No. 10-3836

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

US AIRWAYS, INC., in its capacity as Fiduciary and Plan Administrator of the US Airways, Inc. Employee Benefits Plan,
Plaintiff-Appellee,

v.

JAMES E. MCCUTCHEN, and ROSEN LOUIK & PERRY, P.C.
Defendants-Appellants.

Appeal from the U.S. District Court for the Western District of Pennsylvania
No. 2:08-cv-1593

APPELLANTS' OPENING BRIEF AND APPENDIX VOLUME I OF III (PAGES A1-A18)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

This is an action under 29 U.S.C. § 1132(a)(3). The United States District Court for the Western District of Pennsylvania had federal question jurisdiction under 28 U.S.C. § 1331 and exclusive subject matter jurisdiction under 29 U.S.C. § 1132(e)(1). The district court was a proper venue for the action because it is where one of the Defendants may be found. 29 U.S.C. § 1132(e)(2).

The Court of Appeals for the Third Circuit has jurisdiction under 28 U.S.C. § 1291 because this is an appeal from a final judgment granting Plaintiff's motion for summary judgment under Federal Rule of Civil Procedure 56. The judgment was entered on September 2, 2010. Defendants filed their Notice of Appeal on September 20, 2010.

STATEMENT OF THE ISSUES

1. Whether, under Section 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(3), a seriously injured tort victim who recovered less than 15% of his damages from a third-party tortfeasor must pay 100% of a reimbursement claim made by a health insurance plan simply because the plan language so provides, or whether the insurance plan is limited to seeking "appropriate equitable relief" within the meaning of Section 502(a)(3). A14-15; A18; A28; A152-53; A168.

2. Whether the same seriously injured tort victim must also pay all the fees and costs incurred in obtaining that third-party recovery, or whether an ERISA plan that lays claim to part of that recovery must pay its fair and proportional share of the fees and costs. A15-16; A18; A28; A152-53; A167-68.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this Court previously. Appellants are aware of no other case or proceeding that is in any way related to this appeal.

STATEMENT OF THE CASE

I. Introduction

The plaintiff in this particular case, US Airways Inc. Employee Benefits Plan ("US Airways" or the "Plan"), argues that it is entitled to 100% reimbursement, without any reduction for collection costs, of all the medical expenses it paid out to its beneficiary, defendant James McCutchen, even though Mr. McCutchen paid recurring premiums for that coverage and has only been compensated for, at most, 11% of his injuries. In a nutshell, US Airways argues that it is entitled to be reimbursed for medical expenses that Mr. McCutchen did not himself recover in his third-party lawsuit, without having to pay any of the costs of recovery.

US Airways' claim for relief rest on a fundamentally flawed premise: that an ERISA plan has the "right" to enforce its subrogation/reimbursement provision as written, without regard to the extent to which a beneficiary has recovered for his injuries, and without contributing in any way to the costs of obtaining the tort recovery from which it seeks reimbursement. This premise ignores that the governing statutory provision at issue – ERISA Section 502(a)(3) – limits an insurer to seeking "appropriate equitable relief" from a plan beneficiary.[1] Under this provision, US Airways is only entitled to the relief it seeks if a court, after

[1] A fiduciary, like US Airways, may bring a civil action under Section 502(a)(3) of ERISA "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3).

balancing the governing equitable principles, concludes that it is *both* "appropriate" and "equitable" to award an insurance plan 100% reimbursement of all of its medical payments from a plan beneficiary who has only recovered a fraction of those same payments.

This is an issue of first impression in the Third Circuit. In *Sereboff v. Mid Atlantic Medical Servs., Inc.*, 547 U.S. 356 (2006), the U.S. Supreme Court held that an ERISA reimbursement action constitutes "equitable" relief within the meaning of Section 502(a)(3) because the remedy sought by the insurance plan qualified as an "equitable lien," a type of relief typically available in equity. *Id.* at 368. But *Sereboff* specifically left open the question of critical national importance this Court now must address: what is the *measure* of an ERISA plan's right to reimbursement from an injured beneficiary? *See id.* at 368 n.2 ("declin[ing] to consider" whether permitting 100% reimbursement would be "appropriate" within the meaning of Section 502(a)(3) because the issue had not been raised below). This question, put another way, is whether insurers are entitled to recover whatever relief they write into their insurance plans, or whether their rights to recovery are, as Section 502(a)(3) instructs, subject to limiting principles of equity – and if so, what those principles are and how they are to be applied in this context.

As explained below, *Sereboff* itself provides a roadmap for deciding these issues. There, the Supreme Court instructed courts that, when faced with an equitable claim for reimbursement, they must embrace traditional principles of equity when fashioning relief. Under these equitable principles – which, for equitable reimbursement claims akin to a "constructive trust" or "equitable lien,"

are governed by the principles of unjust enrichment – the appropriate measure of any award is the amount of a recovery that has "unjustly" enriched the defendant. For the type of insurer-reimbursement claim at issue here, this measure limits an insurer's reimbursement to that portion of the injured beneficiary's underlying recovery that is reasonably allocable to those medical expenses that the ERISA plan actually paid, minus a proportional share of the costs and fees accrued in recovering those expenses from a third party. In this case, because Mr. McCutchen only recovered, at most, 11% of his total damages (which include many damage elements unrelated to medical expenses), US Airways' recovery is limited to that same proportion of its medical expenses, which is, at most, $7,355.24 minus appropriate fees and costs.

II. Course of Proceedings and Disposition Below

Plaintiff/Appellee US Airways initially filed suit against James McCutchen and the law firm that represented him, Rosen Louik & Perry, P.C. ("RLP"), in the United States District Court for the Western District of Pennsylvania. A149-53. US Airways filed a motion for summary judgment on the ground that its plan entitles it to 100% reimbursement, regardless of the terms of the governing statute. Rejecting the Appellants' argument that the plain language of ERISA Section 502(a)(3) required the application of well-settled equitable principles limiting any reimbursement award to US Airways, the district court granted US Airways' motion in full and awarded US Airways 100% reimbursement of the amount it paid in medical expenses to Mr. McCuctchen. A14-18. In its final order, the district

court entered a judgment against Mr. McCutchen for $25,365.82 and against RLP in the amount of $41,500.00. A3. This appeal followed. A1.

STATEMENT OF THE FACTS

A. History of Subrogation/Reimbursement. Because this case hinges on the equitable principles governing subrogation/reimbursement, it is important to understand both the historical underpinnings of, and the time-honored equitable limitations on, these types of claims.

Although ERISA is a modern statute, the equitable doctrines of subrogation and reimbursement are as old as the law itself, with roots in Roman, Talmudic, French, and, more recently, British law. *See* Brendan S. Maher & Radha A. Pathak, *Understanding and Problematizing Contractual Tort Subrogation*, 40 Loy. U. Chi. L.J. 49, 60 (2008) (hereinafter "Maher & Pathak, *Understanding Tort Subrogation*"). At their most fundamental level, the doctrines embody a desire to ensure parity between three related parties, a tortfeasor, a victim, and an insurer, by establishing a vehicle for the insurer to recoup some money it may have paid out to the victim, either by suing the tortfeasor directly or – as in this case – seeking reimbursement from the victim. The doctrines have twin purposes: ensure that tortfeasors do not escape liability by allowing the insurer to sue directly; and avoid unjust enrichment of the victim vis-à-vis the insurer by preventing the victim from recovering twice for one injury. *Id.* at 55.[2]

[2] Historically, "subrogation" allowed one party to "stand in the shoes" of another for the purpose of recovering money that the former had paid to the latter, while "reimbursement" allowed an insurer to directly pursue repayment against an insured. *See* 1 D. Dobbs, Law of Remedies § 4.3(4) (2d ed. 1993). Today,

Although subrogation and some forms of reimbursement are ancient equitable remedies, the ability to bring a claim for reimbursement *against a personal-injury victim* is of only recent vintage. Although frequently available in property insurance cases, before the mid-20th century, courts almost universally prohibited this type of claim in the personal-injury context. Chief among the reasons why reimbursement was traditionally unavailable for personal injuries was the recognition that, for those victims suffering a bodily injury, there is no such thing as a true "double recovery," both because the injured party "gets his insurance money under a contract as a quid pro quo," *Suttles v. Ry. Mail Ass'n*, 141 N.Y.S. 1024, 1027 (N.Y. App. Div. 1913), and, more fundamentally, because personal-injury victims are never truly made whole by money damages, let alone deemed to have obtained a double recovery. As one court cogently observed, "[l]egal 'compensation' for personal injuries does not actually compensate. Not many people would sell an arm for the average or even the maximum amount that juries award for loss of an arm." *Hudson v. Lazarus*, 217 F.2d 344, 346 (D.C. Cir. 1954).

In fact, because personal-injury victims are never truly made whole by money damages, many critics of insurer-based subrogation/reimbursement have argued that the practice actually amounts to a windfall for the *insurer*, who gets to have its cake and eat it too. *See, e.g.,* Roger M. Baron, *Subrogation: A Pandora's*

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however, the two doctrines have become functionally intertwined, and, for purposes of this case, are governed by the same controlling principles. *See* 73 Am. Jur. 2d Subrogation § 6 (2007). Hereinafter, the terms are used interchangeably.

Box Awaiting Closure, 41 S.D. L. Rev. 237, 242 (1996) (concluding that the "double recovery" rationale is "flawed" and "proven to be duplicitous" because, in most cases, "the insurer who asserts that the insured will receive an unwarranted 'double recovery' is itself picking up a windfall recovery if subrogation is permitted").[3]

Nevertheless, as World War II came to a close, medical insurance had become a profitable and commonplace product, prompting insurers to begin systematically including subrogation/reimbursement clauses in their insurance agreements, and, in turn, aggressively pursuing recovery for advanced medical expenses under a subrogation or reimbursement theory. *See* Maher & Pathak, *Understanding Tort Subrogation*, 40 Loy. U. Chi. L.J. at 73 (noting that "litigation regarding these contractual subrogation clauses proliferated" after the second World War).

