U.S. Airways, Inc. v. McCutchen: A Win for "Unambiguous" Plan Terms, but What About the Rest of Them?

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Introduction

On April 16, 2013, the Supreme Court affirmed the importance of plan terms under the Employee Retirement Income Security Act ("ERISA") – an issue that many benefits practitioners consider obvious and well settled, but one with which the courts have struggled over the last several years. Specifically, in *U.S. Airways Inc. v. McCutchen*,[1] the Court considered – and rejected – the notion that equitable principles could override "clear" plan terms, but it went on to hold that courts could use equitable principles to construe absent or ambiguous plan provisions.

Although the facts in *McCutchen* involve a plan's right to reimbursement from a participant who recovers for injuries from a third-party tortfeasor, the implications of the decision are much broader. This case provides many reasons for plan sponsors to feel relief, or at least some sense of predictability. The Supreme Court's decision a few terms ago in *Cigna Corp. v. Amara*[2] created uncertainty as to whether a plan's terms remained sacrosanct, and a unanimous Court in *McCutchen* reassured plan sponsors that the terms of a plan – at least where those terms are unambiguous (more on that later) – remain the cornerstone of a participant's rights and obligations under an ERISA plan. In other words, "equity" cannot override the plain terms of the plan.

McCutchen also reaffirmed the importance of drafting plan terms – every word, phrase, comma, and period – carefully. Plan sponsors must be mindful of the terms they include in plans, as well as those that they omit. And when plan administrators interpret those terms, or are involved in litigation where the meanings of those terms are disputed, they should exercise their right (and their discretion, assuming the plan terms vest them with discretion) to interpret them because, otherwise, courts may apply common law or "equitable" principles to fill in those ambiguities.

Summary of the Case

The Facts

As an employee of U.S. Airways, James McCutchen participated in the company's self-funded health plan. The plan terms required U.S. Airways to pay any medical expenses McCutchen incurred as a result of a third-party's actions, and it entitled U.S. Airways to reimbursement if McCutchen recovered the money for those medical expenses from a third-party.

In January 2007, a driver lost control of her car, crossed the median of the road, and struck McCutchen's car. McCutchen was seriously injured, while another person died and two others suffered severe brain injuries. Following the accident, U.S. Airways' plan paid $66,866 for McCutchen's medical expenses resulting from the crash. Meanwhile, McCutchen sued the driver of the other vehicle to recover damages for the injuries he sustained, which he estimated exceeded $1 million. McCutchen agreed to pay his attorneys a 40% contingency fee. Because the driver of the other vehicle had limited insurance, McCutchen settled for $110,000. After paying his attorneys $44,000, McCutchen was left with a recovery of $66,000.

The terms of McCutchen's health plan required participants to reimburse U.S. Airways for medical expenses paid on their behalf from any amounts recovered from third-parties.[3]

The Lawsuit

After learning of McCutchen's recovery, U.S. Airways requested reimbursement of the $66,866 it had paid on his behalf. McCutchen refused to pay the money, so U.S. Airways filed suit under ERISA Section 502(a)(3),[4] seeking "appropriate equitable relief" to enforce the terms of the plan.

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[1] 133 S. Ct. 1537 (2013).

[2] 131 S. Ct. 1866 (2011).

[3] Actually, in the district court and the Third Circuit, the parties based their arguments on language in the Summary Plan Description ("SPD"), and the plan itself was not offered into evidence. A copy of the Plan produced was only before the Supreme Court. The Supreme Court applied the terms of the SPD as if they were the plan terms because the parties in the litigation had "treated the language in the [SPD] as though it came from the plan."

[4] 29 U.S.C. § 1132(a)(3).

In opposing U.S. Airways' claim, McCutchen first argued that he had recovered only a small portion of his total damages sought, and absent over-recovery on his part, U.S. Airways did not have a right to relief. Second, he asserted that any reimbursement to U.S. Airways should be reduced to cover a proportionate share of the attorneys' fees McCutchen had expended to obtain the $110,000. Thus, he argued that any money that U.S. Airways recovered from him should be reduced by 40% under a common-fund theory.

