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' REPLY BRIEF

Matthew W.H. Wessler
PUBLIC JUSTICE, P.C.
1825 K Street NW, Suite 200
Washington, DC 20006
(202) 797-8600

Neil R. Rosen
Paul A. Hilko
ROSEN LOUIK & PERRY, P.C.
200 The Frick Building
437 Grant Street
Pittsburgh, PA 15219
(412) 281-4200

Leslie A. Brueckner
PUBLIC JUSTICE, P.C.
555 12th Street, Suite 1620
Oakland, CA 94607
(510) 622-8150

Counsel for Defendants-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Introduction

The core question in this case is whether the relief afforded under ERISA reimbursement actions is governed by rules of contract law, as US Airways argues, or by principles of equity, as Appellants contend. To discern the answer, this Court need look no further than the plain language of the governing statute, which limits courts to granting "*appropriate equitable* relief." 29 U.S.C. § 1132(a)(3). (emphasis added). As the U.S. Supreme Court recognized in *Sereboff v. Mid Atlantic Medical Servs., Inc.*, 547 U.S. 356 (2006), this provision shows that reimbursement actions brought under ERISA are governed by principles of *equity*, which require courts to exercise their discretion in accordance with principles of unjust enrichment when fashioning appropriate relief. As explained in Appellants' opening brief, this approach – which has been consistently followed by courts sitting in equity, including by the U.S. Supreme Court in a similar context – is not only consistent with the plain language of the statute, but it also furthers ERISA's primary goal of protecting the interests of ERISA participants and beneficiaries.

US Airways' approach, in contrast, ignores both the language and underlying purposes of the statute and places the interests of employers and insurance plans ahead of the interests of the constituency ERISA was enacted to protect. US Airways' mantra throughout its brief is that a court *must* enforce the plan document as written when fashioning relief under Section 502(a)(3) and *may*

not exercise any discretion when determining the measure of reimbursement. This approach, however, reads the words "appropriate equitable relief" right out of the statute. If US Airways were correct, then Congress would have conferred upon courts the right to grant a *legal* remedy, which is exactly what is being sought by US Airways in this case. But Congress did no such thing. Instead, it directed courts to award "appropriate equitable relief" – language that even a first year law student knows is very different from a straightforward legal remedy. Try as it might, US Airways cannot reconcile its enforce-the-contract theory with the words Congress wrote when it enacted ERISA.

I. US Airways' Categorical "Enforce-the-Plan" Approach Contradicts the Core Holding in *Sereboff*.

A. *Sereboff* Produced a Dramatic Change in the Law By Clarifying that ERISA Reimbursement Claims Are Subject to Principles of Equity.

US Airways asks this Court to go back in time and adopt the approach for resolving ERISA reimbursement claims that it took before the U.S. Supreme Court decided *Sereboff*. This approach fails to account for the dramatic impact of *Sereboff* on ERISA reimbursement actions. Until *Sereboff*, many courts – including this one – held that claims for reimbursement are contractual claims governed entirely by the terms of the plan (or, to the extent the plan was ambiguous, "federal common law"). *See, e.g., Bill Gray Enters. v. Gourley*, 248 F.3d 206 (3d Cir. 2001); *Bollman Hat Co. v. Root*, 112 F.3d 113 (3d Cir. 1997);

Ryan by Capria-Ryan v. Fed. Express Corp., 78 F.3d 123 (3d Cir. 1996). In *Sereboff*, however, the U.S. Supreme Court held that ERISA reimbursement actions are governed by Section 502(a)(3), which contains the all-important reference to "appropriate equitable relief," thereby clarifying that these claims arise from, and are governed by, principles of *equity*. *See* 547 U.S. at 361. And *equitable* principles dictate that any relief afforded under an ERISA reimbursement claim be measured by the defendant's unjust enrichment, not by applying rules of contract law. Appellants' Br. at 23-26.

B. US Airways Improperly Interprets *Sereboff* as Holding that ERISA Reimbursement Claims are Governed by Rules of Contract Law.

