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High Court Issues Half-Victory for ERISA Plan Administrators — Reinforcing the Importance of Clear, Unambiguous Plan Terms

On April 16, 2013, the Supreme Court issued its decision in ***US Airways v. McCutchen***—a decision that can best be described as a half-victory for sponsors and administrators of ERISA-governed plans. In a 5-4 ruling that "has two parts, one favoring US Airways, the other McCutchen," the Supreme Court held that, in an action brought under Section 502(a)(3) of ERISA based on an equitable lien by agreement, the terms of the ERISA plan govern.[1] Neither general principles of unjust enrichment nor specific doctrines reflecting those principles (such as double-recovery or common-fund rules) can override the applicable contract. However, if the plan terms do not proscribe who will bear the costs of recovery, the common-fund doctrine provides the best indication of the parties' intent. Though the Supreme Court did not allow equitable defenses to eviscerate and override plan terms, this decision reinforces the importance of ensuring plan terms are sufficiently clear and specific.

The case is ***US Airways v. McCutchen***, No. 11-1285, 2013 WL 1567371 (U.S. Apr. 16, 2013).

Background

James McCutchen ("McCutchen"), a participant in a health benefits plan sponsored by US Airways, was involved in a serious car accident. Following the accident, the US Airways benefits plan paid $66,866 for McCutchen's medical expenses.

The Summary Plan Description ("SPD") for the US Airways benefits plan covering McCutchen contained a provision regarding "Subrogation and Right of Reimbursement," under which a beneficiary is required to reimburse the plan for any amounts it has paid out of any monies the beneficiary recovers from a third party.[2]

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1 *US Airways v. McCutchen*, No. 11-1285, 2013 WL 1567371, at *10 (U.S. Apr. 16, 2013).

2 The applicable provision states: "If [US Airways] pays benefits for any claim you incur as the result of negligence, willful misconduct, or other actions of a third party, ... [y]ou will be required to reimburse [US Airways] for amounts paid for claims out of any monies recovered from [the] third party, including, but not limited to, your own insurance company as the result of judgment, settlement, or otherwise." 2013 WL 1567371, at *3-4.

McCutchen later recovered $110,000 from third parties, with the assistance of his attorneys. US Airways then demanded reimbursement of the $66,866 it had paid, without consideration of McCutchen's legal costs ($44,000, a 40 percent contingency fee).

When McCutchen did not pay, US Airways, in its capacity as the administrator of the ERISA benefits plan in question, filed suit in the United States District Court for the Western District of Pennsylvania (the "District Court"), under ERISA § 502(a)(3),[3] seeking "appropriate equitable relief" in the form of a constructive trust or an equitable lien on the $66,866—$41,500 held in an escrow account by McCutchen's attorneys and the remaining $25,366 personally from McCutchen. McCutchen argued that it would be unfair and inequitable to reimburse US Airways in full when he has not been fully compensated for his injuries, including his pain and suffering. McCutchen argued that US Airways would be unjustly enriched if it were now permitted to recover from him without any allowance for the attorneys' fees and expenses that he incurred in pursuing the recovery from the third parties.

The District Court Granted Summary Judgment for US Airways

The District Court rejected McCutchen's arguments and granted summary judgment in favor of US Airways.[4] The District Court noted that "ERISA expressly authorizes fiduciaries of ERISA-governed plans to sue to seek redress of violations or enforce provisions of ERISA or of particular plans. Further, where an ERISA-governed plan seeks to impose a constructive trust or equitable lien on 'particular funds or property in the defendant's possession,' such plan is seeking equitable restitutionary relief as contemplated by ERISA under § 502(a)(3)."[5] After finding that the term of the US Airways benefits plan "related to subrogation and reimbursement is clear and unambiguous," the District Court held that "[t]he Plan document clearly requires reimbursement by McCutchen of monies recovered including the [] benefits paid by his insurance company."[6]

The District Court rejected McCutchen's argument that allowing the plan to recover any amount would not be "appropriate" equitable relief considering the "make whole doctrine."[7] McCutchen's counsel in the underlying personal injury lawsuit opined that Mr. and Mrs. McCutchen's claims had a combined value of between $1 million and $1.75 million; however, their actual recovery was limited to $110,000 because the other motorist involved in the accident was underinsured.[8] The District Court refused to apply the "make whole doctrine" to shield McCutchen from reimbursement, noting that the doctrine "is inapplicable in the face [of] the Plan's clear reference to 'all rights of recovery' and to 'any monies recovered' set forth in the

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3 That section authorizes a civil action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3).

