# IN ALL FAIRNESS: US AIRWAYS V. MCCUTCHEN AND THE USE OF EQUITABLE DEFENSES IN ERISA REIMBURSEMENT CLAIMS

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#### I. Introduction

A dramatically growing number of Americans are tying up their personal financial stability with the continued solvency of their employer-maintained benefit plans. To help ensure that plans fulfill their promises to employees, Congress passed the Employee Retirement Income Security Act of 1974 (ERISA). Though ERISA does not require employers to provide any specific benefits, it does demand that employers who do offer benefit plans adhere to ERISA's regulations.

In US Airways, Inc. v. McCutchen,<sup>4</sup> the Supreme Court will consider the scope of a benefit-plan fiduciary's ability to seek relief from an employee who has violated a term of his ERISA-governed plan.<sup>5</sup> In particular, Petitioner US Airways asks the Court to define a fiduciary's right to demand reimbursement for medical expenses paid by a plan when a beneficiary later recovers damages from a third-

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<sup>1.</sup> See generally LEE T. POLK, 1 ERISA PRACTICE AND LITIGATION § 1:5 (2012) (stating that pension and welfare benefit assets in ERISA-governed plans exceeded two trillion dollars in 1980 and, by 2011, private retirement assets were approaching twenty trillion dollars).

Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406, § 2, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. § 1001).

<sup>3.</sup> See Capira-Ryan ex rel. Ryan v. Fed. Express Corp., 78 F.3d 123, 127 (3d Cir. 1996) ("ERISA neither requires a welfare plan to contain a subrogation clause nor does it bar such clauses or otherwise regulate their content."), abrogated on other grounds by US Airways, Inc. v. McCutchen, 663 F.3d 671, 677 (3d Cir. 2011), cert. granted, 133 S. Ct. 36 (U.S. June 25, 2012) (No. 11-1285).

<sup>4.</sup> US Airways, Inc. v. McCutchen, No. 11-1285 (U.S. argued Nov. 27, 2012).

<sup>5.</sup> Brief of Petitioner at i, US Airways, Inc. v. McCutchen, No. 11-1285 (U.S. Aug. 29, 2012).

party tortfeasor. Although on its face this question seems to address a simple contract dispute, ERISA allows plan fiduciaries to recover only "appropriate equitable relief... to enforce... the terms of the plan." The Court has already decided that such relief must be "equitable"—that is, it must be a type of relief that would typically have been granted by a court in equity but it has not addressed the significance of the term "appropriate." Answering that question, the Third Circuit held that a fiduciary's relief not only has to be equitable, but it also has to survive application of equitable defenses, namely unjust enrichment.

The Court will decide whether equitable defenses can reduce the amount of reimbursement that an ERISA fiduciary is entitled to recover even when the ERISA-governed plan explicitly prohibits the use of such defenses. While the Court will likely hold that equitable defenses may apply, it will also likely overturn the Third Circuit's decision to apply the equitable defense of unjust enrichment because in equity, unjust enrichment would not have applied to a reimbursement clause in a benefit-plan contract.

### II. FACTS OF THE CASE

In 2007, a young woman lost control of her vehicle, veered over the median, and careened into a car driven by James McCutchen. McCutchen survived but now suffers from chronic pain and is functionally disabled. McCutchen's ERISA-governed health-benefit plan, which is administered by his employer, US Airways, paid his medical expenses of \$66,866. In addition to his medical expenses, McCutchen claims he also suffered damages for past and future lost wages, loss of earning capacity, pain and suffering, loss of enjoyment of life, and disfigurement—all of which are not covered by his plan. McCutchen claims that the amount of his covered and uncovered

Id.

<sup>7.</sup> Employee Retirement Income Security Act (ERISA), 29 U.S.C.A. § 1132(a)(3)(B) (West 2012).

<sup>8.</sup> Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002).

<sup>9.</sup> US Airways, Inc. v. McCutchen, 663 F.3d 671, 679–80 (3d Cir. 2011), cert. granted, 133 S. Ct. 36 (U.S. June 25, 2012) (No. 11-1285).

Brief for Respondents at 4, US Airways, Inc. v. McCutchen, No. 11-1285 (U.S. Oct. 18, 2012).

<sup>11.</sup> McCutchen, 663 F.3d at 673.

Id.