Courts were initially dismissive of these efforts, routinely rejecting insurers' claims for reimbursement on the basis that equitable principles limit or outright prohibit any attempt to recover from an injured insured.[4] But a key turn came when the insurers realized that, by repackaging their arguments for enforcement as based not on equitable grounds, but as rooted in "freedom of contract," they could

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[3] Additionally, courts viewed the likelihood that an injury victim would actually obtain a double recovery as marginal. *See, e.g., Frost v. Porter Leasing Corp.*, 436 N.E.2d 387, 391 (Mass. 1982) (holding that, for an injury victim, "duplicative compensation is both uncertain and unlikely").

[4] *See, e.g., Maxwell v. Allstate Ins. Cos.*, 728 P.2d 812, 815 (Nev. 1986); *Garrity v. Rural Mut. Ins. Co.*, 253 N.W.2d 512, 514-16 (Wis. 1977).

convince courts that the basis of the claim was contractual in nature, and therefore governed by rules of contract law, not equity. *See* Maher & Pathak, *Understanding Tort Subrogation*, 40 Loy. U. Chi. L.J. at 74. This shift, as recent scholarship has demonstrated, was the linchpin in the birth of these types of actions. *Id.* at 74-75.

Still, not all courts accepted this reframing, and, relevant for this case, confusion arose among federal courts about whether reimbursement actions by self-funded insurance plans were authorized under ERISA.[5] Some courts saw these claims as arising under general federal law, but not under any specific provision of ERISA. *See Ryan by Capria-Ryan v. Fed. Express Corp.*, 78 F.3d 123 (3d Cir. 1996). These courts tended to apply general rules of contract law to resolve these claims. Other courts viewed these claims as governed by Section 502(a)(3). *See, e.g., Qualchoice, Inc. v. Rowland*, 367 F.3d 638 (6th Cir. 2004). Among these courts, some held that reimbursement actions similar to US Airways' are not equitable and therefore not available under ERISA, and other courts held to the contrary.[6] Ultimately, that split led to the U.S. Supreme Court taking and

[5] For *non* self-funded insurance plans, ERISA's "savings clause" ensures that state laws apply. *See FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990). In this case, were the US Airways Plan considered not to be self-funded for purposes of ERISA, it would have no right to subrogation. *See* 75 Pa.C.S. § 1720.

[6] *Compare Qualchoice*, 367 F.3d at 638 (holding that Section 502(a)(3) did not authorize a Plan's action for reimbursement) *with Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot and Wansbrough*, 354 F.3d 348 (5th Cir. 2003) (finding that Section 502(a)(3) did authorize recovery).

deciding *Sereboff v. Mid Atlantic Medical Servs., Inc.* *See* 547 U.S. 356, 361 (2006) (granting certiorari "to resolve the disagreement"). But, although *Sereboff* definitively held that an ERISA Plan's action for reimbursement is equitable and therefore authorized by and properly governed under ERISA Section 502(a)(3), it did not reach the question of whether Section 502(a)(3)'s reference to "*appropriate*" equitable relief places limitations on the actual amount to which a plaintiff would be entitled for that reimbursement remedy. Rather, because that question has not been raised below, the Court deemed it waived and expressly reserved it for another day. *See Sereboff*, 547 U.S. at 368 n.2.

This undecided question has enormous implications. Despite the fact that scholars and commentators (not to mention a majority of states) have, in near universal terms, criticized the practice of insurance subrogation/reimbursement as both inequitable and producing perverse consequences for settlement and tort law, the industry is now a $1 billion a year profit center for ERISA insurance plans. *See* Maher & Pathak, *Understanding Tort Subrogation* 40 Loy. U. Chi. L.J. at 77 n.133, 82-90. And, because a majority of Americans with private health insurance receive it through an ERISA plan, over 177 million Americans find themselves the potential defendant in a federal lawsuit like this one. *See id.* at 77 n.133. In some cases, victims have even been rendered unable to care for themselves and their families because the ERISA plan's reimbursement action stripped them of any means of support. *Id.*; *see also* Vanessa Fuhrmans, *Accident Victims Face Grab for Legal Winnings*, Wall St. J., Nov. 20, 2007, at A1 (detailing the plight of

several injured beneficiaries suffering this consequence as a result of their insurance plans' pursuit of subrogation).

James McCutchen's Accident and Injuries. This case provides an object lesson in how the subrogation industry works in practice. On January 24, 2007, Mr. McCutchen, an airline mechanic for US Airways, was seriously injured in a three-vehicle accident when an oncoming vehicle, driven by a teenager, Michelle Battisti, left the roadway, crossed the median, and struck Mr. McCutchen's vehicle. A228. After this initial collision, Mr. McCutchen's vehicle was then struck again by another vehicle that was traveling behind him. A228. In the aftermath of the accident, one passenger in Ms. Battisti's vehicle was killed and two others suffered traumatic brain injuries. A228.

Mr. McCutchen's injuries from the crash were significant. The crash required him to undergo multiple emergency surgeries. A228. He also suffered a severe concussion. A228. Following discharge from the hospital, Mr. McCutchen underwent extensive physical therapy and was not able to return to work until early May of 2007. A228. Pain and limitation of motion required Mr. McCutchen, in October of 2007, to undergo a total right-hip replacement, again requiring him to miss months of work. A229. In spite of the fact that Mr. McCutchen experiences daily pain, he has tried to return to work. A229. The Plan paid medical expenses for Mr. McCutchen in the amount of $66,865.82. A26; A189.

After the accident, Mr. McCutchen and his wife retained a law firm, co-appellant RLP, to represent them in a claim against Ms. Battisti, the third-party tortfeasor. A172. With the help of the RLP firm, the McCutchens also made a

claim for underinsurance coverage from their own automobile policy, as the tortfeasor had only $100,000 in liability coverage to compensate all four individuals injured in the accident. A173; A196-97.

Uncontroverted evidence established that Mr. McCutchen's total damages from the accident were between $1 million and $1.75 million. A228. In addition to past medical expenses of $66,865.82, Mr. McCutchen suffered considerable damages for past lost wages, future lost wages and loss of earning capacity, and non-economic damages for pain and suffering, embarrassment and humiliation, loss of enjoyment of life, and disfigurement. A228-29. In addition, Mrs. McCutchen suffered damages for loss of consortium. A229.

The McCutchens first settled their third party claim against the tortfeasor for $10,000 and then settled their underinsurance claim for policy limits of $100,000. A196-97. The total amount that the McCutchens recovered was $110,000, which compensated them for, at most, 11% of their total damages. A14; A196-97.

Around the time of these settlements, RLP was contacted by one of the largest third-party subrogation recovery companies in the country, Ingenix Subrogation Services. A196. This company informed RLP that it had been hired to pursue a subrogation/reimbursement claim against Mr. McCutchen on behalf of his employer, US Airways. A196. It requested all the information concerning the settlements Mr. McCutchen had entered into and asserted a lien on the entire amount of medical expenses paid by the US Airways' Plan. A198; A200.

Because Mr. McCutchen's recovery was such a small fraction of his total damages, RLP asked Ingenix to waive its asserted lien. A208. Ingenix refused,

and demanded that it be reimbursed for 100% of the medical expenses despite the fact that Mr. McCutchen had recovered only a fraction of his total damages. A196. RLP informed Ingenix that it would escrow $41,500 in its trust account, A218-19, which represented the asserted amount of the lien minus collection costs until the dispute was resolved.

US Airways then sued both Mr. McCutchen and RLP in federal district court in the Western District of Pennsylvania, seeking a "constructive trust or equitable lien" over all of the money it had paid in medical expenses to Mr. McCutchen. *See* A149.

The District Court's Decision. The district court granted US Airways' request for 100% reimbursement on the ground that the "established precedent of the Third Circuit" requires that courts, when faced with a claim for reimbursement by an ERISA plan, apply rules of contract law in determining the amount of any claim for reimbursement. A14-15. In reaching this conclusion, the district court followed a two-step approach. First, the district court determined whether US Airways' Plan established a cognizable claim for equitable reimbursement. Citing *Bill Gray Enters. v. Gourley*, 248 F.3d 206 (3d Cir. 2001) and *Sereboff*, the district court concluded that, based on the language in the plan, US Airways was "entitled to reimbursement from the monies [Mr.] McCutchen received in settlement of his tort claims." A13.

Having concluded that US Airways' plan language established a proper claim to reimbursement, the district court turned its attention to the scope of relief to which US Airways was entitled under its reimbursement claim. *See* A14. Mr.

McCutchen and his law firm argued that, under Section 502(a)(3), any award for equitable reimbursement was governed by the application of well-settled equitable principles, which limited US Airways to recovering, at most, that portion of the underlying settlement that corresponds with those medical expenses paid by US Airways minus the proportionate cost of collection (attorney's fees and costs). Defs. Brief in Opp. to Summary Judgment, at 12-18 (Doc. 33). Mr. McCutchen and RLP further argued that, based on the specific facts of this case, given how seriously Mr. McCutchen had been injured and how small his recovery actually was (11% of his total damages), that the court should exercise its discretion to apply the "make-whole" rule that is followed by the majority of states in the non-ERISA context, pursuant to which an insurer is not entitled to any reimbursement unless the beneficiary has been fully compensated for his damages. *Id.* at 8-10.