4 *US Airways, Inc. v. McCutchen*, No. 2:08cv1593, 2010 WL 3420951, at *8 (W.D. Pa. Aug. 30, 2010).

5 *Id*. at *2 (citing 29 U.S.C. § 1132(a)(3); *Sereboff v. Mid Atlantic Medical Servs*., 547 U.S. 356, 361–62 (2006)).

6 *US Airways, Inc.*, 2010 WL 3420951, at *5.

7 *Id*.

8 *Id*. at *1, 5.

subrogation clause of the ERISA Plan document."[9] The District Court also found that US Airways was entitled to full reimbursement of the benefits paid under the plan, without any reduction for the share of attorneys' fees expended by McCutchen in the underlying personal injury case.[10]

The Third Circuit Vacated the District Court's Decision

On appeal, the United States Court of Appeals for the Third Circuit vacated the underlying decision and held that US Airways' claim for reimbursement under ERISA § 502(a)(3) is subject to equitable limitations.[11] In reaching this finding, the Third Circuit noted that the Supreme Court considered an ERISA plan administrator's claim for reimbursement under the terms of a plan and ERISA § 502(a)(3) in ***Sereboff v. Mid Atlantic Medical Services, Inc***., 547 U.S. 356 (2006). In ***Sereboff***, the Supreme Court determined that a plan administrator could base a claim for reimbursement on an equitable lien by agreement and that such a claim could be "equitable relief" under ERISA § 502(a)(3). However, the Supreme Court in ***Sereboff*** reserved a decision on whether the term "appropriate," which modifies "equitable relief" in ERISA § 502(a)(3), would make equitable principles and defenses applicable to such a claim by a plan administrator.

The Third Circuit agreed with McCutchen's argument that the phrase "appropriate equitable relief" means that courts must exercise their discretion to limit that relief to what is "appropriate" under traditional equitable principles.[12]

The Supreme Court Issues a Two-Part Opinion, Vacating the Third Circuit's Decision

Though the Supreme Court had already held a health-plan administrator like US Airways may enforce a reimbursement provision by filing suit under § 502(a)(3) of ERISA in ***Sereboff***, the Court granted certiorari in ***McCutchen*** to resolve a circuit split on whether, in that kind of suit, a plan participant like McCutchen may raise certain equitable defenses deriving from principles of unjust enrichment to override an ERISA plan's reimbursement provision.[13]

Justice Kagan delivered the opinion of the Court, in which Justices Kennedy, Ginsburg, Breyer and Sotomayor joined. The Court rejected McCutchen's attempt to assert equitable defenses and reinforced

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9 *Id*. at *5.

10 *Id*. at *6.

11 *US Airways, Inc. v. McCutchen*, 663 F.3d 671 (3d Cir. 2011).

12 *McCutchen*, 663 F.3d at 676.

13 As noted above, the reimbursement provision at issue was not actually in the plan itself, but in the SPD. The Supreme Court has previously made clear that the statements in a summary plan description "communicat[e] with beneficiaries about the plan, but . . . do not themselves constitute the terms of the plan." *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1878 (2011). However, the parties litigated this case based solely on the language contained in the SPD. After oral argument in *McCutchen*, there was some speculation that the Supreme Court may revisit its discussion in *Amara* regarding the supremacy of plan language in comparison to language in a summary plan description. Of particular interest would have been confirmation for the benefits community that language in a summary plan description can rightfully be given controlling weight if (as in this case) there is no conflicting plan language. However, the Court declined to do so. Instead, the Court dodged the issue by simply noting that "[b]ecause everyone in this case has treated the language from the summary plan description as though it came from the plan, we do so as well." *McCutchen*, 2013 WL 1567371, at *4, n.1.

the long-standing notion that an ERISA plan's terms govern. US Airways sought to enforce the modern-day equivalent of an "equitable lien by agreement" and, as the Court explained, "enforcing the lien means holding the parties to their mutual promises."[14] The Court rejected McCutchen's attempt to use theories of unjust enrichment to "defeat US Airways' appeal to the plan's clear terms."[15]

