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Inside This Issue

ERISA Benefit Plan Subrogation Divide Continues

By Nicole A. Diller and Abbey M. Glenn

Introduction

Many health plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA")[1] contain provisions requiring beneficiaries to reimburse plans for benefit payments should the beneficiary recover damages through a third-party action against the tortfeasor who caused the medical expenses. To recover such reimbursement, plan fiduciaries may bring suit under ERISA section 502(a)(3), which provides a cause of action for enforcement of ERISA plan terms.[2] Section 502(a)(3) authorizes actions seeking to enjoin any practice that violates plan terms or to "obtain other appropriate equitable relief."[3] Some ERISA plan provisions providing for plan reimbursement expressly disclaim the application of traditional equitable defenses that a court might otherwise consider when determining whether or what amount a plan may recover reimbursement.

In recent years, a number of circuit courts have addressed the issue of whether these plan terms control, or whether courts may apply equitable defenses

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1 29 U.S.C. § 1001 et seq.

2 *See* 29 U.S.C. § 1132(a)(3)(B)(ii) (a "civil action may be brought" by a fiduciary to "obtain other appropriate equitable relief" to enforce "the terms of the plan.").

3 *See* 29 U.S.C. § 1132(a)(3).

(Continued on page 367)

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(Continued from page 365)

despite these plan terms.[4] The Ninth Circuit is the most recent circuit to tackle this question in *CGI Technologies & Solutions, Inc. v. Rose*[5] (hereinafter, "*CGI*"), which held that courts may apply equitable defenses when determining "appropriate equitable relief" in actions brought by plan fiduciaries for subrogation.[6] The Ninth Circuit thus joined the Third Circuit in adopting the minority position in direct conflict with the District of Columbia, Fifth, Seventh, Eighth and Eleventh Circuits. *CGI* is a notable development because it gives California courts considerable discretion when adjudicating actions brought pursuant to section 502(a)(3). It is also a timely decision in that the United States Supreme Court recently granted *certiorari* on this very issue.[7]

This article provides an overview of the *CGI* decision, the issues before the Supreme Court, and the potential implications of the decision.

The *CGI* Ruling

Rhonda Rose was an employee of CGI and a participant in its employee welfare benefits plan.[8] When Rose was seriously injured in a car accident, the CGI plan paid $32,000 of her medical expenses resulting from her treatment.[9] Subsequently, Rose sued the driver who caused the accident and recovered $376,906 from the driver and her car insurance provider.[10] This recovery represented only 21 percent of her total damages.[11] CGI sought reimbursement of the full $32,000 it paid in medical expenses pursuant to a plan provision providing CGI the right to full reimbursement regardless of whether the beneficiary is made whole by the third-party recovery.[12] Rose refused to reimburse the plan, and CGI brought suit under ERISA section 502(a)(3) for a constructive trust and/or equitable lien.[13] The district court granted summary judgment in favor of CGI, enforcing the plan language and concluding that the plan was entitled to full reimbursement of the medical expenses.[14]

Rose appealed.[15] The issue before the Ninth Circuit was whether a district court must consider equitable defenses in determining "appropriate equitable relief."[16] In other words, "whether, in granting 'appropriate equitable relief,' the district court, in its balancing of the equities, should take into account traditional equitable defenses that may limit [a fiduciary's] recovery to less than full reimbursement despite [p]lan terms, or instead give primacy to basic contract interpretation to entitle [the fiduciary] to full reimbursement and exempt [the fiduciary] from responsibility for attorneys' fees."[17]

Rose argued that "appropriate equitable relief" must encompass traditional equitable principles like the make-whole doctrine and reasonably limit CGI's recovery to less than full reimbursement because Rose was not fully compensated for her damages.[18] The make-whole doctrine " 'is a general equitable principle

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4 *See* U.S. Airways, Inc. v. McCutchen, 663 F.3d 671 (3d Cir. 2011); Zurich Am. Ins. Co. v. O'Hara, 604 F.3d 1232 (11th Cir. 2010); Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Shank, 500 F.3d 834 (8th Cir. 2007); Moore v. CapitalCare, Inc., 461 F.3d 1 (D.C. Cir. 2006); Admin. Comm. of Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan v. Varco, 338 F.3d 680 (7th Cir. 2003); Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough, 354 F.3d 348 (5th Cir. 2003).

