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A Victory for Erisa: U.S. Supreme Court Unanimously Holds Equity Doesn't Trump Plan Language

By Gary Wickert | May 2, 2013

On April 16, 2013, the U.S. Supreme Court issued its long-anticipated decision in *U.S. Airways, Inc. v. McCutchen,* 2013 WL 1567371 (2013), a case in which the future of ERISA health insurance subrogation hung in the balance. Subrogation won, trial lawyers lost. In a rare unanimous decision, the Court ruled that equitable principles (*e.g.,* the Made Whole Doctrine and Common Fund Doctrine) cannot override the clear terms of an ERISA Plan requiring reimbursement.

Facts of Case

In *U.S. Airways v. McCutchen,* McCutchen, a U.S. Airways employee, was involved in a car accident in which a young driver lost control of her car, crossed the median of the road, and struck a car driven by 51-year-old McCutchen. The truck traveling

behind McCutchen also slammed into his car. The accident killed one person and left two others with severe brain injuries. McCutchen himself was grievously injured and survived only after emergency surgery. He spent several months in physical therapy and ultimately underwent a complete hip replacement. McCutchen's Health Benefit Plan, administered and self-funded by U.S. Airways, paid medical expenses in the amount of $66,866 on his behalf.

After the accident, McCutchen filed an action against the tortfeasor, who had limited liability insurance. Because three other people were seriously injured or killed, McCutchen settled with the other driver for only $10,000. However, with his lawyers' assistance, he and his wife received another $100,000 in UM coverage for a total third-party recovery of $110,000. After paying a 40 percent contingency attorneys' fee and expenses, his net recovery was less than $66,000. U.S. Airways demanded reimbursement for the entire $66,866 that it had paid for McCutchen's medical bills. McCutchen's attorneys placed $41,500 in a trust account, reasoning that any lien found to be valid would have to be reduced by a proportional amount of legal costs. When McCutchen did not pay, U.S. Airways, in its capacity as administrator of the ERISA benefits Plan, filed suit in the District Court under § 502 (a)(3) of ERISA, seeking "appropriate equitable relief" in the form of a constructive trust or an equitable lien on the $41,500 held in trust and the remaining $25,366 personally from McCutchen. The Summary Plan Description (SPD) describing the U.S. Airways benefits Plan covering McCutchen contained the following paragraph, entitled "Subrogation and Right of Reimbursement":

The purpose of the Plan is to provide coverage for qualified expenses that are not covered by a third party. If the Plan pays benefits for any claim you incur as the result of negligence, willful misconduct, or other actions of a third party, the Plan will be subrogated to all your rights of recovery. You will be required to reimburse the Plan for amounts paid for claims out of any monies recovered from a third party, including, but not limited to, your own insurance company as the result of judgment, settlement, or otherwise. In addition you will be required to assist the administrator of the Plan in enforcing these rights and may not negotiate any agreements with a third party that would undermine the subrogation rights of the Plan.

U.S. Airways argued that under the terms of the SPD, McCutchen was required to reimburse the Plan for any amounts it has paid out of any monies he recovered from a third party. It claimed that this language permitted it to recoup the $66,866 out of

the $110,000 total that he recovered even before his legal costs were deducted. The Plan also argued that the Plan language specifically authorized reimbursement in the amount of benefits paid, out of *any* recovery. McCutchen responded that it would be unfair and *inequitable* to reimburse U.S. Airways in full when he has not been fully compensated for his injuries, including pain and suffering. He argued that U.S. Airways, which made no contribution to his attorneys' fees and expenses, would be unjustly enriched if it were now permitted to recover from him without any allowance for those costs. McCutchen also argued that if legal costs were not taken into account, U.S. Airways would effectively be reaching into McCutchen's pocket, putting him in a worse position than if he had not pursued a third-party recovery at all.

