



BENEFIT NEWS BRIEFS

3rd Circuit Holds Equitable Defenses Available Against Health Plan's Subrogation Claim

Case Headed to U.S. Supreme Court

In [U.S. Airways v. McCutchen](#), 663 F.3d 671 (3rd Cir 2011), the appealing party, James McCutchen, suffered a serious automobile accident and a benefit plan administered by US Airways paid \$66,866 for his medical expenses. McCutchen then recovered \$110,000 from third parties, with the assistance of counsel. US Airways, which had not sought to enforce its subrogation rights, demanded reimbursement of the entire \$66,866 it had paid *without allowance for McCutchen's legal costs of 40% of the recovery and expenses*, which had reduced his net recovery to less than the amount the Plan demanded. In short, the Plan recovered less than the amount it sought from the remains of McCutchen's settlement and then requested he pay the Plan the difference (about \$25,000) out of his own pocket. Litigation followed.

The District Court ruled in favor of the Plan. On appeal to the 3rd Circuit, the issue was whether McCutchen could plead a defense of "unjust enrichment" in that the Plan did not allow for any offset for his legal fees and expenses in obtaining the settlement. After litigation, the 3rd Circuit broke step with the 5th, 7th, 8th, 11th and DC Circuits and held that the term "appropriate equitable relief" pursuant to Section 502(a)(3) of the *Employee Retirement Income Security Act of 1974 ("ERISA")* also included the *equitable defenses* and principles that were "*typically available in equity.*"

Shortly before the U.S. Supreme Court decided to hear an appeal of this case, due to this split in the Circuits, the 9th Circuit followed the 3rd Circuit's lead and held similarly that such equitable defenses were available. See [CGI Technologies and Solutions, Inc. v. Rose](#), 683 F.3d 1113 (9th Cir 2012).

Depending on how the U.S. Supreme Court rules, the face of subrogation for ERISA governed health plans could be drastically changed if an "unjust enrichment" defense is allowed for an injured person's attorney's fees and expenses in obtaining a settlement subject to the health plan's subrogation provisions.

Let's take a quick look at the case highlights. The Summary Plan Description contained the following "Subrogation and Right of Reimbursement" language:

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.

US Airways claimed that this language permitted it to recoup the \$66,866 it provided for McCutchen's medical care out of the \$110,000 total that he recovered *regardless of his legal costs*, arguing that "[t]he Plan language specifically authorized reimbursement in the amount of benefits paid, out of *any recovery*."

The 3rd Circuit summed up McCutchen's argument as it "*would be unfair and inequitable to reimburse US Airways in full when he has not been fully compensated for his injuries, including pain and suffering.*" McCutchen argued that US Airways, which made no contribution to his attorney's fees and expenses, would be unjustly enriched if it were now permitted to recover from him without any allowance for those costs, in essence to reap what he has sown. The Court noted:

"Indeed, if legal costs are not taken into account, US Airways will effectively be reaching into its beneficiary's pocket, putting him in a worse position than if he had not pursued a third-party recovery at all."

In applying the traditional equitable principle of unjust enrichment, the 3rd Circuit concluded that the judgment requiring McCutchen to provide full reimbursement to US Airways constituted inappropriate and inequitable relief because the amount of the judgment exceeded the net amount of his third-party recovery, left him with less than full payment for his emergency medical bills, undermining the entire purpose of the Plan. The Court continued that it amounted to a windfall for US Airways, which did not exercise its subrogation rights or contribute to the cost of obtaining the third-party recovery. The Court noted, "*Equity abhors a windfall.*"

In vacating the District Court's final judgment, the Court did not decide on appeal what *would* constitute appropriate equitable relief for US Airways because "*equity calls for full factual findings rather than our speculation.*" On remand, the District Court was instructed to "engage in any additional fact-finding it finds necessary," including the distribution of the third-party recovery between McCutchen and his attorneys, the nature of their agreement, the work performed, and the allocation of costs and risks between the parties to this suit to inform the Court's exercise of its discretion to fashion "appropriate equitable relief."

One can follow the case and read the S. Ct. briefing at:

<http://www.scotusblog.com/case-files/u-s-airways-inc-v-mccutchen/>.

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