IN THE SUPREME COURT OF THE UNITED STATES

US AIRWAYS, INC., IN ITS CAPACITY AS FIDUCIARY AND PLAN ADMINISTRATOR OF THE US AIRWAYS, INC. EMPLOYEE BENEFITS PLAN, Petitioner v. JAMES E. McCUTCHEN, ET AL. : No. 11-1285

Washington, D.C.

Tuesday, November 27, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

NEAL KUMAR KATYAL, ESQ., Washington, D.C.; on behalf of Petitioner.

JOSEPH R. PALMORE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, in support of neither party.

MATTHEW W.H. WESSLER, ESQ., Washington, D.C.; on behalf

of Respondents.

C O N T E N T S

ORAL ARGUMENT OF	PAGE
NEAL KUMAR KATYAL, ESQ.	
On behalf of the Petitioner	4
ORAL ARGUMENT OF	
JOSEPH R. PALMORE, ESQ.	
For United States, as amicus curiae,	24
in support of neither party	
ORAL ARGUMENT OF	
MATTHEW W.H. WESSLER, ESQ.	
On behalf of the Respondents	34
REBUTTAL ARGUMENT OF	
NEAL KUMAR KATYAL, ESQ.	
On behalf of the Petitioner	57

P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 11-1285, US Airways v. McCutchen.

Mr. Katyal.

ORAL ARGUMENT OF NEAL KUMAR KATYAL

ON BEHALF OF THE PETITIONER

MR. KATYAL: Thank you, Mr. Chief Justice, and may it please the Court:

ERISA permits plan fiduciaries to seek appropriate equitable relief to enforce the terms of the plan.

Six years ago, this Court, in Sereboff, concluded that reimbursement actions by ERISA plans, such as the one at issue here, seek equitable liens by agreement. And because the plan's claim here is one for an equitable lien by agreement, that means one parcel of equitable defenses, those derived from unjustment enrichment, offer no help to Respondents.

JUSTICE SOTOMAYOR: Mr. Katyal, if you go to equity, why aren't you bound by equity?

MR. KATYAL: We certainly are, Justice Sotomayor, bound by equity. Our contention is not that, once you say the magic words "equitable lien by agreement," that somehow transforms into a "we win" as

plaintiffs at all.

JUSTICE SOTOMAYOR: Well, but that's exactly what your bottom line is, which is you have someone else do the work for you and you don't pay them.

MR. KATYAL: Quite to the contrary, Justice Sotomayor, our position is that the rules of equity bind equitable liens by agreement, just as they bind anything else. We're not trying to say that the equity doesn't apply --

JUSTICE SOTOMAYOR: So why does your lien have priority to the attorney's lien that is normally created at the commencement of the litigation? Why is the attorney bound by the agreement you signed with the beneficiary?

MR. KATYAL: So our position is that the attorney doesn't -- there is no lien created with the attorney; that, once Mr. Sereboff signed -- entered into an agreement with US Air, that agreement said -- provided for 100 percent reimbursement rights.

And there is no -- essentially, what happened is Mr. Sereboff -- excuse me -- Mr. -- Mr. McCutchen double-promised his money. He promised it first to -- first to the US Airways plan, and then he promised it to -- to his attorneys.

And that's a problem that he might have with

his attorneys, although, as I understand the facts here, maybe that debt has been forgiven, but it is not something that creates an independent lien on the money that's at issue here.

That is, the rules in equity say that it is the agreement that controls -- when we're talking about an -- when we're talking about an equitable lien by agreement --

JUSTICE GINSBURG: With Sereboff, that you -- you referred to, that -- that certainly describes the lien you rely on, but there's a footnote toward the end that leaves open the make-whole doctrine and, I assume, also the common fund doctrine, so -- so it's -- it's an open question.

MR. KATYAL: Right. So our position is not that Sereboff's letter controls this case. We do think the reasoning of Sereboff essentially does decide the question because what Sereboff said, Justice Ginsburg -- and this is at page 368 of the opinion in the text -- it said -- the Sereboffs had argued the make-whole doctrine.

And the -- in response, what this Court said is, quote, "Mid Atlantic's claim is not considered equitable because it is a subrogation claim. Mid Atlantic's action qualifies as an equitable remedy

because it is indistinguishable from an action to enforce an equitable lien established by agreement of the sort epitomized by our decision in Barnes. Mid Atlantic need not characterize this action as a freestanding action for equitable subrogation. Accordingly, the parcel of equitable defenses the Sereboffs claim accompany any such action are beside the point." Beside the point.

And our position is, once the Court has decided that the type of action that is at issue here is an equitable lien by agreement, the relevant doctrine -- and this is further answer to you, Justice Sotomayor -- that the Court is to look to is how are equitable liens by agreement evaluated in equity?

And those rules in equity say that, again, the general rules of equity apply in government; but the one place -- the one set of defenses that aren't governed, are those that sound an unjust enrichment.

JUSTICE KENNEDY: I -- I recognize that we're talking about a matter of Federal law here. What about the law of most of the States?

Suppose there's an agreement with an insurer and an insured, that says the insured gets 100 percent of the proceeds. I would think that the law of most States gives a superior lien to the attorney for the

contingent fee, notwithstanding the agreement.

I'm not sure of that. It's just an assumption.

MR. KATYAL: That -- that is true, in some subrogation States. However, even with respect to that, when you have -- as long as it's not abrogated by statute or something like that. But if you simply have an agreement by an insured and it provides for 100 percent reimbursement and abrogation of the common fund, even there, Justice Kennedy, the -- the agreement is enforced.

So State Farm v. Clinton, which is a case cited in our brief, as long as -- as well as the Dobbs case and other decisions -- the Arkansas Supreme Court in 1969, the Arkansas court in 1931 -- have all said that, if you have an insurance agreement that abrogates the common fund doctrine, that that agreement is enforced.

And, here, of course, we're dealing --

JUSTICE GINSBURG: Where is that abrogation -- where is that abrogation in this -- not the plan description, but the plan itself -- what clear language in the plan bars the -- the --

MR. KATYAL: Justice Ginsburg, the -- the district court at pages 30A to 32A of the petition

appendix had two pages that found the agreement clear and unambiguous with respect to abrogation of the common fund doctrine. And the plan itself is found at Joint Appendix page 20.

That finding by the district court was never appealed to the Third Circuit. It was not appealed to this Court. And, indeed, the brief in opposition conceded this issue.

JUSTICE GINSBURG: But that --

JUSTICE KENNEDY: That -- that's the summary of the plan that's at A20. That's not the plan --

MR. KATYAL: Yes. The summary plan description is at page --

JUSTICE GINSBURG: I'm asking about the plan itself because the plan controls if there's a discrepancy.

MR. KATYAL: Exactly. And so the plan itself was submitted, I believe, a few days ago. The Respondents have now made an issue of it.

JUSTICE GINSBURG: Yes. And I -- and I don't -- you -- you make a distinction between reimbursement clause and the subrogation clause. And this -- as far as I can tell from the plan, there is no reimbursement clause.

The only one that's there is labeled

"subrogation." And I looked at what's in the plan, and I don't see language that clearly abrogates the common fund.

MR. KATYAL: Your Honor, I suppose that -- that they could have made this an issue when they appealed the district court's finding on this. They didn't. And, indeed, there was discovery --

JUSTICE KENNEDY: Well, I mean, you -- you want us to decide a case without looking at the plan?

I have before me the same language that I believe Justice Ginsburg is looking at, and I think she's quite correct, that the word "abrogation," of course, is not used, but neither is the concept.

JUSTICE SCALIA: I didn't think we took this case to review the plan. Is -- is that what the Supreme Court took the case for, to say what this particular individual plan said?

MR. KATYAL: Absolutely not, Justice Scalia.

JUSTICE SCALIA: Had that -- had that point been raised, we would not have taken the case.

MR. KATYAL: And much to the -- and much to the contrary, Justice Scalia, exactly, this is the way that they framed the brief in opposition. The question presented is this: "Whether a seriously injured ERISA beneficiary must reimburse his ERISA plan for

100 percent of his medical expenses simply because the plan language so provides."

JUSTICE KENNEDY: Well, "simply because the plan language." I mean, obviously, we have to look at the plan language to see what the -- you're -- you're relying on the plan language. And you cite the summary, but you don't cite the main plan.

MR. KATYAL: Two things, Justice Kennedy. First, that brief in opposition goes on to say that that plan was clear with respect to the common fund doctrine and others at page 5.

But, second, if you're concerned --

JUSTICE SOTOMAYOR: Counsel, are you conceding --

JUSTICE SCALIA: I'm sorry. Maybe --

JUSTICE SOTOMAYOR: -- the plan doesn't say it?

JUSTICE SCALIA: Excuse me, please. The second point?

MR. KATYAL: The second point is, even if you are concerned about any discrepancy, point -- 4.2 of the actual plan itself -- and this is page 22 of the PDF that was submitted by -- lodged by my friends on the other side a few days ago -- has essentially an anti-Amara clause in it.

It says that the benefits that are provided under the plan are those put forth in the summary plan description. So there is no discrepancy between the SPD in the plan in this case, unlike in Amara where there very well was a discrepancy.

So here --

JUSTICE SOTOMAYOR: I'm sorry, the phrase that you just read says that the benefits are the same. It doesn't say that the reimbursement and subrogation language are the same.

So go back to Justice Ginsburg's question and point out in the plan what words you're relying upon, not the summary, but the plan.

MR. KATYAL: So the plan has, in 4.7, two things. It has, "The plan" -- quote, "The plan shall have the right to recover from any participant the amount of any benefits paid by this plan for expenses which were recovered from or paid by a source, other than this plan."

And then later, in 4.6, it says, participants are -- quote, "are obligated to avoid doing anything that would prejudice the plan's right of recovery."

So I don't think that there is any discrepancy, Justice Sotomayor. And to the extent that

this Court were concerned about it, there were 4 years for them to have made this an issue, but this is just about as procedurally barred as -- as anything --

JUSTICE BREYER: So if I were -- if I were -- if I were Joe Smith, and a plan -- the plan pays me 100 -- I have medical expenses of $100,000. And, actually, the -- the -- there was a driver who caused this problem. And later, I collect $100,000, but I have to pay 50,000 to get the 100,000.

So I am left with $50,000 net because I had to pay my lawyers, I had to pay expert witnesses, there were a lot of different things I had to pay. I'm left with $50,000 now. So in comes the plan and says, we want 100,000. I say, what? Then I look at the language. The language allows them to get back expenses which were recovered from the third-party.

I didn't recover 100,000 from the third-party. I recovered 50,000 from the third-party because it cost me 50 to get the 100.

Now, if I were a judge and listening to that, I'd say, assuming they wanted a reasonable interpretation of this language, it sounds pretty reasonable to me.

MR. KATYAL: All right. And, Justice Breyer, if you were the district court judge in

this case, I suppose you could have reached that result. The district court here --

JUSTICE BREYER: It's a little tough, since nobody had the plan.

MR. KATYAL: Well, they -- they had the summary plan description, and they did not make an issue. But they had all sorts of discovery requests, but never made a request for that --

JUSTICE BREYER: All right. But, I mean, wouldn't the normal result of such a case, like any contract case, where you have language, even if it was the word "any," it doesn't mean wheat grown on Mars, okay?

And so you'd say -- if it says you can recover anything, that "any expense," it means, yes, you can recover that which was paid, but not money that you had to pay to get the amount paid.

MR. KATYAL: Justice Breyer, we absolutely agree that a plan could be written in order to embrace --

JUSTICE BREYER: But this is a plan that they wrote and that US Air --

MR. KATYAL: -- but I think it would be highly unusual for this Court, indeed, I think, procedurally unavailable for this Court to --

JUSTICE SCALIA: Counsel, I guess your opponent could have raised that point.

MR. KATYAL: Absolutely.

JUSTICE SCALIA: And didn't raise it.

MR. KATYAL: Absolutely.

JUSTICE SCALIA: And we took this case on the assumption that there is an issue of law involved --

JUSTICE BREYER: All right. So I can --

JUSTICE SCALIA: -- and not -- not on the assumption that --

JUSTICE BREYER: What is the issue of law? The issue of law is what happens if we have a plan which says, Joe Smith, my employee, if you have to spend $90,000 to get back 92,000, you have to give us back all 92, even though you only have 2 in pocket. And we are supposed to assume that's what the contract said. Is that right?

And then -- and then we say, now, can you override that with the principle of equity? Is that the issue you see before us?

MR. KATYAL: So, again, we're not overriding with the principle of equity. We're saying that the rules of equity, if they have in the plan an abrogation of the common fund, as that is here, in the way this case comes to the Court, then that is what settles the

question.

Now, you could have a Sereboff plan, which says the reverse, which says, we're going to have a common fund doctrine and avoid that problem at the outset. The parties evaluate the valuation of the transfer of assets at the outset, and that's what controls. And if they want to buy into the common fund, as this Court said in Sereboff, that's absolutely enforceable.

And so it's not a contract around, Justice Sotomayor, doctrines of equity. It's simply a reflection of the general rule that, in equity, if -- when we're talking about equitable liens by agreement, it is the agreement that controls, that starts the ball game.

