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No. 11-1285

IN THE
Supreme Court of the United States

U.S. AIRWAYS, INC.,

Petitioner,

v.

MCCUTCHEN, ET AL.

Respondents.

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

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Association for Justice ("AAJ") is a voluntary national bar association whose members primarily represent plaintiffs in personal injury actions. AAJ is committed to the principle that wrongdoers and those who create unreasonable risks should be held accountable for the harm they cause. Effective tort liability law not only provides compensation to those who face medical expenses and lost income due to wrongful injury, it prevents injury by promoting safety.

AAJ is concerned that allowing ERISA plans to demand reimbursement out of their beneficiary's tort award or settlement without contributing their share of legal costs will discourage wrongfully injured persons from pursuing their tort remedies, undermining the health and safety of all Americans as well as reducing reimbursement of ERISA plans.[1]

SUMMARY OF ARGUMENT

1. The focus of this case is on the limitation "*appropriate* equitable relief" authorized by Congress in § 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"). Petitioner asserts that ERISA plans should be entitled to define for themselves the equitable remedies available to them and that strict

[1] Letters from counsel for all parties evidencing their consent to the timely filing of *amicus curiae* briefs have been filed with the Court. Pursuant to Rule 37.6, *amicus* discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus*, its members, or counsel make a monetary contribution to its preparation.

enforcement of the plan as written is always "appropriate."

Amicus AAJ agrees with Respondents that the statutory text authorizes courts to limit the amount of an equitable lien by agreement based on the principles that courts of equity typically applied. AAJ is specifically concerned that an ERISA plan that received reimbursement out of a beneficiary's tort recovery should be obliged to pay its fair share of the legal fees which created that common fund.

The common fund doctrine is firmly rooted in the historic equity powers of the courts. Indeed, this Court recognized and repeatedly applied the doctrine in the days of the divided bench. The rule continues to be widely recognized by state and federal courts in the subrogation context to prevent those who share in the benefits of a lawsuit from becoming unjustly enriched by avoiding paying their share of the legal costs.

Application of the common fund doctrine does not require an explicit directive in § 502(a)(3). The doctrine is rooted in the courts' inherent equity powers. Congress has given no indication that it intended to remove that authority in ERISA actions. Indeed, ERISA was enacted in response to scandals in which workers lost their pension benefits due to negligence and misfeasance by employers and fund administrators who were allowed to operate without standards or oversight. It is unlikely that Congress intended to remove the traditional equity powers of the courts and instead invite employers and plan administrators to write their own rules governing lawsuits against their own beneficiaries under § 502(a)(3).

Finally, the calculation of the plan's fair share of attorney fees should be easy and transparent: The plan should pay the same percentage of its reimbursement as the beneficiary agreed to pay his or her contingency fee attorney out of the recovery. There is no need or logical reason for a laborious inquiry into the value of the attorney's services to the plan. The retainer agreement between the beneficiary and the attorney provides a reliable marketplace assessment of the value of the attorney's services, including the value of bearing the risk of non-recovery.

That simple means of calculating the share of the fee owed by the plan does not affect the well-settled rule that the court may alter or set aside a contingency fee agreement that is excessive or grossly unfair to the client.

2 Requiring ERISA plans to pay their proportional share of the attorney fees incurred to make reimbursement possible will actually reduce the costs of ERISA plans for employers and employees. Most federal courts outside the Third Circuit allow ERISA plans a free ride by receiving the benefits of the services of their beneficiaries' personal injury attorneys' services without paying for them. However, the amount of free services ERISA plans actually receive, the insurance industry's own figures show, is a miniscule percentage of premiums. Faced with the prospect of becoming economically *worse* off as a result of winning a tort award, many injured ERISA beneficiaries simply do not pursue their state tort law rights.

Providing for payment of the legal costs required to obtain reimbursement funds will remove

this disincentive for beneficiaries to hold tortfeasors accountable. Data confirms that the common fund doctrine lowers the cost of employee health insurance plans. Average premiums for fully insured plans, which are subject to state law common fund and make-whole doctrines, are significantly *less* than the average self-funded ERISA plan, such as Petitioner's. Thus, requiring ERISA plans to pay for the attorney services that make reimbursement possible may lower plan costs in the long run.

3. The common fund doctrine also furthers important state interests. Requiring beneficiaries to pay the legal costs for reimbursing their medical plan is a strong financial disincentive to pursuing tort actions against those responsible for wrongful injury. Tort law is one of the means by which a state exercises its police power to safeguard the health and safety of their citizens. States not only have an interest in providing compensation to those who face medical expenses and lost income due to wrongful injury, they also have an interest in deterring such injuries in the first place by holding tortfeasors accountable. There is no indication that Congress intended to override this important state role.

