American Bar Association
www.supremecourtpreview.org

No. 11-1285

IN THE
Supreme Court of the United States

U.S. AIRWAYS, INC., in its capacity as Fiduciary and Plan Administrator of the U.S. AIRWAYS, INC. EMPLOYEE BENEFITS PLAN,

Petitioner,

v.

JAMES MCCUTCHEN and ROSEN, LOUIK & PERRY, P.C.,

Respondents.

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

BRIEF FOR PETITIONER

NOAH G. LIPSCHULTZ
LITTLER MENDELSON, P.C.
80 S. 8th Street
Minneapolis, MN 55402
(612) 630-1000

SUSAN KATZ HOFFMAN
LITTLER MENDELSON, P.C.
1601 Cherry Street
Suite 1400
Philadelphia, PA 19102
(267) 402-3000

NEAL KUMAR KATYAL*
CATHERINE E. STETSON
DOMINIC F. PERELLA
MARY HELEN WIMBERLY
SEAN MAROTTA
HOGAN LOVELLS US LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner
**Counsel of Record*

QUESTION PRESENTED

Employee benefit plans often cover a participant's medical bills in the event of injury but require that, if the participant obtains compensation from a third party for that injury, he or she reimburse the plan in full. Under Section 502(a)(3) of the Employee Retirement Income Security Act (ERISA), plans may enforce these reimbursement provisions in court by seeking "appropriate equitable relief" to "enforce * * * the terms of the plan." 29 U.S.C. § 1132(a)(3).

The question presented is: Whether ERISA Section 502(a)(3) authorizes courts to use equitable principles to rewrite contractual language, and refuse to order participants to reimburse their plan for benefits paid, even where the plan's terms give it the right to full reimbursement.

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the U.S. Court of Appeals for the Third Circuit:

1. U.S. Airways, Inc., the petitioner on review, was plaintiff-appellee below.

2. James McCutchen and Rosen, Louik & Perry, P.C., respondents on review, were defendants-appellants below.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner U.S. Airways, Inc. is a wholly owned subsidiary of U.S. Airways Group, Inc., which owns 10 percent or more of U.S. Airways, Inc. stock. U.S. Airways Group, Inc. is a publicly traded company.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS ii
RULE 29.6 DISCLOSURE STATEMENT iii
TABLE OF AUTHORITIES vi
OPINIONS BELOW 1
JURISDICTION 1
STATUTE INVOLVED 1
INTRODUCTION 2
STATEMENT 4
SUMMARY OF ARGUMENT 15
ARGUMENT 16
I. THE DECISION BELOW CANNOT BE SQUARED WITH ERISA'S TEXT OR PURPOSE 16
A. Section 502(a)(3) Authorizes Equitable Relief To *Enforce* Plans, Not To Rewrite Them 17
B. Petitioner's Approach To Section 502(a)(3) Honors ERISA's Purpose And Design 24
II. THE APPROACH ADOPTED BELOW CANNOT BE SQUARED WITH THE EQUITABLE LIEN BY AGREEMENT 29

TABLE OF CONTENTS—Continued

Page

A. The Relief At Issue Here Is An Equitable Lien By Agreement 30

B. Equitable Liens By Agreement Enforce Parties' Agreements By Their Terms 31

C. The Third Circuit Reached A Different Result By Applying The Wrong Equitable Principles 38

III. THE DECISION BELOW THREATENS THE STABILITY OF SELF-FUNDED ERISA PLANS AND INCREASES THE BURDENS ON LITIGANTS AND COURTS 42

A. The Third Circuit's Approach Discourages Employers From Offering Benefits 42

B. The Third Circuit's Rule Imposes Heavy Litigation Burdens On Plans And Courts 46

C. The Third Circuit's Rule Encourages Gamesmanship 50

CONCLUSION 51

TABLE OF AUTHORITIES

Page

CASES:

Adkinson & Bacot Co. v. *Varnado*, 47 So. 113 (Miss. 1908) 34

Administrative Comm. of Wal-Mart Stores, Inc. v. *Gamboa*, 479 F.3d 538 (8th Cir. 2007) 25

Administrative Comm. of Wal-Mart Stores, Inc. v. *Shank*, 500 F.3d 834 (8th Cir. 2007) 8, 25, 27, 44

Administrative Comm. of Wal-Mart Stores, Inc. v. *Varco,* 338 F.3d 680 (7th Cir. 2003) 9

Aetna Health Inc. v. *Davila*, 542 U.S. 200 (2004) 5, 6

Alden v. *Garver*, 32 Ill. 32 (1863) 32

Bair v. *Willis*, 129 S.E.2d 774 (Ga. 1963) 33

Barnes v. *Alexander*, 232 U.S. 117 (1914) 30, 31, 35, 37, 40

Bernard v. *Lea*, 210 F. 583 (4th Cir. 1913) 32

Black & Decker Disability Plan v. *Nord*, 538 U.S. 822 (2003) 5, 28

Bombardier Areospace Emp. Welfare Benefits Plan v. *Ferrer, Poirot, & Wansbrough*, 354 F.3d 348 (5th Cir. 2003) 9