CHIEF JUSTICE ROBERTS: Was the plan available to the employee at any time before this litigation?

MR. KATYAL: Sure. If they had asked for the plan, it could have been provided to them. They have --

CHIEF JUSTICE ROBERTS: Are they -- are they advised that they can ask for the plan?

MR. KATYAL: I -- I'm not quite sure about that. I will look into that and try and get you an

answer on that.

JUSTICE SOTOMAYOR: I thought it took most of the litigation for the plan to be provided.

MR. KATYAL: Justice Sotomayor, at the outset, they asked for the summary plan description or the plan. The summary plan description was provided. Only --

JUSTICE SCALIA: You say, "they." I assume you mean their lawyer?

MR. KATYAL: Their lawyer.

JUSTICE SCALIA: This is not -- you know, an ignorant layman who knows nothing about the law.

MR. KATYAL: That's correct.

JUSTICE SCALIA: The lawyer, you say, did not ask for the plan.

MR. KATYAL: And -- and I should say, the minute that US Air found out that a tort -- a plaintiff's lawyer was hired, they sent a letter to that lawyer saying, we assert a right of reimbursement.

JUSTICE KAGAN: But, Mr. Katyal, could I ask you about the legal argument that you are making, the distinction you are making between reimbursement agreements and subrogation agreements, which you think -- seem to think is critical here. And -- you know, once you put it in one box, rather than another,

some result follows -- different results follow.

MR. KATYAL: Yes.

JUSTICE KAGAN: So -- so how do you know whether you have a reimbursement agreement or a subrogation agreement? And what follows from that categorization?

MR. KATYAL: So, Justice Kagan, there are two very distinct rights. Subrogation is the right to stand in someone else's shoes. And so the insured -- the plan says, we are going to inherit all of the benefits and burdens of the insured in bringing an action. It's a vicarious -- it's a kind of vicarious notion.

Reimbursement's an entirely different concept. It's the idea that, look, we're not obligated to give you this money because we're not at fault in this accident, but we're going to essentially advance it to you, but you've got to reimburse us for it. And so --

JUSTICE KAGAN: So if this were a subrogation agreement, what would follow?

MR. KATYAL: So if it were a subrogation agreement, I think my friend's case on the other side gets a lot stronger because there are subrogation cases that -- that have different rules.

But when you talk about reimbursement, which is not the right to stand in someone's shoes, but a first priority absolute agreement between the parties to get money, it's just simply a dispute about that money. And you can't --

JUSTICE KAGAN: So if your friend's argument would get a lot stronger if it were a subrogation agreement, how do we tell that this agreement is a reimbursement agreement, rather than -- are we supposed to just take that because that's the way the Court -- it's come to us? Or -- or is there an argument about why there is a reimbursement?

MR. KATYAL: There is an argument. And, indeed, all I think you have to do, Justice Kagan, is look at what happened in Sereboff because, in Sereboff, you had essentially the same thing, a plan that had both a reimbursement provision and a subrogation provision. And the -- the beneficiaries in Sereboff were saying, hey, this is subrogation, this is subrogation.

And the language that I've read to Justice Ginsburg at page 368, as well as earlier language in the opinion, said, no, this is actually a claim for an equitable lien by agreement that does not sound in subrogation, that sounds in reimbursement.

And so all you have to do here is precisely

what this Court unanimously did in Sereboff, which is to say, look at the nature of the action, is this an action that seeks personal liability, does it specify a particular fund, the typical hallmarks of an action for an equitable lien by agreement; and, if those are present, as they are here, that is enough.

JUSTICE ALITO: Are you, in effect, asking for a windfall because Mr. McCutchen and his attorneys didn't understand what ERISA means in this context?

If they understood that things would work out the way you think they should work out and they saw that the limits of the insurance policies against which they could collect were $110,000, wouldn't they have realized that this was a suit that wasn't worth pursuing? There would be no point in doing it because nothing would be -- nothing would be gained for Mr. McCutchen or for the attorneys.

MR. KATYAL: Not at all, Justice Alito. Two things. One, the rule on ERISA -- and this rule has been the rule in the Third Circuit since Federal Express v. Ryan in 1996, this is a long-established rule -- if an attorney comes and takes a case, knowing that there is a -- an ERISA plan at stake, seems to me they're at least on inquiry notice that there would be some sort of --

JUSTICE ALITO: Well, perhaps they should have realized it. But, if they realized it, they have no incentive to pursue this litigation or to pursue the tort decision --

MR. KATYAL: Not so. This is both in our brief, as well as the Blue Cross amicus brief.

What usually happens in these situations is that an agreement is struck in advance, before the lawsuit is filed, between the plan and the plaintiff's attorney to reach some accommodation. After all, the plan has an incentive in some sort of action being brought --

JUSTICE SOTOMAYOR: In this case, he wrote -- the attorney wrote to you any number of times and finally said, look, unless you come and tell me what your position is, I'm going to go forward.

So what are attorneys supposed to do in those situations, just drop the lawsuit?

MR. KATYAL: Your Honor, I don't think that quite is an accurate statement of the facts. That was precisely what the district court evaluated on the summary judgment motion. They had made a big issue about our failure to communicate and so on. The district court rejected all of those arguments --

JUSTICE SOTOMAYOR: Rejected it because it

had nothing to do with the agreement, but it didn't reject them as a factual matter, that you were contacted.

MR. KATYAL: I do -- I do think that there were lots -- and this is in Joint Appendix, pages 50 to 64 -- lots of communications between the two.

Now, here's -- there was one place where there wasn't communication, which was they went and negotiated a secret settlement of $100,000. And when US Air found out about it --

JUSTICE SOTOMAYOR: Counsel, were they supposed to -- if the insurance limit was $100,000, are you suggesting that that was a bad-faith settlement?

MR. KATYAL: I am suggesting that we didn't have the opportunity, Justice Sotomayor, that we typically do in the lion's share of cases, as I was saying to Justice Alito, where you work these things out in agreement -- in advance with clear lines of communication. And so --

JUSTICE KENNEDY: Justice Kagan's question had two parts. She said, tell me about the two boxes, subrogation and reimbursement.

I think there is quite a bit to your argument that this is not subrogation. The plan is rather confusingly drafted. The plan calls it

subrogation. I don't think it really means subrogation.

If it's not subrogation, Justice Kagan's question was, what then? The -- the common fund rule still does not apply? Because?

MR. KATYAL: Because the common fund rule -- and, this, we are in agreement on, the parties -- the common fund rule is a doctrine based in unjust enrichment. This is what they say at page 26. This is what all the courts say common fund is.

And, indeed, up until six months ago, seven different circuit courts had evaluated this question of whether the agreement can trump the common fund doctrine. 21 of 21 circuit court judges all said it did.

JUSTICE KENNEDY: But you are still in equity, pursuant to the statute.

MR. KATYAL: Yes.

JUSTICE KENNEDY: And are you saying that there is no discretion in the equitable decrees that the judge made?

MR. KATYAL: That -- that is precisely right. The agreement sets the evaluation of the parties. That's what the State Farm case says, what their own treatise says, what the Arkansas Supreme Court says.

JUSTICE SCALIA: That's -- that's not unusual. The motto is equity follows the law. Doesn't -- doesn't that usually -- isn't that usually the case?

MR. KATYAL: That -- that is correct.

JUSTICE SCALIA: Where there is a legal right, equity cannot overcome it.

MR. KATYAL: That is correct. And as the Solicitor General says, at page 17, quoting the Restatement, "A valid contract defines the obligations of parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment." Any inquiry.

If I could reserve the balance of my time?

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Palmore.

ORAL ARGUMENT OF JOSEPH R. PALMORE,
FOR UNITED STATES, AS AMICUS CURIAE,
IN SUPPORT OF NEITHER PARTY

MR. PALMORE: Thank you, Mr. Chief Justice, and may it please the Court:

As this Court's cases recognize, Section 502(a)(3) invokes the equitable powers of the district court. All of the remedial powers of a court in equity are available that -- under Section 502(a)(3), that

would have been available when an analogous claim was brought. And --

JUSTICE SCALIA: Equitable powers to enforce the agreement?

MR. PALMORE: Yes.

And so we agree with Mr. Katyal in what we've characterized as the first question presented, that we think is essentially decided by this Court's case in Sereboff.

At equity, when there was a -- an equitable lien by agreement, that agreement was generally enforceable according to its terms. It was like a mortgage, is the classic case, and the mortgage gave a security interest in land; and, if the debt was not paid off, then the lienholder could -- could foreclose on that land.

JUSTICE KAGAN: Mr. Palmore, do you agree with Mr. Katyal's view of this distinction between subjugation -- subrogation agreements and reimbursement agreements and which this agreement is?

MR. PALMORE: I think that's a -- the -- there is certainly a distinction, and the Couch Insurance treatise talks about the -- the distinction. But the Couch Insurance treatise also explains that the terms are often used interchangeably in a confusing way.

So I don't think that the bright line that Mr. Katyal seeks to establish between subrogation and reimbursement is necessarily reflected in all the cases and all the --

JUSTICE SCALIA: Well, I think you can say that about any legal rule, that some courts bollox them up. I mean, that means the rule doesn't exist because it's sometimes used in a confusing way?

MR. PALMORE: No, I think it's just the fact that the courts do use these terms interchangeably.

JUSTICE SCALIA: What's the rule? What's the rule? Do you acknowledge that that is the rule?

MR. PALMORE: We acknowledge that, when there is a -- when there is a contractual plan-based reimbursement provision like this, it is enforceable as an equitable lien by agreement, in the same way that an equitable lien by agreement would have been --

JUSTICE KAGAN: Well, but I think Mr. Katyal said that, if this were a subrogation agreement, Mr. McCutchen would have a much better argument because a different set of rules would apply. And so that makes this categorization question quite meaningful.

Now, you could say, well, we don't see it as all that meaningful. We think, no matter what you call this agreement, the same rules apply. Or you could say,

yes, different rules apply with respect to these two different kinds of agreements, and your job is to figure out which kind of agreement this is.

MR. PALMORE: Right. We think -- as the -- as the case comes to the Court, this is a case for reimbursement. This is just like Sereboff, and this is a reimbursement agreement.

What -- what adds to the confusion is that -- and if you look at more modern insurance decisions, they're bringing in all kinds of concepts from State law, from insurance law, from public policy of the State. They don't necessarily reflect what would have happened in a court in equity at the time of the divided bench, and that's the import --

JUSTICE BREYER: But that's my exact question. I think, now, what we're being asked to decide is, from your point of view, does the common fund doctrine apply?

I take it the common fund doctrine says, if this victim here got some money back from the person who caused the accident, that that money goes into a common fund, in the sense that those who share in the fund must share as well in the cost of producing the fund.

So if it costs $50,000 to produce $100,000, which is in the fund, that we have to have US Air, as

well, pay part of the cost of producing the fund. That sounds very fair.

But I hear the argument, fair though it is, we have here an agreement, and in this agreement, it says, it's as if it said, and you shall not apply the common fund doctrine or any other equitable doctrine, such as he who seeks equity must do equity, etc. And I think that's the question that's being asked.

And so what is your response to that? In particular, why do you say the common fund doctrine applies, though the contract says it doesn't, we assume, but all these other equitable doctrines don't apply?

MR. PALMORE: Because we think the equitable -- equitable doctrines that apply are the equitable doctrines that would have applied at equity.

JUSTICE BREYER: Good. So now, we have 18th century authority which says that, in the 18th century, Lord Cooke or someone said that the common fund doctrine applies, but the other doctrines don't. And the -- and the name and citation to that authority is?

MR. PALMORE: Well, there is not one authority that is going to give you both -- both answers. But the equitable lien by agreement cases from the time of equity, as I mentioned before, were typically mortgage cases or a promise to provide future

acquired funds to discharge a debt.

And it's clear, under those cases, that that could be executed, according to its terms. The unjust enrichment principles that Respondent is invoking were in a -- really a different silo involving equitable restitution. And this Court in Sereboff said, we are not going to look at equitable restitution principles, we are going to look at equitable lien by agreement cases.

Now, there is a separate line of authority involving the common fund that we talk about in our brief. And, as Mr. Katyal said, it has at times been characterized as an unjust enrichment doctrine, but its roots are different. Its roots are actually in an analogy to trust law.

If you look back to the principal case that established this, the Greenough case that we talk about in our brief, the Court said that the -- Mr. Vose, who -- the bondholder who had secured a benefit for all the bondholders, had -- while not a trustee, had acted the part of a trustee. And it was a well-settled principle of trust law, both then and now, that a trustee is entitled to reimbursement for reasonable expenses from the trust itself.

JUSTICE SCALIA: Was there an agreement that

contradicted that?

MR. PALMORE: There was no agreement in -- in Greenough that contradicted that.

JUSTICE SCALIA: Well, but we have an agreement here, so how does -- how does that line of authority apply?

MR. PALMORE: Because, Justice Scalia, I -- I --

JUSTICE SCALIA: We have an agreement, which says that the insurance company gets all the money. So you either say that that agreement can be overcome by equity, or else, you -- you say the agreement prevails.