The court rejected all of these arguments, holding that, under "established precedent of the Third Circuit," rules of contract law governed the measure of the award. A14-15. Specifically, the district court found that three pre-*Sereboff* cases from this Circuit – none of which involved reimbursement claims under Section 502(a)(3) and none of which construed the language of the governing statute – established that the plan language alone governs the measure of reimbursement under ERISA. *See* A15 (citing *Bill Gray* (decided in 2001), *Bollman Hat Co. v. Root*, 112 F.3d 113 (3d Cir. 1997), and *Ryan by Capria-Ryan v. Fed. Express Corp.*, 78 F.3d 123 (3d Cir. 1996)). According to the district court, where the plan

language is unambiguous, it must be enforced as written, notwithstanding the limiting language of Section 502(a)(3). *See* A16.[7]

As a result, the district court concluded that, because "[t]he US Airways Plan is unambiguous and requires reimbursement of any payments made by the Plan to the participant and clearly provides for subrogation to all of [Mr.] McCutchen's rights of recovery," US Airways "is entitled to full reimbursement." A16. In a single footnoted sentence, it refused to measure the amount of US Airways' reimbursement award based upon the "portion of the amount recovered to the alleged value of [Mr.] McCutchen's personal injury claim," finding this approach "without merit" without providing any explanation for this conclusion. A14. It also rejected any reduction for collection costs. A15-16.

The district court ultimately ordered appellants to pay 100% of US Airways' reimbursement claim, an amount more than half the total amount recovered by Mr.

[7] The lower court focused much of its attention on rejecting Mr. McCutchen's argument that it should apply the "make-whole" rule that numerous states have adopted in the insurance context. A14-15; *see* Kristin L. Huffaker, Note, *Where the Windfall Falls Short: "Appropriate Equitable Relief" After Sereboff v. Mid Atlantic Medical Services, Inc.*, 61 Okla. L. Rev. 233, 235-36 (2008). That rule, which bars reimbursement except in cases where the insured has recovered for all her damages (*i.e.*, has been "made whole"), is fully consistent with Section 502(a)(3)'s reference to "appropriate equitable relief" and thus could be applied as a limiting rule of equity in appropriate cases, such as where the beneficiary would be rendered destitute by 100% reimbursement. *See Werner v. Latham*, 752 A.2d 832, 836 (N.J. App. Div. 2000). Nevertheless, on this appeal Mr. McCutchen merely asks the Court to limit US Airways to recovering the proportional share of the recovery that is reasonably allocable to the medical expenses that it paid and Mr. McCutchen recovered, less an appropriate reduction for costs and fees. This approach has been embraced by the U.S. Supreme Court in a related contexts, and has previously been applied by many courts of equity in the insurance context. *See infra* at pp.29-32. Unlike the make-whole rule, this proportionality approach would allow US Airways to recover its fair share of Mr. McCutchen's recovery.

McCutchen. A5. Because only a portion of that amount was in escrow, the district court ordered the balance to be paid directly by Mr. McCutchen. A3.

SUMMARY OF ARGUMENT

In reflexively enforcing US Airways' employee benefit plan as written, the district court erected a rule that squarely contradicts both the plain language of Section 502(a)(3), which commands courts to apply equitable principles in fashioning relief under the statute, and the purposes and policies of ERISA, which, at their most basic, seek to protect the interests of participants and beneficiaries of employee benefit plans.

ERISA Section 502(a)(3) clearly and unambiguously limits self-funded insurance plans to seeking "appropriate equitable relief" from plan beneficiaries. 29 U.S.C. § 1132(a)(3). Although the U.S. Supreme Court has not squarely decided the extent to which this language limits an insurance plan's reimbursement rights in cases like this one, the Court's recent ERISA cases do provide a blueprint for deciding this question.

Thus, in *Sereboff* and in prior cases, the U.S. Supreme Court has instructed that, when construing and applying Section 502(a)(3), a court should apply principles of equity that existed in the days of the "divided bench." *Sereboff*, 547 U.S. at 363. In so doing, the Court has further instructed, the lower courts should "consult[ ]" standard treatises on equity, "such as Dobbs, Palmer, Corbin, and the Restatements." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217 (2002); *see also Sereboff*, 547 U.S. at 368.

At every turn, these "standard treatises" – none of which, to our knowledge, has been cited to or examined in relevant part by any court since *Sereboff* – reveal that, because the remedy sought by US Airways is rooted in equity, it is necessarily controlled by principles of unjust enrichment. Applying these principles to this case, the most US Airways is entitled to recover is any amount that Mr. McCutchen recovered *for those medical expenses* which US Airways paid; this is the only element of Mr. McCutchen's damages paid for by US Airways and the only amount for which Mr. McCutchen has even arguably recovered twice. And, because it is uncontroverted that Mr. McCutchen has only recovered for, at most, 11% of his total damages, the portion of *that* recovery that is reasonably allocable to the Plan's medical expenses is 11% of its total. Equity, therefore, demands that US Airways' recovery be limited to, at most, 11% of the medical expenses covered by the plan, less its proportional share of costs and attorneys' fees.

This approach is fully consistent with – and, indeed, mandated by – the plain language of ERISA. US Airways' bid for 100% reimbursement ignores the fact that ERISA expressly limits insurance plans to seeking only *appropriate equitable* relief. The district court held that US Airways has an iron-clad right to recover 100% reimbursement based solely on its language for the plan; however, this measurement is based on a classic contractual remedy at law, and leaves no room for the words "equitable" or "appropriate" to exert any limiting influence. Adopting the district court's holding would read these terms out of the statute – a result Congress could not have intended and this Court may not countenance.

The district court's conclusion that the plan language – and not the language of Section 502(a)(3) – controls the outcome here was based chiefly on its belief that the "established precedent of the Third Circuit" required this result. A14. Relying on *Bollman Hat Co. v. Root*, 112 F.3d 113 (3d Cir. 1997) and *Ryan by Capria-Ryan v. Fed. Express Corp.*, 78 F.3d 123 (3d Cir. 1996), the district court held that binding precedent from this Court obligated it to enforce the plan language as written and "rejected" any alternative approach for measuring the amount of reimbursement, including the application of governing equitable principles. A14.

These two cases, however, were decided long before the Supreme Court made clear, in *Sereboff*, that reimbursement actions under ERISA are governed by Section 502(a)(3). By clarifying that reimbursement actions like this one are subject to principles of equity, rather than principles of contract law, this holding fundamentally altered the landscape for analyzing ERISA reimbursement claims. As such, neither of these cases provides any "established" approach for analyzing claims for reimbursement brought under Section 502(a)(3) and, because they advocate an approach contrary to the now-governing analytical framework, they are not controlling and must be rejected.

The district court's ruling that the plan language must necessarily control the outcome of an ERISA reimbursement action is also contrary to the structure and purpose of ERISA, both of which confirm that US Airways' right to reimbursement is subject to – and governed by – limiting principles of equity. ERISA's primary objective, as set forth in its "purpose clause," is to protect the

interests of plan participants and beneficiaries against employer and fiduciary abuses. As the Supreme Court has held, these objectives outweigh *any* other subsidiary interests, including those associated with the categorical enforcement of plan documents. *See Varity Corp. v. Howe*, 516 U.S. 489 (1996). Allowing US Airways to enforce its Plan's terms without regard to the extent to which Mr. McCutchen has recovered for his injuries would create a windfall for insurance plans at the direct expense of beneficiaries, thereby undermining ERISA's primary goal.

Categorically enforcing plan terms, even where doing so would affirmatively harm beneficiaries, would also conflict with the structure of ERISA, which excludes fiduciaries (like US Airways) from the one statutory enforcement provision in ERISA that affirmatively authorizes a plaintiff to "enforce his rights under the terms of a plan." 29 U.S.C. § 1132(a)(1)(B). Surely, if Congress had wanted to permit insurers to "enforce [their] rights under the plan," it would have included them in the only provision in the statute that confers such a right.

Finally, the district court's decision to allow 100% reimbursement runs squarely contrary to public policy, deterring the tort right of injury victims, blocking access to justice, and undermining the strong public policy favoring settlement. These policy concerns have, in similar circumstances, universally convinced courts – including the U.S. Supreme Court – that any equitable award to reimburse an insurer must be limited to the portion of the underlying recovery that proportionally corresponds to the amount of its lien. *See Arkansas Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268 (2006); *Bradley v. Sebelius*, 621 F.3d

1330 (11th Cir. 2010). In allowing the insurer to share in damages for which it has provided no compensation, the district court formulated a rule that is both "absurd and fundamentally unjust." *Ahlborn*, 547 U.S. at 288 n.19. It should not be permitted to stand.

STANDARD OF REVIEW

The district court's interpretation of 29 U.S.C. § 1132(a)(3) and grant of summary judgment on that basis is subject to plenary review. *United States v. Cheeseman*, 600 F.3d 270, 275 n.4 (3d Cir. 2009); *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38, 45 (3d Cir. 2009).

ARGUMENT

I. THE DISTRICT COURT'S GRANT OF 100% REIMBURSEMENT TO US AIRWAYS IS INCONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE.

Section 502(a)(3) of ERISA limits fiduciaries, like US Airways, to obtaining "appropriate equitable relief" for certain injuries caused by violations under ERISA. In concluding that US Airways is entitled to 100% reimbursement based solely on the language of the plan, the district court failed to properly construe and apply the statute. As we now explain, Congress's use of the word "appropriate" in Section 502(a)(3), if it is to have any meaning at all, requires a court to consider and balance the relevant equitable principles that govern an award pursuant to an equitable remedy. Here, that requirement limits US Airways to, *at most*, the proportional share of Mr. McCutchen's recovery that is allocable to the medical expenses paid by the Plan.