Rejecting these arguments, the district court granted summary judgment to U.S. Airways, holding that the plan clearly and unambiguously provided for reimbursement of all medical expenses paid. McCutchen appealed, and the Third Circuit vacated the lower court's order reasoning that certain equitable doctrines and defenses applied to limit U.S. Airways' right to the relief it sought. Specifically, the Third Circuit determined that reimbursement was inappropriate and inequitable because such recovery would exhaust McCutchen's entire settlement and would amount to a windfall for U.S. Airways, which did not contribute to the cost of obtaining the third-party recovery. Therefore, the Third Circuit instructed the district court on remand to determine what amount would be "appropriate" under the circumstances.

The Supreme Court's Decision

The Supreme Court granted certiorari to resolve a circuit split concerning whether Section 502(a)(3) authorizes courts to use equitable doctrines to trump unambiguous plan terms. The Court answered in the negative, and instead affirmed the principle that ERISA's primary function is to "protect contractually defined benefits." Equitable defenses, the Supreme Court explained, cannot override plan contract terms because "[t]he plan, in short, is at the center of ERISA."

Further, the Court rejected the Department of Labor's argument that courts have inherent authority to apportion litigation costs in accordance with the common-fund doctrine, stating that "[t]he agreement itself becomes the measure of the parties' equities; so if a contract abrogates the common-fund doctrine, the insurer is not unjustly enriched by claiming the benefit of its bargain."

Rather than ending its opinion there, however, the majority went on to hold that: (1) the plan terms here were ambiguous as to the common fund apportionment of attorneys' fees and (2) courts could use equitable rules to aid in construing ambiguous plan provisions. Of note, these were *not* issues that the parties had briefed or that had been part of the petition for certiorari; to the contrary, everyone agreed below that the plan terms were not ambiguous and did not call for a common-fund apportionment of attorneys' fees.

In so doing, the Court first considered whether McCutchen could limit U.S. Airways' right to recovery under the double-recovery rule. That rule would allow U.S. Airways to recover only the portion of McCutchen's settlement attributable to his medical expenses. The terms of the plan, however, expressly bestowed to U.S. Airways the right to claim the entire recovery. Because these plan terms squarely contradicted the double-recovery rule, the Court held that the terms of the plan controlled.

The Court next turned to McCutchen's argument that the common-fund doctrine should apply. That rule provides that "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." As to this specific issue, the plan was silent, creating a "conceptual gap" in the terms of the plan.[5] The Court sought to fill the gap with reference to the common-fund doctrine because this common-law rule "offered the best indication of the parties' intent."[6]

Implications of *McCutchen*: Certainty Restored, But Only to a Point

The Supreme Court's decision brings certainty to an area of ERISA jurisprudence that recently has become unsettled. By emphasizing that when "the agreement governs, the agreement governs" and reaffirming its prior holdings, which declared that ERISA's statutory scheme "is built around reliance on the face of written plan documents," *McCutchen* makes clear that the Supreme Court views plan documents as the cornerstone of benefit entitlement. This should help restore some measure of predictability to the cost of providing those benefits, which is good for all – employer-sponsors, fiduciaries, and beneficiaries – because without it, employers may cease to offer employee benefits in the first place.

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[5] This would have seemed the appropriate place to defer to the plan administrator's interpretation of the plan's terms, but the Supreme Court did not, and offered no explanation for not doing so. More on that later.

[6] In a short dissent, Justice Scalia agreed with the portion of the majority's opinion that held that equity cannot override the plain terms of the contract, but asserted that the majority should not have gone on to apply the common-fund doctrine to interpret ambiguous plan terms because that argument was not preserved or included in the question presented.

While the Court's holding allows employers to feel secure in administering their plans and calculating their costs as prescribed by the terms of the plans, *McCutchen* also cautions plan sponsors to carefully consider the terms that they include in their plans – every phrase, word, comma and period. Plan documents should be given the same care and consideration as a multi-million – or multibillion dollar merger agreements because the financial consequences can be just as significant.

The obvious example is for plan subrogation provisions like the one at issue in *McCutchen*: if a plan wants to require reimbursement of third-party recovery, it must say so. Similarly, the plan must specify who will pay for the costs of obtaining such a recovery and how those costs will be shared, if at all. Such a holding provides plan sponsors with significant flexibility to specify exactly how much the plan will expend to obtain a third-party recovery, and how much it wants to encourage participants to seek third-party tort recoveries in the first place. Indeed, although the Supreme Court acknowledged that some plans may choose not to share any portion of the recovery costs, it cautioned that without cost sharing, participants will have little incentive to bring suit against third-party tortfeasors.

But What Happened to the Plan Administrator?