US Airways' argument to the contrary is centered on a misinterpretation of the Supreme Court's ruling in *Sereboff*. To begin, US Airways seizes on a line, early in *Sereboff*, to argue that, in fact, the relief afforded under these types of reimbursement claims is governed by rules of contract (and therefore is properly resolved under this Court's pre-*Sereboff* jurisprudence). Thus, US Airways argues that "[t]he Supreme Court recognized an action under Section 502(a)(3) encompasses enforcement of plan terms when it stated: 'ERISA provides for equitable remedies *to enforce plan terms*, so the fact that the action involves a breach of contract can hardly be enough to prove relief is not equitable.'" Appellee's Br. at 22 (quoting *Sereboff*, 547 U.S. at 463). What US Airways fails to recognize is that, although *Sereboff* looked to the terms of a plan to determine

whether an insurer has the *right* to seek reimbursement, the Supreme Court made clear that the terms of the plan do *not* govern the *extent* of the reimbursement remedy when pursued under Section 502(a)(3). *See* Appellants' Br. at 42-43. Instead, in holding that reimbursement actions are subject to Section 502(a)(3), the Court explained that the *extent* of the remedy is to be determined by applying principles of equity, by looking by the law as it stood during "the days of the divided bench." *Sereboff*, 547 U.S. at 362 (quoting *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002)).

Thus, in *Sereboff*, the Court addressed two related questions and left open a third: first, whether, based on the terms of a health insurance plan, the insurer (Mid Atlantic) had adequately characterized the restitutionary relief it sought as equitable; second, if so, whether the basis for that claim qualified as "equitable" within the meaning of Section 502(a)(3); and third, what the "appropriate" measure of relief is for those claims that fall within Section 502(a)(3). *See id.* at 362-64. As to the first question, the Court contrasted Mid Atlantic's plan with the plan in an earlier Supreme Court case, *Knudson*, which held that an insurer could not maintain a claim for equitable relief within the meaning of Section 502(a)(3)). *See* 547 U.S. at 362. The Court explained that the insurer's claim failed in *Knudson* because the *terms of the plan* were deficient insofar as they did not "specifically identif[y]" funds in the hands of the defendant, *id.* at 362-63, and therefore did not establish a right to equitable relief. *Id.* Mid Atlantic's plan, by

contrast, did not suffer the same "impediment." *Id.* Looking to the specific terms of the plan, the Court held that because the plan sought its recovery through a "specifically identifiable fund," the relief sought, though intended "to enforce plan terms," was properly characterized as equitable in nature. *Id.* at 363.

The mere fact that the Plan in *Sereboff* adequately characterized the relief sought as equitable, however, did not end the case. As the Court went on to explain, "[w]hile Mid Atlantic's case for characterizing its relief as equitable thus does not falter . . . [,] Mid Atlantic still must establish that the basis for its claim is equitable" within the meaning of Section 502(a)(3). *Id.* at 363. This second question, the Court held, hinged on whether the relief sought qualified as a category of relief "typically available in equity," the only type of relief authorized under Section 502(a)(3). *Id.* at 362 (explaining that "we [have] construed [Section 502(a)(3)] to authorize only 'those categories of relief that were *typically* available in equity'") (emphasis in original). Reviewing the "case law from the days of the divided bench" and looking to the leading treatises on equity, the Court determined that Mid Atlantic's claim was equivalent to an "equitable lien established by agreement," a type of relief typically available in equity, and therefore its claim was authorized under Section 502(a)(3). *See id.* at 363-368.

The Court, however, stopped short of deciding the third and final question, also based on the statute, which is what the "appropriate" measure of relief is for

the equitable remedy, declining to consider it because it had not been raised below. *See id.* at 368 n.2.[1] Although the Court did not provide an answer, it has provided explicit instructions as to how future courts should decide this question. In resolving reimbursement claims brought under this statute, the Court has said, because they are equitable in nature, they must be governed by, and resolved under, principles of equity. This is because "statutory reference to [an equitable] remedy must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes." *Knudson*, 534 U.S. at 211 n.1. Otherwise, "any claim for legal relief can, with lawyerly inventiveness, be phrased in terms [of equity]." *Id.* This explains why in *Sereboff*, the Court instructed that the "scope of remedial power conferred on district courts" by Section 502(a)(3) must be ascertained by discerning the law as it stood during "the days of the divided bench," as set forth in certain "cases and secondary legal materials." *Id.* at 362; Appellants' Br. at 35-42.

Sereboff, therefore, does not provide US Airways any of the comfort it

---

[1] Specifically, the Court said:

> [n]either the District Court nor the Court of Appeals considered the argument that Mid Atlantic's claim was not 'appropriate' apart from the contention that it was not 'equitable,' and from our examination of the record it does not appear that the Sereboffs raised this distinct assertion below. *We decline to consider it for the first time here*.