<sup>13.</sup> Brief for Respondents, supra note 10, at 5.

damages totals between \$1 million and \$1.75 million.<sup>14</sup>

In an attempt to recover his remaining damages, McCutchen filed a lawsuit against the young woman and filed a claim for underinsurance coverage from his own automobile policy because the young woman was unlikely to be able to fully compensate all the victims of the accident. The combined recovery from McCutchen's lawsuit against the young woman and his underinsurance claim was \$110,000. After paying a forty-percent contingency fee to his attorneys, McCutchen's net recovery was less than \$66,000. Anticipating a reimbursement claim from US Airways and assuming that any such claim would be reduced for legal costs, McCutchen's attorneys placed \$41,500 of his net recovery into a trust. Presumably, the remainder was dispersed to McCutchen.

Following the settlement and pursuant to the health-benefit plan's reimbursement requirement, US Airways, acting as the plan fiduciary, demanded that McCutchen pay back the plan for all of his medical expenses, even though his net recovery was less than his total medical expenses. The reimbursement requirement stated that when McCutchen received benefits from his health plan, he would "be required to reimburse the plan for amounts paid for claims out of any monies recovered from a third party." Essentially, because McCutchen collected a total of \$110,000 from third parties for the car accident, the plan demanded that he reimburse it for the \$66,686 that it had already paid for his medical expenses related to the same accident. When McCutchen refused to reimburse the plan, US Airways filed a lawsuit under § 503(a)(3) of ERISA. Section 503(a)(3) entitles US Airways to "appropriate equitable relief... to enforce... the terms of the plan." Although the parties do not

<sup>14.</sup> *Id*.

<sup>15.</sup> *Id.* at 5–6.

<sup>16.</sup> *McCutchen*, 663 F.3d at 673. It is unclear whether the \$110,000 recovery was intended to compensate McCutchen's medical expenses or his other damages. *See id.* (failing to identify which damages McCutchen's third-party recovery was meant to cover); Brief for Respondents, *supra* note 10, at 8 (same); Brief of Petitioner, *supra* note 5, at 9–10 (same).

<sup>17.</sup> McCutchen, 663 F.3d at 673.

<sup>18.</sup> Id.

<sup>19.</sup> *Id*.

<sup>20.</sup> *Id*.

<sup>21.</sup> *Id*.

<sup>22.</sup> *Id*.

<sup>23</sup> I.A

<sup>24.</sup> ERISA, 29 U.S.C.A. § 1132(a)(3)(B) (West 2012).

dispute that the relief sought is equitable, and that the plan's terms explicitly require McCutchen to fully reimburse the plan, McCutchen and US Airways scrum over whether full reimbursement is sufficiently appropriate.<sup>25</sup>

The U.S. District Court for the Western District of Pennsylvania ordered McCutchen to reimburse the plan by forfeiting the \$41,500 held in trust and paying \$25,366 himself. The district court based its decision on the plain language of the plan's reimbursement requirement. The U.S. Court of Appeals for the Third Circuit vacated the district court's order, ruling that Congress's use of "appropriate" in \$502(a)(3) meant that US Airways' requested relief needed to survive the application of equitable defenses—specifically the defense of unjust enrichment. The court of appeals remanded the case to determine whether such equitable defenses would curtail the plan's full reimbursement.

#### III. LEGAL BACKGROUND

## A. Purpose of ERISA

ERISA establishes minimum standards for employee benefit plans to ensure that employees actually redeem the benefits they have earned.<sup>30</sup> The statute governs a wide range of employer-provided benefits.<sup>31</sup> Along with pension plans,<sup>32</sup> ERISA regulates "welfare plans," which the statute defines as plans that help cover the costs of a variety of employee benefits including day care centers, scholarship funds, pre-paid legal services, and unemployment, vacation, or healthcare benefits.<sup>33</sup> Although ERISA does not require employers to provide any of these benefits, when employers do establish benefit plans, the plans are governed by the statute's requirements.<sup>34</sup>

<sup>25.</sup> Brief of Petitioner, supra note 5, at 18–19.

<sup>26.</sup> *McCutchen*, 663 F.3d at 674.

<sup>27.</sup> Id.

<sup>28.</sup> Id. at 678-80.

<sup>29.</sup> Id. at 680.

<sup>30.</sup> ERISA, 29 U.S.C.A. § 1001(a) et seq. (West 2012).

<sup>31.</sup> See id. § 1002 (defining the types of benefits programs covered by ERISA).

<sup>32.</sup> Id.

<sup>33.</sup> Id. § 1002(1).

<sup>34.</sup> Lockheed Corp. v. Spink, 517 U.S. 882, 887 (1996).

Though ERISA places dozens of regulations on covered plans,<sup>35</sup> the statute also leaves room for employers to tailor benefit plans. For example, employers may require beneficiaries to reimburse their health-benefit plans when beneficiaries collect tort settlements as a result of injuries for which the plan also paid medical expenses.<sup>36</sup> However, ERISA limits the relief that fiduciaries can seek to "appropriate equitable relief."