TABLE OF AUTHORITIES—Continued

Page

Burrows v. *Hoveland*,
58 N.W. 947 (Neb. 1894) 36

Butts v. *Broughton*,
72 Ala. 294 (1882) 36

CGI Techs. & Solutions v. *Rose*,
683 F.3d 1113 (9th Cir. 2012) 8, 46, 47

CIGNA Corp. v. *Amara*,
131 S. Ct. 1866 (2011) 5, 14, 20-24, 37

Conkright v. *Frommert*,
130 S. Ct. 1640 (2010) 6, 26, 49

Craig v. *Bemis Co.*,
517 F.2d 677 (5th Cir. 1975) 41

Curtiss-Wright Corp. v. *Schoonejongen*,
514 U.S. 73 (1995) 2, 5, 7, 25

Cutting v. *Jerome Foods, Inc.*,
993 F.2d 1293 (7th Cir. 1993) 28

Daggett v. *Rankin*,
31 Cal. 321 (1866) 32

Duncan v. *Walker*,
533 U.S. 167 (2001) 19

Egelhoff v. *Egelhoff*,
532 U.S. 141 (2001) 26

Farmers' Mut. Ins. Ass'n v. *Burch*,
25. S.E. 211 (S.C. 1896) 35

FMC Corp. v. *Holliday*,
498 U.S. 52 (1990) 26, 44, 49

TABLE OF AUTHORITIES—Continued

Page

Fort Halifax Packing Co. v. *Coyne*,
482 U.S. 1 (1987) 42

Foster Lumber Co. v. *Harlan Cnty. Bank*,
80 P. 49 (Kan. 1905) 32

Gill v. *Clark,*
54 Mo. 415 (1873) 36

Good v. *Jarrard*,
76 S.E. 698 (S.C. 1912) 4, 29, 34

Great-West Life & Annuity Ins. Co.
v. *Knudson*, 534 U.S. 204 (2002) 8, 21, 33

H.G. Fitzhugh v. *Smith*,
62 Ill. 486 (1872) 36

Hanson v. *W.L. Blake & Co.*,
155 F. 342 (D. Me. 1907) 36

Harris v. *Harvard Pilgrim Health Care, Inc.*,
208 F.3d 274 (1st Cir. 2000) 27

Harris Trust & Sav. Bank, Inc.
v. *Salomon Smith Barney*,
530 U.S. 238 (2000) 17, 21

Hecht Co. v. *Bowles*,
321 U.S. 321 (1944) 14

Hedges v. *Dixon County*,
150 U.S. 182 (1893) 24

Hovey v. *Elliot,*
73 Sickles 124 (N.Y. 1890) 33

TABLE OF AUTHORITIES—Continued

Page

Ingersoll-Rand Co. v. *McClendon*,
498 U.S. 133 (1990) 26

Kennedy v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285 (2009) 6, 7

Lockheed Corp. v. *Spink*,
517 U.S. 882 (1996) 28

Manufacturers' Fin. Co. v. *McKey*,
294 U.S. 442 (1935) 24

Massachusetts Mut. Life Ins. Co. v. *Russell*, 473 U.S. 134 (1985) 5, 6, 25, 27

Mertens v. *Hewitt Assocs.*,
508 U.S. 248 (1993) 7, 17, 19

Moore v. *CapitalCare, Inc.*,
461 F.3d 1 (D.C. Cir. 2006) 9

Morrison-Knudsen Constr. Co. v. *Director, Office of Workers' Compensation Programs*,
461 U.S. 624 (1983) 22

Parlin & Orendoff Implement Co. v. *Moulden*,
228 F. 111 (5th Cir. 1916) 32

Peacock v. *Thomas*,
516 U.S. 349 (1996) 17

Rimes v. *State Farm Mut. Auto Ins. Co.*,
316 N.W.2d 348 (Wis. 1982) 48

Rodriguez v. *Disner*, __ F.3d __, 2012 WL 3241334 (9th Cir. Aug. 10, 2012) 12

TABLE OF AUTHORITIES—Continued

Page

Runstetler v. *Atkinson*,
11 D.C. 382 (1883)..4, 31

Rush Prudential HMO, Inc. v. *Moran*,
536 U.S. 355 (2002)..7, 26

Ryan v. *Federal Express*,
78 F.3d 123 (3d Cir. 1996) 26

Schwade v. *Total Plastics, Inc.*,
837 F. Supp. 2d 1255
(M.D. Fla. 2011) 27, 44, 46, 50

Sereboff v. *Mid Atl. Med. Servs., Inc.,*
547 U.S. 356 (2006)..................................... *passim*

Sosa v. *Alvarez-Machain*,
542 U.S. 692 (2004)..18

Southern Ice & Coal Co. v. *Alley*,
154 S.W. 536 (Tenn. 1913)..................................33

Standorf v. *Shockley*,
111 N.W. 622 (N.D. 1907)....................................32

Stone v. *First Nat'l Bank of Tillamook*,
198 P. 244 (Or. 1921) 33

United States v. *Morton*,
467 U.S. 822 (1984)..20

United States Fidelity & Guar. Co. v. *Fidelity Trust Co.*, 153 P. 195 (Okla. 1915) 33

Varity Corp. v. *Howe*,
516 U.S. 489 (1996)..............................7, 27, 35, 50

TABLE OF AUTHORITIES—Continued

Page

Walker v. *Brown*,
165 U.S. 654 (1897) 33, 36

Wheeler v. *Insurance Co.*,
101 U.S. 439 (1879) 32

Zurich Am. Ins. Co. v. *O'Hara*, 604
F.3d 1232 (11th Cir. 2010) ....*passim*

STATUTES:

28 U.S.C. § 1254(1) 1

29 U.S.C. § 1001(b) 5

29 U.S.C. § 1102(a)(1) 5

29 U.S.C. § 1109 22

29 U.S.C. § 1132(a)(1) 2, 6

29 U.S.C. § 1132(a)(2) 22

29 U.S.C. § 1132(a)(3) ....*passim*

29 U.S.C. § 1132(c)(3) 18

RULE:

Fed. R. Civ. P. 26(a)(1)(A)(iv) 45

LEGISLATIVE MATERIAL:

120 Cong. Rec. 29942 (1974) 49

OTHER AUTHORITIES:

51 Am. Jur. 2d Liens § 40 ....32, 34

51 Am. Jur. 2d Liens §§ 40-44 39

TABLE OF AUTHORITIES—Continued

Page

51 Am. Jur. 2d Liens §§ 47-50 39

R.M. Baron, *Public Policy Considerations Warranting Denial Of Reimbursement to ERISA Plans: It's Time to Recognize The Elephant In The Courtroom*, 55 Mercer L. Rev. 595 (2004) 43