A. The Use of the Term "Appropriate" in Section 502(a)(3) Vests Courts with Discretion to Fashion Equitable Relief.

"[I]n every case involving construction of a statute," the U.S. Supreme Court has said, the "starting point . . . is the language itself." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976). With regard to ERISA, the Court has repeatedly held that Congress's use of the word "appropriate" in Section 502(a)(3) is a term of limitation, restraining the availability of relief based upon traditional equitable principles. *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996) (holding that equitable relief under the statute is not automatic, but instead must be "fashion[ed]" and may be refused where "appropriate").[8]

The Supreme Court has instructed that, when Congress uses the term "appropriate" in connection with an equitable remedy, a court has "broad discretion" to "fashion[] discretionary equitable relief" through the careful consideration of relevant equitable factors. *Florence County Sch. Dist. v. Carter*, 510 U.S. 7, 16 (1993) (quoting *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 374 (1985)). This Congressional command embodies the fundamental principle that a district court, when sitting in equity, is a "court of conscience" that enjoys broad discretion to afford a measure of equitable relief where equity and justice demand. *Wilson v. Wall*, 73 U.S. (6 Wall.) 83, 90 (1867).

[8] *See also Knudson*, 534 U.S. at 211 n.1 (holding that ERISA 502(a)(3) "contain[s] the limitations upon its availability that equity typically imposes"); *Harris Trust & Sav. Bank v. Solomon Smith Barney, Inc.*, 530 U.S. 238, 252 (2000) (interpreting ERISA Section 502(a)(3) "to incorporate common-law remedial principles").

A district court's task, then, when faced with an equitable reimbursement claim under Section 502(a)(3), is to sit as a court in equity, balancing all the relevant equitable factors and awarding only that relief that is consistent with the relevant equitable principles and therefore "appropriate" in equity. Here, although the district court acknowledged that US Airways' claim for reimbursement was governed by Section 502(a)(3), *see* A7, it failed even to quote the language of the statute, let alone apply it in any meaningful way. Instead, the district court concluded that, for *equitable* reimbursement actions brought under Section 502(a)(3), the relief afforded to a Plan is governed by rules of contract law, and that a Plan is entitled to 100% reimbursement if that is what it says in the plan documents. A14-18. The district court cited no authority for this conclusion, and this is because there is none; this analysis contradicts the plain meaning of the statute because it limits the availability of relief based upon traditional equitable principles *not at all*. At bottom, by adopting this approach, the district court jettisoned the one concrete responsibility required by Section 502(a)(3).

B. US Airways' Right to Relief is Controlled by Equitable Principles of Unjust Enrichment.

Had the district court followed the statute's command and carefully considered the relevant equitable factors, it would have seen that the *amount* of relief afforded by an equitable claim for reimbursement is based on –and governed by – the equitable principles of unjust enrichment.

Sereboff itself leads inexorably to this requirement. There, although the Supreme Court did not reach the specific issue presented in this case, it held that,

when determining the "scope of remedial power conferred on district courts" by Section 502(a)(3), *Sereboff*, 547 U.S. at 361, courts must be guided by the law as it stood during "the days of the divided bench," *id.* at 362 (quoting *Knudson*, 534 U.S. at 212), – an inquiry that is to be accomplished, in turn, by "consulting" the leading treatises on equity and restitution. *See Knudson*, 534 U.S. at 217. In particular, the Court principally relied on the "leading treatise on restitution,"[9] – George Palmer's Law of Restitution – in construing Section 502(a)(3) to authorize the specific remedy sought by the insurer. *See Sereboff*, 547 U.S. at 368 (holding that the insurer's action "qualifies as an equitable remedy" under Section 502(a)(3) because it "is an equitable lien impressed on moneys on the ground that they ought to go to the insurer") (quoting 4 Palmer, Law of Restitution § 23.18(d)).

The Supreme Court mandated a similar approach in *Knudson* when considering whether a plan's claim for reimbursement from an injured beneficiary was equitable under Section 502(a)(3). There, in order to properly carry out this task, the Court explained, a court must examine "standard current" treatises in equity, "such as Dobbs, Palmer, Corbin, and the Restatements" to "make the answer clear." *Knudson*, 534 U.S. at 217. The Court instructed that, although "[r]arely will there be need for" anything more, "[l]ike it or not," this much is required. *Id.*

[9] Dobbs bestows this honor on Palmer's treatise in 1 D. Dobbs, Law of Remedies, § 4.1(1), at 550 n.1, observing that "[t]he leading contemporary work [on restitution] is Professor George Palmer's four-volume treatise."

All the authoritative treatises cited in *Sereboff* and *Knudson* dictate that the measure of any award fashioned for an equitable reimbursement claim like the one at issue here is controlled by principles of unjust enrichment. As explained above, *Sereboff* held that a reimbursement claim by an ERISA Plan is akin to a "constructive trust" or "equitable lien" – both classic remedies in equity. In his venerable treatise, Dobbs explained that both constructive trust and equitable lien remedies "are invoked for the same reasons, *to prevent unjust enrichment* [of the defendant]." 1 D. Dobbs, Law of Remedies § 4.3(3), at 602 (emphasis added). Palmer is no less clear. 1 G. Palmer, Law of Restitution § 1.3, at 16-20 (explaining that these remedies are "aimed at preventing unjust enrichment").

Critically – as the treatises demonstrate – an award measured by principles of unjust enrichment is fundamentally different than an award of money damages, "which measures the remedy by the plaintiff's loss and seeks to provide compensation for that loss." 1 D. Dobbs, Law of Remedies at § 4.1(1), at 555; *see also Greenwood Mills, Inc. v. Burris*, 130 F. Supp. 2d 949, 962-63 (M.D. Tenn. 2001) (explaining that "[a]s an equitable remedy, 'restitution generally is awarded to prevent unjust enrichment to the defendant,'" and that, by contrast, "compensatory legal remedies 'focus on the plaintiff's losses and seek to recover in money the value of the harm done to him.'") (internal citations omitted).

Under a legal remedy for money damages, US Airways – and the district court – would be correct that the measure of its damages would be the full amount of its advanced medical expenses. When these remedies are sought under Section 502(a)(3), however, the most a plaintiff is entitled to is an amount equal to the

defendant's "unjust" gain. *See, e.g.,* Restatement of Restitution § 160 (explaining that the goal of an equitable remedy is to afford a plaintiff relief in the amount of a defendant's unjust gain).

The leading equitable treatise relied on by the unanimous Court in *Sereboff*, Palmer's Law of Restitution, explains why this is so. In the exact same passage quoted by Chief Justice Roberts in *Sereboff* – § 23.18(d) – Palmer teaches that when "an insurer has a lien on the proceeds of the insured's recovery . . . principles of unjust enrichment are controlling" because an "*equitable lien is merely a remedy for preventing unjust enrichment of the insured*." 4 G. Palmer, Law of Restitution § 23.18(d), at 470 (quoted in *Sereboff*, 547 U.S. at 368) (emphasis added).

C. Under Equitable Principles of Unjust Enrichment, the Most US Airways is Entitled to Recover is its Proportional Share of Medical Expenses, Less Costs and Fees.

1. US Airways Is Entitled to No More Than the Portion of Mr. McCutchen's Recovery that is Reasonably Allocable to Medical Expenses.

The equitable principle of unjust enrichment, as applied in this type of case, limits US Airways' recovery, at most, to the amount of Mr. McCutchen's recovery that is reasonably allocable to the medical expenses paid by the Plan, minus a proportional share of the costs and fees accrued in recovering those expenses from third parties. Because Mr. McCutchen only recovered 11% of his damages, US Airways' recovery is similarly limited to that same proportion of the medical expenses it paid (less fees and costs). This is the only amount for which Mr.

McCutchen has recovered twice, and therefore the maximum amount of his unjust enrichment.

This approach achieves an equal balance between US Airways and Mr. McCutchen, whereby each party (1) recovers a proportion of the underlying settlement that corresponds to their claims, and (2) contributes proportionally to the costs of obtaining that recovery. This is in sharp contrast to the rule adopted by the district court, which granted the Plan 100% reimbursement without requiring it to pay a penny in fees and costs.

a. In the insurance context, an insured's unjust enrichment is equal to the amount of the insured's double recovery

It is well settled that, in cases like this one, in which an insured recovers a lump sum from a third-party tortfeasor, the insured's "unjust" gain, and the corresponding measure of an insurer's maximum award, is limited by the amount the insured has "double recovered." *See* 46A C.J.S. Insurance § 1993 (explaining that, in the insurance context, subrogation/reimbursement "prevents . . . unjust enrichment to the insured that would result from double recovery"); Robert E. Keeton & Alan I. Widiss, Insurance Law § 3.10(7) (1988) ("Recognition and enforcement of a right to subrogation for health insurers is primarily premised on precluding duplicative recoveries"); *see also Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1117-18 (9th Cir. 2010). Moreover, it is a bedrock principle that, in the context of an insurer's effort to recover from an insured, a "double recovery" has only occurred where an insured has recovered twice *for the*

same injury. *See, e.g.*, 16 Couch on Ins. § 222:8 ("[S]ubrogation has the objective of preventing the insured from recovering twice for one harm").

Thus, when determining the amount of an insured's unjust enrichment in the context of an insurer's equitable claim for reimbursement, the critical question is how much of the underlying tort recovery is allocable to the insurance plan's medical expenses. As one court explained, in order for there to be double recovery and unjust enrichment, the underlying settlement must "include recovery for medical expenses . . . for [the insured's] health care expenses." *U.S. Healthcare, Inc. v. O'Brien*, 868 F. Supp. 607, 613-14 (S.D.N.Y. 1994); *see also* Maher & Pathak, *Understanding Tort Subrogation*, 40 Loy. U. Chi. L.J. at 58 n.32 (explaining that a double recovery occurs "where the insured receives a tort recovery for medical damages while also collecting insurance *for those damages*") (emphasis added).