# B. Defining "Appropriate Equitable Relief"

ERISA restricts the type of relief fiduciaries can seek from beneficiaries.<sup>38</sup> Section 502(a)(3) of ERISA allows fiduciaries (like US Airways in this case) "to obtain ... appropriate equitable relief ... to enforce ... the terms of the plan."<sup>39</sup> Therefore, although employers are permitted to include reimbursement clauses, such clauses can only be enforced through "appropriate equitable relief." In the context of enforcing reimbursement clauses, the Court has twice considered the meaning of "equitable relief" but has not yet considered the significance of the term "appropriate."

## 1. What Makes Relief "Equitable"?

In *Great-West Life & Annuity Insurance Co. v. Knudson*<sup>40</sup> the Court ruled that § 502(a)(3) entitles a fiduciary only "to those categories of relief that were *typically* available in equity." The Court went on to conclude that the imposition of personal liability, which the fiduciary in *Knudson* sought to impose, "was not typically available in equity" and actually was "the classic form of *legal* relief."

<sup>35.</sup> For example, pension plans must meet minimum funding requirements, and healthcare plans, under certain circumstances, are forbidden from excluding beneficiaries on the basis of preexisting conditions. 29 U.S.C.A. §§ 1082, 1181(a).

<sup>36.</sup> See Capria-Ryan ex rel. Ryan v. Fed. Express Corp., 78 F.3d 123, 127 (3d Cir. 1996) ("ERISA neither requires a welfare plan to contain a subrogation clause nor does it bar such clauses or otherwise regulate their content."), abrogated on other grounds by US Airways, Inc. v. McCutchen, 663 F.3d 671, 677 (3d Cir. 2011), cert. granted, 133 S. Ct. 36 (U.S. June 25, 2012) (No. 11-1285).

<sup>37. 29</sup> U.S.C.A. § 1132(a)(3).

<sup>38.</sup> Id.

<sup>39.</sup> Id.

<sup>40. 534</sup> U.S. 204 (2002).

<sup>41.</sup> *Id.* at 205 (emphasis in original) (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993)).

<sup>42.</sup> *Id.* (emphasis in original) (quoting *Mertens*, 508 U.S. at 255).

Sereboff v. Mid Atlantic Medical Services, Inc.<sup>43</sup> further excavated the definition of "equitable relief." The Court held that reimbursement did constitute equitable relief where the fiduciary sought "to recover a particular fund."<sup>44</sup> Unlike the fiduciary in Knudson, the fiduciary in Sereboff "sought its recovery through a[n]... equitable lien on a specifically identified fund, not from the Sereboffs' assets generally."<sup>45</sup> Equitable liens, which identify particular funds and particular shares of that fund to which the fiduciary is entitled, <sup>46</sup> would have been enforceable by courts in equity and are therefore fair game under ERISA.<sup>47</sup>

## 2. What Makes Equitable Relief "Appropriate"?

Although *Sereboff* clarified the meaning of "equitable relief," the Court chose not to rule on the meaning of "appropriate equitable relief." In a final effort to narrow the fiduciary's recovery, the beneficiary in *Sereboff* argued that even if the fiduciary's requested relief was "equitable," it was only "appropriate" to the extent that it survived the application of equitable defenses. For example, courts have reduced a fiduciary's recovery through application of the "make whole" and "common fund" defenses. The make whole defense forbids reimbursement of a fiduciary until the beneficiary has been fully compensated; essentially the fiduciary must prove that the beneficiary has been made whole before a court will allow the fiduciary to claim a right to reimbursement out of the beneficiary's tort recovery. The common fund defense requires a fiduciary to contribute to the costs of a tort recovery when it seeks reimbursement

<sup>43. 547</sup> U.S. 356 (2006).

<sup>44.</sup> Id. at 363.

<sup>45.</sup> Id.

<sup>46.</sup> See WILLIAM H. BROWN, THE LAW OF DEBTORS AND CREDITORS § 9:13 (2012) ("The [equitable] lien is usually defined as a right not recognized by law to have a fund or specific property, or its proceeds, applied to the payment of a debt or an obligation.").

<sup>47.</sup> Sereboff, 547 U.S. at 364. The parties here do not dispute that the relief sought is an equitable lien by agreement, so the question of whether US Airways' requested relief meets the requirements of an equitable lien is unlikely to receive much attention from the Court. See Brief of Petitioner, supra note 5, at 18–19 ("Respondents... do not dispute that U.S. Airways' action fulfills the criteria for perfecting an equitable lien by agreement.").

<sup>48.</sup> Sereboff, 547 U.S. at 368 n.2.