R.M. Baron, *Subrogation: A Pandora's Box Awaiting Closure*, 41 S.D. L. Rev. 237 (1996) 44

M.C. Campbell, *Non-Consensual Suretyship*, 45 Yale L.J. 69 (1935) 28

Congressional Res. Serv., *ERISA Regulation of Health Plans: Fact Sheet* (Oct. 3, 2007) 5

H. Dagan & J.J. White, *Governments, Citizens, & Injurious Industries*, 75 N.Y.U. L. Rev. 354 (2000) 28

Dan B. Dobbs, *Law of Remedies* (2d ed. 1993) .... *passim*

T.L. Fulks, *The Made-Whole Doctrine: Its Effect on Tennessee Tort Litigation And Insurance Subrogation Rights*, 32 U. Memphis L. Rev. 87 (2001) 47

George E. Palmer, *The Law of Restitution* (1978) 39, 40

TABLE OF AUTHORITIES—Continued

Page

Health Economics Practice, Barents Group, LLC, *Impacts of Four Legislative Provisions on Managed Care Consumers: 1999-2003* (1998) 43

Restatement (Second) of Contracts (1979) 24

Restatement (Third) of Restitution & Unjust Enrichment (2011) 41, 48

L. Russ & T. Segalla, *Couch on Insurance* (3d ed. 2011) 8

N. Singer, *Statutes & Statutory Construction* (6th rev. ed. 2000) 18

S. Symons, *Pomeroy's Equity Jurisprudence* (5th ed. 1941) 23, 29, 33, 39

IN THE
Supreme Court of the United States

No. 11-1285

U.S. AIRWAYS, INC., in its capacity as Fiduciary and Plan Administrator of the U.S. AIRWAYS, INC. EMPLOYEE BENEFITS PLAN,

Petitioner,

v.

JAMES MCCUTCHEN and ROSEN, LOUIK & PERRY, P.C.,

Respondents.

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

BRIEF FOR PETITIONER

OPINIONS BELOW

The District Court's order (Pet. App. 18a) is not reported. The Third Circuit's decision (Pet. App. 1a) is reported at 663 F.3d 671.

JURISDICTION

On March 17, 2012, Justice Alito extended the time to file a petition for certiorari to May 3, 2012. The petition was granted on June 25. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

29 U.S.C. § 1132(a)(3) provides in relevant part:

> 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 ob-

> tain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]

INTRODUCTION

The Employee Retirement Income Security Act of 1974 ("ERISA") comprehensively regulates employee benefit plans. But that does not mean it *negates* them. Quite the contrary: As this Court has made clear, ERISA was designed to respect the primacy of written benefit plans. ERISA recognizes that plans are contracts between employers and employees. And the Act provides participants and plans alike with mechanisms to "enforce * * * the terms of the plan." 29 U.S.C. § 1132(a)(1), (a)(3). ERISA's statutory scheme, in short, "is built around reliance on the face of written plan documents." *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 83 (1995).

The court below lost sight of that core principle. Respondent McCutchen was a participant in U.S. Airways' benefit plan. Under that plan, the parties agreed to a simple quid pro quo. U.S. Airways agreed to pay McCutchen's medical expenses in the event that he was ever injured by a third party. McCutchen in turn agreed that he would reimburse the plan in full "out of any monies recovered" from third parties and that he would not "negotiate any agreements" that would divert the plan's reimbursement monies to others.

McCutchen later suffered injuries in an accident and incurred medical bills totaling $66,866. U.S. Airways lived up to its end of the bargain: It paid for McCutchen's medical care. But McCutchen did not live up to his. When he recovered $110,000 in third-party settlements, he refused to reimburse the plan.

And when U.S. Airways filed suit, McCutchen argued that he should not have to give back a penny. Though the plan agreement provided for full reimbursement "out of *any monies* recovered," McCutchen argued that the plan should get nothing unless he recovered 100 percent of the damages he claimed he had suffered. And though the agreement provided that the reimbursement monies could not be diverted to others, McCutchen argued that the money he recovered should go to pay his lawyers' later-agreed-to contingency fee. McCutchen argued, in short, that the court should override the plan's text. He relied on ERISA Section 502(a)(3), which authorizes plan fiduciaries to seek "appropriate equitable relief" to "enforce * * * the terms of the plan." 29 U.S.C. § 1132(a)(3). The word "appropriate," he argued, frees courts from the strictures of the written plan agreement and authorizes them to draw widely from equitable principles to fashion a remedy left to be decided by whatever court is hearing the case.

Five circuits had previously rejected that position, holding that refusal to enforce a plan's reimbursement provision would "frustrate, rather than effectuate, ERISA's repeatedly emphasized purpose to protect contractually defined benefits." *Zurich Am. Ins. Co.* v. *O'Hara*, 604 F.3d 1232, 1237 (11th Cir. 2010) (citation omitted); *see infra* at 8-9. But here, the Third Circuit broke with them all and agreed with Respondents. It held that a court faced with an unambiguous reimbursement provision may ignore that provision's terms and fashion relief as it sees fit, engaging in "any additional fact-finding it finds necessary" to arrive at a remedy of its own choosing. Pet. App. 17a.