ARGUMENT

I. INTRODUCTION

The focus of this case is a single phrase – actually a single word – in the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*. In *Sereboff v. Mid Atlantic Medical Services, Inc*., 547 U.S. 356 (2006), this Court examined section 502(a)(3), which provides:

> A civil action may be brought . . . by a participant, beneficiary, or fiduciary (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 USC § 1132(a)(3) (emphasis added), 547 U.S. at 361. .

This Court held in *Sereboff* that "equitable relief" includes an equitable lien "by agreement" to reimburse an ERISA plan, pursuant to a reimbursement provision in the plan document, out of the proceeds of a beneficiary's tort award. *Id*. at 365. The Court did not decide whether "appropriate" equitable relief calls upon courts to exercise their traditional equitable powers to limit the amount of reimbursement when the tort proceeds are insufficient to fully compensate both parties. *See id.* at 368 n.2. That question is squarely presented here.

The primary argument urged by U.S. Airways, with the support of amici representing plan sponsors and administrators, is that an ERISA plan is entitled to strict enforcement of its provisions as written. Brief for Petitioner ("Pet. Br.") 17-18.[2] *See also* Brief

[2] Petitioner incongruously insists that Plan provisions be strictly enforced while, as the Solicitor General points out, it has not bothered to introduce the plan documents themselves or make them part of the record. Brief for the United States ("U.S. Br.") 3 n.2. The parties appear to have treated the Summary Plan Description, including its reimbursement provision, as an

for National Association of Subrogation Professionals, *et al*. ("NASP Br.") 7-19; Brief of Chamber of Commerce, *et al*. 6 & 9; Brief of Central States Fund, *et al*. 14.

In their view, although Congress precluded plans from suing participants and beneficiaries for breach of contract, plans should obtain the same result by virtue of an equitable lien under § 502(a)(3), unencumbered by the limitations and defenses that traditionally accompanied equitable relief. In this way, plans could nullify the courts' equitable powers and contract away even the most elemental obligations of fair treatment.

Amicus AAJ agrees with Respondents that where the specified fund identified for reimbursement is insufficient to fully compensate both the plan and the beneficiary, the court may limit the amount of the plan's equitable lien on the fund. Brief for Respondents ("Resp. Br.") 15-25.

If U.S. Airways is entitled to some reimbursement out of the fund that Respondents have created by pursuing their cause of action against the tortfeasor, the Court is presented with another question concerning the appropriate amount

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accurate reflection of the actual terms of the written plan document. The SPD itself warns, however, that it "is only a summary" and that "[i]f there is any difference between the information in this SPD and the legal plan document, the legal plan document will govern." U.S. Airways Complaint, Exhibit A at 20.

This Court has made clear that provisions of the SPD are not themselves enforceable. *CIGNA Corp. v. Amara,* 131 S. Ct. 1866, 1878 (2011). AAJ urges the Court to make clear in this case that it has not weakened this important principle.

of equitable relief: Can a court require Petitioner to bear its share of the attorney fees and legal costs incurred by Respondents?[3]

The answer is clearly yes.

II. COURTS MAY REQUIRE ERISA PLANS SEEKING REIMBURSEMENT FROM A COMMON FUND CREATED BY A BENEFICIARY TO BEAR A PROPORTIONATE SHARE OF THE LEGAL EXPENSE AND ATTORNEY FEES INCURRED BY BENEFICIARY IN CREATING THE FUND.

A. The Common Fund Doctrine Is Rooted in the Historic Equity Powers of the Courts.

This Court has consistently interpreted the term "appropriate equitable relief" in § 502(a)(3) as referring to "those categories of relief that, traditionally speaking (i.e., prior to the merger of law and equity) were *typically* available in equity." *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1878 (2011) (internal quotations omitted, emphasis in original). *See also Sereboff*, 547 U.S. at 361-62 ("The scope of remedial power conferred on district courts by § 502(a)(3)" is defined by the types of relief rendered by courts of equity during 'the days of the divided bench.'") (quoting *Great-West Life & Annuity Ins. Co.*

[3] The plan in *Sereboff* expressly agreed to pay its share of the reasonable attorney fees and court costs incurred by beneficiaries in securing the third-party payments. *Mid Atlantic Med. Servs., LLC v. Sereboff,* 407 F.3d 212, 215 (4th Cir. 2005). This Court was therefore not asked to address the issue. *See* 547 U.S. at 360.

v. Knudson, 534 U.S. 204, 212 (2002). The common fund doctrine is one such limitation on equitable relief that was typically and historically employed by courts sitting in equity, including this Court.

