No. 12-240

IN THE

Supreme Court of the United States

CGI TECHNOLOGIES AND SOLUTIONS, INC., IN ITS CAPACITY AS SPONSOR AND FIDUCIARY OF THE CGI TECHNOLOGIES AND SOLUTIONS, INC. WELFARE BENEFIT PLAN,

Petitioner,

v.

RHONDA ROSE AND NELSON LANGER ENGLE, PLLC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a seriously injured ERISA beneficiary who has recovered only a fraction of her damages from a third party must reimburse her ERISA plan for 100 percent of the medical expenses paid by the plan simply because the plan language so provides, or whether the scope of the plan's relief must be measured according to "appropriate" limiting principles of equity, in accordance with the language of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

RULE 29.6 DISCLOSURE STATEMENT

Respondent Nelson Langer Engle, PLLC, is a professional corporation. Nelson Langer Engle does not have any parent companies, and there is no publicly held corporation that owns 10 percent or more of its stock.

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INTRODUCTION

Respondents agree with Petitioner that this case should be held pending the decision in *U.S. Airways, Inc. v. McCutchen*, No. 11-1285, because both cases involve the same legal issue: Whether a seriously injured ERISA beneficiary who has recovered only a fraction of her damages from a third party must reimburse her ERISA plan for 100 percent of the medical expenses paid by the plan simply because the plan language so provides, or whether the scope of the plan's relief must be measured according to "appropriate" limiting principles of equity, in accordance with the language of ERISA § 502(a)(3). The court of appeals here followed the Third Circuit's holding in *McCutchen* that the traditional equitable principle of unjust enrichment applies to limit the plan's relief.

Though Respondents agree with Petitioner that the case should be held, Respondents write separately to provide the Court with a fuller statement of the facts and to explain why review granting review at this time would be premature.

STATEMENT OF THE CASE

1. In 2003, Respondent Rhonda Rose was seriously injured in a car accident when, while driving below the speed limit, her car collided with a drunk driver who had stopped perpendicularly in the road. Pet. App. 4a; Dist. Ct. Doc. 42, Michael E. Nelson Decl. 2, Nov. 30, 2010. Ms. Rose's car crashed into a ditch and both she and her son, who was a passenger in the car, required emergency medical treatment. *Id.* Though she underwent multiple surgeries, her injuries were permanently disabling, and she was ultimately fired by her employer. *See id.* at 3-4.

As a result of the accident, Ms. Rose suffered multiple categories of damages, including accident-related medical expenses of $169,652.74, future medical expenses estimated to be over $500,000, past and future loss of wages, and pain and suffering. Pet. App. 4a; Dist. Ct. Doc. 42, at 6. Of these damages, Petitioner's self-funded ERISA plan ("the Plan") paid only a small portion of the past medical expenses—$31,979.42—while the remainder was paid out-of-pocket by Ms. Rose and by other sources of insurance. *See* Pet. App. 4a; Dist. Ct. Doc. 42, at 5. All told, it is undisputed that Ms. Rose suffered over $1,750,000 in total damages. Pet. App. 4a.[1]

2. In 2006, Ms. Rose retained the law firm of Nelson Langer Engle, PLLC ("NLE"), to pursue her claims against the drunk driver and to seek recovery under her own Underinsured Motorist ("UIM") policy. Dist. Ct. Doc. 45, Michael E. Nelson Decl. 2, Nov. 30, 2010. NLE worked for several years on Ms. Rose's behalf to convince both the drunk driver's and Ms. Rose's own insurer to agree to policy limits settlements. That work included the preparation of exhaustive profiles and proof of Ms. Rose's injuries and damages. *See, e.g.*, Dist. Ct. Doc. 42 & Exhs. 1-6. Ultimately, this effort proved successful, and on February 4, 2008, the drunk driver's insurer agreed to a policy limits settlement of $300,000, of which $23,093.16 went to Mr. Rose's son. Dist. Ct. Doc. 45, at 2. One and a half years after that, on September

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[1] The amount of medical expenses paid by Petitioner has slightly increased over the course of these proceedings. At the time the complaint was filed, that amount was $30,581.09, but is now $31,979.42. *See* Pet. 3; Dist. Ct. Doc. 4, Am. Compl. 4, Mar. 4, 2010.