MR. PALMORE: There are two answers, Justice Scalia. One is that -- that a plan can't add to or subtract from the powers of the court in equity, under Section 502(a)(3). A plan couldn't disclaim a claimant's ability to get an injunction --

JUSTICE SCALIA: But it only has the powers to enforce the agreement.

MR. PALMORE: The powers to enforce --

JUSTICE SCALIA: There are various equitable powers, and it can use various of them to enforce the agreement.

MR. PALMORE: But we don't think --

JUSTICE SCALIA: That's quite different from

rewriting the agreement, which is what you are using it for here.

MR. PALMORE: No, we -- we are saying that Section 502(a)(3) takes the settled powers of the court in equity as it finds them. And the -- and the plan can't divest the Court of those powers, it can't add to those powers, like this Court held in Great-West; it also can't take away from them.

But, if I could go to an equity answer, because I think this is important --

JUSTICE SCALIA: Excuse me. Do you really think that if -- if an equity court finds the agreement to be unfair, it can say, he who seeks equity must do equity, and rewrite the agreement, so that it's fairer?

MR. PALMORE: Not on general unfairness grounds, but it was a settled principle at trust -- of trust law, and remember, Greenough based the common fund doctrine on trust law that if, for instance, a trust document had said, the trustee shall take his expenses from the trust corpus, not from the income -- or vice-versa, says the trustee shall take his expenses from the income, but not from the trust corpus -- if that proved unworkable or unfair and the trustee couldn't discharge his obligations to maintain the trust, the court of equity had broad reformation powers

and was not bound by that trust document.

CHIEF JUSTICE ROBERTS: Counsel, the -- the position that the United States is advancing today is different from the position that the United States previously advanced. You make their point in footnote 9 of your brief. You say that, in prior case, the Secretary of Labor took this position. And then you say that, upon further reflection, the Secretary is now of the view -- that is not the reason.

It wasn't further reflection. We have a new Secretary now under a new administration, right.

MR. PALMORE: We do have a new Secretary under a new administration. But that --

CHIEF JUSTICE ROBERTS: I think it would be more candid for your office to tell us when there is a change in position, that it's not based on further reflection of the Secretary. It's not that the Secretary is now of the view -- there has been a change. We are seeing a lot of that lately.

It's perfectly fine if you want to change your position, but don't tell us it's because the Secretary has reviewed the matter further, the Secretary is now of the view. Tell us it's because there is a new Secretary.

MR. PALMORE: Well, with respect,

Mr. Chief Justice, the law has changed since that brief was filed nearly ten years ago in the Court's review.

And, of course --

CHIEF JUSTICE ROBERTS: Then tell us the law has changed. Don't say the Secretary is now of the view. It's not the same person. You cite the prior Secretary by name, and then you say, the Secretary is now of the view. I found that a little disingenuous.

MR. PALMORE: Well, I apologize for that, Your Honor, but we do cite in that footnote the Amara case, and that is a key element to our position here because Amara said that Section 502(a)(3) incorporates the traditional powers of the court at equity.

And it talked about, not only the ability to issue an injunction, but the ability to provide for a surcharge remedy, the ability to reform contracts --

JUSTICE SOTOMAYOR: The ability --

JUSTICE SCALIA: We never doubted that before. Was it thought before that all the equitable powers did not exist under ERISA?

MR. PALMORE: These cases weren't litigated in the way they are now before -- before Sereboff --

JUSTICE SCALIA: It seems to be self-evident that the court had all equitable powers. That's not a change in the law. It's just a restatement of the

obvious.

MR. PALMORE: And we think the court has all equitable powers and a plan term can't divest the court of those equitable powers, so among those equitable powers was the ability to enforce an equitable lien by agreement without looking at inapplicable unjust enrichment --

JUSTICE SOTOMAYOR: Or not to enforce it, meaning the equity is to enforce it or to stay your hand. And so the court could decide not to reach into the pocket of the plan participant to pay back money that the lawyer has.

MR. PALMORE: Well, we do agree with respect to the common fund doctrine, and we think that, to the extent this Court is willing to look at the -- at the -- the purposes of ERISA, that the position that we've advanced strikes the right balance, and in particular, it avoids the -- the negative recovery scenario that is a particularly harsh result of Petitioner's position.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Wessler.

ORAL ARGUMENT OF MATTHEW W.H. WESSLER

ON BEHALF OF THE RESPONDENTS

MR. WESSLER: Mr. Chief Justice, and may it

please the Court:

Reimbursement claims that are based on an express subrogation agreement are subject to equitable principles of subrogation.

In equity, these claims were governed, according to the same principles that governed every other type of subrogation.

JUSTICE SCALIA: Your opponent says this is not a subrogation agreement, so that argument goes nowhere. He would concede that point. You have to tell us why this is a subrogation agreement, even though you conceded below that it isn't.

MR. WESSLER: Your Honor, it is a subrogation agreement. The claim, however, that Petitioners have pursued here, is a reimbursement claim. And -- but it's based on an express subrogation clause.

And in equity, reimbursement claims, which, to be clear, are distinct from subrogation claims because they involve a suit directly against the insured, as opposed to against the tortfeasor, are governed by the same principles of subrogation that equity treated -- equity used that -- to apply to all claims that involved an insurer who is seeking to recover money from either an insured or a tortfeasor.

And so we concede, absolutely, Your Honor,

that the claim is one for reimbursement for monies recovered out of a fund obtained by the insured. But it's -- it's based on an expressed subrogation --

JUSTICE SCALIA: That's not what I say you've conceded. That's the common fund doctrine. Your opponent denies that the common fund doctrine applies. And it says this is an equitable lien by agreement, so that the common fund doctrine doesn't apply.

Now, you -- you say it is not an equitable lien by agreement? Is that your position?

MR. WESSLER: No, Your Honor. We -- it -- to be clear, it is an equitable lien by agreement, but it arises within the doctrine of subrogation, which is, as Couch and Palmer and other treatises explain, is an umbrella term that is used to describe all of the rights and rules that govern claims by insurers for money back after they've paid it out under a policy.

Now, the form of the action in this case is a -- is a claim for reimbursement out of a fund, but the mere fact that that's the form of the action, which, in Sereboff, this Court called an equitable lien by agreement, does not alter the underlying rule that equity courts in the days of the divided bench would have applied to the claim.

JUSTICE KAGAN: But doesn't Sereboff suggest

not? I mean, I realize that Sereboff has this footnote, but if you read the text in Sereboff, it says, these affirmative defenses that would arise in a normal subrogation context are beside the point. So how are they not the beside the point?

MR. WESSLER: They are not beside the point for -- for one reason, and let me -- let me explain why. What the Court actually said in Sereboff was that the parcel of equitable defenses accompanying a free-standing claim or free-standing action for equitable subrogation are beside the point. A free-standing action for equitable subrogation is not one based on an agreement. It's an implied claim, a claim for subrogation or reimbursement based on the mere fact that the insurer has paid the money.

JUSTICE KAGAN: So is that true that, in Sereboff, there was no agreement?

MR. WESSLER: There was, but what this Court -- there was absolutely an agreement, just as there is an agreement in this case. What the -- the distinction the Court drew in Sereboff was it said that whatever principles apply to free-standing claims are beside the point, because -- precisely because the claim was based on an agreement. That is absolutely correct.

And it's perfectly consistent with our

position because we believe that the principles in equity that governed exactly the kinds of claims that were at issue in Sereboff and are at issue here, reimbursement claims based on an express agreement, are, in fact, governed by the same principles of unjust enrichment.

JUSTICE KAGAN: I guess I don't understand that because it seems to me that, when Sereboff said it was beside the point, they were refuting the arguments that the insured party was making, that the insured party was saying, hey, look, we have these great defenses.

And -- and you are saying they had an agreement, but they also said they have these great defenses, and the Court said, too bad, those defenses don't work for you here.

MR. WESSLER: The Court -- the -- the beneficiary, Your Honor, in Sereboff, argued that the defenses that applied to a -- a freestanding or implied claim for equitable subrogation should control the -- the measure of relief available in the case.

They said -- it -- the contract doesn't matter. The -- the agreement makes no difference. What the plan is trying to obtain here is a pure, freestanding claim for subrogation. And -- and look at

all these great rules that apply to that -- to that kind of claim.

And the Court said, absolutely correctly, in Sereboff, whatever those principles are doesn't matter because this is a claim based on an agreement. And -- but what our view in this case is --

JUSTICE SOTOMAYOR: So what -- what's the difference between the two? Meaning -- I take your argument to be that the Court was right before, that freestanding subrogation claims have one set of remedies or rights, and subrogation, by agreement, have another. So what do you see as the differences between the two?

MR. WESSLER: When it comes to the rules that govern relief, there is no difference. The same principle of unjust enrichment controls, and it limits an insurer to recovering out of the fund only --

JUSTICE SOTOMAYOR: So was the Court in an exercise of futility, in writing what it did in Sereboff?

MR. WESSLER: Not so, Your Honor. It did not reach the question in Sereboff of what rules apply to -- to reimbursement claims based on express agreement. That was footnote 2.

The Court said, all we're holding in

Sereboff is this is a --

JUSTICE SOTOMAYOR: Counsel, I understand the argument. It's a bit unsettling that you've got two kinds of rights, one implied and one express, and there's no difference between the two? You -- you've got to give them a little bit more body to have a persuasive argument.

MR. WESSLER: Your Honor, in equity, that was the rule. And I'll point this Court's attention to the leading treatise on equity. It's Palmer's treatise cited by this Court in Sereboff and in Great West.

And what Palmer says -- and he -- he discusses, precisely, this claim on pages 473 and 474 of his -- of his treatise, and it's cited on page 21 of our brief. And he says that, "The same principle of unjust enrichment controls claims for reimbursement arising out of an express agreement."

And I'm quoting here --

JUSTICE SOTOMAYOR: Isn't there another line after that, that says something --

MR. WESSLER: Yes, I'm about to quote that.

And he says that that principle, quote, "should serve to limit the effectiveness of contract provisions which in terms provide for reimbursement out of the insured's tort recovery, without regard to

whether or the extent to which that recovery includes medical expense."

CHIEF JUSTICE ROBERTS: Is this the part -- I might be mixing this up with something else, but is this the part where he says, unfortunately, the courts don't agree with that?

(Laughter.)

MR. WESSLER: He -- he -- he identifies two decisions -- that -- you're correct, Your Honor -- he identifies two decisions, which did something contrary to that rule. But, in his view, that is the rule that governs these claims.

JUSTICE GINSBURG: Let's go back to what the -- the simple argument. We have an agreement here, and the plan is asking for what the agreement gives it. Why is the plan unjustly enriched by receiving exactly what the plan entitles it to receive?

MR. WESSLER: Because, Your Honor, these -- these insurance reimbursement cases arose in a very different context from most other equitable lien by agreement cases.

And the core difference in -- between these cases and all 22 or -- or more of the cases that the Petitioner cites, is that they involve a third party, who has caused the loss both to the insurer and the

insured. And that third party, the tortfeasor, in these reimbursement cases is not the defendant.

And so, in two-party equitable lien by agreement cases, which are -- all of the cases that Petitioner cites involve two-party cases in which the defendant is also the wrongdoer, is the person who is culpable and who has caused the -- the Plaintiff's loss. In those cases, when courts awarded relief, they awarded relief that was consistent with the defendant's unjust enrichment, but was also co-extensive with or consistent with the loss under the contract.

In these three-party cases, however, because the defendant, who is -- who is a beneficiary, not -- not the tortfeasor, did not actually trigger the loss, courts developed, in equity, a different set of rules to apply to -- to measure the relief available under the claim.

And what they said was, where there is a fund that is insufficient, where it cannot cover all of the losses suffered by all of the parties, that -- that all of the parties must share equally with -- of the loss. And the Palmer -- Palmer itself has an entire chapter devoted to third-party problems. And --

JUSTICE BREYER: Why -- why is it so unfair? I've been putting it in a way that looks unfair, which

favors your side. But US Air or the equivalent says, now, here is the deal, we'll pay your medical expenses. And now, if somebody causes those expenses, you come to us, and we decide whether we want to sue and get our expenses back, and any extra money, we give to you, and we pay our attorneys' fees extra. They don't count against the fund.

And if our lawyers tell us it isn't worth it, you're free to sue; but, I'll tell you what, your lawyer is going to be at the end of the queue. We're first, then comes your lawyer, and anything left over goes to you.

Now, if you can find a lawyer that takes it on those conditions, good for you. But he might because he might think he's going to get -- but our lawyers have already told us it's not going to work, so that's the situation.

Now, what's -- I'm not -- I think US Air's point would be, well, what's unfair about that? That's -- that makes sure we get our money back. That's what we want to do. And you're free to sue; it's just your lawyer who's going to come at the end of the queue, okay?

What's -- why is that unfair?

MR. WESSLER: Your Honor, it's unfair

because, in equity, parties could not defeat the rules that typically apply.