Palmer is also unequivocal on this point: he teaches that an insurer has a "right . . . to recover medical expense from the tortfeasor to the extent that the insurer has paid such expense." 4 G. Palmer, Law of Restitution § 23.18(d), at 470. And in a case where an "insured has recovered from the tortfeasor *for such expense*, . . . this is the extent of the lien." *Id.* at 470 (emphasis added); *id.* at 474 ("[T]he insurer's claim should be limited to the net amount recovered by the insured *for medical expense*") (emphasis added). The italicized reference to "such expense" is important: what Palmer is saying is that an insurer's claim is limited to *only that portion of a recovery that is devoted to medical expenses* and nothing more.

Applying these principles of unjust enrichment here, the measure of Mr. McCutchen's unjust enrichment, and, in turn, the *maximum* amount of any award for US Airways' reimbursement claim, hinges upon the amount of Mr. McCutchen's settlement that is properly allocable to past medical expenses, for it is this amount that represents Mr. McCutchen's recovery in tort for compensation he also received through ERISA insurance. Although sometimes difficult to measure, *see, e.g., Frost v. Porter Leasing Corp.*, 436 N.E. 2d 387, 390 (Mass. 1982), in this case the district court agreed that, for purposes of the summary judgment motion, Mr. McCutchen only recovered for at most 11% of his injuries. *See* A14. Thus US Airways is, at most, only permitted to recover 11% of its medical expenses. This amount corresponds with that portion of Mr. McCutchen's settlement that is allocable to his past medical expenses for which US Airways paid. To allow any more would improperly invade other damage elements, and contradict the basic equitable principles that any award of reimbursement be measured based on a defendant's unjust enrichment.

b. Courts sitting in equity apply this measurement for equitable claims of reimbursement.

Those courts that regularly sit in equity, and that award equitable reimbursement in this context, confirm the soundness of an approach that limits a health insurer's right of reimbursement "to that portion of the judgment or settlement reasonably attributable to medical expenses only." *Werner v. Latham*, 752 A.2d 832, 835 (N.J. App. Div. 2000). The highest court of the State of New York, for example, has held that, "in cases where an injured person who has

obtained reimbursement for medical expenses from an insurer, is subsequently reimbursed by the tort-feasor for the same injuries, a lien attaches on behalf of the insurer to that portion of the recovery." *Aetna Life & Cas. Co. v. Nelson*, 492 N.E.2d 386, 390 (N.Y. 1986); *see also Miller v. Liberty Mut. Fire Ins. Co.*, 264 N.Y.S. 2d 319, 324 (1965), *aff'd mem.*, 289 N.Y.S.2d 726 (1968) (awarding an insurer reimbursement "only to the extent that [the insured] receives" a recovery for "that portion of his claim arising out of the medical expenses for which he has received reimbursement"). As another court has recognized, allowing an insurer to recover anything more than the portion of an underlying settlement that is allocable to medical expenses would "lead to the anomalous result that the insured would be paying his own [insurance] benefits out of the compensation for his pain and suffering, items specifically excluded from [insurance] payments." *Adams v. Gov't Emp. Ins. Co.*, 383 N.Y.S.2d 319, 321 (N.Y.A.D. 1976) (internal quotations omitted).

In fact, even federal courts have increasingly understood that this approach is required when fashioning relief under an equitable claim for reimbursement. During the same term that *Sereboff* was decided, the U.S. Supreme Court endorsed exactly this approach for fashioning a measure of equitable relief under an equitable lien in *Arkansas Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268 (2006). *Ahlborn* involved a claim for reimbursement by Medicaid against an injured beneficiary. *Id.* at 272. There, the Court limited an insurer to recovering no more than "that portion of a settlement that represents payments for medical care." *Id.* at 282. In refusing to allow the insurer to "lay claim" to anything more,

the Court rejected "[a] rule of absolute priority" that would have permitted recovery of 100% reimbursement because, it said, such a rule runs the very real risk of "preclud[ing] settlement in a large number of cases," and works dramatic inequities "to the recipient in others." *Id.* at 280, 288. Furthermore, the Court made clear that allowing an entity to "share in damages for which it has provided no compensation . . . would be absurd and fundamentally unjust." *Id*. at 288 n.19. Other federal courts, too, have recently adopted this approach. *See Bradley v. Sebelius*, 621F.3d 1330, 1333-34 (11th Cir. 2010) (affirming that where an underlying tort settlement involves several distinct damage elements, a health insurer's equitable remedy should be calculated by the specific "component's contribution to the total full value, if such value were collectible"); *McKinney ex rel. Gage v. Philadelphia Housing Auth.*, 2010 WL 3364400 (E.D. Pa. Aug. 24, 2010) (applying a similar measure of relief).

Those concerns motivating the Supreme Court to adopt this approach in *Ahlborn* are squarely evident here and warrant the same approach for fashioning equitable relief. The controlling factor in the *Ahlborn* Court's choice to adopt a proportionality approach was not the language of the Medicaid statute, but rather the perverse incentives encouraged by permitting 100% reimbursement. *See Ahlborn*, 547 U.S. at 288. The idea that these concerns are relevant only where the lienholder is the government (as opposed to a private insurer) is logically incoherent. Just as in the Medicaid context, endorsing the district court's approach here would "lead to the anomalous result that the insured would be paying his own [insurance] benefits out of the compensation for his pain and suffering, items

specifically excluded from [insurance] payments." *Adams v. Gov't Emp. Ins. Co.*, 383 N.Y.S.2d 319, 321 (N.Y.A.D. 1976) (internal quotations omitted). Indeed, even in *Ahlborn* itself, the Court looked to contexts *outside* of Medicaid in reaching its conclusion that a proportionality approach offered the fairest and most supported method for measuring relief. *See* 547 U.S. at 288 n.19 (looking to "cases involving the recovery of workers' compensation benefits").

At base, there is no legitimate reason why the proportionality approach does not control in the ERISA context where it controls in every other context that allows claims for equitable reimbursement. The policy rationales motivating courts and treatises to adopt this approach, which include the risk of deterring settlement in a large number of cases and the unfairness to the insured that flows from permitting an insured to invade unrelated damage elements, have led courts across the spectrum to adopt a proportionality approach for measuring the relief afforded under an equitable claim for reimbursement. Those concerns pose no less of a threat, and the principles apply with no less force, in the virtually identical cases (like this one) brought under ERISA.

2. Principles of Equity Also Require US Airways' Recovery to be Limited by Appropriate Costs and Fees.

The same principles, just discussed above, apply with equal force to the question of whether unjust enrichment requires that any award be reduced by a proportional amount of costs and attorneys' fees. The district court was therefore wrong in concluding that any award for reimbursement did not need to be reduced by an appropriate proportion of costs and fees. This conclusion is not only

unsupported by *Sereboff*, but it is contradicted by the equitable treatises discussing the proper measure of any reimbursement award.

The same treatise passages relied on by the Court in *Sereboff* confirm the basic rule that any recovery must be reduced by an appropriate proportion of costs and fees. Thus, Palmer instructs that, where an insured has recovered from a tortfeasor for medical expenses paid by the insurer, "the net amount of such recovery, *after subtracting the cost of collection* ought to go to the insurer." 4 G. Palmer, Law of Restitution § 23.18(d), at 470; *id.* at 471-72 (unjust enrichment principles require that any award "take account of the costs of collecting medical expenses from the tortfeasor, in order to limit the insurer's claim to the insured's net recovery") (emphasis added); *see also id.* at 473 n.58 ("the insurer is entitled to restitution only to the extent that the insured was enriched through overcompensation for medical expense; and in determining the extent of overcompensation," the measure of any relief is "the insured's *net recovery* of medical expense from the tortfeasor") (emphasis added).

This rule explains why the district court's conclusion that US Airways' claim takes precedence over the law firm's claim for attorney's fees is mistaken. *See* A15-16. Under principles of equity, US Airways' claim is necessarily limited to the *net* amount of recovery for medical expenses, *after* a deduction for collection costs (*i.e.,* costs and attorneys' fees). Because US Airways' relief may only extend to the net amount of recovery, there is no basis for the district court's assertion that

the Plan, and not Mr. McCutchen's lawyers (who are entitled to those collection costs), is entitled to recover first on, and 100% of, its claim. [10]

Like the proportionality measure based on double recovery, this rule is consistent with the ways in which other courts in equity have fashioned awards of relief for reimbursement. In *Faust v. Luke*, for example, the court explained that "[i]t is manifestly unjust to require the recipient of medical payments, who pays a premium for such coverage, and who is called upon to grant a right of subrogation to the payor, to then, through his or her lawyer, act as a collection agency for the paying carrier in a suit against the tortfeasor." 364 N.Y.S.2d 344, 347 (1975). This same principle likewise prohibits the insurer from "sit[ting] back and becom[ing] enriched by the fruits of [the insured's] efforts and endeavors." *Id.* Courts in equity affording the type of relief sought by US Airways here are similarly in accord on this point. *See, e.g.*, *Lee v. State Farm Mut. Auto. Ins. Co.*, 57 Cal. App. 3d 465 (1976); *Nat'l Union Fire Ins. Co. v. Grimes*, 153 N.W.2d 152 (1967); *Metropolitan Life Ins. Co. v. Ritz*, 70 Wash. 2d 317 (1967).