The Third Circuit's decision conflicts with ERISA and this Court's precedents. Section 502(a)(3) does not empower courts to use free-floating equitable principles to rewrite benefit plans. That is so for three primary reasons. *First*, Section 502(a)(3) authorizes appropriate equitable relief to "*enforce * * * the terms of the plan*." 29 U.S.C. § 1132(a)(3) (emphasis added). Respondents' approach does not "enforce the terms of the plan"; it obliterates them. *Second*, the type of "equitable relief" U.S. Airways seeks here—an equitable lien by agreement—does not authorize a court to do equity in the abstract, adjusting burdens and benefits long after the fact. An equitable lien by agreement enforces the parties' *actual agreement* by "regard[ing] * * * as done which was agreed to be done." *Runstetler* v. *Atkinson*, 11 D.C. 382, 384 (1883). It "cannot be invoked to create a right contrary to the agreement of the parties." *Good* v. *Jarrard*, 76 S.E. 698, 702 (S.C. 1912). *Third*, Respondents' approach runs headlong into the goals of ERISA. ERISA seeks to minimize litigation burdens; Respondents would multiply them. ERISA seeks to encourage employers to offer benefits; Respondents would discourage them by threatening plan solvency. And ERISA seeks to make liabilities predictable; Respondents would make them utterly *un*predictable, subject to the vagaries of litigation and the whim of a single judge.

The decision below accordingly should be reversed.

STATEMENT

A. ERISA and Section 502(a)(3)

1. Enacted in 1974, ERISA places the regulation of private-sector employee benefit plans "primarily under federal jurisdiction for about 177 million people." Congressional Res. Serv., *ERISA Regula-*

tion of Health Plans: Fact Sheet 1 (Oct. 3, 2007).[1] Congress enacted ERISA to ensure the "fair and prompt enforcement of rights" created under employee benefit plans. *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 215 (2004). To that end, the statute assigns plans specific fiduciary responsibilities; sets minimum standards for plan funding and plan termination insurance; and creates "carefully integrated civil enforcement provisions" available to plan participants, plans themselves, and the Secretary of Labor. *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146 (1985); *see* 29 U.S.C. § 1001(b); *id.* § 1132(a).

Equally important, however, is what ERISA does *not* do. Both before and after ERISA, employers have chosen whether to offer plans at all and, if so, on what terms, and they set forth the plan terms in written documents that constitute "contracts." *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866, 1879 (2011). ERISA did not override those practices. With very limited exceptions, it does not dictate to employers what benefits or terms to offer; "employers have large leeway to design disability and other welfare plans as they see fit." *Black & Decker Disability Plan* v. *Nord*, 538 U.S. 822, 833 (2003). And—importantly for this case—ERISA is designed to recognize the primacy of, and work in harmony with, written benefit plans. One of the statute's "core functional requirements" is that " '[e]very employee benefit plan shall be established and maintained *pursuant to a written instrument*.' " *Curtiss-Wright*, 514 U.S. at 83 (quoting 29 U.S.C. § 1102(a)(1)) (emphasis in *Curtiss-Wright*). That is why ERISA's

---

[1] *Available at* http://congressionalresearch.com/RS20315/document.php?study=ERISA+Regulation+of+Health+Plans+Fact+Sheet.

enforcement provision, Section 502, authorizes a plan participant to file a civil action "to recover benefits due to him under *the terms* of his plan, to enforce his rights under *the terms* of the plan, or to clarify his rights to future benefits under *the terms* of the plan." 29 U.S.C. § 1132(a)(1) (emphases added). Section 502 likewise authorizes plan participants and plans themselves to file civil actions "to enjoin any act or practice which violates any provision of this subchapter or *the terms* of the plan," and 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." *Id.* § 1132(a)(3) (emphases added).

ERISA, in short, sets up a "straightforward rule" of "hewing to" the contractual "plan documents." *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 300 (2009). That effectuates its "repeatedly emphasized purpose to protect contractually defined benefits." *Russell*, 473 U.S. at 148.

Congress designed ERISA this way to encourage employers to provide benefits to workers. "Congress enacted ERISA to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the first place. We have therefore recognized that ERISA represents a 'careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans.' " *Conkright* v. *Frommert*, 130 S. Ct. 1640, 1648-49 (2010) (quoting *Aetna Health*, 542 U.S. at 215). Specifically, "Congress sought 'to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering plans in the first place.' " *Id.*

(quoting *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996)). It did so by "assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002). And one of the ways the statute ensures predictable liabilities is by establishing the primacy of the written plan. As this Court has emphasized, ERISA's scheme " 'is built around reliance on the face of written plan documents.' " *Kennedy*, 555 U.S. at 301 (quoting *Curtiss-Wright*, 514 U.S. at 83).

2. This case concerns Section 502, ERISA's enforcement provision. Section 502(a)(3) authorizes civil actions by plans—which it refers to as "fiduciar[ies]"—as well as by plan participants. It provides that "[a] civil action may be brought * * * by a participant, beneficiary, or fiduciary" to "enjoin any act or practice which violates any provision of this subchapter or the terms of the plan" or 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[.]" *Id.* § 1132(a)(3).

This Court repeatedly has discussed the remedies available under the "other appropriate equitable relief" language of Section 502(a)(3). In *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993), the Court construed Section 502(a)(3) to authorize only "those categories of relief that were typically available in equity." *Id.* at 255-256 (emphasis deleted). And in two later cases—both involving reimbursement actions similar to the one here—the Court made clear that while the relief sought must be "equitable," that statutory descriptor does not prevent plans from enforcing their terms and collecting reim-

bursement. In *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204, 213 (2002), the Court held that plans may seek restitution for a participant's failure to reimburse so long as the claim is *equitable*, not legal. And in *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, the Court explained that reimbursement provisions create an "equitable lien by agreement" that the plan may enforce under Section 502(a)(3). 547 U.S. 356, 364-365 (2006).

The participants in *Sereboff* had argued that even if the relief the plan sought was "equitable," it was not "appropriate" under Section 502(a)(3). *Id.* at 368 n.2. That was so, they argued, because the word "appropriate" authorizes courts to consider equitable defenses such as the "make-whole doctrine"—which requires that an insured party be fully compensated for all injuries before a subrogee can obtain any reimbursement, *see* 16 L. Russ & T. Segalla, *Couch on Insurance* § 223:134 (3d ed. 2011)—and use those defenses to override the plan's provisions. *Id.* This Court deemed the argument waived. *Id.* The Court ordered the plan participants to reimburse their plan some $74,000—the amount the plan had paid out to cover the participants' medical expenses. *Id.* at 360.

