of a successful recovery will not be divided between the employer and the longshoreman's attorney. In any event, it is apparent that a "windfall" does not necessarily result when attorney's fees are shared.

The Bloomer majority refers to a "uniform rule" of the courts that the stevedore should not be required to contribute to the longshoreman's legal expenses. It is further implied that congressional inaction was tantamount to congressional approval of this rule.

61. 100 S. Ct. at 937 (Blackmun, J., dissenting).
62. "The aim of workmen's compensation was to replace the occasionally exorbitant and always uncertain indemnity from civil actions by a definite but limited compensation scale." H. Somers & A. Somers, Workmen's Compensation 59 (1975). See Atleson, supra note 56, at 518.
63. For example, the congressional record of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 shows that the basic requirement of the Act is for the injured worker to receive 66\(\frac{2}{3}\)% of his average weekly wage. . . . Section 5 of the bill amends the Act to provide that the maximum compensation for disability shall not exceed 200% of the national average weekly wage to be determined annually by the Secretary of Labor. [1972] U.S. Code Cong. & Ad. News at 4700.
64. Poindexter, Journey Into The Twilight Zone, 4 Workmen's Compensation L. Rev. 495 (1977).
66. A number of state worker's compensation plans guarantee the employee a percentage of the recovery. It is contended by some that this is merely a method of apportioning attorney's fees, a disguised sharing of attorney's fees. See Atleson, supra note 56 at 531. See also Chouest v. A & P Boat Rentals, Inc., 472 F.2d 1026 (5th Cir. 1973). The Federal Employees' Compensation Act creates a specific guaranteed share of a recovery fund for the employee. "Congress has indicated its own concern with providing the injured employee a reward sufficient to dispel his fears that the proceeds of a successful recovery will be divided between the lawyer and his employer." Id. at 1035 n.14.
67. 100 S. Ct. at 931.
68. "In these circumstances it is for Congress, not this Court, to determine whether a requirement of proportional payment of legal expenses would ultimately
Even if congressional silence is unequivocally interpreted as congressional acceptance, the cases which the majority cites in support of its proposition are distinguishable. These cases cannot be examined properly without a recognition that their rulings were fashioned in an atmosphere in which the interests of the stevedore and the longshoreman were conflicting. Secondly, some of the cases address the broad question of whether or not the employer is entitled to any reimbursement for his compensation payments. Lastly, the factual situations are diverse. Certain additional facts may be instrumental in putting these rulings in perspective.

The Court relied partially on the cases of *Miranda v. City of Galveston* and *Haynes v. Rederi A/S Aladdin* to support the proposition that Congress had accepted the judicial rule of non-apportionment. In both of those cases, however, the opinions emphasized the fact that the employer's compensation carrier had been represented by its own counsel; this may have influenced the decisions to deny apportionment of fees. Furthermore, the fifth circuit's opinion in *Haynes* explicitly recognized the equitable common fund doctrine which had been applied by that court in *Strachan Shipping Company v. Melvin*. The fifth circuit summarized its holdings by stating that

benefit injured longshoremen, or instead longshoremen's lawyers, who were found to have been the primary beneficiaries of third-party actions in the past." *Id.* at 932 n.11.

69. "I feel the Court has . . . overdrew the clarity of congressional approval of it [the rule denying apportionment]." 100 S. Ct. at 934 (Blackmun, J., dissenting).


71. See text at note 53, *supra*.


74. 362 F.2d 345 (5th Cir. 1966).

75. "In fact it employed its own attorney's to preserve its position during this litigation and these counsel represented it and actively asserted its rights throughout the trial." *Haynes v. Rederi A/S Aladdin*, 362 F.2d 351 (5th Cir. 1966); "Each was represented by counsel. Information obtained by each in prior investigations and litigation was used at the trial." *Miranda v. City of Galveston*, 123 F. Supp. 891 (S.D. Tex. 1954). See *Celia v. Partenreederei MS Ravena*, 529 F.2d 15 (1st Cir. 1975). In this case the insurance carrier for the stevedore specifically informed the longshoreman's attorney that he was not being engaged to represent the company for the recovery of the compensation payments. Furthermore, the insurance carrier retained a firm which monitored the proceedings for the insurance carrier. The *Celia* court disallowed apportionment of fees.