Sereboff, 547 U.S. at 368 n.2 (emphasis added).

seeks. If US Airways were correct, then *Sereboff* would have simply held, as to the third question, that the insurer was entitled to 100% reimbursement under the terms of the plan (which are virtually identical to the plan terms here) rather than expressly reserve for future decision the question of what relief is "appropriate" under Section 502(a)(3). And if US Airways were correct, then *Sereboff* would not have bothered to instruct future courts to consult equitable treatises when determining the *statutory* questions concerning the appropriate scope of the remedy under Section 502(a)(3). These aspects of *Sereboff* reveal that, contrary to US Airways' view, Section 502(a)(3) requires a court to analyze reimbursement claims according to principles of equity, rather than to categorically enforce the plan terms as written.

C. US Airways Misreads *Sereboff* as Holding that "Equitable Liens by Agreement" Must be Enforced According to Their Terms.

US Airways also seizes on language in *Sereboff* to argue that its claim is properly characterized as an "equitable lien by agreement" and, as such, is unconditionally subject to rules of contract law. Appellee's Br. at 22-23.[2] This

[2] As a threshold matter, although US Airways now contends that the remedy it seeks is exclusively an "equitable lien established by agreement," it made no such claim before the district court. Instead, it argued in the alternative that it was entitled to equitable relief "in the form of a constructive trust or equitable lien." *See* Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 2 [dkt. # 29]. Because of this, the district court made no findings of fact or conclusions of law on the precise nature of the remedy. *See* A18 (concluding that "Plaintiff is entitled to an equitable lien by agreement or constructive trust"). To

argument is equally meritless. The distinction the Court drew in *Sereboff* between an "equitable lien by agreement" and other equitable remedies was relevant only for purposes of determining whether the relief was of a type that was "typically available in equity," and therefore available under Section 502(a)(3) (this is the second question discussed above). Specifically, the Court asked whether *all* restitutionary remedies under Section 502(a)(3) required "strict tracing rules" in order to qualify as equitable relief. *See* 547 U.S. at 365. *Sereboff* concluded that they did not, and that there were "different species of relief" that qualified under Section 502(a)(3). *Id.* at 365. According to the Court, the fact that Mid Atlantic's claim was considered an "equitable lien established by agreement" meant that it did not need to satisfy a tracing requirement in order to qualify as an "equitable remedy," and, therefore, it could pursue its claim under Section 502(a)(3) (even though it could not trace its money). *See id.* ("*Barnes* confirms that no tracing requirement of the sort asserted by the Sereboffs applies to equitable liens by agreement or assignment").

But this discussion has no relevance to the question now before this Court, which is, given the right to seek an equitable remedy under Section 502(a)(3), how

---

the extent that this distinction is relevant at all, it should be determined in the first instance by the district court upon remand. *See Scalea v. Scalea's Airport Service, Inc.*, 833 F.2d 500, 503 (3d Cir. 1987) (declining invitation "to construe the contract in the first instance" and remanding "for findings of fact and conclusions of law").

must the relief be measured? Try as it might, US Airways cannot change the fact that, irrespective of the specific "species" of relief, *every* treatise and authority provides the same answer: whatever the equitable remedy, the equitable principles governing the *measure* of relief are the same, and require a court to fashion a measure of relief based upon the defendant's unjust enrichment.[3] Basing the measure of relief on the categorical enforcement of the terms of the plan, and, therefore, on the plaintiff's loss, would inescapably violate the governing authorities relied upon by the Court in *Sereboff*, and would, as a result, eviscerate the terms of Section 502(a)(3).

D. US Airways Misinterprets *Sereboff* as Holding that Principles of Equity are "Beside the Point" in an ERISA Reimbursement Action.

US Airways also errs in suggesting that, because *Sereboff* said that "the parcel of equitable defenses [such as the "made whole" doctrine]. . . are beside the point" for the type of remedy brought by Mid Atlantic, the district court was right to award 100% reimbursement here. *See* Appellee's Br. at 28 (quoting *Sereboff*,

[3] *See* 1 D. Dobbs, Law of Remedies § 4.3(3), at 602 (explaining that both constructive trust and equitable lien remedies "are invoked for the same reasons, *to prevent unjust enrichment* [of the defendant]"); 1 G. Palmer, Law of Restitution § 1.3, at 16-20 (explaining that these remedies are "aimed at preventing unjust enrichment"); 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); *see also* Douglas Laycock, *The Scope and Significance of Restitution*, 67 Texas L. Rev. 1277, 1279 (1989) ("Palmer and the *Restatement* [of Restitution] define restitution in terms of unjust enrichment. . . . It follows that restitution measures recovery by defendant's gain rather than plaintiff's loss").