Numerous authorities are also in accord that allowing the insurer to recover its *gross* proportional amount would frustrate the principle of unjust enrichment. As Palmer observed, an "insurance carrier is unjustly enriched if the insured is forced to bear the cost of recovering medical payments for the carrier's benefit." 4 G. Palmer, Law of Restitution § 23.18(d), at 672 n.56; *see also Hospital Service Co. v. Penn. Ins. Co.*, 227 A.2d 105, 111 (R.I. 1967) (holding that "[i]t would be

[10] The Ninth Circuit recently recognized this exact principle in *AC Houston Lumber Co. v. Williams L. Berg*, 2010 WL 5439789 (9th Cir. Dec. 29, 2010).

inequitable and unjust to require [an insured] to incur expenses for the recovery of money which will inure to the benefit of [the insurer] without allowing [the insured] some reimbursement"). Indeed, in instances where an insured's recovery is equal to or less than the insurer's claim for reimbursement, enforcing that right in the absence of limiting principles of equity "would leave the insured to pay his attorney out of his own separate funds," a result again not countenanced in equity. *Remsen v. Midway Liquors, Inc.*, 174 N.E.2d 7, 15 (Ill. App. 1961) (rejecting the application of a rule that could permit this result).

In short, any recovery obtained by US Airways must be reduced by its proportional share of costs and fees. This being so, the district court's decision awarding US Airways 100% reimbursement without any deduction for the costs of collection was error. The fact that US Airway's Plan purports to disclaim this equitable requirement is irrelevant because, as we now explain, contractual provisions that attempt to override principles of unjust enrichment are not to be given effect by courts when fashioning a measure of relief to prevent unjust enrichment. Thus, whatever US Airways' Plan says, the insurer cannot grant unto itself the right to freeload off of its insured's recovery.

D. The District Court's Award of 100% Reimbursement Violated the Statutory Requirements of Section 502(a)(3) and Failed to Adhere to Equitable Principles of Unjust Enrichment.

None of the foregoing statutory commands or equitable principles was applied by the district court in rendering its decision below. Instead, the court merely deferred to the plan language in determining the measure of relief, thereby applying traditional contract law principles that measure an award of damages

based upon the plaintiff's *loss*. This enforce-the-plan-as-written approach for measuring relief under an equitable remedy was grounded in several key errors of law that led the lower court badly astray.

1. The Lower Court Erred by Relying on Pre-*Sereboff* Decisions that are No Longer Good Law.

The district court's conclusion that the plan language controls the outcome here was based chiefly on an anachronistic application of dated Third Circuit precedent, decided before the Supreme Court made clear, in *Sereboff*, that reimbursement actions under ERISA are governed by Section 502(a)(3). *See* A14 (citing *Bollman Hat Co. v. Root*, 112 F.3d 113 (3d Cir. 1997) and *Ryan by Capria-Ryan v. Fed. Express Corp.*, 78 F.3d 123 (3d Cir. 1996)). These cases, the lower court said, "rejected" any alternative approach, and bound the district court to enforce the Plan language as written. A14. However, both of these cases were decided a decade before *Sereboff* fundamentally altered the landscape for analyzing ERISA reimbursement claims, and neither involved a claim for reimbursement under Section 502(a)(3). As such, neither of these cases provides any "established" approach for analyzing claims for reimbursement brought under Section 502(a)(3) and, because they advocate an approach contrary to the now-governing analytical framework, they are not controlling and must be rejected.[11]

[11] The district court also cited a third pre-*Sereboff* case from this Court, *Bill Gray Enters. v. Gourley*, 248 F.3d 206 (3d Cir. 2001), for the proposition that the make whole doctrine could not apply to limit a reimbursement claim because "importing federal common law doctrines to ERISA plan interpretation is generally inappropriate." A14. But *Bill Gray* suffers from the same anachronistic flaws as *Ryan* and *Bollman Hat* (discussed below), and is inapposite for all the same reasons.

Before the Supreme Court decided *Sereboff*, courts were uncertain about the proper approach for resolving claims for reimbursement brought by ERISA plans. The majority of these courts – including this one – believed that reimbursement claims were contractual in nature, and therefore governed by normal rules of contract law. *See, e.g., Harris v. Harvard Pilgrim Health Care, Inc.*, 205 F.3d 274 (1st Cir. 2000); *Ryan*, 78 F.3d at 127. These courts also held that, in the absence of clear contractual language, federal common law could act as a "gap filler," supplying a rule where none could be discerned from the plan documents. *See, e.g., Ryan*, 78 F.3d at 126. Importantly, however, this analytical framework was based on the belief that ERISA Plans' claims for reimbursement under ERISA were *contractually* – not equitably – governed. *See United McGill Corp. v. Stinnett*, 154 F.3d 168 (4th Cir. 1998).

In *Sereboff*, however, the Supreme Court for the first time held that claims for reimbursement are not free-floating contractual claims governed entirely by the terms of the plan (or, to the extent the plan was ambiguous, "federal common law."). Rather, the Court explained, ERISA reimbursement actions are governed by Section 502(a)(3), which contains the all-important reference to "appropriate equitable relief." *See Sereboff*, 547 U.S. at 369. *Sereboff* consequently overrode the contract law approach taken by most courts and clarified that ERISA reimbursement actions arise from, and are governed by, principles of *equity*.

Indeed, this Court's decisions in *Bollman Hat* and *Ryan* firmly illustrate the analytical shift that the Supreme Court adopted when it decided *Sereboff*. In *Ryan*, the panel agreed with the district court's conclusion that "ERISA is silent on the

issue of subrogation agreements" but rejected its imposition of a "new federal common law right of recovery." *Id.* at 125. Instead, the court held that the subrogation provision "must be enforced as written." *Id.* at 128. According to the panel, the district court failed to explain how refusing to enforce the plan "served to validate an important statutory policy of ERISA," which, for the panel, was a "necessary antecedent to overriding an express provision of a benefits plan within the purview of ERISA." *Id.* at 124. Because the panel could not see any "statutory polic[y] of ERISA" that conflicted with the enforcement of the plan as written, it held that where plan language is unambiguous, a beneficiary's "attempt to establish the common law right" to some reduction in an award must fail. *Id.* at 127.

Similarly, in *Bollman Hat*, decided one year later, this Court refused to revisit its holding in *Ryan*. There, a Plan brought a claim for reimbursement against a beneficiary based on language that it had inserted into the plan documents. The court emphasized its belief that *Ryan* was decided correctly, and that, for claims of reimbursement, the proper analytical approach, "under federal common law," was to apply traditional rules of contract interpretation. *Bollman Hat*, 112 F.3d at 115. For reimbursement claims, this approach required a court to enforce terms as written where those terms are unambiguous. *Id.* Only where the terms of the plan are ambiguous could a court "adopt[] . . . common law," and then, only where "necessary to fill in interstitially or otherwise effectuate the statutory pattern enacted in large by Congress." *Id.* at 118.

In light of *Sereboff*, however, the analysis applied in these cases is fatally flawed. Most critically, in neither of these cases did the litigants or the panels understand that *reimbursement claims brought under ERISA are governed by* Section 502(a)(3). In *Bollman Hat*, neither the Plan nor the court could point to any specific ERISA provision that governed the Plan's claim, and so the court held instead that, "we nonetheless have jurisdiction arising under the federal common law developed pursuant to ERISA." 112 F.3d at 115. panel proceeded to analyze the claim accordingly.

So too, in *Ryan*. There, in the first sentence of the opinion, the panel framed the overarching question of the case: "we must decide the extent of the power of federal courts *to develop federal common law* in cases involving [ERISA]." *Ryan*, 78 F.3d at 124 (emphasis added). Given this assumption that the case was governed by "federal common law," rather than by the provisions of ERISA itself, the court saw the issue principally as one dictated by rules of contract law, holding that the terms of the plan were to be enforced as written unless the language of the plan was ambiguous. Nowhere in the opinion did the panel even mention Section 502(a)(3) as a basis for the Plan's claim, or as providing the governing framework for resolving the dispute.[12]

[12] In *Ryan*, the panel also held that awarding the Plan 100% reimbursement, without deduction for collection costs, would not unjustly enrich the Plan. *See* 78 F.3d at 127-28. This holding stems from the panel's same mistaken belief that rules of contract law governed the outcome. The panel's reasoning that "[e]nrichment is not 'unjust' where it is allowed by the express terms of the plan," *id.* at 127, is a classic rule of contract law, but it has no place in a court of equity.

The *Ryan* and *Bollman Hat* panels' erroneous assumption that ERISA reimbursement claims are governed *not* by any specific statutory provision in ERISA but rather by principles of general federal law makes all the difference. Before the Supreme Court stepped in, courts were unsure how to properly analyze claims for subrogation/reimbursement. Most, like the two panels of this Circuit, chose to analyze these types of reimbursement claims by viewing the issue as primarily one of contract law. *See, e.g., Harris v. Harvard Pilgrim Health Care, Inc.*, 205 F.3d 274 (1st Cir. 2000); *United McGill Corp. v. Stinnett*, 154 F.3d 168 (4th Cir. 1998). Under this view, because no precise provision governed the claim, no specific "statutory polic[y]" conflicted with enforcement of the plan terms. *Ryan*, 78 F.3d at 127.

But the Supreme Court in *Sereboff* fundamentally altered the assumption that reimbursement claims are not governed by a specific statutory provision in ERISA and overruled an approach for resolving reimbursement claims that hinged on the application of contract law and federal common law. Instead, the Court clarified that claims for reimbursement must be brought under, and are governed by, Section 502(a)(3). *See Sereboff*, 547 U.S. at 369 (explaining that the Plan's action for reimbursement "properly sought 'equitable relief' under § 502(a)(3)"). Simply put, when the Supreme Court decided *Sereboff*, it breathed life into Section 502(a)(3) which, until then, had not been generally thought to provide the vehicle for reimbursement claims brought on behalf of ERISA plans. Under this new approach, it is no longer acceptable for courts to merely enforce plan language as written, as this position contradicts the plain language and meaning of the Section

502(a)(3) itself, which confers *broad discretion* upon a court to – and expects that a court will – fashion equitable relief based on a balancing of the governing equitable considerations that accompany a specific remedy.