76. 327 F.2d 83 (5th Cir. 1964).
all share the underlying premise that, where the reimbursement of the employer's compensation carrier is achieved through the efforts of the plaintiff's counsel, a reasonable fee for plaintiff's counsel may, if necessary, be levied for recovery of the compensation. 77

In summary, all of the cases cited by the majority pre-date the 1972 Amendments. In addition to this distinction, Miranda and Haynes address a situation in which the compensation carriers employed their own counsel. There is no indication in the instant case that the worker's compensation carrier for Bloomer's employer employed independent counsel to secure recovery of its compensation payments. Thus, the instant case is not squarely in line with the cases used to support a rule of non-apportionment of attorney's fees. 78

A further argument used by the Bloomer Court to support a denial of apportionment is based upon the idea that the stevedore would thus be subject to a "new liability." 79 It certainly is not denied that one of the motivating forces behind the 1972 Amendments was to limit the liability of the stevedore. 80 In fact, the response of Congress in 1972 was in part a result of the suggestion of stevedores that some sort of remedial congressional legislation would enable them to pay greater compensation awards. 81 As a result of the Amendments, the stevedore is insulated from any action for contribution or indemnity from the shipowner. 82 It is thus conceded that limitation of the stevedore's liability is within the congressional purpose in enacting the 1972 Amendments. However, the Court's conclusion that a decision in favor of sharing attorney's fees would create a new liability is questionable. A recovery of the compensa-

78. It might be noted that while the Court refers to a longstanding judicial rule that fees should not be apportioned, the opinion admits that "[w]e granted certiorari to resolve this recurring question on which the courts of appeals have been divided." 100 S. Ct. at 927.
79. Id. at 932.
80. "[T]here is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker. . . . Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty." [1972] U.S. CODE CONG. & AD. NEWS at 4704.
81. See Steinberg, supra note 5, at 659.
82. See Robertson, supra note 11, at 436. See also Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979). In Edmonds, although the stevedore was 70% at fault and the longshoreman was 10% at fault, the shipowner was held responsible for 90% of the damages. The longshoreman's recovery was only reduced by his own negligence. The stevedore was not liable for any contribution or indemnity.
tion payments does not represent a reduction of liability, but rather, a satisfaction of that liability. Although a required sharing of recovery fees would reduce the compensation fund, sharing would not create a new liability. "To call this an increase in the carrier's net liability . . . is merely to play with words." The liability of the stevedore for compensation payments is the result of the statutorily-created compensation system. The stevedore must pay compensation, regardless of whether he has an opportunity to be reimbursed. To allege that a reduction of the compensation lien results in the creation of new liability does not seem logically supportable.

Coupled with an unwillingness to create any new liability for the stevedore, the majority enunciated a desire to "ensure conservation of the legal expenses of stevedores and their insurers." Certainly, this is a laudable goal; but if husbanding the stevedore's resources is an objective, then actions by longshoremen against third parties should be encouraged. An absolute denial of any sharing of attorney's fees would, in many instances, discourage such action. On the contrary, a reduction of the stevedore's lien by a portion of the expenses involved in recovery would encourage the longshoreman to sue the allegedly negligent third party. It is only through a third-party action, brought either by the longshoreman or the stevedore, that the stevedore will be able to recuperate his compensation payments. Thus, encouragement of these suits does not reduce the resources of the stevedore, but rather replenishes them.