547 U.S. at 368). The issue before the Court in *this* case is not about whether "certain equitable defenses, such as the defense that subrogation may only be pursued after a victim had been made whole for his injuries," are applicable such that they defeat US Airways' claim for reimbursement. *See Sereboff* 547 U.S. at 368. Instead, this case presents the question, squarely left open after *Sereboff*, of what constitutes "appropriate" equitable relief in the context of an ERISA reimbursement action. As to this question, *Sereboff* made no findings. *See Sereboff*, 547 U.S. at 368 n.2.

This fact alone betrays the fatal weakness in US Airways' reliance on *Sereboff* in arguing that ERISA plans must be categorically enforced according to their terms when courts are tasked with fashioning equitable relief under Section 502(a)(3). If the Court had actually reached that conclusion, then there would have been no reason for it to reserve decision as to whether the word "appropriate" imposes any limitations on an insurer's reimbursement remedy under the statute. The Supreme Court's reservation of that question nullifies US Airways' argument that *Sereboff* supports its "enforce-the-plan" theory of the case.

In addition, contrary to US Airways' claims, Appellants are *not* seeking to avail themselves of common-law defenses, such as the "make whole" rule, that US Airways argues was explicitly rejected by *Sereboff*. Instead, they merely ask this Court to recognize what the statute requires, which is that courts possess broad discretion to fashion relief under an equitable remedy consistent with principles of equity. In this case, those principles authorize a court to apply a rule of

proportionality that has been endorsed by every treatise on equity and which the Supreme Court itself has embraced as the fairest method for calculating relief in comparable circumstances. *See* Appellants' Br. at 29-32 (discussing *Arkansas Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268 (2006)). If a statute commands a court to sit in equity and fashion relief for claims of equitable reimbursement, the approach taken must be guided by this equitable principle. As explained below, US Airways has offered no principled reason why the proportionality approach is not the most "equitable" and "appropriate" under the circumstances of this case.

E. US Airways Relies on Case Law that Has Been Rendered Moot by *Sereboff*.

US Airways' misinterpretation of *Sereboff* has also led it to rely on cases that are either inapplicable or outdated (or both). For example, US Airways cites *Kress v. Food Employers Labor Relations Ass'n*, 391 F.3d 563 (4th Cir. 2004) for the proposition that "reading restrictions into [an ERISA plan's] provisions" would be unjustified, as this approach "would surely discourage plan sponsors" from providing benefits to beneficiaries. Appellee's Br. at 20. In reality, however, *Kress* involved no claim under Section 502(a)(3), no discussion of how courts should resolve claims for equitable relief, and did not require the court to construe the language at issue here in any way. Instead, in *Kress*, the sole question posed to the Fourth Circuit was "whether the Fund can condition the receipt of benefits on

[an] attorney's signature [on the plan documents]." 391 F.3d at 567. The court found nothing in ERISA prohibiting this requirement, and the opinion is devoid of any reference to the relevant language of Section 502(a)(3). *Id.*

Nevertheless, even in *Kress*, the court recognized a signal principle that, though US Airways refuses to acknowledge it, governs all cases under ERISA: *i.e*., that courts will "*adhere to plan documents unless they contravene ERISA or other binding authority*." 391 F.3d at 568 (emphasis added). In this case, however, unconditionally adhering to the terms of the Plan *would* "contravene ERISA," and thus *Kress* itself disproves US Airways' approach.

US Airways' reliance on *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995) is equally flawed. *See* Appellee's Br. at 17-18 There, the Supreme Court merely held that an employer's amendment of its plan was justified *because* it was consistent with the requirements set forth in the text of ERISA, specifically Section 402(b)(3). *See* 514 U.S. at 79-80. As the Court recognized two years later, the right that an employer or plan sponsor may enjoy to "unilaterally amend or eliminate" its welfare benefit plan "does not justify" a departure from the plain language of ERISA. *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997). Here too, US Airways' quest for 100% reimbursement without regard to principles of equity "does not justify" a departure from the plain terms of Section 502(a)(3).