5 No. 11-35127, 2012 U.S. App. LEXIS 12556 (9th Cir. June 20, 2012).

6 *CGI*, 2012 U.S. App. LEXIS 12556, at *24.

7 *See* U.S. Airways, Inc. v. McCutchen, No. 11-1285, 2012 U.S. LEXIS 4727 (June 25, 2012).

8 *CGI*, 2012 U.S. App. LEXIS 12556, at *2.

9 2012 U.S. App. LEXIS 12556, at *2-3.

10 2012 U.S. App. LEXIS 12556, at *3.

11 2012 U.S. App. LEXIS 12556, at *3.

12 2012 U.S. App. LEXIS 12556, at *2-3.

13 2012 U.S. App. LEXIS 12556, at *3-4.

14 2012 U.S. App. LEXIS 12556, at *4.

15 2012 U.S. App. LEXIS 12556, at *4.

16 2012 U.S. App. LEXIS 12556, at *13.

17 2012 U.S. App. LEXIS 12556, at *13.

18 2012 U.S. App. LEXIS 12556, *12.

of insurance law that, absent an agreement to the contrary, an insurance company may not enforce a right to subrogation until the insured has been fully compensated for her injuries, that is, has been made whole.' "[19] CGI, on the other hand, contended that the court must honor the plan's express terms which mandated full reimbursement.[20]

The Ninth Circuit agreed with Rose, holding that "parties may not by contract deprive the district court of its power to act as a court in equity in a [Section] 502(a)(3) action."[21] The court reasoned that Congress intentionally used the term "appropriate" when drafting the statute, indicating a limit to the relief available under Section 502(a)(3).[22] The Ninth Circuit then explained that courts sitting in equity "considered concerns of unjust enrichment" when fashioning relief.[23] Because the make-whole and common fund doctrines, for example, were "rooted in concerns about unjust enrichment," these doctrines among others should be considered when determining whether the equitable relief sought is appropriate.[24]

The Ninth Circuit acknowledged the existing circuit split on this issue, recognizing that the Eleventh, Eighth, Seventh and Fifth Circuits disclaim the application of traditional equitable defenses when determining "appropriate equitable relief."[25] The court, however, found persuasive the Third Circuit opinion *U.S. Airways, Inc. v. McCutchen*, and agreed that a district court "may consider traditional equitable defenses notwithstanding express terms disclaiming their application."[26]

The Ninth Circuit also relied on the recent United States Supreme Court opinion *CIGNA Corporation v. Amara*,[27] stating that in *Amara*, the Supreme Court recognized the broad equitable powers of district courts and reasoned that a "district court, sitting as a court of equity in a [Section] 502(a)(3) action, need not honor the express terms of the [p]lan where traditional notions of equitable relief so require."[28] Further, the Ninth Circuit reasoned, *Amara* specifically states that plan terms are not inviolable and contract reformation is within a district court's broad equitable powers.[29] With respect to Section 502(a)(3), Congress empowered courts to consider equitable principles, and the Ninth Circuit refused to read out of the statute the "limitation that equitable relief be appropriate."[30]

In sum, the Ninth Circuit found that an ERISA plan's contract terms should be considered in assessing the scope of equitable relief, but that courts have broad discretion not to give the plan terms controlling weight.[31] The Ninth Circuit then remanded the case to the district court to determine what constituted "appropriate equitable relief" in this particular case.[32]

The *CGI* decision also furthers the existing conflict among Circuit Courts. This in turn increases the uncertainty that plan fiduciaries may rely on plan terms as drafted.