The common-fund doctrine refers to the "equitable principle underlying a federal court's power to award counsel fees out of a fund created or preserved through someone's efforts." 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2675 (3d ed. 1998). The treatises this Court looked to for a description of equity practice during the days of a divided bench, *see Knudson* at 217, similarly describe the common fund doctrine traditionally applied by equity courts. *See, e.g.*, 2 George E. Palmer, *Law of Restitution* § 10.8, 431 (1978); 1 Dan B. Dobbs, *Law of Remedies* § 3.10(2) (2d ed. 1993).

This Court's own description of this equitable doctrine is that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The purpose of the common fund doctrine is to prevent "persons who obtain the benefit of a lawsuit without contributing to its cost [from being] unjustly enriched at the successful litigant's expense." *Id.*

An early application of the common fund doctrine as a limitation on equitable claims for reimbursement out of tort recovery was articulated by the Supreme Court of Ohio:

> [Where an insured has sustained a loss,] he has an undoubted right to have

> it satisfied by actions against the wrong-doer. But if, by such action, there comes into his hands, any sum for which, in equity and good conscience, he ought to account to the underwriter, reimbursement will, to that extent, be compelled in an action by the latter, based on his right in equity to subrogation. But, the assured will not, in the forum of conscience, be required to account for more than the surplus, which may remain in his hands, after satisfying his own excess of loss in full, *and his reasonable expenses incurred in its recovery.*

Newcomb v. Cincinnati Ins. Co., 22 Ohio St. 382, 388 (1872) (emphasis added).

This Court first invoked the common fund doctrine in *Trustees v. Greenough*, 105 U.S. 527 (1881), in a suit involving bonds of the Florida Railroad Company secured by property held in trust. One bondholder, Vose, sued to set aside a fraudulent real estate sale that had undermined the bonds' value. After he succeeded in restoring the value of the bonds, he sought contribution from the other bondholders for the legal expenses he incurred. *See id.* at 529. The Court held that Vose was entitled to reimbursement by the nonparty bondholders. To deny Vose's claim "would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage." *Id.* at 532.

Shortly thereafter, in *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885), the Court

applied the doctrine and recognized an independent cause of action by the attorney for his fees which may be enforced by an equitable lien on the fund. This Court emphasized the equity rule, explaining that those who accepted "the fruits of the labors" of the attorneys should expect to be called upon to contribute to the expenses, including reasonable attorney fees. *Id*. at 127.

In *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939), it was the client who sued for contribution for litigation expenses and counsel fees, to be paid out of a clearly identified fund, bonds that had been set aside and earmarked as the subject of an express trust previously created. Justice Frankfurter wrote for the Court that the "power of federal courts in equity suits to allow counsel fees and other expenses" incurred by a client to achieve a result which benefits others "is part of the historic equity jurisdiction of the federal courts . . . ever since the First Judiciary Act, 1 Stat. 73, constituted that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery," *id*. at 164, and was "part of the original authority of the chancellor to do equity in a particular situation." *Id*. at 166.

Thereafter, this Court consistently maintained that it is "a general rule in courts of equity that a trust fund which has been recovered or preserved through [a litigant's] intervention may be charged with the costs and expenses, including reasonable attorney's fees, incurred in that behalf." *United States v. Equitable Trust Co.*, 283 U.S. 738, 744 (1931). *See also Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 719 (1967) (The common-fund rule is based on the equity rationale

that "to have allowed the others to obtain full benefit from the plaintiff's efforts without requiring contribution or charging the common fund for attorney's fees would have been to enrich the others unjustly at the expense of the plaintiff."); *Hall v. Cole*, 412 U.S. 1, 7 & n.7 (1973) (Common-fund doctrine supported award of attorney fees in suit under Labor-Management Reporting and Disclosure Act); *Bloomer v. Liberty Mut. Ins. Co.*, 445 U.S. 74, 88, n.15 (1980) (Noting "the established power of a court of equity to charge beneficiaries with a proportionate share of the costs of creating a common fund through litigation.").