US Airways also attempts to salvage this Court's pre-*Sereboff* trilogy of reimbursement cases by arguing that, even though these cases did not arise "specifically under Section 502(a)(3)" and were decided long before *Sereboff*, they nevertheless establish the "proper" approach to resolving "subrogation/reimbursement claims." Appellee's Br. at 21-25. As explained in Appellants' opening brief, however, those decisions considered ERISA reimbursement claims as legal in nature and applied principles of standard contract law, enforcing the contractual terms as written in order to fashion an award for reimbursement. In those cases, this Court concluded that its jurisdiction arose "under the federal common law developed pursuant to ERISA." *Bollman Hat*, 112 F.3d at 115; *see also Ryan*, 78 F.3d at 125 (concluding that ERISA itself "is silent on the issue of subrogation agreements").[4] Given that this Court saw no statutory basis for these reimbursement claims, it was left to analyze them under "the federal common law developed pursuant to ERISA." *Bollman Hat*, 112 F.3d at 115. And, under this framework, this Court saw the issue principally as one

[4] US Airways is wrong in suggesting that *Ryan* actually applied an unjust enrichment measure to its determination of the appropriate award under a claim for reimbursement. This assertion turns the equitable principle of unjust enrichment on its head. In *Ryan*, this Court addressed the distinct question of whether allowing an insurer 100% reimbursement would unjustly enrich *the insurer*. *See Ryan*, 78 F.3d at 127. This question, however, is irrelevant for determining the measure of relief under an equitable claim for reimbursement, which is based upon the *defendant's* unjust enrichment and is designed to prevent the unjust enrichment of the *insured*.

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. *See Ryan*, 78 F.3d at 123; *Bollman Hat*, 112 F.3d at 115. Viewing these cases as not governed by any specific ERISA provision also led this Court to conclude that there was no "statutory polic[y] of ERISA" that conflicted with the enforcement of the plan as written, which this Court explained was a "necessary antecedent to overriding an express provision of a benefits plan within the purview of ERISA." *Ryan*, 78 F.3d at 124, 127.

But 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. When the Supreme Court decided *Sereboff*, it breathed life into Section 502(a)(3) which, until then, had not been thought to provide the vehicle for reimbursement claims brought on behalf of ERISA plans. For courts resolving ERISA reimbursement claims, now under Section 502(a)(3), it is no longer acceptable 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.

Unlike the district court, US Airways' also relies on two post-*Sereboff* rulings that eschewed an equitable approach for resolving reimbursement claims under Section 502(a)(3). *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 cases, however, the panels granted 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. By holding themselves duty bound to enforce plan terms as written, both *Shank* and *O'Hara* read the term "appropriate" out of the statute, violating one of the most basic canons of statutory interpretation. *Mertens*, 508 U.S. at 258 (courts should avoid "read[ing] the statute to render [a] modifier superfluous").

This departure from the plain language requirements of the statute was based on these courts' same mistaken conclusion that the equitable limitations relevant in fashioning relief were based not within Section 502(a)(3), but rather, in federal common law. 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 balance and apply the relevant equitable limitations on a claim for reimbursement under Section 502(a)(3). Neither court, moreover, despite the explicit teachings of the U.S. Supreme Court, cited even a single equitable treatise when determining the correct measure of relief afforded under the statute. This too reveals the degree to which these courts misconceived the nature and basis of the inquiry.

II. US Airways' Categorical "Enforce-the-Plan" Approach Also Contradicts the Plain Language of Section 502(a)(3).

US Airways' "enforce-the-terms-of-the-plan" refrain also runs headlong into the plain language of Section 502(a)(3). Time and again, the U.S. Supreme Court has held that, when Congress uses the term "appropriate" in connection with "equitable relief," it intends to confer broad discretion on district courts to fashion relief based on relevant equitable principles. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) (looking to Congress's use of similar language in other statutes to construe Section 502(a)(3)); *see also EEOC v. Waffle House, Inc.*, 534 U.S. 279, 292-93 (2002) (explaining that Congress's use of similar language in Title VII "obviously refer[s] to the trial judge's discretion in a particular case to . . . award [equitable relief] in an amount warranted by the facts of that case"); *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1985)

(holding that the "ordinary meaning" of a statutory command that a court "grant such relief as [it] determines is appropriate" "confers broad discretion on the court"). That Congress used this language in Section 502(a)(3) is all that is needed to refute US Airways' entire theory of this case, because it conclusively demonstrates that the method for resolving the type of reimbursement claim at issue here is governed by principles of equity. *See Franks v. Bowman Trans. Co., Inc.*, 424 U.S. 747, 777 n.39 (1976) (construing similar language and explaining that "[i]n equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests").

Despite its near-constant repetition of this theme, US Airways has failed to explain how unconditionally enforcing the terms of its Plan would result in an award consistent with Section 502(a)(3)'s reference to "appropriate equitable relief." The basic principle, completely ignored in US Airways' brief, is that the rigid enforcement of contractual terms is the province of a court of *law*. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002) (contract-enforcement actions are "actions at law" because they seek to "obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money"). When a court sits in equity, however, its job is fundamentally different: it must determine the fairest and most appropriate result under the circumstances.