Now, if this were a legal case and that were a legal claim, there's nothing unfair about that. The parties can structure their contracts or agreements as they see fit. But the fact is that we are talking about the rules that equity applied in these situations.

JUSTICE SCALIA: So whenever you have a contract that explicitly, although -- you know, nowadays when the merged bars, I suppose, you wouldn't even have to say it, but let's assume it explicitly says that rights under this contract can be enforced in law or -- at law or in equity.

Whenever -- whenever you have a contract like that, it's going to be up to the court of equity to decide whether it's fair?

MR. WESSLER: No, Your Honor. I -- I don't think that's right. And I would point the Court to -- to its decision in McKee in 1935, in which it drew a distinction between a claim in equity that was a legal claim based on a contract, which could happen, and a claim in equity that was a, quote, "purely equitable claim," based on the contract.

JUSTICE SCALIA: Why isn't this a legal claim? It's -- it's a promise made in a contract.

Why -- why is that not a legal claim?

To be sure, the contract says that -- that -- you know, all equitable remedies are available to enforce that claim. But why is it an equitable claim, not a legal claim?

MR. WESSLER: It -- it could be either, Your Honor. And we've cited -- cited to this Court cases in -- in the days of the divided bench, in which a party could have sought legal relief for breach for this exact kind of claim, but there was also a remedy that a party could seek in equity.

But in order to do that, in order to -- to enter equity's doors on this reimbursement theory, it -- it had to agree to allow other parties their correlative rights in equity, and it also had to agree not to override or defeat the -- the rules in equity that typically would --

JUSTICE GINSBURG: Well, couldn't that party simply say, I want to go to the other side of the court? You just made a distinction between the remedy at law and at equity. This is the plan, and if the plan is told, well, if you go to equity, you get all these extra things. You could say, I'm asserting my rights at law.

MR. WESSLER: No, Your Honor. The -- the plan is in a bind here. And we know this from Sereboff

and Great West and Mertens. They cannot seek legal relief under this contract.

The only -- the only provision in ERISA's enforcement section that allows that is Section 502(a)(1)(b). And it says, a party has rights to -- has the right to enforce the terms of the plan. But -- but fiduciaries like Petitioner are not allowed to pursue relief under that provision, so all they get is purely equitable relief under 502(a)(3).

JUSTICE KENNEDY: The general rule in equity was that the equity court would not give a specific performance decree to pay a certain amount of money, was the general rule. Were there exceptions?

MR. WESSLER: Your Honor --

JUSTICE KENNEDY: And -- and if so, do those exceptions bear on this case?

MR. WESSLER: And there were -- there were exceptions, but we don't view this case as a specific performance case. And I'm not sure Petitioner --

JUSTICE KENNEDY: We -- you don't view the case as?

MR. WESSLER: As a specific performance case. That -- that was a specific type of -- of remedy. The remedy here that's being sought is an equitable lien by agreement, but -- but in our view, when an insurer

sought to enforce, through an equitable lien by agreement, a claim or a lien on a fund, it must agree to take that relief, subject to the way equity would have treated the claim.

And what Palmer and what Couch and -- and what the cases we've cited say is that, even for those reimbursement claims that are based or arise on an express agreement, that the relief available is limited in two concrete ways.

The -- the insurer could not get more out of the fund than its share of the fund that accounted for the medical expenses it paid, and it must have agreed to reduce proportionately for an amount of -- of fees and costs.

JUSTICE BREYER: Enter best case -- what is your best case? I'd love to find it. There's a case that says something like this.

MR. WESSLER: The Svea case, Your Honor, which is --

JUSTICE BREYER: Well -- well, let me tell you what I'm thinking of. The -- there is a contract, all written down. They forgot to put a seal on it. They forgot to put a seal on it. So I guess it's now 1463 or some year like that. So they go into equity.

And now, they are in equity. And the

plaintiff says, judge, I want you to enforce this contract. He says, I'm a judge in equity. He says, I know, but we've agreed, and you enforce it in equity.

The contract says, give Smith all the wheat. And equity says -- you know, there are other people who would like some of this wheat, too, so we are not going to follow the contract. We are going to modify the contract according to equitable principles, which, as you say, they can do. And the other side says, no, they wouldn't. They'd follow the contract. They are just in equity because they forgot the seal.

Okay. What is your best case to show they did, indeed, modify it with the common fund doctrine or some other doctrine? I want to be sure to read it with a magnifying glass.

MR. WESSLER: Well, Your Honor, to be clear, there is not a single equitable lien case that -- that Petitioners have found in which a court has --

JUSTICE BREYER: I know, but I didn't ask you about what they found. I was asking what you found.

MR. WESSLER: So -- so, Your Honor, the Svea case, is -- is, I think, our best example. And in that case, the insurer had a subrogation agreement, which authorized it to recover -- authorized recovery to, quote, "the extent of its payment" out of, quote, "all

rights of recovery of the insured."

And in that case, there was an underlying settlement that the insured reached with the tortfeasor, the wrongdoer. And after that occurred, the insurer did not participate in that underlying proceeding at all. And after that occurred, the insurer then directly sued the insured.

This is exactly the kind of case we're talking about here, seeking recovery out of the fund. And they based that claim on their -- on their express subrogation agreement. And they said, we paid approximately $3,000. You recovered something like $9,000. We should get $3,000 back.

And the court there said, no, because the fund was insufficient to cover all of the losses -- the -- the insured did not recover for all of its losses, several other claimants did not recover for all of their losses -- and the court said that, because the fund was insufficient, the -- the insurer was limited to recovering -- and I'm quoting here -- "no more than its proportion of the amount recovered after deducting costs and fees."

And so they applied both the double recovery cap that we believe applied in every single case in equity in which an insurer --

JUSTICE SCALIA: What -- what case is this?

MR. WESSLER: This is the Svea case, Your Honor.

JUSTICE SCALIA: From what court, what -- what year?

MR. WESSLER: The highest court in Maryland, I believe from 1901.

JUSTICE KAGAN: Mr. Wessler, would it be fair to say -- I mean, we're in this unusual position because we're supposed to be looking back to before the 1930s sometime.

Would it be fair to say that we just don't have very many cases, and Mr. Katyal doesn't have any, and you don't have any, that raise this question that, where somebody walks into an equity court with a contract, and we try to figure out whether the equity court is going to use these unjust enrichment defenses? Would it be fair to say that we just don't know?

MR. WESSLER: I -- I think -- I think that it's fair to say that this did not arise that frequently in courts of equity.

JUSTICE KAGAN: Why didn't it?

MR. WESSLER: Be -- for -- for several reasons, Your Honor.

First, most of these claims arose simply as

freestanding or implied claims. So there was not -- there was no need for an insurer to include in its insurance policy an expressed subrogation agreement.

However, that -- that changed approximately around the turn -- the mid-20th century, when medical insurance started to become an increasing commodity. When that occurred, most States had a -- a prohibition on the assignment of personal injury claims.

And so what insurers began to do to get around that prohibition was to insert in their -- in their policies an express clause allowing them to obtain reimbursement from the insured, in the event that the insured recovered money that it had paid.

Now, there is another reason in this case -- or in these ERISA cases -- why these agreements need to be in the plan. And that's because Section 502(a)(3) itself does not allow for a plan, like Petitioner, to obtain a general right to equitable relief. All that the Petitioner can -- can seek here is equitable -- appropriate equitable relief to enforce the terms of its plan.

And so, in the absence of an expressed provision, like a subrogation clause, it would not be entitled to pursue a -- a general right to subrogation.

It's a term -- that back-end reference is

a -- is a term of limitation that limits the types of claims that Petitioner can bring in these cases.

CHIEF JUSTICE ROBERTS: Counsel, can -- I want to give you an opportunity to respond to the argument that you've waived, the -- the -- your argument based on the distinction between the summary of the plan and the plan.

And there are two things that concern me about that, in particular. The summary of the plan, which you've had all the time, says, on page 1, "This is only a summary. Complete plan details are contained in a legal plan document. If there is any difference between the information in the summary and the legal plan, the legal plan" -- "the legal plan document will govern."

So when you had the summary, you were on notice that, if there were any difference between it and the plan, the plan would govern. You received a copy of the plan in June of 2012. Okay?

And as late as August 29th of 2012, two-and-a-half months afterward, you filed a Joint Appendix that didn't -- didn't contain the provision that you say now governs. So why shouldn't you be held to have waived that?

The first time we found out about that was

in your red brief that was filed -- June, July, August, September -- three months -- October -- four months after you had the plan.

So didn't you waive it?

MR. WESSLER: Well, I -- I don't think we waived it, Your Honor. It's in our opening brief on the merits to this Court, and --

CHIEF JUSTICE ROBERTS: Which was four months after you had the plan and -- and the plan was lodged with us last week for the first time.

MR. WESSLER: That's correct, Your Honor. In our view -- and -- and I think I need to be clear about this. I mean, the -- the fact that the plan contains a different set of rights than -- than the SPD, to us, is meaningful in -- in its -- in its effect that it will have on this case when this -- if and when this Court remands because -- because, in our view, the rights are different.

However, I -- it doesn't change the underlying nature of our argument, which is that, even the strong form argument that Petitioners have made here, which is that, on the SPD, it can defeat the -- the rules that typically would have applied, that equity would not have allowed that. And so --

CHIEF JUSTICE ROBERTS: The problem is that

the district court interpreted the plan as precluding the claim you're making here. And your argument that that's not true is based not on the summary of the plan, but on the plan itself.

MR. WESSLER: That --

CHIEF JUSTICE ROBERTS: And what the district court does is it defers to the administrator's interpretation of the plan. So the district court found that the administrator's interpretation was not arbitrary and capricious.

So what your friend is arguing is that, well, you are kind of stuck with the district court interpretation, and you can't, at the last minute, argue that it shouldn't control because of some other document.

MR. WESSLER: Well -- well, we think we do have the right to argue that on remand, Your Honor. And -- and this Court's decision in Cigna only -- only arose in this case after the -- the briefs were complete to the Third Circuit.

And so it's -- I -- I think Cigna has changed the law to the extent that all parties are now on notice and know that the plan document will trump any contrary language --

CHIEF JUSTICE ROBERTS: Well, no, Cigna

didn't tell you that. The plan -- the summary told you that. It says, "Complete plan details are in the legal plan. If there is any difference between the summary and the plan, the plan controls." So you didn't need Cigna to tell you that.

MR. WESSLER: Well -- well, Your -- Your Honor, I mean, I -- I think that the -- the -- you know, that -- for us, that's an issue on remand. We're comfortable that our arguments in this case control, even -- even as it relates to the actual language in the SPD and that -- and that whatever differences between the SPD and the plan actually are don't necessarily change the rules that govern when a -- when a party in equity sought this kind of reimbursement relief directly from -- from an insured.

I'd like, just -- just for the last minute or so, to discuss the common fund rule because I do think it applies as a separate and distinct rule, regardless of how this Court interprets the agreement as governing the rights between Mr. McCutchen, the beneficiary, and the plan.

And I'd just like to point out that this Court, in Pettus, made clear that the common fund doctrine confers a separate lien on the attorney. And so whatever the agreements control between the

beneficiary and the plan has, it cannot defeat the rights that the attorney has, as a separate matter, to come into court and invoke its own lien on the fund as a first priority lien over the money.

And -- and I -- and I'd just like to point out that Petitioners have not responded to that argument. Nowhere in their reply brief did they explain why their theory would allow them to defeat the rights of a third-party defendant in this case, Mr. McCutchen's lawyers, who have their own separate right to the lien.

And -- and none of their equitable lien cases, Your Honor, involve any kind of common fund whatsoever. So they say precisely nothing about the rules that would have applied in equity to an attorney's attempt to -- to take their proportion out of the fund before it was distributed to any of the parties.

JUSTICE GINSBURG: I thought you were discussing the common fund would be the allocation between McCutchen and the plan. But now, you seem to be talking only about the attorney's right to come in first.

MR. WESSLER: The common fund, Your Honor, applied either to deduct -- either as -- as a deduction off the -- Your Honor, may I -- may I finish answering the question?

CHIEF JUSTICE ROBERTS: Sure.

MR. WESSLER: As a deduction out of the entire fund for the attorney's lien or it can be applied to reduce proportionately each of the claimant's claims to that fund. And in this case, it should be applied to reduce Petitioner's claim on the fund, irrespective of McCutchen's own claim.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Katyal, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF NEAL KUMAR KATYAL

ON BEHALF OF THE PETITIONER

MR. KATYAL: Thank you.

I'd like to begin where -- where Mr. Wessler left off, with the common fund, and make three quick points.

The first is that both equity law and ERISA law point in the same direction. Justice Scalia is absolutely right, that they have zero cases that say, if there's a preexisting agreement that settles the common fund doctrine, that that makes it not enforceable.

And Justice Ginsburg's absolutely right to say that when the plan -- the plan is not unjustly enriched, to get the money that they are entitled to get under the contract.

The second point I would make is that the Solicitor General says, well, this is now --

JUSTICE SOTOMAYOR: Put on the back of someone else, meaning --

MR. KATYAL: I agree.