<sup>49.</sup> *Id.* ("The Sereboffs argue that, even if the relief Mid Atlantic sought was 'equitable' under § 502(a)(3), it was not 'appropriate' under that provision in that it contravened principles like the make-whole defense.").

<sup>50.</sup> Roger M. Baron, Subrogation: A Pandora's Box Awaiting Closure, 41 S.D. L. REV. 237, 249–50, 255–56 (1996).

<sup>51.</sup> Id. at 249-50.

from the proceeds of that recovery.<sup>52</sup>

Chief Justice Roberts unceremoniously brushed away the beneficiary's attempt to apply equitable defenses because the lower courts had not considered the beneficiary's last-ditch argument about appropriateness. Therefore, although *Knudson* and *Sereboff* began to give shape to the meaning of "equitable relief," they did not reach the question of what makes a fiduciary's equitable relief "appropriate." Although the Court has held that a party must "do equity in order to get equity," it has not provided guidance to address whether a judge, in fashioning appropriate equitable relief, can disregard the explicit requirements of a benefit plan and limit a fiduciary's relief based on equitable defenses.

# 3. Circuit Split on "Appropriate" Equitable Relief

The circuit courts have split on the question of whether Congress's use of the term "appropriate" allows judges to apply equitable defenses where plan terms explicitly require full reimbursement. While most circuits that have considered the question refuse to use defenses like "make whole" and "common fund" to override the express terms of a benefit plan, 55 a minority has held that equitable relief can only be "appropriate" when it survives equitable defenses. 56

<sup>52.</sup> Id. at 255.

<sup>53.</sup> Sereboff, 547 U.S. at 368 n.2 ("Neither the District Court nor the Court of Appeals considered the argument that Mid Atlantic's claim was not 'appropriate'.... We decline to consider it for the first time here.").

<sup>54.</sup> Mfrs. Fin. Co. v. McKey, 294 U.S. 442, 449 (1935).

<sup>55.</sup> See Zurich Am. Ins. Co. v. O'Hara, 604 F.3d 1232, 1237 (11th Cir. 2010) ("[W]e cannot conclude . . . that a balancing of the equities in this case requires application of the make-whole doctrine to defeat the Plan's unambiguous reimbursement requirement."); Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Shank, 500 F.3d 834, 837 (8th Cir. 2007) ("We are not persuaded that the Committee's full recovery according to the terms of the plan is not 'appropriate' relief within the meaning of ERISA."); Moore v. CapitalCare, Inc., 461 F.3d 1, 10 (D.C. Cir. 2006) ("[W]e need not decide whether to adopt the make whole doctrine as a default rule because the ERISA plan unambiguously establishes a plan priority to any third party recovery the beneficiary obtains regardless [of] whether the beneficiary has been made whole by the recovery."); Bombardier Aerospace Emp. Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough, 354 F.3d 348, 362 (5th Cir. 2003) ("[F]ederal common fund doctrines are inapplicable when, as here, the controlling plan language clearly and unambiguously expresses that fees and cost are the sole responsibility of the participant."); Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Varco, 338 F.3d 680, 692 (7th Cir. 2003) ("[A]pplying federal common law to override the Plan's reimbursement provision would contravene, rather than effectuate, the underlying purposes of ERISA because the express terms of the Plan provide for the appropriate distribution of attorney's fees.").

<sup>56.</sup> See CGI Techs. & Solutions Inc. v. Rose, 683 F.3d 1113, 1123 (9th Cir. 2012) ("[I]n granting 'appropriate equitable relief,' [the district court] may consider traditional equitable defenses notwithstanding express terms disclaiming their application.").

The Eleventh Circuit's decision in *Zurich American Insurance Co.* v. O'Hara<sup>57</sup> encapsulates the majority view. Mirroring the prototypical § 502(a)(3) case, the beneficiary was injured in a car accident, recovered damages from a third party, and did not reimburse his ERISA-governed health plan for the medical costs it had paid.58 While the Eleventh Circuit acknowledged that the make whole defense is a default rule of construction in subrogation cases, it held that parties could contract out of the assumed application of such equitable defenses.<sup>59</sup> There, the plan's provision that it was entitled to any proceeds from a third-party recovery "regardless of whether the covered person has been ... made whole" defeated any make whole defense limitations.<sup>60</sup> Although enforcing equitable defenses would have assisted the beneficiary in O'Hara, the court held that it would detract from the overall purpose of ERISA by forcing the fiduciary to pass increased costs onto other beneficiaries and by removing an incentive to provide any benefit plans. 61

In contrast, the minority view, represented by the Ninth Circuit in *CGI Technologies & Solutions Inc. v. Rose*, <sup>62</sup> is that ERISA gives courts the power to apply equitable defenses and that parties cannot contract to eliminate that power. <sup>63</sup> The Ninth Circuit held that the majority rule "read out of the statute the limitation that equitable relief be appropriate." <sup>64</sup> Citing numerous other cases where the Supreme Court had articulated the broad equitable powers of the lower courts, the Ninth Circuit ruled that § 502(a)(3) does not deprive courts of "the traditional broad powers of a court in equity."