The Supreme Court Grants *Certiorari* on the Issue

The United States Supreme Court granted *certiorari* in *U.S. Airways* within a week of the *CGI* decision.[33] *U.S. Airways* presents the same issue: whether the Third Circuit correctly held that Section 502(a)(3) authorizes courts to use equitable principles to rewrite contractual plan language that gives a fiduciary the right to full reimbursement if the court determines that enforcement of those plan terms is not "appropriate" in a particular case.[34]

U.S. Airways involves facts very similar to those at issue in *CGI*. In *U.S. Airways*, James McCutchen, a participant in U.S. Airways' health benefit plan, sustained medical injuries in a car accident.[35] The

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19 2012 U.S. App. LEXIS 12556, at *17 (quoting Barnes v. Indep. Auto. Dealers Ass'n of Cal. Health & Welfare Benefit Plan, 64 F.3d 1389, 1395 (9th Cir. 1995)).

20 2012 U.S. App. LEXIS 12556, at *12.

21 2012 U.S. App. LEXIS 12556, at *28.

22 2012 U.S. App. LEXIS 12556, at *5.

23 2012 U.S. App. LEXIS 12556, at *18.

24 2012 U.S. App. LEXIS 12556, at *18.

25 2012 U.S. App. LEXIS 12556, at *20-21.

26 2012 U.S. App. LEXIS 12556, at *24.

27 131 S. Ct. 1866 (2011).

28 *CGI*, 2012 U.S. App. LEXIS 12556, at *20.

29 2012 U.S. App. LEXIS 12556, at *20.

30 2012 U.S. App. LEXIS 12556, at *25.

31 2012 U.S. App. LEXIS 12556, at *28-29.

32 2012 U.S. App. LEXIS 12556, at *29.

33 *See* U.S. Airways, Inc. v. McCutchen, No. 11-1285, 2012 U.S. LEXIS 4727 (June 25, 2012).

34 Brief for Petitioner, U.S. Airways, Inc. v. McCutchen, No. 11-1285, United States Supreme Court, at i (Apr. 25, 2012) ("Petitioner's Brief"), *available at* http://www.synergysettlements.com/files/US%20Airways%20Petition%20for%20Cert.pdf.

35 U.S. Airways, Inc. v. McCutchen, 663 F.3d 671, 673 (3d Cir. 2011).

plan paid medical expenses on his behalf.[36] McCutchen initiated litigation against the driver, but settled for only a small amount due to the driver's limited insurance coverage.[37] McCutchen recovered a relatively small amount of additional damages from underinsured motorist coverage.[38] After attorneys' fees and expenses were deducted, McCutchen's net recovery was less than the amount the plan paid for his medical expenses.[39] U.S. Airways, in its capacity as fiduciary and plan administrator, sought full reimbursement of the medical expenses pursuant to the plan's subrogation and reimbursement provision, which would have required McCutchen to pay in excess of $20,000 out of his own funds.[40] The district court ordered McCutchen to pay the entire amount.[41] The Third Circuit reversed, holding that requiring full reimbursement constituted inappropriate relief.[42]

The parties' arguments as articulated in the *certiorari* petition briefing are the same as those for and against court consideration of equitable defenses in determining appropriate equitable relief in the *CGI* decision, and reflect the far-ranging effect of this question.

Arguments in Favor of Enforcing Plan Terms As Written

U.S. Airways asserted that the Third Circuit decision was wrongly decided because courts should not be permitted to create remedies that contravene express plan terms. In support of this argument, U.S. Airways posited that the Third Circuit ruling contravenes the purpose and intent of ERISA - to encourage employers to provide benefit plans.[43] The plan administrator argued that this purpose will be frustrated if the cost of maintaining benefit plans becomes too burdensome for employers due to the inability to recover reimbursement.[44] Further, U.S. Airways contended that Congress established ERISA to ensure a "predictable set of liabilities" and designed its statutory scheme "around reliance on the face of written plan documents."[45] The plan administrator asserted that the *U.S. Airways* opinion flies in the face of that scheme by permitting courts to rewrite plan language and disavow express plan terms.[46] As a result, the administrator argues, plan fiduciaries will face unknown liabilities if plan terms are not enforced, and plan operation will become difficult because fiduciaries will be unable to anticipate how plans will be interpreted and enforced.[47] Moreover, if courts are permitted to substitute their own assessment for what relief is "appropriate," inconsistent judicial rulings are likely.[48] U.S. Airways stressed that fiduciaries need to be able to rely on predictable regulation and consistent plan interpretation; otherwise, they may not be willing to administer plans.[49]