3. Courts of appeals have confronted the question reserved in *Sereboff* many times. Until the decision below,[2] all had answered it in the negative, holding that unambiguous reimbursement provisions should be enforced as written. In *Administrative Committee of Wal-Mart Stores, Inc.* v. *Shank*, 500 F.3d 834 (8th Cir. 2007), for example, the plan included a reim-

[2] Another court, the Ninth Circuit, joined the Third Circuit after the decision below. *See CGI Techs. & Solutions* v. *Rose*, 683 F.3d 1113 (9th Cir. 2012), *pet. for cert. filed*, Aug. 24, 2012 (No. 12-240). *CGI* is discussed *infra* at 45.

bursement provision. *Id.* at 835. Despite the provision's clear terms, the participants argued that full reimbursement was not "appropriate" under Section 502(a)(3), and they asked the court to apply either the "make whole" doctrine or a *pro rata* share requirement to override it. *Id.* at 837.

The Eighth Circuit refused to use Section 502(a)(3) "to alter the express terms of a written plan." *Id.* "Nothing in the statute," it wrote, "suggests Congress intended that section 502(a)(3)'s limitation of the [plan's] recovery to 'appropriate equitable relief' would upset [the parties'] contractually defined expectations." *Id.* at 839. Other circuits have reached the same conclusion, holding that Section 502(a)(3) does not authorize courts to rewrite reimbursement provisions. *See O'Hara*, 604 F.3d at 1237; *Moore* v. *CapitalCare, Inc.*, 461 F.3d 1, 9 (D.C. Cir. 2006); *Bombardier Aerospace Empl. Welfare Benefits Plan* v. *Ferrer, Poirot, & Wansbrough*, 354 F.3d 348, 357 (5th Cir. 2003); *Admin. Comm. of Wal-Mart Stores, Inc.* v. *Varco*, 338 F.3d 680 (7th Cir. 2003).

B. The Decision Below

1. Respondent McCutchen was seriously injured in a 2007 car accident. Pet. App. 3a. McCutchen was covered by a health benefit plan (the "Plan") administered and self-financed by his employer, Petitioner U.S. Airways. The Plan "paid medical expenses in the amount of $66,866 on his behalf." *Id.*

McCutchen then sought to recover from third parties for his injuries. He retained counsel and promised his lawyers a 40 percent contingency. *Id.* He and his counsel eventually settled for $10,000 with the driver who had injured him, and "he and his wife received another $100,000 in underinsured motorist coverage for a total third-party recovery of $110,000."

Id. That recovery, after taking 40 percent for attorney's fees off the top, would amount to $66,000—$866 less than U.S. Airways' claimed lien.[3]

2. The Plan contains a reimbursement provision similar to the ones in *Sereboff* and *Knudson*. The provision is summarized in the Plan's Summary Plan Description, in a paragraph entitled "Subrogation and Right of Reimbursement." It provides:

> The purpose of the Plan is to provide coverage for qualified expenses that are not covered by a third party. If the Plan pays benefits for any claim you incur as the result of negligence * * * or other actions of a third party, *the Plan will be subrogated to all your rights of recovery. You will be required to reimburse the Plan for amounts paid for claims out of any monies recovered from a third party*, including, but not limited to, your own insurance company[.] * * * *In addition you * * * may not negotiate any agreements with a third party that would undermine the subrogation rights of the Plan*. [J.A. 20 (emphases added).]

Invoking the provision, U.S. Airways sent McCutchen's counsel a letter in June 2007—long before he obtained the settlements discussed above—placing him on notice of a lien against any recovery. Pet. App. 19a-20a. "McCutchen denied the Plan's

---

[3] The record actually does not establish that McCutchen paid a 40 percent contingency on the full $110,000 settlement, or that his recovery was thereby reduced to $66,000. It establishes, instead, merely that his attorneys took a 40 percent contingency out of one *portion* of the settlement—the portion it held in trust, as described below. J.A. 59. Nevertheless, the Third Circuit stated that after fees and expenses, McCutchen's "net recovery was less than $66,000." Pet. App. 3a. It presumably reached that conclusion by assuming the attorneys took a 40 percent contingency out of the full settlement amount.

right to reimbursement out of any settlement proceeds." *Id.* at 19a. He and his counsel proceeded to settle his claims in 2008 without telling U.S. Airways about the larger of the settlements. J.A. 41, 58.

U.S. Airways eventually found out about the settlements. Applying the reimbursement provision by its terms, U.S. Airways asked McCutchen to reimburse the Plan "for the entire $66,866 that it had paid for [his] medical bills." Pet. App. 3a. McCutchen refused. His attorneys, meanwhile, placed $41,500 of the $110,000 recovery in a trust account "for any lien against McCutchen found to be valid." Pet. App. 20a. That $41,500 reflected the reimbursement amount U.S. Airways sought, reduced by 40 percent for attorney's fees; McCutchen's attorneys "reason[ed] that any lien found to be valid would have to be reduced by a proportional amount of legal costs." Pet. App. 4a.[4] The attorneys disbursed the remainder of the recovery to McCutchen.

3. U.S. Airways, acting in its capacity as plan administrator, filed suit, seeking "appropriate equitable relief" under Section 502(a)(3) "in the form of a constructive trust or an equitable lien on the $41,500 held in trust and the remaining $25,366 personally from McCutchen." Pet. App. 4a. U.S. Airways argued that the Plan's terms entitled it to full reimbursement. McCutchen, in response, argued that any reimbursement should be reduced or eliminated under doctrines grounded in equitable subrogation—such as the make-whole, common-fund, and *pro rata*-

---

[4] $41,500 actually reflects a bit less than a 40 percent reduction from $66,866. The discrepancy apparently arises from the fact that McCutchen's counsel believed the requested reimbursement was $68,866, rather than $66,866. J.A. 58-59.

share doctrines[5]—and that U.S. Airways would be "unjustly enriched" if permitted to recover without allowance for attorney's fees. Pet. App. 5a, 28a-32a.