15, 2009, NLE settled Ms. Rose's UIM claim for the policy limit of $100,000, for a total gross recovery of $376,906.84. *Id.* It is undisputed that the total amount recovered amounted to, at most, 21.44 percent of Ms. Rose's total damages. Pet. App. 4a; Dist. Ct. Doc. 29, Stipulation 2, Oct. 19, 2010.

Throughout the entire three-year period that NLE worked to obtain a settlement for Ms. Rose, NLE heard nothing from the Plan about any putative reimbursement or subrogation rights: The Plan never contacted NLE, never voiced any intention to exercise its subrogation rights, and never sought to intervene in the underlying settlement proceedings. Instead, less than one month *after* NLE finally settled Ms. Rose's UIM claim—in October 2009—a company called Ingenix sent a fax to NLE indicating that it was acting on behalf of the Plan and detailing the medical expenses that the Plan had paid on Ms. Rose's behalf. Dist. Ct. Doc. 45 at 2-3; Dist. Ct. Doc. 45-2, Exh. 2 to Nelson Decl. Soon after, Ingenix demanded a first-dollar recovery for all the money paid by the Plan out of the recovery obtained by Ms. Rose and NLE. In response, NLE denied that the Plan was entitled to recover its full amount, but nevertheless attempted to negotiate with Ingenix to reach an agreeable resolution, pointing out that no other insurance provider had demanded such a right to recovery, given that Ms. Rose recovered only about one-fifth of her total damages from her two settlements. Doc. 45 at 3; Doc. 42, at 5. NLE also placed the total disputed amount ($31,979.42) in a separate, segregated trust account while disbursing the rest to Ms. Rose, less an amount for costs and fees. Pet. App. 4a.

Ingenix refused NLE's offer to negotiate a settlement of its claim against Ms. Rose. Instead, Ingenix issued a threat: either convince Ms. Rose to pay the full amount of the medical expenses paid out by the Plan or prepare to be sued in two days. Dist. Ct. Doc. 45-4, Exh. 4 to Nelson Decl. Because NLE believed that equity limited the amount of reimbursement available to the Plan, it did not advise Ms. Rose to pay the full amount. Dist. Ct. Doc. 45, at 4-5. She did not, and Petitioner made good on the threat to sue, naming both Ms. Rose and NLE as party-defendants in this case. Dist. Ct. Doc. 1, Compl., Feb. 18, 2010.

3. Petitioner filed suit against Ms. Rose and NLE on February 18, 2010, seeking "equitable relief under ERISA § 502(a)(3)." Dist. Ct. Doc. 4, at 5; Dist. Ct. Doc. 1. The complaint alleged that CGI was entitled to either a constructive trust or equitable lien of the full $31,979.42 because the summary plan description provided that CGI had a first priority lien over any third-party recoveries regardless of whether the beneficiary was fully compensated for her injuries and expressly prohibited any reductions for attorney's fees and costs. Dist. Ct. Doc. 4, at 2-6.[2]

NLE sought dismissal of the claim specifically against it on the ground that CGI lacked any basis

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[2] The summary plan description ("SPD") of the CGI Health Plan, on which Petitioner relies, provides that the Plan has "the right to be reimbursed" for services and benefits provided to the beneficiary out of injury-related compensation obtained from a third party, including other insurers and the party who caused the injury. Pet. App. 49a-50a. The SPD further provides that the Plan has the first priority over any other claims on the recovered money, and that attorney's fees and costs may not be deducted from the Plan's reimbursement. *Id.* at 51a-52a.

for suing Ms. Rose's attorneys, who were undisputedly obeying the terms of the Plan by holding the disputed amount in trust. Dist. Ct. Doc. 30, Order Denying Def. Nelson Langer Engle PLLC's Mot. to Dismiss 8, Oct. 21, 2010. The court denied NLE's motion on the ground that the disputed fund was in NLE's possession. *Id.* at 5-7.