#### IV. HOLDING

The U.S. Court of Appeals for the Third Circuit sided with the minority view and held that actions for relief under ERISA § 502(a)(3) are subject to limitation by equitable defenses, even if the

<sup>57. 604</sup> F.3d 1232 (11th Cir. 2010).

<sup>58.</sup> Id. at 1234–36.

<sup>59.</sup> See id. at 1236 ("The Plan's reimbursement and subrogation provision . . . is clearly sufficient to disclaim any 'make-whole' limitation . . . . ").

<sup>60.</sup> *Id*.

<sup>61.</sup> *Id.* at 1237–38.

<sup>62. 683</sup> F.3d 1113 (9th Cir. 2012).

<sup>63.</sup> Id. at 1123.

<sup>64.</sup> *Id*.

<sup>65.</sup> Id. at 1124.

plan expressly requires full reimbursement.66

The Third Circuit, much like the Ninth Circuit, reasoned that because "equitable relief" means something less than all relief, "appropriate equitable relief" must be something less than all equitable relief." To explain the difference the term "appropriate" makes, the court stated that "it would be strange for Congress to have intended that relief under § 502(a)(3) be limited to traditional equitable categories, but not limited by other equitable doctrines and defenses that were traditionally applicable to those categories."

The court also pointed to CIGNA Corp. v. Amara<sup>69</sup> to support its finding. In CIGNA, the Supreme Court stated in dicta that a court could use § 502(a)(3) to reform a fraudulent benefit plan.<sup>70</sup> Although the CIGNA trial court was primarily concerned with fraud, the Third Circuit summarized CIGNA's critical reasoning by stating that, in equity, "contractual language was not as sacrosanct as it is normally considered to be... at common law."<sup>71</sup> While one of ERISA's purposes was to honor the integrity of benefit plans as written, Congress hedged that purpose by requiring that all equitable relief be "appropriate."<sup>72</sup>

The Third Circuit then struck down the district court's ruling.<sup>73</sup> The court held that requiring full reimbursement, when McCutchen's net recovery fell short of the medical expenses paid by the plan, did not comport with the equitable defense of unjust enrichment.<sup>74</sup> While McCutchen would be left "with less than full payment for his emergency medical bills," US Airways would gain a windfall.<sup>75</sup> Because "[e]quity abhors a windfall,"<sup>76</sup> the court remanded the case to the district court to determine what would constitute "appropriate equitable relief."<sup>77</sup>

<sup>66.</sup> US Airways, Inc. v. McCutchen, 663 F.3d 671, 676 (3d Cir. 2011), cert. granted, 133 S. Ct. 36 (U.S. June 25, 2012) (No. 11-1285).

<sup>67.</sup> *Id*.

<sup>68.</sup> Id.

<sup>69. 131</sup> S. Ct. 1866 (2011).

<sup>70.</sup> Id. at 1879–80.

<sup>71.</sup> McCutchen, 663 F.3d at 678-79.

<sup>72.</sup> Id. at 679.

<sup>73.</sup> Id.

<sup>74.</sup> *Id*.

<sup>75.</sup> *Id*.

<sup>76.</sup> *Id*.

<sup>77.</sup> Id. at 680.

#### V. ARGUMENTS

US Airways and McCutchen each make three arguments. First, they each make a textual argument explaining the meaning of "appropriate equitable relief." Second, assuming that equitable defenses do apply, the parties argue about which defenses apply in this case. Finally, they enumerate policy rationales supporting their desired rule.

## A. US Airways' Argument

US Airways first argues that § 502(a)(3), by its plain terms, does not permit "equity in the air," but instead confines courts to "enforce the terms of the plan." Therefore, appropriate relief is any equitable relief that is "suitable under the circumstances to enforce the plan."80 Here, the plan explicitly demands full reimbursement.81 But, US Airways argues, the Third Circuit's approach, far from enforcing the plan, actually re-wrote the plan by inserting a requirement that reimbursement be limited by equitable defenses.82 Therefore the court exceeded its ERISA authority. 83 US Airways concludes that a plainlanguage approach would enforce the plan's reimbursement terms as written because the relief sought is equitable and would enforce the agreement the parties originally made. 84

Independent of its textual argument, US Airways argues that because the plan establishes an equitable lien by agreement, the District Court cannot apply an equitable defense of unjust enrichment.85 One element that must be shown for the creation of any equitable lien is an intent by the parties "that [some] property serve as security for the payment of [a] debt or obligation."86 This intent element is generally established either where the parties have an express agreement or where the application of an equitable lien is necessary to avoid unjust enrichment.87 US Airways states that the

<sup>78.</sup> Brief of Petitioner, *supra* note 5, at 17.