In *Alyeska Pipeline Services Co. v. Wilderness Society*, 421 U.S. 240 (1975), this Court engaged in a comprehensive review of court-awarded attorney fees in federal courts. Justice White wrote for the Court that the common fund doctrine articulated and applied in *Greenough*, *Pettus* and *Sprague*, is grounded in:

> [T]he historic power of equity to permit . . . a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit. That rule has been consistently followed.

Id. at 257-58 (citing decisions).

"The *Greenough* version of the common fund doctrine has found universal approval by state courts because it is so firmly rooted in the equitable power

to grant restitution in order to prevent unjust enrichment or deter fiduciary misconduct." Lloyd C. Anderson, *Equitable Power to Award Attorney's Fees: the Seductive Appeal of "Benefit,"* 48 S.D. L. Rev. 217, 226 (2002-03). State courts have invoked this equitable doctrine to prevent the problem of free riding insurers who seeking to benefit from the efforts of their insureds to recover damages from tortfeasors. *See generally* Johnny Parker, *The Common Fund Doctrine: Coming of Age in the Law of Insurance Subrogation*, 31 Ind. L. Rev. 313, 337 (1998) ("All states, except New Hampshire and Wyoming, have adopted the common fund doctrine" in the subrogation context.).

B. Courts Retain Their Equity Powers in Actions Seeking Equitable Relief Under ERISA Under § 502(a)(3).

Petitioner and its amici argue that in the absence of authorization in § 502(a)(3), the written terms of plans trump traditional equity doctrines such as the common fund rule. *See* Pet. Br. 37; NASP Br. 7-12.

However, the equitable powers of the courts are inherent powers and do not depend upon congressional authorization. This Court made clear in *Greenaugh* that the courts retain their equitable powers regarding fees, even when Congress has itself addressed the subject of fees in the relevant statute.

As this Court subsequently explained in *Alyeska*, Congress had undertaken in 1853 "to standardize the costs allowable in federal litigation" and eliminate the "exorbitant fees for the victor's attorneys" being imposed on losing litigants. *Alyeska*,

at 251: Nevertheless, the *Greenough* Court held that the statute did not "take away the power of a court of equity to permit counsel fees" under the common-fund doctrine. 105 U.S. at 535. An equity court retains that authority unless the language of the statute

> [C]an be fairly construed to deprive the Court of Chancery of its long-established control over the costs and charges of the litigation, to be exercised as equity and justice may require, including proper allowances to those who have instituted proceedings for the benefit of a general fund.

Id. at 536.

This Court has ruled similarly with regard to other statutes. *See, e.g., Hall v. Cole*, 412 U.S. 1, 10 (1973) (Authorization of "appropriate" relief in Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 412, leaves in place the equitable power of the court to award attorney fees); *Mills v. Electric Auto-Lite Co*., 396 U.S. 375, 391-92 (1970) (Securities Exchange Act of 1934 does not circumscribe the court's equitable power to award attorney fees under the common-fund doctrine).

In this case, nothing in ERISA's statutory text can be fairly construed as depriving the courts of their equitable powers. To the contrary, this Court has pointed out that § 502(a)(3) authorizes not only equitable *relief*, but also, rather more broadly, "invokes the equitable *powers* of the District Court." *Amara*, 131 S. Ct. at 1880 (emphasis added).

The very use of the modifier "appropriate" indicates Congress' intent that the courts exercise their equitable authority. *See School Comm. of Burlington v. Dep't. of Educ. of Mass.*, 471 U.S. 359, 374 (1985) ("[T]he court was correct in concluding that 'such relief as the court determines is appropriate,' within the meaning of [the Education of the Handicapped Act, § 615(e), as amended, 20 U.S.C.A.] § 1415(e)(2) (2010), means that equitable considerations are relevant in fashioning relief.").

As this Court noted with reference to injunctive relief authorized by § 502(a)(3)(A), "statutory reference to that remedy must, absent other indication, be deemed to contain *the limitations upon its availability that equity typically imposes*. *Knudson*, at 211 n.1 (emphasis added). Clearly the equitable remedy sought by U.S. Airways in this case must be deemed to be subject to the limitations equity typically imposes, including the common fund doctrine.

That result comports with the background against which Congress acted. This Court has repeatedly observed that ERISA is "the product of a decade of congressional study of the Nation's private employee benefit system." *Knudson*, 534 U.S. at 209 (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993)). Congress acted against a backdrop of scandal and distrust. As one of the chief authors of the statute has noted, much of the impetus for ERISA's enactment was the financial failure of the Studebaker-Packard automobile company, many workers who had paid into the employee pension program for years were left with little or nothing. Michael S. Gordon, *Overview: Why Was ERISA Enacted?*, *in* Senate Special Comm. on Aging, 98th

Cong., 2d Sess., The Employee Retirement Income Security Act of 1974: the First Decade 8 (Comm. Print 1984). The pension failure was blamed on underfunding, mismanagement, and wrongdoing on the part of the company, fund administrators, and the UAW. James A. Wooten, *"The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 Buff. L. Rev. 683, 697-716 (2001).