In response to the argument that proportional sharing of attorney's fees would assist the stevedore by encouraging the longshoreman to bring suit, the Court stated that the stevedore himself was encouraged by the LHWCA to initiate the action if the longshoreman failed to do so. However, there are situations in which a stevedore may be hesitant to bring suit against the third party shipowner. In Valentino v. Rickners Rhederei, G.m.B.H. the court noted that stevedores do not generally bring negligence suits against shipowners for fear of antagonizing customer relations. Additionally, third party actions are not likely to be pursued when the

83. See Atleson, supra note 56, at 515.
84. Id. at 545.
85. 100 S. Ct. at 932. See also Cella v. Partenreederei MS Ravenna, 529 F.2d 15-20 (1st Cir. 1975) ("We conclude that the overriding purpose of the 1972 Amendments was to strictly limit the liability of the stevedore in order to husband its resources, and its insurance carrier's resources, for payment of the increased benefits under the Act").
87. 100 S. Ct. at 932 n.12.
88. 552 F.2d 466, 469 (2d Cir. 1977).
employer's compensation carrier, subrogee to the employer's claim, is also the liability insurer for the third party shipowner. In these instances, the stevedore's only hope of recovering any part of the compensation already paid may be through a suit initiated by the longshoreman. In neither situation can it be said that a contribution by the stevedore to the longshoreman's fees and court costs would deplete the stevedore's resources. Instead, it would enable the stevedore to "husband" his resources. At the same time, the longshoreman would not be forced to pay the attorney's fees totally from his own recovery.

In order to place the instant dispute in perspective, it might be helpful to reconsider the overall objectives of a worker's compensation system. "Workmen's compensation represents a balanced set of sacrifices by and gains for the worker and the employer which could be legally enforced in the public interest." When worker's compensation systems were first conceived, the basic idea was that each side gave up something and gained something in return. The entire system operates on a quid pro quo principle. The denial by the Court of any type of sharing of the costs involved in bringing suit seems to violate the quid pro quo philosophy underlying the LHWCA. The Act effects a compromise between the employer and the employee: the stevedore benefits from a limitation of his liability to compensation payments; the employee is relieved of the risk and uncertainty that would accompany a suit against the employer based on negligence. While possibly less than a tort recovery, the longshoreman's recovery against the stevedore is, nonetheless, certain. The 1972 Amendments can be seen as a compromise. The longshoreman was deprived of an action against the shipowner based on a warranty of seaworthiness, but he is still able to bring an action in negligence. Furthermore, the shipowner is no longer allowed to seek contribution or indemnity from the stevedore, although the shipowner's liability is based on fault principles instead of on the warranty system. Thus, it would not be unreasonable to conclude

89. An example of this situation can be found in Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525, 530 (1956). Here, the action had been assigned, but because of the interests involved the employer did not initiate an action against the third party. "The result is that Czaplicki's rights of action were held by the party most likely to suffer were the rights of action to be successfully enforced." See generally Rodriguez v. Compass Shipping Co. Ltd., 456 F. Supp. 1014, 1023 (S.D.N.Y. 1978).

90. See H. Somers, supra note 62, at 28.

91. See G. Gilmore, supra note 8, at 401.

that when the stevedore recovers his compensation payments, he should have to contribute to the expenses involved in the recovery. If the stevedore is reimbursed without having to sue the third party himself and without having to contribute to the longshoreman's expenses, there is no *quid pro quo.*

Because the solution to the question of sharing recovery expenses should be consistent with congressional intent, the purposes of the 1972 Amendments should be considered. The protection of the longshoreman was one of the goals sought. Secondly, the Act was designed to encourage negligence actions. By permitting those actions, Congress sought to encourage safety. The legislative history of the 1972 Amendments reveals a strong desire to assure that negligence actions remain viable and that the vessel owners and other persons are held to their obligations and duties under the Occupational Safety and Health Act of 1970.

Thus, the longshoreman's right to sue the shipowner for negligence should be encouraged and protected. However, the longshoreman may be discouraged from pursuing the very actions which the Act seeks to promote when he is the last one to receive any benefit therefrom. Regardless of who brings the suit, the longshoreman is relegated to a status well behind the stevedore and, in some cases, behind his attorney. If the *stevedore* initiates the suit, he deducts his compensation payments and his costs, which include reasonable attorney's fees. The stevedore also gets one-fifth of the

93. *See Atleson, supra* note 56, at 539. Many states have found it unfair for there to be no apportionment of fees. "The objection is probably not so much that the employee may find himself with nothing, but rather that the insurer receives reimbursement *without the outlay of attorney's fees.*" *Id.* (emphasis in original). In other words, the stevedore gets something for nothing.