The district court failed to accord this new statutorily required analytical approach even a passing nod; it failed to cite even a single equitable treatise and failed to engage in any analysis of the equitable principles that govern equitable claims for reimbursement. By instead holding itself duty bound to enforce plan terms as written, the district court read the terms "appropriate" and "equitable" out of the statute, violating one of the most basic canons of statutory interpretation. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 258 (1993) (courts should avoid "read[ing] the statute to render [a] modifier superfluous"). The approach taken by this Court's pre-*Sereboff* panels in *Ryan* and *Bollman Hat*, and the district court's reliance on them here, therefore, is erroneous.[13]

[13] Although the district court did not expressly rely on them, the only two post-*Sereboff* appellate court decisions on this issue perpetuate the analytical errors that undermine the pre-*Sereboff* cases discussed above. *See Zurich Amer. Ins. Co. v. O'Hara*, 604 F.3d 1232 (11th Cir. 2010); *Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health and Welfare Plan v. Shank*, 500 F.3d 834 (8th Cir. 2007). In both, the panels applied the same pre-*Sereboff* approach of granting insurers' 100% reimbursement based solely on the language of the plan, thereby ignoring the limiting language of Section 502(a)(3) and erecting a per se bar against any reduction in award. Thus, in *Shank*, the court keyed its rejection of any limitation on a plan's reimbursement award on the theory that "federal courts lack authority to fashion a rule of *federal common law* that conflicts with the written plan and that is unnecessary to achieve the purposes of ERISA." *Shank*, 500 F.3d at 839 (emphasis added); *see also O'Hara*, 604 F.3d at 1237 (refusing to "[a]pply[] *federal common law* to override the Plan's controlling language") (emphasis added). But this conclusion runs afoul of the fact that it is the *statute itself*, as opposed to some floating body of federal common law, that requires a court to

2. The Lower Court also Erred in Assuming that *Sereboff* Mandated an Award of 100% Reimbursement.

Not only did the district court fail to understand that *Sereboff* effected a sea change in the law, it also appeared to be under the impression that *Sereboff* itself authorized an award of 100% reimbursement. *See* A13. As explained above, however, *Sereboff* decided only whether a fiduciary could establish a reimbursement claim against a beneficiary under Section 502(a)(3). The Court explicitly left open the question presented here, which is what the "appropriate" measure of relief is for that claim.

Contrary to the district court's suggestion, *Sereboff* held that the plan language is *only* relevant for determining whether US Airways has a legal right to seek relief under ERISA, *i.e.*, whether the plan terms "establish" a basis for a cognizable equitable claim under Section 502(a)(3). 547 U.S. at 363; *see also* 1 D. Dobbs, Law of Remedies § 4.1(1), at 552 ("The substantive question is whether the plaintiff *has a right at all*, that is, whether the defendant is unjustly enriched by legal standards.") (emphasis added). Those terms, however, do not govern the scope of permissible remedy. To the contrary, "purely remedial questions" involving "the appropriate measure or form of restitution" are governed *not* by the language of a contract, but instead by principles of unjust enrichment. 1 D. Dobbs, Law of Remedies § 4.1(1), at 552.

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balance and apply the relevant equitable limitations on a claim for reimbursement under Section 502(a)(3).

Palmer again provides definitive support. Where a contract's terms would create an inequitable result, for example by forcing the insured to "bear the cost of recovering medical payments for the carrier's benefit," Palmer teaches that the principle of unjust enrichment steps in to "limit[] the effect of the contract provision." 4 Palmer, Law of Restitution § 23.18(d), at 472-73 & n.56. "Th[is] same principle," according to Palmer, "should serve to limit the effectiveness of contract provisions which in terms provide for reimbursement out of the insured's tort recovery without regard to whether, or the extent to which, that recovery includes medical expense." *Id.* at 473-74.

In short, the terms of US Airways' plan merely establish its right to *seek* relief. The actual *measure of relief* afforded by Section 502(a)(3) is governed by the extent of a defendant's unjust enrichment, which is independent inquiry, unrelated to the terms of the contract. *See* 4 Palmer, Law of Restitution § 23.18(d), at 470 (explaining that the nature of relief sought by an insurer "*is not an express lien based on agreement, but instead is an equitable lien impressed on moneys on the ground that they ought to go to the insurer*") (emphasis added). Any measure of relief based solely on contractual language would transform the basis of the remedy from an "equitable lien or constructive trust" to an "express lien based on agreement," a remedy unavailable under Section 502(a)(3). *See Sereboff*, 547 U.S. at 368.

II. THE DISTRICT COURT'S GRANT OF 100% REIMBURSEMENT TO US AIRWAYS IS INCONSISTENT WITH BOTH THE STRUCTURE AND PURPOSES OF ERISA.

Although the district court failed to address this issue, implicit in its conclusion that the plan language should control is the assumption that this result is consistent with ERISA's overall statutory scheme. In fact, the opposite is the case: both the structure and purpose of ERISA confirm that US Airways' right to reimbursement is subject to limiting principles of equity, and that a court is not permitted to simply enforce the plan terms as written.

The Supreme Court has instructed courts to look to ERISA's "basic purposes," embodied in its "purpose clause," when measuring whether an award would be "appropriate" within the meaning of Section 502(a)(3). *Varity Corp. v. Howe*, 516 U.S. 489, 513 (1996) (looking to ERISA's purpose clause in interpreting Section 502(a)(3). In particular, the Court has directed the lower courts to "keep in mind the special nature and purpose of employee benefit plans, and [to] respect the policy choices in the inclusion of certain remedies and the exclusion of others." *Id.* at 515 (internal quotations omitted).

US Airways' bid for 100% reimbursement is directly contrary to the purposes and "policy choices" underlying ERISA. In passing ERISA, "the crucible of Congressional concern was misuse and mismanagement of plan assets by plan administrators." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985). ERISA was designed to protect plan participants and beneficiaries against two principle hazards that had revealed themselves in pre-ERISA practice: first, the risk that an employer (or other plan sponsor) might default on the pension

promise; and second, the concern that an entity responsible for managing plan assets would abuse its authority. The *primary* goal, then, was to "protect . . . the interests of participants in employee benefit plans . . . [by] providing for appropriate remedies . . . ." 29 U.S.C. § 1001(a). These objectives, embodied in ERISA's purpose clause, are determinative for purposes of construing Section 502(a)(3). *See Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 2349 (2008) (finding that "Congress' desire to offer employees enhanced protection for their benefits" "outweighed" other considerations including reduction of costs associated with plan); *Varity*, 516 U.S. at 513 (holding that, when construing Section 502(a)(3), ERISA's "basic purposes" of "protect[ing] the interests of participants and beneficiaries" trump "the need for a sensible administrative system," which was, at most, a "subsidiary congressional purpose").

Given these objectives, it is difficult to imagine why Congress would want to permit an approach to affording relief that not only violates basic principles of equity, but would also harm those individuals the statute was designed to protect. *See Varity*, 516 U.S. at 513. Allowing US Airways to enforce its plan's terms without regard to the extent to which Mr. McCutchen has recovered for his injury would foster this result and undermine ERISA's primary goals.

The argument that enforcing plan terms is categorically required, even where doing so would affirmatively harm beneficiaries, is also contrary to Congress's decision to exclude fiduciaries (like US Airways) from the one statutory enforcement provision in the statute that affirmatively authorizes a plaintiff to "enforce his rights under the terms of a plan." 29 U.S.C. § 1132(a)(1)(B). ERISA

includes a set of "carefully integrated civil enforcement provisions," whereby Congress enumerated the universe of possible plaintiffs authorized to sue for violations of the statute. *Russell*, 473 U.S. at 146. These enforcement provisions reflect a "comprehensive scheme" that "deliberately target[s] specific problems with specific solutions." *Varity*, 516 U.S. at 519 (Thomas, J., dissenting). As the Supreme Court has consistently held, this enforcement scheme "provide[s] strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Russell*, 473 U.S. at 146 (emphasis in original).

Tellingly, Congress included one express enforcement provision, 29 U.S.C. § 1132(a)(1)(B), designed specifically to remedy the precise harm US Airways claims it has suffered. This provision authorizes a plaintiff to, *inter alia*, "enforce his rights under the terms of the plan."[14] But Congress foreclosed this type of relief for *Plans*, instead deciding that the only parties who may obtain this relief, consistent with ERISA's primary objectives, are *beneficiaries and participants*. If Congress had intended to allow a Plan to secure precisely the type of relief authorized under this provision, surely it would have made that clear in Section 1132(a)(1)(B) itself, the provision specifically enacted to redress the type of breach claimed here. *See Knudson*, 534 U.S. at 217-18 (instructing that, when interpreting ERISA, a court's job is to "avoid rendering what Congress has plainly done (here, limit the available relief) devoid of reason and effect"); *Russell*, 473 U.S. at 146

[14] Specifically, Section 1132(a)(1)(B) provides that a civil action may be brought by a participant or beneficiary "to recover his benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his right to future benefits under the terms on the plan."

("The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated and interdependent remedial scheme.").