Moreover, at the time Congress was fashioning ERISA, the great majority of states applied the common-fund doctrine in the context of insurance subrogation. Parker, at 333-34; *see also* J.F. Riley, Annot., *Right of Attorney for Holder of Property Insurance to Fee Out of Insurer's Share of Recovery From Tortfeasor*, 2 A.L.R.3d 1441 at § 2 & 3 (1965).

This history strongly indicates that Congress intended that the courts would play an active role in "construing the private remedy that Congress explicitly provided in § 502(a)(3)." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 155 (1985) (Brennan, J., concurring). It does not indicate that Congress intended to deprive the courts of their equitable powers. Nor does it suggest that Congress intended to invite employers and plan administrators to write their own favorite rules governing their claims for equitable relief simply by inserting them into plan documents.

C. The Plan's Equitable Share of Attorney Fees Is Calculated by Multiplying the Amount the Plan Receives by the Percentage Contingency Fee the Beneficiary Paid the Attorney to Pursue the Claim.

U.S. Airways raises an additional concern, speculating that the method of calculating the Plan's fair share of attorney fees would result in "costly" and "endless" litigation. Pet. Br. 49. Petitioner reaches this alarming conclusion by asserting that it should not be obliged to pay the proportional share of its reimbursement that matches the percentage paid by the beneficiary. Instead, "a federal judge in every case would need to determine an appropriate fee for the plan member's counsel by quantifying the nearly unquantifiable: 'the value of the services' the plan *member*'s attorney rendered to the *plan*." *Id.* at 48, referring to the Reporter's Illustration 26 accompanying Restatement (Third) of Restitution & Unjust Enrichment § 29 (2011).[4]

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[4] Illustration 26 is based on *Brown v. T.W. Phillips Gas & Oil Co.*, 105 F. Supp. 479 (W.D. Pa. 1952), where three fire insurance companies sought reimbursement out of the property owner's tort judgment against the wrongdoer. The district court ordered that each insurer pay its share of the attorney fees and costs. Rather than apply the attorney's contingency fee percentage to each insurer's reimbursement, the court indicated it would hold a hearing to arrive at a fair fee. *Id.* at 482. This case does not appear to reflect usual practice in tort personal injury subrogation. The court cited no authority for conducting a fee hearing in a subrogation matter, but instead looked to the "principles of equity applied in class actions and decedents' estates." *Id.* at 481. Nor has this decision been cited for that point, apart from its use as a basis for an illustration in the modern restatement.

Petitioner argues that it is entitled to a large portion of Mr. McCutchen's tort settlement without Petitioner contributing to its cost because the calculations required to determine its fair share "are not, after all, simple or mathematical; they are intensely factual and circumstance-specific, and they would embroil federal courts and litigants in resource-consuming litigation." Pet. Br. 49.

To the contrary, the fee calculation is mathematical and fairly simple. If the attorney has undertaken to pursue plaintiff's cause of action for 33 percent of the recovery, if any, and the plan receives all or part of the recovery, the plan's fee is 33 percent of its recovery – it pays the same percentage of its recovery as the tort plaintiff paid on his.

It is true that in other common fund contexts, such as class actions, the court will inquire into the number of hours spent by counsel, the difficulty of the case and other factors. Plaintiffs in personal injury actions are almost invariably represented on a contingency fee basis, which provides a ready and accurate means of calculating the amount of unjust enrichment if the plan is not required to contribute to the legal costs of making its reimbursement possible.

The contingent fee represents "the dominant system in the United States by which legal services

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Significantly, the only other decision the Restatement Reporter cites regarding the calculation of fees was *Guiel v. Allstate Insurance Co.*, 756 A.2d 777 (Vt. 2000), in which the court upheld a common-fund fee award that applied the plaintiff's agreed-upon contingency-fee percentage. *Id*. at 785.

are financed by those seeking to assert a claim." F. MacKinnon, *Contingent Fees for Legal Services* 4 (1964). It serves as the "key to the courthouse" for the vast majority of ordinary Americans, who could not otherwise afford to pursue their rights at the profession's prevailing hourly rates, *See* Philip H. Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, 2 Litigation 27 (Summer 1976); Peter Karsten, *Enabling The Poor To Have Their Day In Court: The Sanctioning Of Contingency Fee Contracts, A History To 1940*, 47 DePaul L. Rev. 231 (1998). The contingency fee lawyer provides access to affordable legal representation by agreeing to be paid as a percentage of the recovery, thus bearing the risk of losing the case.