In so holding, the Court noted that this result fits "lock and key with ERISA's focus on what a plan provides."[16] Specifically, the section under which this suit was brought does not authorize "'appropriate equitable relief,' *at large*"—rather, it only allows such relief as will enforce "*the terms of the plan*."[17] The Court noted that this "limitation reflects ERISA's principal function: to 'protect contractually defined benefits.'"[18] Moreover, as the Court has often noted, ERISA's statutory scheme is "built around reliance on the face of written plan documents."[19] In short, because the plan "is at the center of ERISA," it precludes McCutchen's equitable defenses from overriding plain contractual terms.[20]

Yet, the Supreme Court's opinion was not a complete victory for US Airways. The Court then turned to the problem of how to apportion the costs incurred (attorneys' fees) to recompense the injury. The plan said nothing about this specific issue. The Court then held that, while equitable rules cannot trump a reimbursement provision, they may aid in properly construing it when the plan is silent.[21]

The Court then held that in those circumstances where the plan is silent on the allocation of attorneys' fees, "the common-fund doctrine provides the appropriate default."[22] Without such cost-sharing, "the insurer free rides on its beneficiary's efforts—taking the fruits while contributing nothing to the labor."[23] Here, for example, McCutchen spent $44,000 (representing a 40 percent contingency fee) to recover $110,000, leaving him with a real recovery of only $66,000. But US Airways claimed $66,866, which "would put McCutcheon $866 in the hole; in effect, he would pay for the privilege of serving as US Airways' collection agent."[24]

Thus, the Court's mandate was clear: "if US Airways wished to depart from the well-established common-fund rule, it had to draft its contract to say so—and here it did not."[25]

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14 2013 WL 1567371, at *6.

15 *Id*.

16 *Id*. at *7.

17 *Id*. (emphasis in original) (citations omitted).

18 *Id*. (citations omitted).

19 *Id*. (quoting *Curtiss–Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995)).

20 *Id*.

21 *Id*. at *8.

22 *Id*. at *8. Under the "common-fund" doctrine, "a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Id*. at *5 (citations omitted).

23 *Id*. at *9.

24 *Id*.

25 *Id*.

The Court did not specifically determine what portion of US Airways' recovery should be reduced for attorneys' fees notwithstanding that McCutchen agreed to a 40 percent contingency fee, but instead remanded the case for further proceedings consistent with its opinion. In this regard, it is likely that McCutchen will ask the District Court to require US Airways to reduce its recovery by 40 percent.

Dissent

Justice Scalia agreed in part and dissented in part with the Court's decision, and he was joined in his dissenting opinion by Chief Justice Roberts, and Justices Thomas and Alito. Justice Scalia would have reversed the judgment of the Third Circuit. However, he disagreed with the Court's application of the "'common-fund' doctrine to fill that 'contractual gap,'" where the terms of the plan are "*not* plain."[26] Justice Scalia was troubled that the Court "granted certiorari on a question that presumed the contract's terms were unambiguous—namely, 'where the plan's terms give it an absolute right to full reimbursement.'"[27] In Justice Scalia's view, all of the parties, as well as the Solicitor General (who participated at oral argument before the High Court as *amicus curiae*) treated the concession that the plan terms were plain and absolute as valid. In sum, Justice Scalia thought that the Court had "no business deploying against [US Airways] an argument that was neither preserved . . . nor fairly included within the question presented."[28]

Analysis

Though the issues presented in ***McCutchen*** revolve around a somewhat narrow reimbursement provision, the implications of this opinion are far broader. Regardless of the provision at issue, plan administrators should rest easy knowing that equitable principles cannot trump clear terms of the plan, period. That is, "if the agreement governs, the agreement governs."[29]

With that said, however, where the agreement does not clearly govern, these equitable principles may be used to fill in any "contractual gaps" where the plan may be silent. Plan sponsors and administrators should not only confirm that their reimbursement provisions clearly address who will cover (or share in) the costs of recovery, but they should also take a hard look at all plan provisions and fill in any gaps where the plan may be silent or ambiguous.

To keep on top of the latest hot topics related to employee benefit plans—including recent opinions and litigation trends—please visit Alston & Bird's ERISA Litigation blog, **ERISA*inBrief***.

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[26] *Id.* at *10 (Scalia, J. dissenting) (emphasis in original).

[27] *Id.*

[28] *Id.* (citations omitted).

[29] *Id.* at *7.

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