Recognizing that the reimbursement provision's "any monies recovered" language plainly entitled the Plan to full reimbursement, the District Court rejected McCutchen's arguments and granted summary judgment to U.S. Airways. Pet. App. 26a-34a. The court found that "[t]he Plan document clearly requires reimbursement by McCutchen of monies recovered including the * * * benefits paid by his insurance company." *Id.* at 28a. In so holding, the court rejected McCutchen's attempt to import make-whole, common-fund, or *pro rata* principles into the analysis. "The US Airways Plan," it wrote, "is unambiguous and requires reimbursement of any payments made by the Plan to the participant[.]" *Id.* at 32a. U.S. Airways thus was "entitled to full reimbursement of benefits paid under the Plan without reduction" for fees or other offsets. *Id.*

4. On appeal, McCutchen did not dispute the District Court's finding that the Plan unambiguously required full reimbursement. Nor did he dispute the District Court's finding that the plan unambiguously forbade an offset for attorney's fees. He also abandoned his "make-whole" argument. Appellants' Opening Br. 16 n.7, 2011 WL 791769 (3d Cir. Feb.

---

[5] The common-fund doctrine, "rooted in concepts of quasi-contract and restitution," provides that in some circumstances 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 as a whole." *Rodriguez* v. *Disner*, __ F.3d __, 2012 WL 3241334, at *4 (9th Cir. Aug. 10, 2012) (citations omitted). Under the *pro rata* share doctrine, a subrogee "receive[s] only partial reimbursement equal to the share of [the subrogor's] settlement that compensates her for medical expenses." *Shank*, 500 F.3d at 837.

16, 2011) ("Third Circuit Opening Br."). Instead, he minted a new theory to get around the Plan's reimbursement provision: He argued that the court should "limit U.S. 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." *Id.* McCutchen argued, in other words, that the court should (1) quantify the abstract "total harm" he suffered in the accident, (2) create a ratio of his actual recovery divided by his "total harm," (3) reduce the reimbursement by that proportion, and then (4) apply common-fund-type principles and reduce the recovery yet *again* to assign U.S. Airways responsibility for fees and costs. Applying that "proportionality" test, McCutchen argued that his "total harm" amounted to $1 million; that he had recovered 11 percent of that amount; and that U.S. Airways could recover only 11 percent of its claimed reimbursement—"at most, $7,355.24 minus appropriate fees and costs." *Id.* at 6.

Parting with every other court of appeals to have considered the question to that point, the Third Circuit agreed with McCutchen. As the panel saw it, "it would be strange for Congress to have intended that relief under Section 502(a)(3) be limited to traditional equitable categories," as described in *Knudson*, "but not limited by other equitable doctrines and defenses that were traditionally applicable to those categories." Pet. App. 10a. The panel concluded that one particular doctrine, unjust enrichment, applies in this case because "the principle of unjust enrichment is broadly applicable to claims for equitable relief." *Id.* at 11a. And the panel made clear its view that the unjust-enrichment rubric

authorizes a court to replace a plan's reimbursement provision with any remedy the court deems fair. Thus the panel wrote that " '[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case.' " *Id.* at 17a (quoting *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944)). And it explained that the decision on remand could turn on a potpourri of factors, including "the distribution of the third-party recovery between McCutchen and his attorneys * * *, the nature of their agreement, the work performed, and the allocation of costs and risks between the parties to this suit." *Id.* The court remanded for a determination of what—if any—reimbursement McCutchen should have to provide to the Plan that had paid all his medical expenses.

The panel acknowledged that its conclusion departed from that of every other court of appeals to have confronted the question. Pet. App. 13a-14a. But the panel found support for its holding in this Court's recent decision in *CIGNA Corp.* v. *Amara*, which held that courts have "[t]he power to reform contracts" in ERISA cases "*to prevent fraud*." 131 S. Ct. at 1879 (emphasis added). The panel acknowledged that there was no hint of fraud in this case. Pet. App. 15a. It nonetheless read *CIGNA* to stand for the broad proposition that "the importance of the written benefit plan is not inviolable, but is subject—based upon equitable doctrines and principles—to modification and, indeed, even equitable reformation under Section 502(a)(3)." *Id.* As the panel saw it, in equity, "contractual language [i]s not as sacrosanct as it is normally considered to be when applying breach of contract principles at common law." *Id.*

U.S. Airways sought rehearing. It was denied. *Id.* at 41a. It then sought certiorari, which this Court granted.

SUMMARY OF ARGUMENT

1. The decision below is contrary to the text of ERISA. Section 502(a)(3) authorizes "appropriate equitable relief" to "enforce * * * the terms of the plan." 29 U.S.C. § 1132(a)(3). The Third Circuit did not "enforce the terms of the plan"; instead it read into Section 502(a)(3) the authority for district courts to rewrite those terms. That is improper statutory interpretation. Nor can the Third Circuit's approach be reconciled with the purposes this Court has long identified in ERISA. ERISA builds its enforcement scheme around the terms of written plan documents, but the decision below subjugates those written agreements to the case-by-case perceptions of individual judges. ERISA is designed to ensure predictable liabilities, but under the approach adopted below those liabilities will vary in every case in ways no one can predict. And ERISA is designed to let employers choose which benefits to offer, but the decision below effectively chooses for them. The Third Circuit fled from the statute that was supposed to govern its decision.