For that reason, the time-consuming fee inquiry Petitioner envisions is illogical as well as unnecessary. The value of the contingency fee lawyer's services is not measured after the contingency has come to pass and the attorney has succeeded and reimbursement of the plan is ensured. The plan could have invoked its subrogation rights and brought suit with its own attorney.

The value of allowing McCutchen's attorney to pursue the claim includes the value of the attorney bearing the risk of loss. That value in this case was set by the attorney and client at the time the litigation commenced. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 731 (1987) ("The private market commonly compensates for contingency through arrangements in which the attorney receives a percentage of the damages awarded to the plaintiff.") (O'Connor, J., concurring). McCutchen and his attorney agreed at that time as to the value of the attorney's services.

Thus, Professor Dawson states that, in contrast to class actions and other common-fund contexts, the prevailing rule in subrogation cases is that "the contingent fee arrangements between the lawyer and his client were carried over and applied to the 'fund.'" John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 Harv. L. Rev. 1597, 1623 n.85 (1974) (citing cases).

The Solicitor General makes a somewhat different observation, that the beneficiary who has provided a fund from which the plan can obtain reimbursement "is not necessarily entitled to a mechanical, pro rata apportionment," of the agreed-upon contingency fee and that the court should review the fee for reasonableness. U.S. Br. 27 n.10 (citing *Pettus*, 113 U.S. at 128).

In fact, this Court in *Pettus* did not instruct federal courts to look for a "reasonable" percentage fee different from the percentage the attorney had agreed upon with the client. To the contrary, the Court found it an abuse to charge a different percentage to the fund from what the client had agreed to pay. Plaintiffs in that case had retained their attorney for five percent of the bonds and coupons involved, but were awarded ten percent out of the common fund. *Id.* at 128. The Court, reversing, could "perceive no reason for this discrimination against creditors who were not parties" and remanded to recalculate their fees using the same percentage agreed upon by the client. *Id.*

Amicus emphasizes that it is not unfair that the subrogee be bound by the agreement between the attorney and client. "[T]he insurer that wishes to avoid application of the common fund doctrine in

cases may do so by the simple act of refusing to accept the benefits of a settlement in which it did not participate." *Lopez v. Farm Bureau Mut. Ins. Co.*, 148 Idaho 515, 519, 224 P.3d 1104, 1108 (2010).

Amicus also notes that declining to require an individualized inquiry in every case to evaluate the reasonableness of applying the contingency fee percentage to the plan's recovery does not diminish the courts' well-settled authority to alter or set aside a contingent fee that is unconscionable to the *client. See, e.g., Schlesinger v. Teitelbaum*, 475 F.2d 137, 141 (3d Cir. 1973). *See also, Kalyawongsa v. Moffett*, 105 F.3d 283, 286 (6th Cir. 1997) ("federal district judges have 'broad equity power to supervise the collection of attorneys' fees under contingent fee contracts'") (quoting *Krause v. Rhodes*, 640 F.2d 214, 218 (6th Cir. 1981)). *See generally*, Robert L. Rossi, *Attorney's Fees* § 2.8-2.10 (2d ed. 1995).

III. APPLICATION OF THE EQUITABLE COMMON FUND DOCTRINE UNDER 502(A)(3) WILL REDUCE PLAN COSTS AND PREMIUMS BY ENCOURAGING TORT ACTIONS THAT WILL FUND REIMBURSEMENT.

A. Any Increased Premium Cost Due to Requiring ERISA Plans to Contribute Their Proportional Share of the Attorney Fees Would Be Miniscule.

U.S. Airways and its supporting amici argue that limiting reimbursements will devastate ERISA plans economically, leading many employers to raise premiums substantially and others to discontinue

medical coverage altogether. They reason that full reimbursement out of third-party tort judgments and settlements is essential to keeping down the costs of ERISA medical plans. *See* Pet. Br. 42-46; NASP Br. 24-26.