Citing the Plan's use of the language "any monies recovered," the District Court rejected McCutchen's arguments and granted summary judgment to U.S. Airways, requiring McCutchen to sign over the $41,500 held in trust and to pay $25,366 from his own funds. The case was appealed by McCutchen to the 3rd Circuit. Inspired by the 2011 U.S. Supreme Court decision of *CIGNA Corp. v. Amara*, 131 S. Ct. 186 (2011), which held that language in a SPD does not qualify as Plan language, and that Plan participants and beneficiaries cannot directly sue to enforce language in an SPD that conflicts with Plan language, the 3rd Circuit held that the "appropriate equitable relief" qualifier in the grant of civil remedies under ERISA's § 501(a)(3) allows for the application of equitable defenses to Plan reimbursement claims in "appropriate" situations. The 3rd Circuit noted that the Plan administrator in *Sereboff v. Mid Atlantic Medical Services,* 547 U.S. 356 (2006) properly sought "equitable relief" under § 502(a)(3), but expressly reserved decision on whether the term "appropriate," would make equitable principles and defenses applicable to a claim under that section. *Id*. This was the opening trial lawyers had been waiting for. The *U.S. Airways v. McCutchen* appeal squarely addressed the question that *Sereboff* left open: whether § 502(a)(3)'s requirement that equitable relief be "appropriate" means that a fiduciary like U.S. Airways was limited in its recovery from a beneficiary like McCutchen by the equitable defenses and principles that were "typically available in equity." The 3rd Circuit answered the question as follows;

Applying the traditional equitable principle of unjust enrichment, we conclude that the judgment requiring McCutchen to provide full reimbursement to U.S. Airways constitutes inappropriate and inequitable relief. Because the amount of the judgment exceeds the net amount of McCutchen's third-party recovery, it leaves him with less

than full payment for his emergency medical bills, thus undermining the entire purpose of the Plan. At the same time, it amounts to a windfall for U.S. Airways, which did not exercise its subrogation rights or contribute to the cost of obtaining the third-party recovery. Equity abhors a windfall. See Prudential Ins. Co. of America v. S.S. American Lancer, 870 F.2d 867 (2nd Cir. 1989).

The Plan immediately petitioned the U.S. Supreme Court for review and it was granted. After the 3rd Circuit's unusual decision, the attack on ERISA subrogation switched its focus from what constitutes "equitable relief" to whether the particular equitable relief sought is "appropriate." Prior to 2011, the analysis and legal treatment of the "appropriate equitable relief" issue appeared to presume that the word "appropriate" in "appropriate equitable relief" modified "equitable relief" rather than standing alone. If a court were to opine that any relief must be "appropriate" as a synonym for "equitable," "just," or "fair," then the entire analysis of subrogation and reimbursement rights would change.

The Supreme Court's Decision

The Supreme Court unanimously reversed the 3rd Circuit, holding that in a §502(a)(3) action based on an equitable lien, the ERISA Plan's terms govern. The clear provisions of an ERISA Plan are not subject to equitable defenses. The Supreme Court held that the Plan at issue clearly required reimbursement regardless of whether McCutchen was receiving a double recovery. As such, the Made Whole Doctrine did not apply.

The Court held that the parties should be held to the mutual promises they made in the terms of the ERISA Plan, and declined to apply equitable rules which were contrary to the parties expressed commitments. It noted that §502(a)(3) does not authorize appropriate equitable relief *at large*, but countenances only such relief as will enforce the terms of the Plan or the ERISA statute itself.

This wonderful decision reverses the 3rd Circuit's ruling as well as a similar 9th Circuit decision in *CGI Technologies v. Rose,* 683 F.3d 1113 (9th Cir. 2012), a case in which the Amicus Brief on behalf of NASP was written and filed by Matthiesen, Wickert & Lehrer, S.C. The unanimous part of the ruling means that healthcare

ERISA Plans can contract the Made Whole Doctrine, the Common Fund Doctrine, and other equitable Doctrines.

However, the Supreme Court in *U.S. Airways v. McCutchen* also ruled 5-4 that the Plan language at issue was silent in negating the Common Fund Doctrine or whether the Plan should bear any of McCutchen's attorneys' fees and litigation costs incurred in obtaining the recovery. The Court stated that the Common Fund Doctrine could be read into the language and remanded the matter back to the district court to determine how much the Plan's reimbursement should be reduced for attorney's fees. In the absence of clear Plan language to the contrary, courts may draw upon equitable principles to "fill the gap." Interestingly, Justices Scalia, Roberts, Thomas, and Alito – four of the Court's most conservative Justices – dissented to this portion of the decision and stated that because McCutchen had agreed that the Plan unambiguously gave itself a right of *full* reimbursement of all the funds the Plan had expended, the Court had no business deploying an argument that was neither preserved on appeal or included in the issue on appeal.