While the motion to dismiss was still pending, the parties agreed to stipulate that Ms. Rose's total damages were $1,757,943.08. Dist. Ct. Doc. 29, at 2. That number was reached by approximating the value of all Ms. Rose's injuries: $169,652.74 in past medical expenses, some of which were paid by the Plan, some by other insurers, and some by Ms. Rose herself; over $500,000 in future medical expenses; $199,000 in loss of household services; $23,683.59 in past lost wages; $395,000 in future lost wages; and $450,000 for pain and suffering and permanent disability. Dist. Ct. Doc 42, at 6. CGI specifically agreed that, because Ms. Rose only recovered $376,906.84 (which was the maximum amount she could have recovered under the policies), she did not recover full compensation for her numerous types of injuries. Dist. Ct. Doc. 29, at 1-2. Rather, CGI stipulated that Ms. Rose had only recovered 21.44 percent of her total damages ($376,906.84 is 21.44 percent of $1,757,943.08). *Id.*; Pet. App. 4a.

Nevertheless, on summary judgment, the district court awarded CGI 100 percent reimbursement, minus a proportionate amount of fees and costs. *Id.* at 34a-35a. Relying on this Court's decision in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), the district court reasoned that CGI had a valid claim under § 502(a)(3) because CGI identified a distinct fund—what Ms. Rose had recovered—and

a particular share to which it is entitled—the value of the medical expenses it had paid out. Pet. App. 33a. Further, the Plan terms clearly provided that CGI was entitled to full reimbursement. *Id.* at 34a.

As to the attorney's fees and costs, the court reasoned that it could not enforce an equitable lien against a law firm not a party to the original agreement. *Id.* at 31a-32a. The court dismissed NLE and awarded CGI $31,979.42, minus a proportionate share of fees and costs. *Id.* at 34a-35a. Both Ms. Rose and CGI appealed.

4. The court of appeals affirmed the dismissal of the suit against NLE and vacated the district court's award to CGI, remanding the case for the district court to apply the unjust enrichment principles of double recovery and common fund to determine the amount of CGI's reimbursement. *Id.* at 24a-25a.

In affirming the dismissal of NLE, the Ninth Circuit held that, unlike the situation in *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000), where a nonsignatory broker who had engaged in questionable conduct was held to be a proper party to suit under § 502(a)(3), the suit against NLE was improper because the law firm had committed no wrongdoing. Pet. App. 7a-8a. The lower court observed that NLE "has not asserted a right to the specific funds, nor appropriated the funds in any lawful way." *Id.* at 9a. To the contrary, "NLE placed the disputed fund in trust pending the outcome of CGI's litigation," where it remained in the constructive possession and control of *Ms. Rose*. *Id.* The lower court held that, because NLE "merely honored Rose's request that it hold the entire disputed amount in trust subject to the resolution of CGI's

claim for reimbursement," the law firm's conduct was reasonable and thus it was not properly subject to suit under § 502(a)(3). *Id.*

In vacating the district court's 100 percent reimbursement to CGI, the lower court held that, because § 502(a)(3) limits ERISA fiduciaries to seeking "appropriate equitable relief," CGI's reimbursement claim was subject to reduction under the equitable principle of unjust enrichment. *Id.* at 22a. In so holding, the Ninth Circuit began by noting that there was no dispute that CGI was seeking equitable relief—that was the only avenue open to it after this Court's decision in *Sereboff*, 547 U.S. 356. Pet. App. 11a-12a. The Ninth Circuit held, however, that the mere fact that the claim was equitable did not end things. Instead, looking to this Court's cases—in particular *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002)—the court explained that the statute's reference to "appropriate equitable relief" "places an 'unmistakable limitation' on the availability of equitable relief": A party is only entitled to that relief which would have traditionally been available to it had it brought its claim *at equity*. Pet. App. 13a, 15a. The Ninth Circuit went on to explain that, because CGI's claim arose in the insurance subrogation and reimbursement context, the traditional equitable principles that apply are the unjust enrichment doctrines of double recovery and common fund. *Id.* at 14a.

In rejecting CGI's argument that the terms of the plan should categorically govern its claim, the court of appeals expressly agreed with the Third Circuit's decision in *McCutchen*, 663 F.3d 671 (3d Cir. 2011), explaining that a court may not "read out of the statute the limitation that equitable relief be appro-

priate." Pet. App. 19a. In the lower court's view, "CGI would have us decide that the parties may, by contract, limit the district court's ability, in its capacity as a court of equity under § 502(a)(3), to fashion '*appropriate* equitable relief' along these lines." *Id.* at 20a (emphasis in opinion). If Congress had meant to make such an "abrupt departure from traditional equity practice," the lower court observed, it would have said so. *Id.* at 21a (quoting *Hecht v. Bowles*, 321 U.S. 321, 330 (1944)). Thus, the court concluded, the measure of CGI's relief is subject to double recovery and common fund limitations, the principles of equity that traditionally apply in the insurance reimbursement context. *Id.* at 14a, 22a.