This is not to say that US Airways is precluded from receiving *some* measure of relief, as discussed above. Indeed, as the Supreme Court has explained, the fact that one provision in ERISA provides a specific remedy does not compel a conclusion that Congress could not have "provided yet other remedies . . . in another, 'catchall' remedial section." *Varity*, 516 U.S. at 512. But interpreting Section 502(a)(3) to authorize a measure of relief based solely on the terms of the contract would "render[] the statute's limitation of relief" to "other appropriate equitable relief" "utterly pointless." *Knudson*, 534 U.S. at 217. Section 502(a)(3) is *not* a "catchall provision that authorizes *all* relief that is consistent with ERISA's purposes and is not explicitly provided elsewhere." *Id.* at 221 n.5. Allowing a fiduciary to achieve the functional equivalent of what Congress plainly said it could not do would upset the "carefully crafted and detailed enforcement scheme embodied in the text Congress has adopted." *Knudson*, 534 U.S. at 221

Given the "evident care" with which ERISA was crafted, US Airways' attempted end run around this important limitation, by seeking the exact relief enjoyed by participants and beneficiaries but under a different provision, is contrary to the structure and purposes of ERISA. If Congress had wanted to enable fiduciaries to enjoy the same rights as fiduciaries and beneficiaries, it could easily have written this provision to allow it. *See Knudson*, 534 U.S. at 218 (explaining that if Congress had intended to exclude only damage awards from Section

502(a)(3), "it could have simply said that"); *Russell*, 473 U.S. at 147 (holding that courts must be "reluctant to tamper with [the] enforcement scheme" embodied in the statute). But Congress did no such thing. Instead, it expressly excluded fiduciaries from the universe of possible plaintiffs permitted to seek this type of relief – an omission that, standing alone, speaks volumes. If US Airways is successful in obtaining the relief here that Congress specifically barred, this prohibition will be perfectly obviated.

III. THE DISTRICT COURT'S GRANT OF 100% REIMBURSEMENT IS CONTRARY TO PUBLIC POLICY.

The district court's decision to allow 100% reimbursement based solely on the language of the Plan is also contrary to public policy and would not, contrary to some insurers' claim, inure to the benefit of other plan participants. *See Varity*, 516 U.S. at 514 (discussing the relevance of public policy concerns when construing ERISA).

A. Permitting 100% Reimbursement Would Deter Tort Victims from Holding Wrongdoers Accountable.

To begin with, US Airways' position is nothing short of a full-scale assault on the ability of injury victims to obtain adequate compensation for their injuries. It is axiomatic that twin objectives animate tort recovery: restitution and deterrence. US Airways' approach, which would automatically entitle insurers to complete first-dollar reimbursement from any third-party recovery, would "gratuitously deter the exercise of the tort rights of plan participants." *Wal-Mart Stores, Inc. Assocs. Health and Welfare Plan v. Wells*, 213 F.3d 398, 402 (7th Cir.

2000) (Posner, J.). As Judge Posner explained, the prospect that a plan will be entitled to 100% reimbursement irrespective of either the amount of the underlying settlement or the portion of that settlement that is allocable to medical expenses "might well deter a suit likely to result in a judgment or settlement not much larger than the benefits available under the plan." *Id.* This result, he warns, "would produce undercompensation for harms that were unrelated to the type of harm to which the benefits pertain." *Id.*

The district court's approach would also have the real world effect of deterring lawyers from representing an injured victim whose recovery would be subject to a claim for 100% reimbursement by an ERISA plan. The possibility that any recovery would be usurped by an ERISA plan – preventing both the victim and the attorney from being compensated – creates a powerful economic disincentive to take on the representation of a client who received anything more than a trivial amount of medical insurance from an ERISA plan. By chilling injury victims' ability to obtain representation, this approach would unavoidably exculpate tortfeasors from liability while denying injury victims just compensation for their injuries. *See* Maher & Pathak, *Understanding Tort Subrogation*, 40 Loy. U. Chi. L.J. at 86, 90 (noting that "first-dollar recovery provisions significantly undercut" an insured's incentive or ability to sue and "frustrate tort law's goal of supplying full compensation for tort victims").

B. The District Court's Approach Also Undermines the Public Policy in Favor of Settlements.

Left to stand, the district court's endorsement of US Airways' demand for 100% reimbursement also threatens the strong public policy interest in the expeditious resolution of lawsuits through settlement. *See, e.g., McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994) ("public policy wisely encourages settlement"). Under the district court's view, an injury victim who acts reasonably to settle his tort claim would automatically make himself liable for repayment of the total amount of medical expenses irrespective of the actual amount of the settlement that is allocable to those expenses. Under this regime, many injury victims would have virtually no incentive to settle their claims. Instead, in many cases it would make better economic sense "roll the dice" in hopes of obtaining a sufficient recovery through trial, thereby burdening the courts with cases that otherwise would have settled.

There is perhaps no clearer way to see these implications than by looking to analogous contexts. In similar circumstances involving reimbursement claims made by insurers, the same policy concerns at issue here have universally convinced courts that any equitable award to reimburse an insurer must be limited to the portion of the underlying recovery that proportionally corresponds to the amount of its lien. *See Arkansas Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268 (2006); *Bradley v. Sebelius*, 621 F.3d 1330 (11th Cir. 2010). As the U.S. Supreme Court explained in *Ahlborn*, "[a] rule of absolute priority" poses the very real risk of "preclud[ing] settlement in a large number of cases," and works

dramatic inequities "to the recipient in others." *Ahlborn*, 547 U.S. at 288. Thus, according to the Court, allowing an entity to "share in damages for which it has provided no compensation . . . would be absurd and fundamentally unjust." *Id.* at 288 n.19 (quoting *Flanigan v. Dep't of Labor and Inds.*, 869 P.2d 14, 17 (1994)).

The Eleventh Circuit reached a similar conclusion in *Bradley*, a very recent case involving Medicare liens. There, the court held that where an underlying tort settlement involves several distinct damage elements – medical expenses and costs "along with" non-medical, tort damages – the measure of a health insurer's equitable lien under basic principles of equity should be calculated by the specific "component's contribution to the total full value, if such value were collectible." *Bradley*, 621 F.3d at 1334-37. In affirming an award based on these considerations, the court observed that any approach to the contrary, *i.e.*, one allowing an insurer to obtain 100% reimbursement even in the face of an underlying settlement representing a fraction of the total damages, "would have a chilling effect on settlement." *Id.* at 1339. The court admonished the insurer for refusing to agree to a prorated portion of its asserted right to recovery, warning that this hard-line position "would compel plaintiffs to force their tort claims to trial, [thereby] burdening the court system," and creating "a financial disincentive" to settlement that would "allow tortfeasors to escape responsibility." *Id.*

The *Bradley* court further observed that, given the myriad potential costs of trial, including the inherent risk of litigation and the possibility that a defendant might not be able to pay full compensation, the "vast majority of tort lawsuits are resolved by settlement," which are "often for less than the full value of the

damages suffered by plaintiffs." *Id.* at 1339 n.20. Allowing an insurer to obtain 100% reimbursement would defeat the "strong public interest in the expeditious resolution of lawsuits through settlement," which "[t]hroughout history, our law has encouraged." *Id.* at 1339; *see also* Mark Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 Stan. L. Rev. 1255, 1272-74 (2005). With the single exception of ERISA insurance plans' efforts to seek reimbursement, this practice is either prohibited or strictly circumscribed. Neither ERISA nor equity supports its continued endorsement.[15]

C. Permitting 100% Reimbursement Would Only Benefit Insurers, Not Other Beneficiaries.

Nor could it be reasonably argued that 100% reimbursement is appropriate because it benefits all the plan beneficiaries by reducing their costs in the form of premium payments. This argument, which was adopted by both the Eighth and Eleventh Circuits to justify enforcement of a plan's claim for 100% reimbursement, *see O'Hara*, 604 F.3d at 1237-38; *Shank*, 500 F.3d at 838, is contrary to all available evidence. Numerous scholars and commentators have concluded that insurance plans do not factor subrogation/reimbursement recoveries into rate calculations, either historically or at present. *See* Maher & Pathak, *Understanding Tort Subrogation*, 40 Loy. U. Chi. L.J. at 58 n.31 ("[I]t is likely that

[15] It is worth noting that US Airways' approach also threatens the health of state and Federal assistance programs. As one court recently put it, where the damages to an injury victim are significant and life-long, "the real dispute . . . is between [the Plan] and the taxpayers who, in the future, will be called upon to bear the [injury victim's] medical expenses. [The Plan] was paid premiums for its coverage; the taxpayers have not been." *Mills v. London Grove Twnshp.*, 2007 WL 2085365, *3 (E.D. Pa. July 19, 2007).

insurers will not offer lower subrogation adjusted rates even though they will grant themselves a subrogation right"); Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation*, 70 Mo. L. Rev. 723, 737 (2005) ("[S]ubrogation has not led to lower premium costs for the insured."); *see also* Andrew H. Koslow, *"Appropriate Equitable Relief" in Wal-Mart v. Shank: Justice for Whom?*, 12 Quinnipiac Health L.J. 277, 279 (2009); Roger M. Baron, *Subrogation: A Pandora's Box Awaiting Closure*¸ 41 S.D. L. Rev. 237, 243-45 (1996).

In light of this authority, it is perhaps not surprising that US Airways has *not* pressed that argument in this case. Thus, this Court need not even address the specious argument that ERISA reimbursement actions benefit beneficiaries – although it is useful to understand that those courts concluding otherwise had no basis for doing so.

CONCLUSION

For the foregoing reasons, the decision of the district granting plaintiff's motion for summary judgment court should be reversed.

Respectfully Submitted,

Dated: February 16, 2011

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1. With respect to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), this brief contains 13,951 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Office Word 2007 for Windows in Times New Roman 14-point font.

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CERTIFICATE OF ADMISSION

I certify that Matthew W.H. Wessler and Leslie A. Brueckner are members of the bar of this Court.

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, this Brief and Appendix Volume I was filed electronically through the Third Circuit's CM/ECF system and served via CM/ECF system, and ten copies were mailed to:

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