2. The Third Circuit likewise must be reversed because the uncabined "unjust enrichment" analysis it embraced has no role in the equitable relief at issue here—the equitable lien by agreement. The equitable lien by agreement is designed to enforce the actual agreement a party made. It does not contemplate that a judge will *rewrite* that agreement—which, no doubt, explains why the approach adopted below lacks support in the cases decided at

common law. Because the Third Circuit did not hew to "the parcel of equitable defenses" accompanying the equitable lien by agreement, *Sereboff*, 547 U.S. at 368, the principles on which it sought to rely are "beside the point." *Id.*

3. Finally, the rule adopted below would have unfortunate consequences for all involved—employers, employees, and courts. That rule would reduce the reimbursements on which self-funded plans rely to remain solvent and thus would discourage employers from offering benefits in the first place. It would encourage gamesmanship by plan participants. And it would impose new and substantial burdens on federal courts, which would be required to undertake sprawling factual inquiries to decide what is clear from the very face of the plan documents: how much reimbursement the plan is owed. This case is not, and should not be, so complicated. The Court should adhere to the plain meaning of Section 502(a)(3) and reverse the decision below.

ARGUMENT

I. THE DECISION BELOW IS CONTRARY TO ERISA'S TEXT AND PURPOSES.

Respondents argued below, and the Third Circuit agreed, that Section 502(a)(3) authorizes courts to override the clear terms of a benefit plan and replace them with other terms the court thinks fair. That approach cannot be reconciled with the statute. Section 502(a)(3) requires that, where there is an equitable mechanism available to do so, courts should enforce the plan terms as written.

A. Section 502(a)(3) Authorizes Equitable Relief To *Enforce* Plans, Not To Rewrite Them.

1. Respondents' approach fails, first and foremost, because it cannot be reconciled with the text of Section 502(a)(3). Section 502(a)(3) plainly contemplates "appropriate equitable relief" to "*enforce* * * * *the terms of the plan*." 29 U.S.C. § 1132(a)(3) (emphasis added). The provision does not empower district courts to do equity in the air, picking and choosing among common-law remedies to reach a result they think fair on the facts.

This Court recognized the point in *Mertens*: It wrote that Section 502(a)(3) "does not, after all, authorize 'appropriate equitable relief' *at large*, but only 'appropriate equitable relief' for the purpose of 'redress[ing any] violations or * * * enforc[ing] any provisions' of ERISA or an ERISA plan." 508 U.S. at 253 (emphasis in original); *accord Harris Trust & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 246 (2000) (quoting this description of Section 502(a)(3)); *Peacock* v. *Thomas*, 516 U.S. 349, 353 (1996) (same). As the government similarly told this Court in *Sereboff*: "Section 502(a)(3) itself makes clear" that "the terms of the ERISA plan * * * are to govern in an action for appropriate equitable relief such as this." Br. of United States as Amicus Curiae, *Sereboff* v. *Mid Atl. Med. Servs., Inc.*, No. 05-260, 2006 WL 460876, at *28 n.13 (Feb. 23, 2006) ("U.S. Sereboff Br.").

Indeed, other language in Section 502 underscores this point and demonstrates that, when Congress wished to grant courts broad discretion to fashion relief in ERISA, it knew exactly how to do so. Section 502(c)(3) provides that when an employer fails to

meet certain notice requirements, "a court may in its discretion order such other relief as it deems proper." 29 U.S.C. § 1132(c)(3). That subsection clearly grants courts more latitude in fashioning remedies than does Section 502(a)(3). And " 'when the legislature uses certain language in one part of the statute and different language in another,' " courts must assume that " 'different meanings were intended.' " *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 n.9 (2004) (quoting 2A N. Singer, *Statutes & Statutory Construction* § 46:06, at 194 (6th rev. ed. 2000)).

A court presented with a Section 502(a)(3) claim thus should do just what the statute says: It should determine whether the type of equitable relief the plaintiff seeks is "appropriate" to "enforce * * * the terms of the plan," 29 U.S.C. § 1132(a)(3), and, if the answer is yes, the court should enforce those terms. Applying that plain-language approach here, this Court should enforce the Plan's reimbursement provision as written. After all, *Sereboff* already established that the equitable relief U.S. Airways invoked—the equitable lien by agreement—is a proper type of relief to enforce the terms of a plan's reimbursement provision. *See* 547 U.S. at 368. The courts below both found, and Respondents do not dispute, that the Plan's reimbursement provision unambiguously requires McCutchen to fully reimburse the Plan.[6] And Respondents likewise do not

---

[6] The District Court concluded that the reimbursement provision was "clear and unambiguous," Pet. App. 30a, and Respondents did not contest that finding on appeal. The Third Circuit thus recognized that under the provision "a beneficiary is required to reimburse the Plan for any amounts it has paid out of any monies the beneficiary recovers from a third party." Pet. App. 5a. Moreover, Respondents in their certiorari-stage papers again conceded the point, writing that under the reimbursement provision a participant must "reimburse the

dispute that U.S. Airways' action fulfills the criteria for perfecting an equitable lien by agreement. *See infra* at 31. The Court accordingly should "enforce * * * the terms of the plan." 29 U.S.C. § 1132(a)(3).

2. The Third Circuit interpreted Section 502(a)(3) to import into every ERISA plan an implicit limitation on the plan's rights: Full reimbursement is permitted only where, in a particular court's view, it is justified under the facts of a particular case. Pet. App. 16a-17a. But that interpretation does substantial violence to the statute's command. Under the Third Circuit's approach, the court does not "enforce * * * the terms of the plan," 29 U.S.C. § 1132(a)(3); it rewrites them. That is directly at odds with the Court's "duty 'to give effect, if possible, to every clause and word of a statute.' " *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (citation omitted). As this Court wrote in *Mertens*: "The authority of courts to develop a 'federal common law' under ERISA * * * is not the authority to revise the text of the statute." 508 U.S. at 259 (citation omitted).