JUSTICE SOTOMAYOR: -- I may or may not agree that, in terms of your split with the participant, the contract might control. But I still am having trouble with understanding how you can bind a third party, like a lawyer, who's done the effort to recover that fund -- more along Justice Breyer's question, which is not only in -- in all equity, lawyers are entitled, whether by contract or by unjust enrichment principles, to a -- to a percentage of their expenses in recovering something.

MR. KATYAL: Justice Sotomayor, that's precisely what cases like State Farm and the Arkansas case from 1969, the Maryland case from 1931, address, which is that situation. And the reason is that essentially here -- it's a mistake to see this as a third-party case.

This is really a situation created by Mr. McCutchen double-promising the same money to two entities, US Air and to his lawyers. And so it's essentially a dispute, really, among two parties, not

three.

Now, the Solicitor General says, well, this is rooted in -- in equitable doctrine. There is no case that they have that says that there's some equitable doctrine that trumps the preexisting agreement. And, indeed, the case that they cite, the Greenough case, is one that essentially relies on unjust enrichment principles.

Sure, the Court has an equity power when to remedy unjust enrichment. That is an inherent power of the Court. We're not disagreeing with that. What we are saying is that, when you have an agreement in advance, that means, per se, there is no unjust enrichment, that they are, to use this Court's language in the Sereboff, a defense that it is beside the point.

JUSTICE SOTOMAYOR: Counsel, I'm assuming, because ERISA's in place now, that the many State laws that prohibit this kind of agreement, where insurance plans are seeking full reimbursement, despite an attorney's efforts, that those are void, that those would be enforceable.

MR. KATYAL: That is precisely --

JUSTICE SOTOMAYOR: The only one who can fix this problem now is Congress, if they --

MR. KATYAL: That is correct.

JUSTICE SOTOMAYOR: -- if they perceive it as a problem.

MR. KATYAL: Congress, in 1974, set it up this way. And I think that that's an important point, Justice Sotomayor. For 38 years, this Court has never embraced an idea that Federal common law allows rewriting plan terms. It would be a very dangerous doctrine to do so. It'd be standardless.

And here is a very vivid example: They are saying that it is inequitable to have the Federal Blue Cross/Blue Shield plan, which governs 4.6 million people, including perhaps members of this Court, which has the exact same provisions as the US Air plan, an abrogation of common fund and a 100 percent reimbursement provision.

And they are saying that that would not be enforceable. That may create any number of problems for the government, I imagine, when it tries to enforce that.

JUSTICE BREYER: Suppose the expense weren't to pay the lawyer. Suppose, in order to get the 100,000, you had, for example, to build a model car to demonstrate to the manufacturer what caused the injury, and it cost you 98,000 to do it. And they pay you 100,000.

You're saying that -- it wouldn't be unjust to say the 100,000 has to go to -- back to pay US Air?

MR. KATYAL: Justice Breyer, if the agreement settled that in advance, yes, it would not be unjust. It is the agreement that controls.

CHIEF JUSTICE ROBERTS: Thank you, counsel. Counsel.

The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)

A
ability 30:17 33:14,15,16,17 34:5
above-entitled 1:15 61:10
abrogated 8:6
abrogates 8:16 10:2
abrogation 8:9 8:21,21 9:2 10:12 15:23 60:14
absence 51:22
absolute 19:3
absolutely 10:18 14:18 15:3,5 16:8 35:25 37:19,24 39:3 57:19,22
accident 18:17 27:21
accommodation 21:10
accompany 7:7
accompanying 37:9
accounted 47:11
accurate 21:20
acknowledge 26:12,13
acquired 29:1
acted 29:20
action 6:25 7:1,4 7:5,7,10 18:12 20:2,2,4 21:11 36:18,20 37:10 37:12
actions 4:14
actual 11:22 55:10
add 30:14 31:6
address 58:18
adds 27:8
administration 32:11,13
ADMINISTR... 1:5
administrator's 54:7,9
advance 18:17 21:8 22:18 59:13 61:4
advanced 32:5 34:17
advancing 32:3
advised 16:23
affirmative 37:3
afterward 52:21
ago 4:13 9:18 11:24 23:10 33:2
agree 14:19 25:6 25:17 34:13 41:6 45:14,15 47:2 58:5,7
agreed 47:12 48:3
agreement 4:16 4:17,25 5:7,13 5:18,18 6:6,8 7:2,11,14,22 8:1,8,10,16,17 9:1 16:13,14 18:4,5,21,23 19:3,8,8,9,23 20:5 21:8 22:1 22:18 23:6,12 23:22 25:4,11 25:11,20 26:16 26:17,19,25 27:3,7 28:4,4 28:23 29:8,25 30:2,5,9,11,12 30:19,23 31:1 31:12,14 34:6 35:3,9,11,14 36:7,10,12,22 37:13,17,19,20 37:24 38:4,14 38:23 39:5,11 39:24 40:17 41:14,15,21 42:4 46:25 47:2 47:8 48:23 49:11 51:3 55:19 57:20 59:5,12,18 61:4 61:5
agreements 17:23,23 25:19 25:20 27:2 44:5 51:15 55:25
Air 5:18 14:22 17:17 22:10 27:25 43:1 58:24 60:13 61:2
Airways 1:3,6 4:4 5:23
Air's 43:18
AL 1:10
Alito 20:7,18 21:1 22:17
allocation 56:18
allow 45:14 51:17 56:8
allowed 46:7 53:24
allowing 51:11
allows 13:15 46:4 60:6
alter 36:22
Amara 12:4 33:10,12
amicus 1:23 3:7 21:6 24:18
amount 12:17 14:17 46:12 47:13 49:21
analogous 25:1
analogy 29:15
answer 7:12 17:1 31:9
answering 56:24
answers 28:23 30:13
anti-Amara 11:25
apologize 33:9
appealed 9:6,6 10:6
APPEARANC... 1:18
appendix 9:1,4 22:5 52:22
applied 28:15 36:24 38:19 44:7 49:23,24 53:23 56:14,23 57:3,5
applies 28:11,19 36:6 55:18
apply 5:9 7:16 23:4 26:21,25 27:1,18 28:5,12 28:14 30:6 35:22 36:8 37:22 39:1,22 42:16 44:2
appropriate 4:11 51:20
approximately 49:12 51:4
arbitrary 54:10
argue 54:13,17
argued 6:20 38:18
arguing 54:11
argument 1:16 3:2,5,9,12 4:3,6 17:21 19:6,11 19:13 22:24 24:17 26:20 28:3 34:23 35:9 39:9 40:3,7 41:14 52:5,5 53:20,21 54:2 56:7 57:11
arguments 21:24 38:9 55:9
arises 36:13
arising 40:16
Arkansas 8:14 8:15 23:24 58:17
arose 41:19 50:25 54:19
asked 16:19 17:5 27:16 28:8
asking 9:14 20:7 41:15 48:20
assert 17:19
asserting 45:23
assets 16:6
assignment 51:8
Assistant 1:21
assume 6:13 15:16 17:8 28:11 44:11
assuming 13:21 59:16
assumption 8:3 15:7,10
Atlantic 7:4
Atlantic's 6:23 6:25
attempt 56:15
attention 40:9
attorney 5:13,16 5:17 7:25 20:22 21:10,14 55:24 56:2
attorneys 5:24 6:1 20:8,17 21:17 43:6
attorney's 5:11 56:14,20 57:3 59:20
August 52:20 53:1
authority 28:17 28:20,22 29:10 30:6
authorized 48:24

48:24
available 16:17 24:25 25:1 38:21 42:16 45:3 47:8
avoid 12:21 16:4
avoids 34:18
awarded 42:8,8
a.m 1:17 4:2 61:9
A20 9:11

B

back 12:11 13:15 15:14,14 27:20 29:16 34:11 36:16 41:13 43:5,20 49:13 50:10 58:3 61:2
back-end 51:25
bad 38:15
bad-faith 22:13
balance 24:14 34:17
ball 16:14
Barnes 7:3
barred 13:3
bars 8:23 44:10
based 23:7 31:17 32:16 35:2,16 36:3 37:13,14 37:24 38:4 39:5 39:23 44:21,23 47:7 49:10 52:6 54:3
bear 46:16
began 51:9
behalf 1:19,25 3:4,11,14 4:7 34:24 57:12
believe 9:18 10:11 38:1 49:24 50:7
bench 27:14 36:23 45:8
beneficiaries 19:18
beneficiary 5:14 10:25 38:18 42:13 55:21 56:1
benefit 29:19
benefits 1:7 12:1 12:8,17 18:11
best 47:15,16 48:12,22
better 26:20
big 21:22
bind 5:6,7 45:25 58:9
bit 22:23 40:3,6
Blue 21:6 60:10
body 40:6
bollox 26:6
bondholder 29:19
bondholders 29:20
bottom 5:3
bound 4:21,23 5:13 32:1
box 17:25
boxes 22:21
breach 45:9
Breyer 13:4,25 14:3,9,18,21 15:8,11 27:15 28:16 42:24 47:15,20 48:19 60:20 61:3
Breyer's 58:11
brief 8:13 9:7 10:23 11:9 21:6 21:6 29:12,18 32:6 33:1 40:15 53:1,6 56:7
briefs 54:19
bright 26:1
bring 52:2
bringing 18:11 27:10
broad 31:25
brought 21:12 25:2
build 60:22
burdens 18:11
buy 16:7

C

C 3:1 4:1
call 26:24
called 36:21
calls 22:25
candid 32:15
cap 49:24
CAPACITY 1:3
capricious 54:10
car 60:22
case 4:4 6:16 8:12,14 10:9,15 10:16,20 12:4 14:1,10,11 15:6 15:25 18:23 20:22 21:13 23:23 24:4 25:9 25:13 27:5,5 29:16,17 32:6 33:11 36:18 37:20 38:21 39:6 44:3 46:16 46:18,19,21,23 47:15,16,16,18 48:12,17,22,23 49:2,8,24 50:1 50:2 51:14 53:16 54:19 55:9 56:9 57:5 58:18,18,21 59:3,6,6 61:8,9
cases 18:24 22:16 24:22 26:3 28:23,25 29:2,9 33:21 41:19,21,23,23 42:2,4,4,5,8,12 45:7 47:6 50:13 51:15 52:2 56:12 57:19 58:17
categorization 18:6 26:22
caused 13:7 27:21 41:25 42:7 60:23
causes 43:3
century 28:17,17 51:5
certain 46:12
certainly 4:22 6:10 25:22
change 32:16,18 32:20 33:25 53:19 55:13
changed 33:1,5 51:4 54:22
chapter 42:23
characterize 7:4
characterized 25:7 29:13
Chief 4:3,8 16:16 16:22 24:15,20 32:2,14 33:1,4 34:21,25 41:3 52:3 53:8,25 54:6,25 57:1,9 61:6
Cigna 54:18,21 54:25 55:5
circuit 9:6 20:20 23:11,13 54:20
citation 28:20
cite 11:6,7 33:6 33:10 59:6
cited 8:13 40:11 40:14 45:7,7 47:6
cites 41:24 42:5
claim 4:16 6:23 6:24 7:7 19:23 25:1 35:14,15 36:1,19,24 37:10,13,14,23 38:20,25 39:2,5 40:13 42:17 44:4,20,21,22 44:23,25 45:1,4 45:5,5,10 47:2 47:4 49:10 54:2 57:6,7
claimants 49:17
claimant's 30:17 57:4
claims 35:2,5,17 35:18,23 36:16 37:22 38:2,4 39:10,23 40:16 41:12 47:7 50:25 51:1,8 52:2 57:4
classic 25:13
clause 9:22,22 9:24 11:25 35:16 51:11,23
clear 8:22 9:1 11:10 22:18 29:2 35:18 36:12 48:16 53:12 55:23
clearly 10:2
Clinton 8:12
collect 13:8 20:13
come 19:11 21:15 43:3,22 56:3,20
comes 13:13 15:25 20:22 27:5 39:13 43:11
comfortable 55:9
commencement 5:12
commodity 51:6
common 6:13 8:9 8:17 9:2 10:2 11:10 15:24