See, e.g., Lemon v. Kurtzman, 411 U.S. 192, 200 (U.S. 1973) ("In shaping equitable decrees, the trial court is vested with broad discretionary power . . . . equitable remedies are a special blend of what is necessary, what is fair, and what is workable"); *Willard v. Tayloe*, 75 U.S. 557, 567 (1869) ("It is the advantage of a court of equity . . . that it can modify the demands of parties according to justice"); Black's Law Dictionary 540 (6th ed. 1990) (defining equity as "[j]ustice administered according to fairness as contrasted with strictly formulated rules of common law" and "based on what was fair in a particular situation"). Because US Airways' contrary position would strip a court of this broad discretion to fashion appropriate equitable relief, it is at odds with the statutory language, the Supreme Court, and the views of the Unites States Government expressed in *Sereboff*. *See, e.g.,* Brief for the United States as Amicus Curiae supporting Respondent, *Sereboff v. Mid Atlantic Medical Servs., Inc.*, at 23 (U.S. Feb. 23. 2006) (explaining that Congress designed Section 502(a)(3) to "incorporate[] the kind of flexibility in equitably remedying injustice that characterized the equitable side of the bench").

US Airways attempts to reconcile its theory with the language of the statute by arguing that strictly enforcing its plan would be an "equitable" outcome – and therefore consistent with Section 502(a)(3) -- because this is what the parties

agreed to. *See* Appellee's Br. at 27.[5] Given that this contention ignores every equitable treatise and other authority on restitution, it should be rejected. To hold that the controlling measure of an equitable award is the plaintiff's loss under a contract fundamentally violates *the* animating distinction between law and equity. *See* 1 D. Dobbs, Law of Remedies at § 4.1(1), at 555 (explaining that the measure of an award in equity 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"). If US Airways were correct, and a court's job were simply to enforce the parties' "bargain" as written, then it would simply be acting as a court of law, in derogation of the limiting language of Section 502(a)(3). So here again, US Airways ends up where it began, by advocating an approach that cannot be reconciled with the governing statute.

III. US Airways' Categorical "Enforce-The-Plan" Approach Contradicts ERISA's Basic Purposes.

US Airways' approach is also contrary to ERISA's basic purposes, which is a key part of the analysis. *See Varity Corp. v. Howe*, 516 U.S. 489, 513 (1996) (instructing 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)). US Airways wants this Court to endorse its belief

[5] It is worth noting that, although US Airways now advances this argument, the district court never once mentioned that it was applying *any* kind of equitable analysis.

that ERISA's primary purpose is "to ensure the integrity and primacy of written plans." Appellee's Br. at 25 (quoting *Longaberger v. Kolt*, 586 F.3d 459, 472 (6th Cir. 2009)). The Supreme Court has consistently held, however, that "[t]he principal object of [ERISA] is to protect plan participants and beneficiaries." *Boggs v. Boggs*, 520 U.S. 833, 845 (1997); *see also Varity*, 516 U.S. at 513 (holding that ERISA's *ultimate* purpose is "to protect the interests of participants and beneficiaries") (quoting from ERISA's basic purposes provision) (alterations omitted).

More to the point, though, what US Airways really wants to say is that ERISA requires courts always to enforce plan terms as written. Of course, ERISA does not actually say this, so US Airways settles on the goal of "protecting the integrity" of the plan. But even on its own terms, protecting the "integrity" of a plan is only a relevant purpose insofar as it is consistent with the statute itself and supports the statute's actual stated goals. *See Knudson*, 534 U.S. at 220 (finding that the purpose of "enforce[ing] the terms of the plan" is "inadequate to overcome the words of [ERISA's] text regarding the *specific* issue under consideration"). US Airways offers no answer as to how, in its view, enforcing its plan in absolute terms would vindicate the principal objective of protecting participants and beneficiaries. Indeed, it is a glaring omission, though not surprising, that US Airways does not come out and say that enforcing the Plan as written actually

"protects the interest of participants and beneficiaries." This is because doing so here actually would do the opposite. Allowing US Airways to enforce its plan's terms without regard to the extent to which Mr. McCutchen has recovered for his injury would injure its beneficiary and undermine ERISA's primary goals.