94. "[W]e find nothing to indicate and should not presume that Congress intended to place the burden of the inequity on the longshoreman whom the Act seeks to protect." Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 270 (1979).

95. Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.


96. *Id* at 4705. *See Robertson, supra* note 11, at 456.

97. Valentino v. Rickners Rhederei, G.m.B.H., 552 F.2d 466 (2d Cir. 1977). In this case the recovery was not sufficient to cover both the stevedore's lien and the attorney's fees. The court held that the attorney's lien had priority over the stevedore's. Compare this result with Justice Blackmun's dissenting view in *Bloomer.* Bloomer v. Liberty Mut. Ins. Co. 100 S. Ct. at 933 (1980) (Blackmun, J., dissenting). Justice Blackmun stated that the welfare of longshoremen is relegated to secondary status. His status is secondary to that of the stevedore.
excess. This bonus is given to encourage the stevedore to bring suit if the longshoreman does not do so. The longshoreman is entitled to four-fifths of the sum that remains after the reduction of the stevedore's compensation lien and expenses. According to the *Bloomer* decision, the longshoreman is the last in line even when he initiates the action. The stevedore must be reimbursed, and in at least one circuit, the attorney's fees will already have been deducted.

Even when the longshoreman himself is not discouraged from suing the third party, the plaintiff's bar may be reluctant to handle his suit; most notably, there may be situations in which the attorney's lien does not have priority and the recovery is not sufficient to cover both the stevedore's lien and the attorney's fees. The action will not be initiated unless the attorney is certain of a sufficient recovery. This is especially true today, when the recovery against the shipowner is based on ordinary negligence principles instead of upon the *Sieracki* warranty of seaworthiness, which did not require proof of fault. The greater preparation required for a successful 905(b) action will thus make the attorney even more reluctant to accept this type of case if he is not assured of being compensated fully. Furthermore, "in many cases . . . an attorney cannot justly charge the longshoreman a percentage of the gross recovery because the plaintiff's low net recovery would make such a result unconscionable." In short, third party actions may be discouraged.

If the longshoreman fails to sue the third party, it is possible that no action will be brought. The stevedore may not want to initiate the action for business reasons. Thus, the allegedly negligent third party would be relieved of liability. The compensation system would be forced to absorb all of the loss, and the shipowner would not be encouraged to promote safety.

Besides having a potential for discouraging third party actions, the Court's holding results in a windfall to the stevedore. If the

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99. Valentino v. Rickners Rhederei, G.m.B.H., 552 F.2d 466 (2d Cir. 1977). In *Bloomer v. Liberty Mut. Ins. Co.*, 100 S. Ct. 925, 932 n.13 (1980), the Court suggests that the attorney's lien will have priority: "We do not today address the *Valentino* situation, and contrary to the implication of the dissent, nothing in our decision suggests that the stevedore's lien has priority over the longshoreman's expenses."
101. The Court fails to state what the result would be in this situation (one in which the recovery is insufficient to cover both the attorney's and the stevedore's lien). Justice Blackmun's dissent states that "it is to be hoped that the injured longshoreman will not be required to disgorge part of his compensation payment." 100 S. Ct. at 937 (Blackmun, J., dissenting).
stevedore brings the action, he is entitled to one-fifth of the excess after reimbursement of his lien and payment of his costs. The one-fifth excess is given as an incentive to the stevedore not to settle merely for his compensation payments and is designed for the protection of the longshoreman. However, the one-fifth excess certainly can be seen as a windfall to the stevedore. Thus, even if the requirement of proportional sharing could be seen as a burden on the stevedore, this burden could serve only to counterbalance the windfall that the stevedore receives if he brings the action. When the longshoreman initiates the suit, the stevedore still receives a windfall because he recovers his compensation lien without any expense or inconvenience. An even greater inequity results if the longshoreman brings the suit and the stevedore was partially at fault. The longshoreman may recover the full extent of his damages from the shipowner, such recovery being neither barred nor reduced by the negligence of his employer. According to the instant decision, the stevedore will, despite his negligence, be reimbursed fully for his compensation payments, without having to contribute to the expenses of the longshoreman's recovery.