16:4,7 23:3,5,7 23:9,12 27:17 27:19,21 28:6 28:10,18 29:11 31:17 34:14 36:5,6,8 48:13 55:17,23 56:12 56:18,22 57:15 57:20 60:6,14
communicate 21:23
communication 22:8,19
communications 22:6
company 30:10
complete 52:11 54:19 55:2
concede 35:10 35:25
conceded 9:8 35:12 36:5
conceding 11:14
concept 10:13 18:15
concepts 27:10
concern 52:8
concerned 11:12 11:21 13:1
concluded 4:14
concrete 47:9
conditions 43:14
confers 55:24
confusing 25:25 26:8
confusingly 22:25
confusion 27:8
Congress 59:24 60:3
considered 6:23
consistent 37:25 42:9,10
contacted 22:3
contain 52:22
contained 52:11
contains 53:14
contention 4:23
context 20:9 37:4 41:20
contingent 8:1
contract 14:11 15:16 16:10 24:10 28:11 38:22 40:23 42:11 44:9,12 44:14,21,23,25 45:2 46:2 47:21 48:2,4,7,8,10 50:16 57:25 58:8,13
contracts 33:16 44:5
contractual 26:14
contradicted 30:1,3
contrary 5:5 10:22 41:10 54:24
control 38:20 54:14 55:9,25 58:8
controls 6:6,16 9:15 16:7,14 39:15 40:16 55:4 61:5
Cooke 28:18
copy 52:18
core 41:22
corpus 31:20,22
correct 10:12 17:13 24:5,8 37:24 41:9 53:11 59:25
correctly 39:3
correlative 45:14
cost 13:19 27:23 28:1 60:24
costs 27:24 47:14 49:21
Couch 25:22,24 36:14 47:5
counsel 11:13 15:1 22:11 24:15 32:2 34:21 40:2 52:3 57:9 59:16 61:6 61:7
count 43:6
course 8:19 10:13 33:3
court 1:1,16 4:9 4:13 6:22 7:9 7:13 8:14,15,25 9:5,7 10:16 13:1,25 14:2,24 14:25 15:25 16:8 19:10 20:1 21:21,24 23:13 23:24 24:21,24 24:24 27:5,13 29:6,18 30:15 31:4,6,7,12,25 33:13,24 34:2,3 34:10,15 35:1 36:21 37:8,19 37:21 38:15,17 39:3,9,18,25 40:11 44:15,18 45:7,19 46:11 48:18 49:14,18 50:4,6,15,17 53:7,17 54:1,7 54:8,12 55:19 55:23 56:3 59:9 59:11 60:5,12
courts 23:9,11 26:6,10 36:23 41:5 42:8,15 50:21
court's 10:6 24:22 25:8 33:2 40:9 54:18 59:14
cover 42:19 49:15
co-extensive 42:10
create 60:17
created 5:12,16 58:22
creates 6:3
critical 17:24
Cross 21:6
Cross/Blue 60:11
culpable 42:7
curiae 1:23 3:7 24:18

D

D 4:1
dangerous 60:7
days 9:18 11:24 36:23 45:8
deal 43:2
dealing 8:19
debt 6:2 25:14 29:1
decide 6:17 10:9 27:17 34:10 43:4 44:16
decided 7:10 25:8
decision 7:3 21:4 44:19 54:18
decisions 8:14 27:10 41:9,10
decree 46:12
decrees 23:19
deduct 56:23
deducting 49:21
deduction 56:23 57:2
defeat 44:1 45:16 53:22 56:1,8
defendant 42:2,6 42:13 56:9
defendant's 42:9
defense 59:15
defenses 4:18 7:6,17 37:3,9 38:12,15,15,19 50:17
defers 54:7
defines 24:10
demonstrate 60:23
denies 36:6
Department 1:22
derived 4:18
describe 36:15
describes 6:10
description 8:22 9:13 12:3 14:6 17:5,6
despite 59:19
details 52:11 55:2
developed 42:15
devoted 42:23
difference 38:23 39:8,14 40:5 41:22 52:12,17 55:3
differences 39:12 55:11
different 13:12 18:1,14,25 23:11 26:21 27:1,2 29:5,14 30:25 32:4 41:20 42:15 53:14,18
direction 57:18
directly 35:19 49:6 55:14
disagreeing 59:11
discharge 29:1 31:24
disclaim 30:16
discovery 10:7

14:7
discrepancy 9:16 11:21 12:3,5,25
discretion 23:19
discuss 55:17
discusses 40:13
discussing 56:18
disingenuous 33:8
displacing 24:11
dispute 19:4 58:25
distinct 18:8 35:18 55:18
distinction 9:21 17:22 25:18,22 25:23 37:21 44:20 45:20 52:6
distributed 56:16
district 8:25 9:5 10:6 13:25 14:2 21:21,24 24:23 54:1,7,8,12
divest 31:6 34:3
divided 27:14 36:23 45:8
Dobbs 8:13
doctrine 6:12,13 6:21 7:11 8:17 9:3 11:10 16:4 23:7,13 27:18 27:19 28:6,6,10 28:18 29:13 31:18 34:14 36:5,6,8,13 48:13,14 55:24 57:21 59:3,5 60:8
doctrines 16:11 28:12,14,15,19
document 31:19 32:1 52:12,14 54:15,23
doing 12:21 20:15
doors 45:13
double 49:23
double-promised 5:22
double-promisi... 58:23
doubted 33:18
drafted 22:25
drew 37:21 44:19
driver 13:7
drop 21:18
D.C 1:12,19,22 1:25

E

E 1:10 3:1 4:1,1
earlier 19:21
effect 20:7 53:15
effectiveness 40:23
effort 58:10
efforts 59:20
either 30:11 35:24 45:6 56:23,23
element 33:11
else's 18:9
embrace 14:20
embraced 60:6
employee 1:6 15:13 16:17
enforce 4:11 7:2 25:3 30:19,20 30:22 34:5,8,9 45:4 46:6 47:1 48:1,3 51:20 60:18
enforceable 16:9 25:12 26:15 57:21 59:21 60:17
enforced 8:11,18 44:12
enforcement 46:4
enriched 41:16 57:24
enrichment 4:19 7:18 23:8 24:12 29:4,13 34:7 38:6 39:15 40:16 42:10 50:17 58:13 59:7,10,14
enter 45:13 47:15
entered 5:17
entire 42:22 57:3
entirely 18:14
entities 58:24
entitled 29:23 51:24 57:24 58:12
entitles 41:17
epitomized 7:3
equally 42:21
equitable 4:11 4:15,17,18,24 5:7 6:7,24,25 7:2,5,6,11,13 16:13 19:23 20:5 23:19 24:23 25:3,10 26:16,17 28:6 28:12,14,14,15 28:23 29:5,7,8 30:21 33:19,24 34:3,4,4,5 35:3 36:7,9,12,21 37:9,11,12 38:20 41:20 42:3 44:22 45:3 45:4 46:9,24 47:1 48:8,17 51:18,19,20 56:11 59:3,4
equity 4:21,21 4:23 5:6,8 6:5 7:14,15,16 15:19,22,23 16:11,12 23:16 24:2,7,24 25:10 27:13 28:7,7,15 28:24 30:12,15 31:5,9,12,13 31:14,25 33:13 34:9 35:5,17,22 35:22 36:23 38:2 40:8,10 42:15 44:1,7,13 44:15,20,22 45:11,15,16,21 45:22 46:10,11 47:3,24,25 48:2 48:3,5,11 49:25 50:15,16,21 53:23 55:14 56:14 57:17 58:12 59:9
equity's 45:13
equivalent 43:1
ERISA 4:10,14 10:24,25 20:9 20:19,23 33:20 34:16 51:15 57:17
ERISA's 46:3 59:17
ESQ 1:19,21,25 3:3,6,10,13
essentially 5:20 6:17 11:24 18:17 19:16 25:8 58:20,25 59:7
establish 26:2
established 7:2 29:17
ET 1:10
evaluate 16:5
evaluated 7:14 21:21 23:11
evaluation 23:22
event 51:12
exact 27:15 45:9 60:13
exactly 5:2 9:17 10:22 38:2 41:16 49:8
example 48:22 60:9,22
exceptions 46:13 46:16,18
excuse 5:21 11:18 31:11
executed 29:3
exercise 39:19
exist 26:7 33:20
expense 14:15 41:2 60:20
expenses 11:1 12:17 13:6,15 29:24 31:19,21 43:2,3,5 47:12 58:14
expert 13:11
explain 36:14 37:7 56:7
explains 25:24
explicitly 44:9,11
express 20:20 35:3,16 38:4 39:23 40:4,17 47:8 49:10 51:11
expressed 36:3 51:3,22
extent 12:25 24:12 34:15 41:1 48:25 54:22
extra 43:5,6 45:22

F

fact 26:9 36:20 37:15 38:5 44:6 53:13
facts 6:1 21:20

factual 22:2
failure 21:23
fair 28:2,3 44:16 50:9,12,18,20
fairer 31:14
far 9:23
Farm 8:12 23:23 58:17
fault 18:16
favors 43:1
Federal 7:20 20:20 60:6,10
fee 8:1
fees 43:6 47:13 49:22
fiduciaries 4:10 46:7
FIDUCIARY 1:4
figure 27:2 50:16
filed 21:9 33:2 52:21 53:1
finally 21:15
find 43:13 47:16
finding 9:5 10:6
finds 31:5,12
fine 32:20
finish 56:24
first 5:23,23 11:9 19:3 25:7 43:11 50:25 52:25 53:10 56:4,21 57:17
fit 44:6
fix 59:23
follow 18:1,21 48:7,10
follows 18:1,5 24:2
footnote 6:11 32:5 33:10 37:1 39:24
foreclose 25:15
forgiven 6:2
forgot 47:22,23 48:11
form 36:18,20 53:21
forth 12:2
forward 21:16
found 9:1,3 17:17 22:10 33:8 48:18,20,20 52:25 54:8
four 53:2,8
framed 10:23
free 43:9,21
freestanding 7:5 38:19,25 39:10 51:1
free-standing 37:10,10,12,22
frequently 50:20
friend 54:11
friends 11:23
friend's 18:23 19:6
full 59:19
fund 6:13 8:9,17 9:3 10:3 11:10 15:24 16:4,7 20:4 23:3,5,7,9 23:12 27:17,19 27:22,22,23,25 28:1,6,10,18 29:11 31:17 34:14 36:2,5,6 36:8,19 39:16 42:19 43:7 47:2 47:11,11 48:13 49:9,15,19 55:17,23 56:3 56:12,15,18,22 57:3,5,6,15,21 58:11 60:14
funds 29:1
further 7:12 32:8 32:10,16,22
futility 39:19
future 28:25

G

G 4:1
gained 20:16
game 16:15
general 1:22 7:16 16:12 24:9 31:15 46:10,13 51:18,24 58:2 59:2
generally 25:11
Ginsburg 6:9,18 8:20,24 9:9,14 9:20 10:11 19:21 41:13 45:18 56:17
Ginsburg's 12:11 57:22
give 15:14 18:16 28:22 40:6 43:5 46:11 48:4 52:4
gives 7:25 41:15
glass 48:15
go 4:20 12:11 21:16 31:9 41:13 45:19,22 47:24 61:2
goes 11:9 27:21 35:9 43:12
going 16:3 18:10 18:17 21:16 28:22 29:7,8 43:10,15,16,22 44:15 48:6,7 50:17
good 28:16 43:14
govern 36:16 39:14 52:15,18 55:13
governed 7:18 35:5,6,21 38:2 38:5
governing 55:20
government 7:16 60:18
governs 41:12 52:23 60:11
great 38:11,14 39:1 40:11 46:1
Great-West 31:7
Greenough 29:17 30:3 31:17 59:6
grounds 31:16
grown 14:12
guess 15:1 38:7 47:23

H

hallmarks 20:4
hand 34:10
happen 44:21
happened 5:21 19:15 27:13
happens 15:12 21:7
harsh 34:19
hear 4:3 28:3
held 31:7 52:23
help 4:19
hey 19:19 38:11
highest 50:6
highly 14:24
hired 17:18
holding 39:25
Honor 10:4 21:19 33:10 35:13,25 36:11 38:18 39:21 40:8 41:9,18 43:25 44:17 45:7,24 46:14 47:18 48:16,21 50:3,24 53:6,11 54:17 55:7 56:12,22,24 57:8

I

idea 18:15 60:6
identifies 41:8 41:10
ignorant 17:12
imagine 60:18
implied 37:13 38:19 40:4 51:1
import 27:14
important 31:10 60:4
inapplicable 34:6
incentive 21:3,11
include 51:2
includes 41:1
including 60:12
income 31:20,22
incorporates 33:12
increasing 51:6
independent 6:3
indistinguisha... 7:1
individual 10:17
inequitable 60:10
information 52:13
inherent 59:10
inherit 18:10
injunction 30:17 33:15
injured 10:24
injury 51:8 60:23
inquiry 20:24 24:12,13
insert 51:10
instance 31:18
insufficient 42:19 49:15,19
insurance 8:16 20:12 22:12 25:23,24 27:9 27:11 30:10 41:19 51:3,6 59:18
insured 7:23,23 8:8 18:9,11

35:20,24 36:2 38:10,10 42:1 49:1,3,7,16 51:12,13 55:15
insured's 40:25
insurer 7:22 35:23 37:15 39:16 41:25 46:25 47:10 48:23 49:4,6,19 49:25 51:2
insurers 36:16 51:9
interchangeably 25:25 26:10
interest 25:14
interpretation 13:22 54:8,9,13
interpreted 54:1
interprets 55:19
invoke 56:3
invokes 24:23
invoking 29:4
involve 35:19 41:24 42:5 56:12
involved 15:7 35:23
involving 29:5,11
irrespective 57:6
issue 4:15 6:4 7:10 9:8,19 10:5 13:2 14:7 15:7,11,12,20 21:22 33:15 38:3,3 55:8
It'd 60:8