IV. Principles of Equity Counsel in Favor of the Proportionality Approach Advocated by Appellants.

US Airways also fails to offer any convincing response to Appellants' arguments regarding the appropriate measure of relief under Section 502(a)(3). As explained in Appellants' opening brief at 26-32, based on the principle of unjust enrichment, an insurer's recovery should be limited to that portion of the underlying recovery that is allocable to medical expenses. US Airways does not discuss in any detail any of the numerous authorities cited by Appellants in their opening brief, including the equitable treatises referenced in *Sereboff* (and in every other Supreme Court case concerning Section 502(a)(3)). *See id.* This is not surprising, given that these authorities all agree that, when fashioning relief under a claim of equitable reimbursement, a plaintiff only has a right to recover that portion of the underlying recovery that is allocable to the medical expenses is paid. *See* Brendan S. Maher & Radha A. Pathak, *Understanding and Problematizing Contractual Tort Subrogation*, 40 Loy. U. Chi. L.J. 49, 58 n.32 (2008) (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).

Despite the fact that this approach has been consistently (and increasingly) embraced as the most appropriate method for fashioning relief for equitable reimbursement claims by courts sitting in equity, *see* Appellants' Br. at 29-32, US Airways warns that adopting this approach here would create endless and unworkable litigation over what is "appropriate" in any given case. This scare tactic ignores the fact that courts, in almost every other setting in which equitable reimbursement claims are permitted, have had no problem fashioning relief in individual cases on this basis. *See, e.g., Werner v. Latham*, 752 A.2d 832, 835 (N.J. App. Div. 2000) (confining a health insurer's right of reimbursement "to that portion of the judgment or settlement reasonably attributable to medical expenses only"); *Aetna Life & Cas. Co. v. Nelson*, 492 N.E.2d 386, 390 (N.Y. 1986) ("[I]n 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.").

Indeed, the Supreme Court itself adopted this approach in virtually identical circumstances in *Arkansas Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268 (2006), which involved an equitable reimbursement claim brought on behalf of the government. The Court in that case, which was decided the same term as

Sereboff and addressed the proper measure for an appropriate equitable award for reimbursement, had no difficulty authorizing courts sitting in equity to fashion relief based on the proportion of the underlying recovery or settlement allocable to medical expenses. *See Ahlborn*, 547 U.S. at 288 (rejecting the argument that "a rule of full reimbursement is needed generally to avoid the risk of settlement manipulation"). The reason for this, of course, is that this is precisely what a court sitting in equity is expected to do, and precisely what Congress intended when it wrote Section 502(a)(3). *See* Appellants' Br. at 22-23; *see also Holland v. Florida*, 130 S.Ct. 2549, 2563 (2010) (instructing that "the exercise of a court's equity powers ... must be made on a case-by-case basis") (internal quotations omitted).

US Airways attempts to distinguish *Ahlborn* on the ground that the Court relied on the specific language of the Medicaid statute. Appellee's Br. at 36. But this is a distinction without a difference. Although *Ahlborn* certainly made reference to the language of the Medicaid statue, it placed far more emphasis on the public policy rationale for adopting a proportionality approach. Thus, for example, the Court explained that "[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. Ultimately, the Court settled on a proportionality approach for precisely the same reason that

every other authority has: 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 (internal quotations omitted).

The identical public policy concerns are implicated here. US Airways' argument 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, to adopt US Airways' position 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* the Medicaid arena in reaching its conclusion that a proportionality approach best addressed the relevant public policy and offered the fairest method for measuring relief. *See* 547 U.S. at 288 n.19 (looking to "cases involving the recovery of workers' compensation benefits"). US Airways offers no reason why this approach does not make the same good sense in the ERISA context, which presents similar concerns related to the risk of deterring settlement "in a large number of cases" and the "unfair[ness] to the recipient," that would result from a rule of absolute priority and unconditional enforcement of terms as written.

At base, US Airways' transparent warning about the perils of a "case-by-case approach" underscores how divorced its position is from core principles of equity. Just last year, the Supreme Court reiterated that the hallmark of the equitable side of the bench is that it follows "a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules." *Holland*,130 S.Ct. at 2563 (internal quotations omitted). "The flexibility inherent in equitable procedure," the Court explained, "enables courts to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct ... particular injustices." *Id.* (internal quotations omitted). US Airways' position, and that of the district court, would disinter these principles in exchange for a categorical rule of law. It should not be condoned.

V. US Airways' Approach is Contrary to Public Policy.

US Airways' approach would also have devastating real-world consequences. US Airways downplays the implications of its stance, suggesting that the result it seeks is simply part of the bargain that Mr. McCutchen and US Airways have struck. In reality, what US Airways seeks is the right to skim its medical expenses off the top of any tort recovery, without regard to the extent of the victims' injuries and without contributing to the cost of the recovery. This approach, as Judge Posner explained, is a "gratuitous" exercise in the deterrence 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); *see* Maher & Pathak, *Understanding Tort Subrogation*, 40 Loy. U. Chi. L.J. at 83 ("[M]odern subrogation provisions do not reflect appropriately bargained-for arrangements" and "threaten to result in a subrogation mechanism . . . that insufficiently advances the restitutionary, compensatory, and deterrence objectives of tort law.").