This petition followed. In it, CGI only challenges the lower court's ruling as to the measure of CGI's reimbursement claim. Pet. i. CGI has not sought review of the lower court's ruling that the suit against NLE was improper; thus, that argument is waived. *See* Sup. Ct. R. 14.1(a) (The Court will not consider questions not presented by the petition.). *See also Yee v. City of Escondido*, 503 U.S. 519, 535-36 (1992); E. Gressman, *et al.*, Supreme Court Practice §§ 6.25, 6.27, at 452, 456-59, 471-72 (9th ed. 2007).

REASONS

I. The Petition Should Be Held Pending a Ruling in *McCutchen*.

Respondents agree with Petitioner that this petition should be held pending the outcome of the ruling in *U.S. Airways, Inc. v. McCutchen*, No. 11-1285, which will be heard by this Court on November 27, 2012. The legal issue here is the same as in *McCutchen*: Whether a seriously injured ERISA beneficiary who has recovered only a fraction of her

damages from a third party must reimburse her ERISA plan for 100 percent of the medical expenses paid by the plan simply because the plan language so provides, or whether the scope of the plan's relief must be measured according to "appropriate" limiting principles of equity, in accordance with the language of ERISA § 502(a)(3). Because this Court's decision in *McCutchen* will likely govern the outcome in this case, *certiorari* should not be granted, if at all, until *McCutchen* is resolved.

This case and *McCutchen* involve similar facts and resulted in similar rulings by the courts of appeal. In both cases, the beneficiary of a self-funded ERISA plan was seriously injured in a car accident and recovered only a small fraction of his or her total damages from the insurance policy of the driver who caused the car accident and his or her own UIM policy. Pet. App. 4a, 18a. In both cases, the ERISA plans declined to participate in any capacity in the underlying settlement proceedings, instead opting to wait in the wings until the beneficiary and his or her lawyer obtained a recovery. Only then did the plans, both here and in *McCutchen*, swoop in and demand full reimbursement out of the limited recovery, despite the fact that each plan had the right to seek reimbursement directly against the tortfeasor. And, in both cases, when confronted with refusals on the part of the beneficiaries and their lawyers to roll over and permit such an inequitable result, the ERISA plans then sued both the beneficiaries and their law firms under § 502(a)(3), seeking full reimbursement of the medical expenses paid out on the beneficiaries' behalf. *Id.*

The primary legal question in both cases is also the same. Both here and in *McCutchen*, the Petition-

ers are arguing that the terms of the plan—which provided for unlimited reimbursement—should be enforced as written, despite the fact that § 502(a)(3) limits an award to "appropriate equitable relief." *Id.* at 10a-11a; *McCutchen*, 663 F.3d at 677. And, in both cases, the beneficiary's position is that the Plan's recovery is limited by the traditional equitable principles that a court of equity would have applied in the days of the divided bench to this specific type of claim, arising as it does out of a subrogation clause in an insurance policy. Pet. App. 10a, 18a.

The courts of appeals' holdings in this case and in *McCutchen* on this question are also parallel. In fact, the lower court here explicitly agreed with, and relied on, the Third Circuit's holding in *McCutchen* that "appropriate equitable relief" in § 502(a)(3) means that the relief available to plans bringing § 502(a)(3) reimbursement claims is limited by traditional equitable principles of unjust enrichment, specifically the double recovery rule and the common fund rule. *Id.* at 14a, 19a.

For all these reasons, this case presents the same legal issue as *McCutchen*—and Petitioner does not contend otherwise. If *McCutchen* is affirmed, this petition should be denied because the Ninth Circuit's decision here will have been correct. If *McCutchen* is reversed, this case should be granted, vacated, and remanded in light of *McCutchen*. As Petitioner concedes, granting the petition prior to a ruling in *McCutchen* would be premature.