J

JAMES 1:10
job 27:2
Joe 13:5 15:13
Joint 9:3 22:5 52:21
JOSEPH 1:21
3:6 24:17
judge 13:20,25 23:20 48:1,2
judges 23:13
judgment 21:22
July 53:1
June 52:19 53:1

K

Kagan 17:20 18:3,7,20 19:6 19:14 25:17 26:18 36:25 37:16 38:7 50:8 50:22
Kagan's 22:20 23:2
Katyal 1:19 3:3 3:13 4:5,6,8,20 4:22 5:5,15 6:15 8:4,24 9:12,17 10:4,18 10:21 11:8,20 12:14 13:24 14:5,18,23 15:3 15:5,21 16:19 16:24 17:4,10 17:13,16,20 18:2,7,22 19:13 20:18 21:5,19 22:4,14 23:5,17 23:21 24:5,8 25:6 26:2,18 29:12 50:13 57:10,11,13 58:5,16 59:22 59:25 60:3 61:3
Katyal's 25:18
Kennedy 7:19 8:10 9:10 10:8 11:3,8 22:20 23:15,18 46:10 46:15,20
key 33:11
kind 18:12 27:3 39:1 45:10 49:8 54:12 55:14 56:12 59:18
kinds 27:2,10 38:2 40:4
know 17:11,25 18:3 44:9 45:3 45:25 48:3,5,19 50:18 54:23 55:7
knowing 20:22
knows 17:12
KUMAR 1:19 3:3,13 4:6 57:11

L

labeled 9:25
Labor 32:7
land 25:14,16
language 8:23 10:2,10 11:2,4 11:5,6 12:10 13:15,15,22 14:11 19:20,22 54:24 55:10 59:14
late 52:20
lately 32:19
Laughter 41:7
law 7:20,21,24 15:7,11,12 17:12 24:2 27:11,11 29:15 29:22 31:17,18 33:1,4,25 44:12 44:13 45:20,23 54:22 57:17,18 60:6
laws 59:17
lawsuit 21:9,18
lawyer 17:9,10 17:14,18,19 34:12 43:10,11 43:13,22 58:10 60:21
lawyers 13:11 43:8,15 56:10 58:12,24
layman 17:12
leading 40:10
leaves 6:12
left 13:10,12 43:11 57:15
legal 17:21 24:6 26:6 44:3,4,20 44:24 45:1,5,9 46:1 52:12,13 52:14,14 55:2
letter 6:16 17:18
let's 41:13 44:11
liability 20:3
lien 4:17,24 5:10 5:11,16 6:3,7 6:11 7:2,11,25 19:23 20:5 25:11 26:16,17 28:23 29:8 34:5 36:7,10,12,21 41:20 42:3 46:24 47:1,2 48:17 55:24 56:3,4,10,11 57:3
lienholder 25:15
liens 4:15 5:7 7:13 16:13
limit 22:12 40:23
limitation 52:1
limited 47:8 49:19
limits 20:12 39:15 52:1
line 5:3 26:1 29:10 30:5 40:19
lines 22:18
lion's 22:16
listening 13:20
litigated 33:21
litigation 5:12 16:18 17:3 21:3
little 14:3 33:8 40:6
lodged 11:23 53:10
long 8:6,13
long-established 20:21
look 7:13 11:4 13:14 16:25 18:15 19:15 20:2 21:15 27:9 29:7,8,16 34:15 38:11,25
looked 10:1
looking 10:9,11 34:6 50:10
looks 42:25
Lord 28:18
loss 41:25 42:7 42:11,14,22
losses 42:20 49:15,17,18
lot 13:12 18:24 19:7 32:19
lots 22:5,6
love 47:16

M

magic 4:24
magnifying 48:15
main 11:7
maintain 31:24
make-whole 6:12 6:20
making 17:21,22 38:10 54:2
manufacturer 60:23
Mars 14:12
Maryland 50:6 58:18
matter 1:15 7:20

22:2 26:24 32:22 38:23 39:4 56:2 61:10
matters 24:11
MATTHEW 1:25 3:10 34:23
McCUTCHEN 1:10 4:4 5:22 20:8,17 26:20 55:20 56:19 58:23
McCutchen's 56:9 57:7
McKee 44:19
mean 10:8 11:4 14:9,12 17:9 26:7 37:1 50:9 53:13 55:7
meaning 34:9 39:8 58:4
meaningful 26:22,24 53:15
means 4:17 14:15 20:9 23:1 26:7 59:13
measure 38:21 42:16
medical 11:1 13:6 41:2 43:2 47:12 51:5
members 60:12
mentioned 28:24
mere 36:20 37:14
merged 44:10
merits 53:7
Mertens 46:1
Mid 6:23,25 7:4
mid-20th 51:5
million 60:11
minute 17:17 54:13 55:16
minutes 57:10
mistake 58:20
mixing 41:4
model 60:22
modern 27:9
modify 48:7,13
money 5:22 6:3 14:16 18:16 19:4,4 27:20,21 30:10 34:11 35:24 36:16 37:15 43:5,20 46:12 51:13 56:4 57:24 58:23
monies 36:1
months 23:10 52:21 53:2,2,9
morning 4:4
mortgage 25:13 25:13 28:25
motion 21:22
motto 24:2

N

N 3:1,1 4:1
name 28:20 33:7
nature 20:2 53:20
NEAL 1:19 3:3 3:13 4:6 57:11
nearly 33:2
necessarily 26:3 27:12 55:12
need 7:4 51:2,15 53:12 55:4
negative 34:18
negotiated 22:9
neither 1:24 3:8 10:13 24:19
net 13:10
never 9:5 14:8 33:18 60:5
new 32:10,11,12 32:13,23
normal 14:10 37:3
normally 5:11
notice 20:24 52:17 54:23
notion 18:13
notwithstanding 8:1
November 1:13
nowadays 44:9
number 21:14 60:17

O

O 3:1 4:1
obligated 12:21 18:15
obligations 24:10 31:24
obtain 38:24 51:11,18
obtained 36:2
obvious 34:1
obviously 11:4
occurred 49:4,6 51:7
October 53:2
offer 4:19
office 32:15
okay 14:13 43:23 48:12 52:19
once 4:24 5:17 7:9 17:25
open 6:12,14
opening 53:6
opinion 6:19 19:22
opponent 15:2 35:8 36:6
opportunity 22:15 52:4
opposed 35:20
opposition 9:7 10:23 11:9
oral 1:15 3:2,5,9 4:6 24:17 34:23
order 14:19 45:12,12 60:21
outset 16:5,6 17:5
overcome 24:7 30:11
override 15:19 45:16
overriding 15:21

P

P 4:1
page 3:2 6:19 9:4 9:13 11:11,22 19:21 23:8 24:9 40:14 52:10
pages 8:25 9:1 22:5 40:13
paid 12:17,18 14:16,17 25:14 36:17 37:15 47:12 49:11 51:13
Palmer 36:14 40:12 42:22,22 47:5
Palmer's 40:10
Palmore 1:21 3:6 24:16,17,20 25:5,17,21 26:9 26:13 27:4 28:13,21 30:2,7 30:13,20,24 31:3,15 32:12 32:25 33:9,21 34:2,13
parcel 4:17 7:6 37:9
part 28:1 29:21 41:3,5
participant 12:16 34:11 58:7
participants 12:21
participate 49:5
particular 10:16 20:4 28:10 34:17 52:9
particularly 34:19
parties 16:5 19:3 23:6,23 24:11 42:20,21 44:1,5 45:14 54:22 56:16 58:25
parts 22:21
party 1:24 3:8 24:19 38:10,11 41:24 42:1 45:8 45:10,18 46:5 55:13 58:10
pay 5:4 13:9,11 13:11,12 14:17 28:1 34:11 43:2 43:6 46:12 60:21,24 61:2
payment 48:25
pays 13:5
PDF 11:22
people 48:5 60:12
perceive 60:1
percent 5:19 7:23 8:9 11:1 60:14
percentage 58:14
perfectly 32:20 37:25
performance 46:12,19,22
permits 4:10
person 27:20 33:6 42:6
personal 20:3 51:8
persuasive 40:7
petition 8:25
Petitioner 1:8,20 3:4,14 4:7 41:24 42:5 46:7 46:19 51:17,19

52:2 57:12
Petitioners 35:15 48:18 53:21 56:6
Petitioner's 34:19 57:6
Pettus 55:23
phrase 12:7
place 7:17 22:7 59:17
plaintiff 48:1
plaintiffs 5:1
plaintiff's 17:18 21:9 42:7
plans 4:14 59:19
plan's 4:16 12:22
plan-based 26:14
please 4:9 11:18 24:21 35:1
pocket 15:15 34:11
point 7:8,8 10:19 11:19,20,21 12:12 15:2 20:15 27:17 32:5 35:10 37:4 37:5,6,11,23 38:9 40:9 43:19 44:18 55:22 56:5 57:18 58:1 59:15 60:4
points 57:16
policies 20:12 51:11
policy 27:11 36:17 51:3
position 5:6,15 6:15 7:9 21:16 32:3,4,7,16,21 33:11 34:16,19 36:10 38:1 50:9
power 59:9,10
powers 24:23,24 25:3 30:15,18 30:20,22 31:4,6 31:7,25 33:13 33:20,24 34:3,4 34:5
precisely 19:25 21:21 23:21 37:23 40:13 56:13 58:17 59:22
precluding 54:1
preexisting 57:20 59:5
prejudice 12:22
present 20:6
presented 10:24 25:7
pretty 13:22
prevails 30:12
previously 32:5
principal 29:16
principle 15:19 15:22 29:22 31:16 39:15 40:15,22
principles 29:4,7 35:4,6,21 37:22 38:1,5 39:4 48:8 58:13 59:8
prior 32:6 33:6
priority 5:11 19:3 56:4
problem 5:25 13:8 16:4 53:25 59:24 60:2
problems 42:23 60:17
procedurally 13:3 14:25
proceeding 49:5
proceeds 7:24
produce 27:24
producing 27:23 28:1
prohibit 59:18
prohibition 51:7 51:10
promise 28:25 44:25
promised 5:22 5:24
proportion 49:21 56:15
proportionately 47:13 57:4
proved 31:23
provide 28:25 33:15 40:24
provided 5:19 12:1 16:20 17:3 17:6
provides 8:8 11:2
provision 19:17 19:17 26:15 46:3,8 51:23 52:22 60:15
provisions 40:24 60:13
public 27:11
pure 38:24
purely 44:22 46:8
purposes 34:16
pursuant 23:16
pursue 21:3,3 46:7 51:24
pursued 35:15
pursuing 20:15
put 12:2 17:25 47:22,23 58:3
putting 42:25

Q

qualifies 6:25
question 6:14,18 10:23 12:11 16:1 22:20 23:3 23:11 25:7 26:22 27:16 28:8 39:22 50:14 56:25 58:11
queue 43:10,22
quick 57:15
quite 5:5 10:12 16:24 21:20 22:23 26:22 30:25
quote 6:23 12:15 12:21 40:21,22 44:22 48:25,25
quoting 24:9 40:18 49:20

R

R 1:21 3:6 4:1 24:17
raise 15:4 50:14
raised 10:20 15:2
reach 21:10 34:10 39:22
reached 14:1 49:3
read 12:8 19:20 37:2,48:14
realize 37:1
realized 20:14 21:2,2
really 23:1 29:5 31:11 58:22,25
reason 32:9 37:7 51:14 58:19
reasonable 13:21,23 29:23
reasoning 6:17
reasons 50:24
REBUTTAL 3:12 57:11
receive 41:17
received 52:18
receiving 41:16
recognize 7:19 24:22
recover 12:16 13:17 14:15,16 35:24 48:24 49:16,17 58:10
recovered 12:18 13:16,18 36:2 49:12,21 51:13
recovering 39:16 49:20 58:14
recovery 12:23 34:18 40:25 41:1 48:24 49:1 49:9,23
red 53:1
reduce 47:13 57:4,6
reference 51:25
referred 6:10
reflect 27:12
reflected 26:3
reflection 16:12 32:8,10,17
reform 33:16
reformation 31:25
refuting 38:9
regard 40:25
regardless 55:19
reimburse 10:25 18:18
reimbursement 4:14 5:19 8:9 9:22,24 12:9 17:19,22 18:4 19:1,9,12,17 19:24 22:22 25:19 26:3,15 27:6,7 29:23 35:2,15,17 36:1 36:19 37:14 38:4 39:23 40:16,24 41:19 42:2 45:13 47:7 51:12 55:14 59:19 60:15
Reimburseme... 18:14
reject 22:2
rejected 21:24