US Airways' insistence that there would be no chilling effect on attorneys in representing injury victims because "potential reimbursement is but one of many risk factors that tort attorneys take into consideration when deciding whether to pursue a claim," runs contrary to all available evidence. Appellee's Br. at 38. Commentators across the spectrum understand what US Airways apparently does not: 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 taking the representation of a client who received anything more than a trivial amount of medical insurance from an ERISA plan. *See* Maher & Pathak, *Understanding Tort Subrogation*, 40 Loy. U. Chi. L.J. at 86, 90.

Tort system aside, US Airways' suggestion that Mr. McCutchen's receipt of health care coverage somehow justifies its bid for reimbursement is equally baseless. *See* Appellee's Br. at 27. When an insured receives medical benefits

pursuant to an insurance agreement, he is "merely receiving the benefits for which he has already paid." *Maxwell v. Allstate Ins. Cos.*, 728 P.2d 812, 815 (Nev. 1986). The *premiums* paid by the insured are what entitles him to medical benefits. Permitting insurers like US Airways to unconditionally recover all of the advanced medical expenses, where it is clear that the beneficiary recovered for only a fraction of his injuries, deprives an insured, like Mr. McCuctchen, of the legal redress to which he is entitled and provides a windfall recovery for the *insurer*. US Airways pretends that this result is "fair" because the parties agreed to it, but in truth there is nothing fair about allowing insurers to have their cake and eat it too by invading unrelated elements of a recovery.

US Airways' last public policy argument is that allowing insurance plans anything less than 100% reimbursement from injured tortfeasors will "dissuade[ ] [employers] from offering any welfare benefits" at all. Appellee's Br. at 29. This claim defies common sense. Very small numbers of beneficiaries are actually ever injured, and even from that pool, an even smaller fraction of those will ever recover from a tortfeasor. The argument that limiting insurers to recovering their proportional share of these beneficiaries' recovery – rather than 100% recovery regardless of the circumstances – would threaten the entire insurance industry's profitability is not only nonsensical but it denies the actual history of the industry, which did – and does – quite well in those contexts in which this type of claim was

either not permitted in the first place (at all times before the mid-20th century) or substantially limited (a majority of states). *See* Appellants' Br. at 7-12. For employer-funded plans, "every dollar provided in benefits is a dollar spent by the employer; and every dollar saved is a dollar in the employer's pocket." *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 112 (2008) (internal alterations and quotations omitted). The choice here is no less clear.

Conclusion

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

Dated: April 1, 2011

Respectfully Submitted,

/s/ Matthew W.H. Wessler_____

Matthew W.H. Wessler
Public Justice, P.C.
1825 K Street NW, Suite 200
Washington, DC 20006
(202) 797-8600

Leslie A. Brueckner
Public Justice, P.C.
555 12th Street, Suite 1620
Oakland, CA 94607
(510) 622-8205

Neil R. Rosen
Paul A. Hilko
ROSEN LOUIK & PERRY, P.C.
200 The Frick Building
437 Grant Street
Pittsburgh, PA 15219

(412) 281-4200

Counsel for Defendants-Appellants

CERTIFICATES OF COMPLIANCE

1. With respect to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), this brief contains XXXX 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.

3. **L.A.R.31.1(c) Certification:** The text of the electronic version of this brief is identical to the text in the paper copies of this brief. A virus detection program (XXXX) has been run on the file of this brief and no virus was detected.

Dated: April 1, 2011

/s/ Matthew W.H. Wessler
Matthew W.H. Wessler
Counsel for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on this date, this Reply Brief was filed electronically through the Third Circuit's CM/ECF system and served via CM/ECF system, and one copy served by Express Mail, on the following counsel of record:

Noah G. Lipshultz, Esq.
LITTLER MENDLESON, P.C.
1300 IDS Center
80 South 8th Street,
Minneapolis, MN 55042

Shannon H. Paliotta, Esq.
LITTLER MENDLESON, P.C.
625 Liberty Avenue, 26th Floor
Pittsburgh, PA 15222

Dated: Washington, D.C., April 1, 2011.

/s/ Matthew W.H. Wessler
Matthew W. H. Wessler
Counsel for Defendants-Appellants