It must be acknowledged at the outset, however, that Congress' primary goal in enacting ERISA was not to reduce the cost of employee benefit plans. It was to safeguard their integrity. The "legislative history of ERISA reveals that Congress was, in large part, motivated by 'the absolute need that safeguards for plan participants be sufficiently adequate and effective to prevent the numerous inequities to workers under plans which have resulted in tragic hardship to so many.'" David M. Kono, *Unraveling the Lining of ERISA Health Insurer Pockets – A Vote for National Federal Common Law Adoption of the Make Whole Doctrine*, 2000 B.Y.U. L. Rev. 427, 444 (2000) (quoting H. R. Rep. No. 93-533, at 9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4647). *Cf. Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981) (noting that Congress in enacting ERISA had "the primary goal of benefiting employees and the subsidiary goal of containing pension costs.").

Obviously a plan might reduce its costs by shifting administrative expenses to its injured claimants. But the principle of health insurance is to the spread risk of large expense by assessing a relatively small premium among many insureds when they are relatively healthy. Petitioner favors imposing all of a large administrative expense on a small number of injured beneficiaries for the purpose of saving the many healthy participants a very slight

amount in premiums. It is insurance running in reverse.

How exceedingly slight the maximum savings would be is demonstrated by the figures cited by Petitioner itself. U.S. Airways states that ERISA "plans recover more than $1 billion annually under reimbursement provisions," the loss of which could result in "potential loss of insurance coverage." Pet. Br. 42-43 (citing Health Economics Practice, Barents Group, LLC, *Impacts of Four Legislative Provisions on Managed Care Consumers: 1999-2003* (1998)). *See also* BCBS Br. 12 (estimating that "plans recover over $1 billion each year through subrogation and reimbursement."). The Barents Group report estimates that employers and employees pay approximately $300 billion in premiums to those plans. Barents, at 1. Thus, reimbursements represent about one-third of 1 percent of premiums.

A substantial portion of those reimbursements have nothing to do with third party tort recoveries. Many, if not most, are recoveries of overpayments or erroneous payments. About a third of that smaller number, less than ten cents of every $100 in premiums, roughly represents the ERISA plans' proportional share of attorney fees.

Nor are employers with self-funded plans, as in this case, obliged to use reimbursements to reduce premiums. Amicus Blue Cross/Blue Shield lectures, "Every dollar blocked from subrogation or reimbursement recovery by an equitable defense is one less dollar for all plan participants to use for their current and future claims." BCBS Br. 12. Because reimbursements flow into the employer's general revenues, it can also be said that there is one

less dollar for executive bonuses, stockholder dividends, advertising campaigns or other purposes.

B. Preserving Financial Incentives for Beneficiaries to Bring Claims Against Tortfeasors Will Lower the Costs of ERISA Coverage for Employers and Employees.

The very small increase in administrative costs that might result from requiring ERISA plans to contribute their fair share of attorney fees incurred to provide a source of reimbursement would be far outweighed by the consequent increase in reimbursements.

Even if successful tort plaintiffs typically recovered their full losses, equity would require ERISA plans to pay their share of the attorney fees incurred to make reimbursement possible. But "scholarly research documents that more seriously injured victims tend to recover only a part of their total financial losses, notwithstanding the supposed legal entitlement to full compensation." Kenneth S. Abraham, Robert L. Rabin & Paul C. Weiler, *Enterprise Responsibility for Personal Injury: Further Reflections*, 30 San Diego L. Rev. 333, 340 (1993). In fact, the consistent "undercompensation [of personal injury plaintiffs] at the higher end is so well replicated that it qualifies as one of the major empirical phenomena of tort litigation." Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System – And Why Not?* 140 U. Pa. L. Rev. 1147, 1218 (1992). Additionally, tort settlements are often necessary compromises in the face of inadequate insurance.

It has also been observed that "attorneys rarely work for free." *Guiel v. Allstate Ins. Co.*, 756 A.2d 777, 780 (Vt. 2000). Commitments to staff salaries, rent, and other costs and expenses must be met. As Chief Judge Richard Posner has pointedly observed, rejecting the common-fund doctrine allows the plan "to free ride on the efforts of the plan participant's attorney." *Wal-Mart Stores, Inc. Associates' Health & Welfare Plan v. Wells*, 213 F.3d 398, 402 (7th Cir. 2000). Consequently, a victim of wrongful injury may face the prospect of owing the attorney a percentage of his own recovery, but also a percentage of the fund that was paid over to the ERISA plan. Many wrongful injury victims face the real possibility of "winning" their tort lawsuit, but finding themselves worse off than if they had not sued at all. *Id.*

This prospect, "gratuitously deter[s] the exercise of the tort rights" of many participants whose medical expenses were paid by ERISA plans. *Id.* They simply do not bring suit against tortfeasors responsible for their injuries.