21:25
relates 55:10
relevant 7:11
relief 4:11 38:21 39:14 42:8,9,16 45:9 46:2,8,9 47:3,8 51:18,20 55:14
relies 59:7
rely 6:11
relying 11:6 12:12
remaining 57:10
remand 54:17 55:8
remands 53:17
remedial 24:24
remedies 39:10 45:3
remedy 6:25 33:16 45:10,20 46:23,24 59:10
remember 31:17
reply 56:7
request 14:8
requests 14:7
reserve 24:14
respect 8:5 9:2 11:10 27:1 32:25 34:13
respond 52:4
responded 56:6
Respondent 29:4
Respondents 2:1 3:11 4:19 9:19 34:24
response 6:22 28:9
restatement 24:10 33:25
restitution 29:6,7
result 14:1,10 18:1 34:19
results 18:1
reverse 16:3
review 10:15 33:2
reviewed 32:22
rewrite 31:14
rewriting 31:1 60:7
right 6:15 12:16 12:22 13:24 14:9 15:8,17 17:19 18:8 19:2 23:22 24:7 27:4 32:11 34:17 39:9 44:18 46:6 51:18,24 54:17 56:10,20 57:19 57:22
rights 5:19 18:8 36:15 39:11 40:4 44:12 45:15,23 46:5 49:1 53:14,18 55:20 56:2,8
ROBERTS 4:3 16:16,22 24:15 32:2,14 33:4 34:21 41:3 52:3 53:8,25 54:6,25 57:1,9 61:6
rooted 59:3
roots 29:14,14
rule 16:12 20:19 20:19,20,21 23:3,5,7 26:6,7 26:11,12,12 36:22 40:9 41:11,11 46:10 46:13 55:17,18
rules 5:6 6:5 7:15 7:16 15:23 18:25 26:21,25 27:1 36:16 39:1 39:13,22 42:15 44:1,7 45:16 53:23 55:13 56:14
Ryan 20:21

S

S 3:1 4:1
saw 20:11
saying 15:22 17:19 19:18 22:17 23:18 31:3 38:11,13 59:12 60:10,16 61:1
says 7:23 12:1,8 12:20 13:13 14:14 15:13 16:3,3 18:10 23:23,24,25 24:9 27:19 28:5 28:11,17 30:10 31:21 35:8 36:7 37:2 40:12,15 40:20,22 41:5 43:1 44:11 45:2 46:5 47:17 48:1 48:2,2,4,5,9 52:10 55:2 58:2 59:2,4
Scalia 10:14,18 10:19,22 11:15 11:18 15:1,4,6 15:9 17:8,11,14 24:1,6 25:3 26:5,11 29:25 30:4,7,9,14,18 30:21,25 31:11 33:18,23 35:8 36:4 44:8,24 50:1,4 57:18
scenario 34:18
scope 24:11
se 59:13
seal 47:22,23 48:11
second 11:12,19 11:20 58:1
secret 22:9
Secretary 32:7,8 32:11,12,17,18 32:22,22,24 33:5,7,7
section 24:22,25 30:16 31:4 33:12 46:4,4 51:16
secured 29:19
security 25:14
see 10:2 11:5 15:20 26:23 39:12 44:6 58:20
seeing 32:19
seek 4:10,15 45:11 46:1 51:19
seeking 35:23 49:9 59:19
seeks 20:3 26:2 28:7 31:13
self-evident 33:23
sense 27:22
sent 17:18
separate 29:10 55:18,24 56:2 56:10
September 53:2
Sereboff 4:13 5:17,21 6:9,17 6:18 16:2,8 19:15,15,18 20:1 25:9 27:6 29:6 33:22 36:21,25 37:1,2 37:8,17,21 38:3 38:8,18 39:4,20 39:22 40:1,11 45:25 59:15
Sereboffs 6:20 7:7
Sereboff's 6:16
seriously 10:24
serve 40:23
set 7:17 26:21 39:10 42:15 53:14 60:3
sets 23:22
settled 31:4,16 61:4
settlement 22:9 22:13 49:3
settles 15:25 57:20
seven 23:10
share 22:16 27:22,23 42:21 47:11
Shield 60:11
shoes 18:9 19:2
show 48:12
side 11:24 18:23 43:1 45:19 48:9
signed 5:13,17
silo 29:5
simple 41:14
simply 8:7 11:1,3 16:11 19:4 45:19 50:25
single 48:17 49:24
situation 43:17 58:19,22
situations 21:7 21:18 44:7
six 4:13 23:10
Smith 13:5 15:13 48:4
Solicitor 1:21 24:9 58:2 59:2
somebody 43:3 50:15
someone's 19:2
sorry 11:15 12:7
sort 7:3 20:25 21:11
sorts 14:7
Sotomayor 4:20

4:23 5:2,6,10 7:12 11:13,16 12:7,25 16:11 17:2,4 21:13,25 22:11,15 33:17 34:8 39:7,18 40:2,19 58:3,6 58:16 59:16,23 60:1,5
sought 45:9 46:24 47:1 55:14
sound 7:18 19:24
sounds 13:22 19:24 28:2
source 12:18
SPD 12:3 53:14 53:22 55:11,12
specific 46:11,18 46:22,23
specify 20:3
spend 15:13
split 58:7
stake 20:23
stand 18:9 19:2
standardless 60:8
started 51:6
starts 16:14
State 8:12 23:23 27:11,12 58:17 59:17
statement 21:20
States 1:1,16,23 3:7 7:21,25 8:5 24:18 32:3,4 51:7
statute 8:7 23:16
stay 34:9
strikes 34:17
strong 53:21
stronger 18:24 19:7
struck 21:8
structure 44:5
stuck 54:12
subject 35:3 47:3
subjugation 25:19
submitted 9:18 11:23 61:8,10
subrogation 6:24 7:5 8:5 9:22 10:1 12:9 17:23 18:5,8,21,22 18:24 19:7,17 19:19,19,24 22:22,24 23:1,1 23:2 25:19 26:2 26:19 35:3,4,7 35:9,11,14,16 35:18,21 36:3 36:13 37:4,11 37:12,14 38:20 38:25 39:10,11 48:23 49:11 51:3,23,24
subtract 30:15
sue 43:4,9,21
sued 49:6
suffered 42:20
suggest 36:25
suggesting 22:13 22:14
suit 20:14 35:19
summary 9:10 9:12 11:6 12:2 12:13 14:6 17:5 17:6 21:22 52:6 52:9,11,13,16 54:3 55:1,3
superior 7:25
support 1:23 3:8 24:19
suppose 7:22 10:4 14:1 44:10 60:20,21
supposed 15:16 19:9 21:17 22:12 50:10
Supreme 1:1,16 8:14 10:15 23:24
surcharge 33:16
sure 8:2 16:19,24 43:20 45:2 46:19 48:14 57:1 59:9
Svea 47:18 48:21 50:2

T

T 3:1,1
take 19:10 27:19 31:8,19,21 39:8 47:3 56:15
taken 10:20
takes 20:22 31:4 43:13
talk 19:1 29:11 29:17
talked 33:14
talking 6:6,7 7:20 16:13 44:6 49:9 56:20
talks 25:23
tell 9:23 19:8 21:15 22:21 32:15,21,23 33:4 35:10 43:8 43:9 47:20 55:1 55:5
ten 33:2
term 34:3 36:15 51:25 52:1
terms 4:11 25:12 25:25 26:10 29:3 40:24 46:6 51:20 58:7 60:7
text 6:19 37:2
Thank 4:8 24:15 24:20 34:20,21 57:8,9,13 61:6
theory 45:13 56:8
They'd 48:10
thing 19:16
things 11:8 12:15 13:12 20:10,19 22:17 45:23 52:8
think 6:16 7:24 10:11,14 12:24 14:23,24 17:24 17:24 18:23 19:14 20:11 21:19 22:4,23 23:1 25:8,21 26:1,5,9,18,24 27:4,16 28:8,13 30:24 31:10,12 32:14 34:2,14 43:15,18 44:18 48:22 50:19,19 53:5,12 54:16 54:21 55:7,18 60:4
thinking 47:21
third 9:6 20:20 41:24 42:1 54:20 58:9
third-party 13:16 13:18,18 42:23 56:9 58:21
thought 17:2 33:19 56:17
three 53:2 57:15 59:1
three-party 42:12
time 16:17 24:14 27:13 28:24 52:10,25 53:10
times 21:14 29:12
today 32:3
told 43:16 45:22 55:1
tort 17:17 21:4 40:25
tortfeasor 35:20 35:24 42:1,14 49:3
tough 14:3
traditional 33:13
transfer 16:6
transforms 4:25
treated 35:22 47:4
treatise 23:24 25:23,24 40:10 40:10,14
treatises 36:14
tries 60:18
trigger 42:14
trouble 58:9
true 8:4 37:16 54:3
trump 23:12 54:23
trumps 59:5
trust 29:15,22,24 31:16,17,18,18 31:20,22,25 32:1
trustee 29:20,21 29:23 31:19,21 31:23
try 16:25 50:16
trying 5:8 38:24
Tuesday 1:13
turn 51:5
two 9:1 11:8 12:14 18:8 20:18 22:6,21 22:21 27:1 30:13 39:8,12 40:3,5 41:8,10 47:9 52:8 58:23 58:25
two-and-a-half 52:21
two-party 42:3,5
type 7:10 35:7 46:23

types 52:1
typical 20:4
typically 22:16 28:25 44:2 45:17 53:23

U

umbrella 36:15
unambiguous 9:2
unanimously 20:1
unavailable 14:25
underlying 36:22 49:2,5 53:20
understand 6:1 20:9 38:7 40:2
understanding 58:9
understood 20:10
unfair 31:13,23 42:24,25 43:19 43:24,25 44:4
unfairness 31:15
unfortunately 41:5
United 1:1,16,23 3:7 24:18 32:3 32:4
unjust 7:18 23:7 24:12 29:3,13 34:6 38:5 39:15 40:15 42:9 50:17 58:13 59:7,10,13 61:1 61:5
unjustly 41:16 57:23
unjustment 4:18
unsettling 40:3
unusual 14:24 24:2 50:9
unworkable 31:23
use 26:10 30:22 50:17 59:14
usually 21:7 24:3 24:3

V

v 1:9 4:4 8:12 20:21
valid 24:10
valuation 16:5
various 30:21,22
vicarious 18:12 18:12
vice-versa 31:21
victim 27:20
view 25:18 27:17 32:9,18,23 33:6 33:8 39:6 41:11 46:18,20,25 53:12,17
vivid 60:9
void 59:20
Vose 29:18

W

waive 53:4
waived 52:5,24 53:6
walks 50:15
want 10:9 13:14 16:7 32:20 43:4 43:21 45:19 48:1,14 52:4
wanted 13:21
Washington 1:12 1:19,22,25
wasn't 20:14 22:8 32:10
way 10:22 15:24 19:10 20:11 25:25 26:8,16 33:22 42:25 47:3 60:4
ways 47:9
week 53:10
well-settled 29:21
went 22:8
weren't 33:21 60:20
Wessler 1:25 3:10 34:22,23 34:25 35:13 36:11 37:6,18 38:17 39:13,21 40:8,21 41:8,18 43:25 44:17 45:6,24 46:14 46:17,22 47:18 48:16,21 50:2,6 50:8,19,23 53:5 53:11 54:5,16 55:6 56:22 57:2 57:14
West 40:11 46:1
we'll 4:3 43:2
we're 5:8 6:6,7 7:20 8:19 15:21 15:22 16:3,13 18:15,16,17 27:16 39:25 43:10 49:8 50:9 50:10 55:8 59:11
we've 25:7 34:16 45:7 47:6 48:3
whatsoever 56:13
wheat 14:12 48:4 48:6
willing 34:15
win 4:25
windfall 20:8
witnesses 13:11
word 10:12 14:12
words 4:24 12:12
work 5:4 20:10 20:11 22:17 38:16 43:16
worth 20:14 43:8
wouldn't 14:10 20:13 44:10 48:10 61:1
writing 39:19
written 14:19 47:22
wrongdoer 42:6 49:4
wrote 14:22 21:14,14
W.H 1:25 3:10 34:23

X

x 1:2,11

Y

year 47:24 50:5
years 4:13 13:1 33:2 60:5

Z

zero 57:19

$

$100,000 13:6,8 22:9,12 27:24
$110,000 20:13
$3,000 49:12,13
$50,000 13:10,13 27:24
$9,000 49:13
$90,000 15:14

1

1 52:10
10:02 1:17 4:2
100 5:19 7:23 8:8 11:1 13:6,19 60:14
100,000 13:9,14 13:17 60:22,25 61:2
11-1285 1:6 4:4
11:03 61:9
1463 47:24
17 24:9
18th 28:16,17
1901 50:7
1930s 50:11
1931 8:15 58:18
1935 44:19
1969 8:15 58:18
1974 60:3
1996 20:21

2

2 15:15 39:24
20 9:4
2012 1:13 52:19 52:20
21 23:13,13 40:14
22 11:22 41:23
24 3:7
26 23:8
27 1:13
29th 52:20

3

30A 8:25
32A 8:25
34 3:11
368 6:19 19:21
38 60:5

4

4 3:4 13:1 57:10
4.2 11:21
4.6 12:20 60:11
4.7 12:14
473 40:13
474 40:13

5

5 11:11
50 13:19 22:5
50,000 13:9,18
502(a)(1)(b) 46:5
502(a)(3) 24:23 24:25 30:16 31:4 33:12 46:9

51:16
57 3:14

6

64 22:6

9

9 32:5
92 15:15
92,000 15:14
98,000 60:24