The Court reasoned that because U.S. Airways' reimbursement provision "does not advert to the costs of recovery, it is properly read to retain the common-fund doctrine."[7] This conclusion is problematic because it ignores the role of the administrator in interpreting plan provisions. In this case, U.S. Airways, as plan administrator, had sole responsibility for the administration of the plan and sole discretion to determine all matters relating to eligibility, coverage and benefits under the plan, including entitlement to benefits. Therefore, the Court should have looked to the administrator's interpretation and analyzed whether it was reasonable. Indeed, that is the Supreme Court's teaching from *Firestone Tire & Rubber Co. v. Bruch*,[8] *Metropolitan Life Insurance Co. v. Glenn*,[9] and *Conkright v. Frommert*.[10]

Here, U.S. Airways argued, and the district court agreed, that the plan contained unambiguous language requiring beneficiaries to fully reimburse "amounts paid" by the plan out of "any" monies recovered from a third-party without any reduction for the proportionate share of attorneys' fees. On appeal, this issue was neither raised nor briefed to the Third Circuit and, accordingly, the Third Circuit did not address it. Similarly, the parties did not raise or address this issue in their certiorari briefings. In fact, at the time the parties submitted their briefs to the Supreme Court, all parties *agreed* that the terms were unambiguous. Nonetheless, the Supreme Court found that the plan's silence created ambiguity, or a "contractual gap." To fill that gap, Supreme Court precedent – *Firestone*, *Glenn*, and *Frommert* – should have required consideration of the issue by the plan administrator and deference by the courts to the administrator's interpretation. But instead, the Court applied "ordinary principles of contract interpretation" and interpreted the plan provision on its own. The majority's opinion does not provide an explanation for this omission. The simple answer may be that this issue was not before the Court. Indeed, U.S. Airways did not offer any evidence about the proper interpretation of this plan language at any point during the proceedings (as Xerox had done with an affidavit from the administrator in *Frommert*) but instead argued (successfully in the courts below) that the plan terms were unambiguous and required no interpretation.

Regardless, going forward, plans should be mindful of their administrators' discretion to interpret plan terms and exercise that discretion – even outside the administrative claims and appeals process – where plan interpretation, or application of plan terms, is required. *Frommert* is especially instructive in this regard. There the Court held that an administrator's plan interpretation was entitled to deference, notwithstanding the fact that it was offered many years after litigation commenced and that it differed from the administrator's original interpretation. In so holding, the Court reiterated the broad standard of deference granted to plan administrators and held that this general interpretive is

[7] *McCutcheon*, 2013 U.S. LEXIS 3156, at **33. To view Supreme Court briefs related to the *McCutcheon* case, go to 2011 U.S. Briefs 1285 on Lexis.com. To view district court motions, go to 2008 U.S. Dist. Ct. Motions 126929. For pleadings, go to 2008 U.S. Dist. Ct. Pleadings 126929.

[8] 489 U.S. 101 (1989).

[9] 554 U.S. 105 (2008). To view Supreme Court briefs related to the *Metropolitan Life Ins. Co.* case, go to 2006 U.S. Briefs 923 on Lexis.com. To view oral argument transcripts, go to 2008 U.S. Trans. LEXIS 43.

[10] 559 U.S. 506 (2010). To view Supreme Court briefs related to the *Conkright* case, go to 2008 U.S. Briefs 810 on Lexis.com. To view oral argument transcripts, go to 2010 U.S. Trans. LEXIS 10.

not limited to first efforts to construe the Plan. The Court explained that this approach furthered ERISA's careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans. It also promoted the statute's interests in efficiency, predictability, and uniformity. In the face of challenges to plan terms brought in light of *McCutchen*, such broad deference (and affidavits from the administrators) can mean the difference between victory and defeat in litigation and will ensure that the plans are operated the way the plan sponsors intend.

Conclusion

The Supreme Court's decision in *McCutchen* has important implications for plan sponsors and administrators. It reaffirms the importance of plan terms while cautioning plan sponsors to draft those terms clearly. Unfortunately, *McCutchen* also highlights (because of its absence in the case) the critical role that plan administrators can play in interpreting plan provisions. Indeed, perhaps the decision in that case would have been different – and more favorable to U.S. Airways – if the U.S. Airways plan administrator had offered its interpretation of the plan's subrogation provision instead of relying on the Supreme Court to interpret that provision in the first instance.

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