II. Petitioner's Statutory and Policy Arguments in Support of Review Lack Merit.

Petitioner's statutory and policy arguments in support of review—that the decision below was

wrong on the merits and that imposing any limitations on ERISA reimbursement claims would force ERISA plans to raise premiums and/or reduce coverage—lack merit. Because the parties to this proceeding agree that this petition should be held until *McCutchen* is decided, it is not necessary to address these arguments in detail. But in brief:

1. The crux of the court of appeals' ruling was that an ERISA reimbursement claim must be measured according to those principles of equity that would typically have applied to the claim in the days of the divided bench. *Id.* at 22a. As explained in the Respondents' brief in *McCutchen*, this conclusion is well grounded in the language of § 502(a)(3), which limits ERISA fiduciaries to seeking "appropriate equitable relief" from plan beneficiaries. 29 U.S.C. § 1132(a)(3); Br. of Respondents, at 44-47, *U.S. Airways, Inc. v. McCutchen*, No. 11-1285. This Court has interpreted this language to mean that ERISA plans are limited to seeking relief that was "*typically* available" in equity. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (emphasis in original); *see Sereboff*, 547 U.S. at 368 & n.2. In pre-merger days, equity courts measured claims exactly like Petitioner's—that is, claims by an insurer that it should be reimbursed by an insured who has recovered proceeds from a third party—by applying the principle of unjust enrichment. Br. of Respondents, at 13-32, *McCutchen*. This is exactly what the Ninth Circuit held in this case, and the lower court was right.

2. Petitioner's argument that the court of appeals' approach would wreak havoc on the health care system by increasing plan costs and premiums is equally baseless. *See* Pet. 8-9. First, CGI has presented no evidence—none—to support this claim. The same

was true in *McCutchen*. There, both the ERISA Plan and its numerous *amici* (most of whom are ERISA plans) made the same sort of apocalyptic predictions that CGI is making in this case. *See* Br. of Respondents, at 48, *McCutchen* (describing arguments). Yet there, as here, not one plan offered any actual evidence on this point, despite the fact that they are the ones who possess all the relevant evidence. This is reason alone to reject CGI's gloomy predictions.

Petitioner's sky-is-falling rhetoric is also belied by the limited evidence that *is* available on this point. As explained by the Respondents in *McCutchen*, all available evidence indicates that ERISA reimbursement recoveries—which are miniscule relative to total payouts by ERISA plans—have *de minimus*, if any, impact on rate setting or premiums. *Id.* at 49-51. Nor is there any evidence that, absent a complete and unfettered right to full reimbursement, ERISA plans would either reduce coverage or eliminate it entirely. *Id.* at 53. To the contrary, in every other comparable setting where reimbursement recoveries are limited, either by operation of state or federal law, insurers have continued to thrive. *Id.* at 51-52.

Equally baseless is Petitioner's hyperbolic claim that the lower court's approach would result in an explosion of "mini-trials," in which district courts would be forced to hear all sorts of evidence and then pluck from a grab-bag of equitable principles to reach whatever result they deem appropriate in any given case. *See* Pet. 9. The reality is that most ERISA reimbursement claims settle. Br. of Respondents, at 53, *McCutchen* (citing *McCutchen amicus* briefs). And even in those cases that do not settle, it is commonplace for the parties to reach an agreement as to the proper allocation of damage elements. In this

case, for example, the parties had no difficulty stipulating to the total damages incurred by Ms. Rose, agreeing that she only recovered 21.44 percent of her total damages. Dist. Ct. Doc. 29, at 2. In light of this stipulation, there will be no need for the district court to conduct a "mini-trial" on damages to determine the extent of Ms. Rose's unjust enrichment.

Nor will the district court's determination be unguided by any governing legal principles. As explained by the Ninth Circuit here, equity courts have always evaluated insurance-based subrogation and reimbursement claims according to two concrete rules that arise from the overarching principle of unjust enrichment: the double recovery rule and the common fund rule. Pet. App. 14a; *McCutchen*, 663 F.3d at 676-77 (explaining that courts should follow the standard treatises on which equitable principles apply). From pre-merger days to the present, courts have had no difficulty applying these principles to claims just like CGI's, notwithstanding its protestations to the contrary.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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