The instant decision, which denied sharing of the expenses of recovery, may serve to deter use of the 905(b) action, to discourage the plaintiff's bar from representing 905(b) claimants, and to encourage the use of fee arrangements between the longshoreman's attorney and the stevedore. The Bloomer decision may, by discouraging 905(b) actions, "increase the burden upon the public as a whole where the compensation benefits are in fact inadequate to care for the worker and his family."

The Court does not deal with the situation in which the recovery is insufficient to cover both the longshoreman's attorney fees and the stevedore's lien. If the attorney is not compensated, the contingent fee system will be discouraged. As stated in Valentino v. Rickners Rhederei, G.m.B.H., a denial of legal fees from the stevedore's recovery may reduce the number of suits, but the fact of overcrowded court dockets is not a good reason for a rule which would close the courts to many longshoremen by reducing the value of the contingent fee system.

The problem of apportionment of attorney's fees could have been addressed in several ways. The Court could have adopted the

103. Atleson, supra note 56, at 542.
105. Gorman, supra note 100.
106. Atleson, supra note 56, at 520.
107. See note 99, supra.
"balancing formula" of the Mitchell court or the "pro rata" approach of the fourth circuit. Perhaps the "balancing approach" would be the most equitable; Mitchell states:

Our concern rather is whether the plaintiff justly can be asked to bear alone a reasonable fee for his total recovery: when he cannot, the size of the gross recovery is only one factor to consider in determining the appropriateness of requiring the compensation lienor to contribute to a reasonable fee for plaintiff's counsel.109

The equities should be balanced. As stated by Edmonds v. Compagnie Generale Transatlantique,110 there is nothing to indicate that Congress intended that the burden of the inequity rest on the longshoreman. It is interesting to note that a growing number of state compensation systems do apportion attorney's fees.111 It may be contended that statutory reform is needed instead of judicial interference.112 However, a statutory formula would not be as flexible as an ad hoc determination by the court as to whether or not apportionment would be the most equitable solution in a particular case. It is rather ironic that the Court is now hesitant to fashion an equitable remedy without specific authorization by Congress113 when the earlier Sieracki and Ryan cases "effectively nullified the exclusive liability provisions of the compensation act."114 Although judicial activism may be unappealing, the fact is that the Supreme Court has been very active in the field of maritime law. Especially in the absence of a specific statutory mandate, the Court should be able to fashion the most equitable solution. The Court's decision in Bloomer provides the stevedore with a windfall and leaves the longshoreman with the burden of an inequitable result.

Marlene Maria Krousel

109. 579 F.2d 1274 (5th Cir. 1978).
111. Atleson, supra note 56, at 527.
112. Steinberg, supra note 5, at 685-86. This article suggests that judicial restraint would be the proper approach to the 1972 Amendments. The problems involve intricate policy decisions which the writer of the article believes should best be dealt with by the legislative branch.
113. Bloomer v. Liberty Mut. Ins. Co., 100 S. Ct. 925, 932 n.11 (1980): "In these circumstances it is for Congress, not this Court, to determine whether a requirement of proportional payment of legal expenses would ultimately benefit injured longshoremen, or instead longshoremen's lawyers, who were found to have been the primary beneficiaries of third-party actions in the past."
114. G. Gilmore & C. Black, supra note 8 at 448. The writers of the cited text believe that judicial activism in the field of maritime law is increasing: "The Supreme Court seems to have decided to carry out experiments in such reform in the field of maritime law, perhaps because the peculiar constitutional background lends itself to an unusual degree of judicial activism."