<sup>79.</sup> *Id.* (emphasis in original) (quoting ERISA, 29 U.S.C. § 1132(a)(3)).

<sup>80.</sup> *Id.* at 21.

<sup>81.</sup> Id. at 18.

<sup>82.</sup> See id. at 19 ("The Third Circuit interpreted Section 502(a)(3) to import into every ERISA plan an implicit limitation on the plan's rights . . . . [T]he court does not 'enforce the terms of the plan'... it rewrites them.").

<sup>83.</sup> Id.

<sup>84.</sup> Id. at 18.

<sup>85.</sup> Id. at 29.

<sup>86.</sup> Brown, *supra* note 46, § 9:13.

plan's reimbursement provision creates an equitable lien by agreement because, as in *Sereboff*, the provision identifies particular funds (i.e., funds that McCutchen recovers from third-parties) and "a particular share of that fund to which the plan [is] entitled."

Dredging through more than a century of case law, US Airways states that courts enforcing equitable liens by agreement have never "stop[ped] to ask whether [they] should recalibrate the parties' bargain based on some after-the-fact notion of fairness." Instead, the only defenses applicable to equitable liens by agreement have been that the agreement was produced by fraud, was waived or lapsed, or would result in fraudulent transfer. Because McCutchen presented none of these defenses, he has no basis to oppose reimbursement. In sum, US Airways argues that, even if equitable defenses do apply to claims for "appropriate equitable relief," the defense of unjust enrichment employed by the Third Circuit is not applicable to an equitable lien by agreement.

To explain the Third Circuit's reasoning, US Airways hypothesizes that the court mistook the plan's equitable lien by agreement for an equitable lien to prevent unjust enrichment. The latter, unsurprisingly, is meant to prevent unjust enrichment as opposed to enforcing a contract. Liens to prevent unjust enrichment can be limited by a defense that they themselves would create unjust enrichment, but that same defense does not apply to equitable liens by agreement. 4

As a final catch-all argument, US Airways contends that even if the defense of unjust enrichment were applied to this case, the plan is still entitled to full reimbursement. <sup>95</sup> Essentially, it cannot be unjust to enforce a contract into which the parties freely entered. <sup>96</sup>

Capping its brief, US Airways makes three policy-based arguments.<sup>97</sup> First, US Airways argues that application of equitable

<sup>88.</sup> Brief of Petitioner, *supra* note 5, at 30 (quoting Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 364 (2006)).

<sup>89.</sup> Id. at 32-33, 34.

<sup>90.</sup> Id. at 36.

<sup>91.</sup> Id. at 37.

<sup>92.</sup> Id. at 38.

<sup>93.</sup> *Id.* at 39.

<sup>94.</sup> Id. at 39-40.

<sup>95.</sup> Id. at 41.

<sup>96.</sup> *Id*.

<sup>97.</sup> *Id.* at 42.

principles discourages employers from offering benefit plans because they are certain to lose some portion of the one billion dollars collected annually in reimbursement. Second, the Third Circuit's approach would increase the burden on litigants and courts by possibly requiring mini-trials to determine what portion of a beneficiary's third-party recovery went to compensate plan-covered expenses and therefore are recoverable by the fiduciary. Finally, US Airways postulates that the application of equitable defenses would encourage gamesmanship by allowing beneficiaries to structure settlements so as to avoid reimbursement requirements.

## B. McCutchen's Argument

McCutchen offers only a brief response to US Airways' textual argument. McCutchen argues that Congress only meant for the "terms of the plan" language to limit the types of claims a party could bring, not to limit the power of the court. A claim under § 502(a)(3) must arise out of ERISA or the plan; it cannot be a freestanding equitable claim. For example, the language would have kept US Airways from pursuing a freestanding claim for reimbursement if the plan did not contain an express reimbursement clause. Therefore, as opposed to US Airways' argument, the requirement that relief "enforce the terms of the plan" is irrelevant to determining what constitutes "appropriate" relief.

McCutchen also counters US Airways' differentiation of equitable liens by agreement and equitable liens for unjust enrichment. To begin, McCutchen sets aside US Airways' distinction between the two types of equitable liens. <sup>105</sup> Although the difference affects how the liens are created, enforcement of either must adhere to the same rules. <sup>106</sup> McCutchen then discounts US Airways' summation of a century of case law <sup>107</sup> by pointing out that in typical equitable lien cases, there would be no need to resort to equitable defenses. <sup>108</sup> Thus,

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98. Id. at 42–43.
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<sup>99.</sup> *Id.* at 48.