The cost of rejecting the common fund doctrine is substantial. Amicus Blue Cross/Blue Shield indicates that fully insured plans are subject to state insurance laws that include the make whole doctrine and the common fund doctrine, while those doctrines have generally been held inapplicable to self-funded ERISA plans. BCBS Br. 16 n.12. *See FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990) (plans that are fully insured by insurance companies are subject to state laws regulating insurance; those regulations are preempted as to ERISA plans that are fully funded by employer/employee contributions).

According to the Kaiser Foundation survey cited by Blue Cross, the average premium charged by the self-insured plans is 3.3 percent *higher* for individual workers and 7.3 percent *higher* for family coverage than for fully insured plans that are subject to the make whole and common fund doctrines. Kaiser Family Foundation and Health Research and Educational Trust, *Employer Health Benefits: 2011 Annual Survey* 26 & 27 (2011), *at* http://ehbs.kff.org.[5]

Thus, as Judge Easterbrook has pointed out, the common-fund doctrine "may even increase the plan's recoveries in the long run." *Blackburn v. Sundstrand Corp.*, 115 F.3d 493, 496 (7th Cir. 1997).

IV. PUBLIC POLICY SUPPORTS THE BENEFICIARY'S EQUITABLE REMEDY FOR A PRO RATA SHARE OF ATTORNEY FEES.

As demonstrated in Part II above, rejecting the common-fund doctrine sets up a strong financial disincentive for ERISA participants to pursue their rights to seek compensation from tortfeasors. The consequences extend far beyond increasing the cost of ERISA plans. Such a rule undermines the interest of the states in holding tortfeasors accountable.

Tort liability is chiefly a matter of state law. "Throughout our history," this Court has stated, "the

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[5] The average annual premium for workers covered by fully insured plans in 2011 was $5,324 for individuals and $14,434 for families. For those covered by self-funded plans, the average premiums were $5,499 and $15,492 respectively. Kaiser, at 26-27, exhibits 1.5 & 1.6. Blue Cross/Blue Shield mistakenly reverses those survey results. *See* BCBS Br. 16 n.12.

several States have exercised their police powers to protect the health and safety of their citizens." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996). These are "primarily, and historically, . . . matter[s] of local concern." *Id*. (quoting *Hillsborough Cnty. v. Automated Med. Labs. Inc.*, 471 U.S. 707, 719 (1985)). Hence, federal law must take into account the "legitimate and substantial interest of the State in protecting its citizens" through tort liability. *Farmer v. United Bhd. of Carpenters & Joiners of America*, 430 U.S. 290, 304 (1977).

States do so first by requiring that those who engage in harmful or unreasonably dangerous conduct bear the cost of the harms they cause. Liability is a powerful incentive to invest in safety. *See* Guido Calabresi, *The Costs of Accidents* 68-129 (1970) (tort liability acts as specific and general deterrent to accidents). *See also* American Bar Association, *Towards a Jurisprudence of Injury* 4-3 (1984) (deterrence of misconduct is "a strong thread running through tort law"); Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages*, 56 S. Cal. L. Rev. 133, 137 (1982) ("There is now a rich body of academic literature supporting the view that a primary purpose of tort liability rules is to discourage inappropriate behavior.").

By discouraging ERISA beneficiaries from pursuing meritorious tort lawsuits, the rule Petitioner advocates weakens this safety incentive, which may be expected to result in an increase in accidental injuries. Some of the resulting medical expenses, of course, will be paid by ERISA plans.

"It is beyond dispute," this Court has also stated, that the States have "a significant interest in redressing injuries that actually occur within the State." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 502 (1987) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984)). Although federal law is supreme, the "State's interest in applying its own tort laws cannot be superseded by a federal act unless that was the clear and manifest purpose of Congress." *Id.* at 503.

If ERISA plans are not required to contribute a pro rata share of the attorney fees incurred by beneficiaries to create a fund from which plans might seek reimbursement, beneficiaries will not retain attorneys to do so. Plans will not be reimbursed for paid benefits, and beneficiaries will not obtain compensation for their other losses. The advantage under such a rule goes to the tortfeasor who is not made accountable for wrongful injury.

There is no indication in ERISA that Congress intended to undermine the role and responsibility of the States in this way.

CONCLUSION

For the foregoing reasons, the decision by the Court of Appeals for the Third Circuit should be affirmed.

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