In addition to thwarting Congressional intent and predicable regulation, more dire consequences may follow if courts are permitted to ignore plan reimbursement provisions. U.S. Airways explained that reimbursement and subrogation provisions are crucial to the financial viability of ERISA plans.[50] Specifically, if plans are prohibited from recovering full reimbursement, plan administration costs will increase. Those costs are either passed on to participants in the form of higher co-payments or reduced coverage, or they may lead some employers to terminate plans because they are too expensive to administer. U.S. Airways claimed that plan solvency benefits all plan participants because it ensures the continuation of coverage and benefits.[51] Thus, increased cost and risk could ultimately lead fiduciaries to determine that plan administration is not worth the trouble and leave increasing numbers of Americans without employer-provided health and welfare benefits.

Arguments in Favor of Permitting Courts' Consideration of Equitable Defenses

Conversely, McCutchen reframed the issue as one of fairness, stating that the issue before the Third Circuit was whether a seriously injured beneficiary who has recovered only a fraction of damages from a third-party must fully reimburse a plan for all medical

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36 663 F.3d at 673.

37 663 F.3d at 673.

38 663 F.3d at 673.

39 663 F.3d at 674.

40 663 F.3d at 674.

41 663 F.3d at 674.

42 663 F.3d at 679.

43 Petitioner's Brief, *supra* note 34, at 2-3.

44 Petitioner's Brief, *supra* note 34, at 11.

45 Petitioner's Brief, *supra* note 34, at 16-17.

46 Petitioner's Brief, *supra* note 34, at 17.

47 Petitioner's Brief, *supra* note 34, at 17.

48 Petitioner's Brief, *supra* note 34, at 20.

49 Petitioner's Brief, *supra* note 34, at 19.

50 Petitioner's Brief, *supra* note 34, at 6.

51 Petitioner's Brief, *supra* note 34, at 13.

expenses simply because plan language requires it.[52] McCutchen argued that ERISA's purpose is to protect plan participants and beneficiaries, not strictly enforce plan language at the expense of beneficiaries.[53] Unjust enrichment of the plan should be avoided, McCutchen argued, regardless of the plan language disclaiming equitable defenses.[54] McCutchen relied on *CIGNA Corporation v. Amara*,[55] arguing that the Supreme Court instructs courts to identify equitable principles governing the award of relief and prevent unjust enrichment where it might result.[56] *Amara*, McCutchen urged, "stands firmly for the principle that a court sitting in equity should not enforce a contract as written where equity demands otherwise."[57]

Further, like the Ninth Circuit in *CGI*, McCutchen highlighted Congress's careful crafting of ERISA's statutory language. Section 502(a)(3) uses the term "appropriate," which McCutchen argues signals a limit to the available equitable relief.[58]

Conclusion

It is unclear how the Supreme Court will rule on this issue. Supreme Court guidance is necessary, however, as the existing circuit court split leads to immense difficulties with respect to plan drafting, administration, and ERISA benefits litigation. Both *CGI* and *McCutchen* injected uncertainty such that plan fiduciaries can no longer be sure whether plan provisions requiring full reimbursement regardless of the amount a beneficiary recovers will be uniformly enforced. This presents a practical problem for fiduciaries of plans whose participants live (and may sue) within more than one circuit. The Supreme Court is expected to render its decision resolving this split in Fall 2012.

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52 Respondents' Brief in Opposition, U.S. Airways v. McCutchen, No. 11-1285, United States Supreme Court, at i (June 5, 2012) ("Respondent's Brief"), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/11-1285-U.S.-Airways-v.-McCuthen-BIO.pdf.

53 Respondent's Brief, *supra* note 52, at 28.

54 Respondent's Brief, *supra* note 52, at 10.

55 131 S. Ct. 1866 (2011).

56 Respondent's Brief, *supra* note 52, at 19-20.

57 Respondent's Brief, *supra* note 52, at 19-20.

58 Respondent's Brief, *supra* note 52, at 23-24.