<sup>100.</sup> Id. at 50.

<sup>101.</sup> Brief for Respondents, supra note 10, at 44.

<sup>102.</sup> Id. at 45.

<sup>103.</sup> Id.

<sup>104.</sup> Id.

<sup>105.</sup> Id. at 37-38.

<sup>106.</sup> Id.

<sup>107.</sup> Brief of Petitioner, *supra* note 5, at 32.

<sup>108.</sup> Brief for Respondents, *supra* note 10, at 39.

McCutchen reasons, US Airways' ability to cite numerous cases where equitable defenses did not limit recovery tells the Court nothing about whether the defenses actually applied. 109

Distinguishing the types of cases cited by US Airways from this case, McCutchen argues that "determining who has been unjustly enriched" becomes significantly more complicated where a third party is responsible for the initial loss. 110 Therefore, examining cases that do not involve a subrogation right are unhelpful. 111 Instead of focusing on the litany of (seemingly unhelpful) cases cited by US Airways, McCutchen points the Court toward the decision in *Manufacturers' Finance Co. v. McKey*, 112 which held that when a party seeks equitable relief, it must "do equity in order to get equity." 113 Thus, McCutchen concludes, US Airways cannot avoid the equitable defense of unjust enrichment regardless of how the equitable lien was created. 114

Finally, McCutchen counters US Airways' policy arguments. McCutchen argues that there is no reason to believe that reduction in reimbursement will remove employers' incentive to offer plans because collection of reimbursement is so unpredictable that it likely does not significantly factor in to any benefit decisions.<sup>115</sup> Also, application of the Third Circuit's rule will not "dramatically increase plans' administrative costs" because similar rules already apply to Medicaid and Medicare without crippling effects.<sup>116</sup> Finally, far from encouraging settlement gamesmanship, the majority rule would encourage beneficiaries to gamble for large jury verdicts instead of accepting settlements because a modest settlement would be largely reclaimed by the fiduciary in an action for reimbursement.<sup>117</sup>

#### VI. ANALYSIS AND LIKELY DISPOSITION

The precise question presented to the Court is whether § 502(a)(3) permits courts to apply equitable defenses to claims for relief in the face of ERISA-governed reimbursement clauses that

<sup>109.</sup> See id. at 39–42 (explaining why courts would not need to resort to equitable defenses in the types of cases cited by US Airways).

<sup>110.</sup> Id. at 42.

<sup>111.</sup> Id. at 43.

<sup>112. 294</sup> U.S. 442 (1935).

<sup>113.</sup> Brief of Respondents, supra note 10, at 43–44 (quoting McKey, 294 U.S. at 449).

<sup>114.</sup> Id. at 44.

<sup>115.</sup> Id. at 50.

<sup>116.</sup> Id. at 53.

<sup>117.</sup> Id. at 53-54.

explicitly require full reimbursement.<sup>118</sup> The Court may also take the opportunity to address whether the Third Circuit erred in requiring the trial court to specifically consider the equitable defense of unjust enrichment.<sup>119</sup>

The Third Circuit's decision gives the Supreme Court an opening to hand down a decision that will be partially unsatisfactory to both sides. While the Court will likely conclude that equitable defenses do apply to claims for "appropriate equitable relief," it will also likely hold that the defense of unjust enrichment applied by the Third Circuit does not apply to claims for equitable lien by agreement.

The Court's first step will be to hold that "appropriate equitable relief" allows modern courts to apply the equitable defenses that a court in equity would have applied. As the Court held in *Knudson*, "equitable relief must mean *something* less than *all* relief." Thus, appropriate equitable relief must mean something less than all equitable relief. The most logical limitations are, as the Third Circuit acknowledged, the equitable defenses that have traditionally limited equitable relief. 121

This conclusion is supported by Holland v. Florida. 122 There the Court held that, traditionally, "courts of equity have sought to 'relieve hardships which, from time to time, arise from a hard and fast adherence' to more absolute legal rules, which, if strictly applied, threaten the 'evils of archaic rigidity.'" By restricting a fiduciary's relief to appropriate equitable relief, Congress surely recognized that it opened such claims to the kinds of specific tailoring that a court in equity would have applied.

<sup>118.</sup> Brief of Petitioner, *supra* note 5, at i.

<sup>119.</sup> See US Airways, Inc. v. McCutchen, 663 F.3d 671, 678 (3d Cir. 2011), cert. granted, 133 S. Ct. 36 (U.S. June 25, 2012) (No. 11-1285) (disagreeing with those circuits that held that the equitable relief limitation in the statute has been met "so long as the suit can be properly characterized as an equitable action, without also asking whether the relief sought in the action is 'appropriate' under traditional equitable principles and doctrines").

<sup>120.</sup> Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209 (2002) (emphasis in original) (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 258 n.8 (1993)).

<sup>121.</sup> See McCutchen, 663 F.3d at 676 ("Indeed, it would be strange for Congress to have intended that relief under § 502(a)(3) be limited to traditional equitable categories, but not limited by other equitable doctrines and defenses that were traditionally available to those categories.").

<sup>122. 130</sup> S. Ct. 2549 (2010).

<sup>123.</sup> Id. at 2563 (quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 248 (1944)).

US Airways' response is unlikely to persuade the Court otherwise. Its central textual argument—that fiduciaries can seek *any* equitable relief that is suitable to enforce the "terms of the plan"<sup>124</sup>—mischaracterizes the language of the section. "Appropriate" modifies "equitable relief," but US Airways gives no life to this reality. Courts are commonly reluctant to treat statutory terms as surplusage. <sup>125</sup> US Airways' argument violates this cannon because its interpretation would remain unchanged if the term "appropriate" were stricken; a fiduciary would still only be limited to any equitable relief that enforces plan terms. Instead, the Court should hold that proper relief under § 502(a)(3) must be equitable (as already decided in *Knudson*), must enforce the terms of the plan, and must be appropriate in light of traditional equitable defenses.

But the analysis does not end there. The Third Circuit ventured to state which equitable defense should limit US Airways' recovery—namely unjust enrichment. <sup>126</sup> The Supreme Court will likely overturn this decision and hold that a court in equity would not have applied unjust enrichment to an equitable lien by agreement.

The Court has already implicitly decided that equitable liens by agreement are not subject to any and every equitable defense. For example, *Sereboff* held that a reimbursement provision essentially identical to the one here qualified as an equitable lien by agreement. <sup>127</sup> McCutchen does not dispute this conclusion, but argues that the same equitable defenses apply no matter the type of equitable device at issue. <sup>128</sup> However, McCutchen's conclusion is also foreclosed by *Sereboff*. The Court explicitly held that "the parcel of equitable defenses the Sereboffs claim[ed] accompany [actions for equitable subrogation] are beside the point" because the plaintiff in

<sup>124.</sup> See Brief of Petitioner, supra note 5, at 21 ("Appropriate'... bears a... sensible meaning: It requires that the type of 'equitable relief' the plaintiff seeks be suitable under the circumstances to enforce the plan.").

<sup>125.</sup> E.g., Duncan v. Walker, 533 U.S. 167, 174 (2001) ("We are thus 'reluctant to treat statutory terms as surplusage' in any setting." (quoting Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 698 (1995))).

<sup>126.</sup> McCutchen, 663 F.3d at 679.

<sup>127.</sup> See Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 368 (2006) ("Mid Atlantic's action to enforce the 'Acts of Third Parties' provision... is indistinguishable from an action to enforce an equitable lien established by agreement.... Mid Atlantic need not characterize its claim as a freestanding action for equitable subrogation.").

<sup>128.</sup> See Brief for Respondents, supra note 10, at 38 ("[W]hen it comes to enforcing equitable liens, the rules did not vary with the method of creation.").

that case sought to enforce an equitable lien by agreement.<sup>129</sup> Thus the Court has acknowledged that equitable liens by agreement are subject to their own distinct equitable defenses.

As US Airways describes, equity actions for enforcement of an equitable lien by agreement could only be limited by defenses of fraud in production, waiver or lapse, or prevention of fraudulent transfer.<sup>130</sup> Therefore, because unjust enrichment is not a defense applicable to equitable liens by agreement, the Court will likely overturn the Third Circuit's ruling insofar as it requires application of unjust enrichment.

### VII. CONCLUSION

McCutchen faces an uphill battle in attempting to have the Court approve an unwieldy standard for crafting relief in ERISA reimbursement cases. McCutchen might be successful in convincing the Court that this case should be treated as it would have been in equity, but that conclusion, while opening the door to equitable defenses, also limits the types of defenses that can be asserted. Unfortunately for McCutchen, the defense of unjust enrichment would not have been used to limit an equitable lien by agreement. Therefore, while the Court will likely uphold the Third Circuit's ruling that some equitable defenses do apply, it will also likely strike down the specific application of the unjust enrichment defense.

<sup>129.</sup> Sereboff, 547 U.S. at 368.

<sup>130.</sup> Brief of Petitioner, *supra* note 5, at 36.