Neither Respondents' briefing below nor the Third Circuit's opinion made any attempt to address this fatal difficulty with Respondents' interpretation. Instead, both simply ignored the problem by proceeding as if the "enforce the terms of the plan" language in Section 502(a)(3) did not exist. Respondents' opening brief to the Third Circuit quoted the phrase "appropriate equitable relief" nine times—but except for an obligatory footnote reproducing the full statutory text (*see* Third Circuit Opening Br. 4 n.3), Respondents never once quoted the second half of the

---

Plan for any amounts it has paid out of any monies the beneficiary recovers from a third-party, without any contribution to attorneys' fees." Brief in Opposition 5.

sentence, which ties that relief to "enforc[ing]" the "terms of the plan." The Third Circuit followed suit: Its opinion quoted the phrase "appropriate equitable relief" fourteen times, *see* Pet. App. 2a, 4a, 7a, 9a, 10a, 12a, 14a, 16a, 17a, and yet it never discussed the rest of the sentence. But courts "do not * * * construe statutory phrases in isolation; [they] read statutes as a whole. Thus, the words [in question] must be read in light of the immediately following phrase." *United States* v. *Morton*, 467 U.S. 822, 828 (1984). The court below ignored that guidance, at Respondents' behest, and was led astray.

3. Respondents offered a pair of arguments below to justify their position: first, that the statute's use of "appropriate" in the phrase "appropriate equitable relief" must be read to give courts freewheeling discretion to embrace equitable offsets; and second, that this Court's decision in *CIGNA* authorized courts to rewrite benefit plans even absent fraud. The Third Circuit accepted both arguments. Pet. App. 9a, 15a-16a. That was error twice over.

a. Respondents argued below (Third Circuit Opening Br. 21) that "if it is to have any meaning at all," the word "appropriate" must authorize courts to import any and all equitable principles required to reach what the court considers a fair result—principles that, at various stages of Respondents' briefing, have included the make-whole doctrine, the common-fund doctrine, the *pro rata* share doctrine, and Respondents' later-arriving "proportionality" theory. They argued, in other words, that "appropriate" either authorizes courts to rewrite benefit plans or it is a nullity. *Id.*; *see also* Brief in Opposition 26. But that is demonstrably incorrect. "Appropriate" in Section 502(a)(3) comfortably bears a much more

sensible meaning: It requires that the type of "equitable relief" the plaintiff seeks be suitable under the circumstances to enforce the plan.

That understanding of "appropriate" is reflected in this Court's precedent. In *Harris Trust*, the Court applied Section 502(a)(3) by asking whether, at equity, the common law "countenance[d] *the sort of relief sought by petitioners*." 530 U.S. at 250 (emphasis added). Answering in the affirmative, the Court concluded that petitioners' action "satisfies the 'appropriate[ness]' criterion in § 502(a)(3)." *Id.* at 253 (alteration in original). In *CIGNA*, the Court explained that it has "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.' " 131 S. Ct. at 1878 (quoting *Sereboff*, 547 U.S. at 361). And in *Knudson*, the Court explained that to be "appropriate equitable relief" the relief must conform with "the conditions that equity attached to its provision." 534 U.S. at 216. The Court, in sum, has long understood "appropriate" equitable relief under Section 502(a)(3) to be equitable relief of a type suitable under the circumstances to "enforce [the statute] or the terms of the plan." 29 U.S.C. § 1132(a)(3). The Court has *never* understood the word "appropriate" to override the second half of the statutory phrase—"enforce the terms of the plan." Nor has it understood "appropriate" to authorize courts to choose from a grab-bag of equitable principles even if—as we discuss below—those principles have no relationship to the particular type of relief the plaintiff seeks.

ERISA's text further supports this understanding of "appropriate." Section 502(a)(2)—the provision

immediately adjacent to the one at issue here—authorizes suit "by the Secretary, or by a participant, beneficiary, or fiduciary for *appropriate* relief under section 1109 of this title." 29 U.S.C. § 1132(a)(2) (emphasis added). Section 1109, in turn, authorizes suits against fiduciaries and provides for a variety of remedies, including money damages. The only plausible reading of "appropriate" in Section 502(a)(2) is that it means remedies *suitable* under 29 U.S.C. § 1109. The Court should understand the word to mean the same thing in Section 502(a)(3). *See Morrison-Knudsen Constr. Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 633 (1983) ("[A] word is presumed to have the same meaning in all subsections of the same statute").

In this case, then, the word "appropriate" requires that the equitable relief that is sought be suitable to enforce the terms of the Plan. Here it is. The Court held in *Sereboff* that the equitable lien by agreement is suitable to enforce reimbursement provisions. *See* 547 U.S. at 368. And as we discuss *infra* at 31, the reimbursement provision here meets all the criteria for an enforceable equitable lien by agreement. That should be the end of the matter. The word "appropriate" in Section 502(a)(3) can bear no more weight than that.

b. Respondents and the Third Circuit also relied heavily on this Court's decision in *CIGNA* for their understanding of Section 502(a)(3). *See* Pet. App. 7a, 10a, 11a, 15a-16a. That reliance is misplaced. *CIGNA* involved a situation in which a plan "intentionally misled its employees" about the benefits the plan provided. 131 S. Ct. at 1874. This Court explained that in such a circumstance, courts enjoy the power to reform the plan in order "to remedy the

false or misleading information [the plan] provided." *Id.* at 1879. That was so because "[t]he power to reform contracts * * * is a traditional power of an equity court * * * and was used to prevent fraud." *Id.* As the Court explained, "equity often considered reformation a 'preparatory step' that 'establishes the real contract,' " *id.* (quoting 4 S. Symons, *Pomeroy's Equity Jurisprudence* § 1375, at 999 (5th ed. 1941) ("Pomeroy")), and accordingly " 'equity would reform the contract, and enforce it, as reformed, if * * * mistake or fraud were shown.' " *Id.* (citation omitted).

The Third Circuit correctly acknowledged that there has been no allegation here that Petitioner was "fraudulent or dishonest" in any way. Pet. App. 15a. The panel nonetheless read *CIGNA* to stand for a proposition far broader than that case permits: that in equity, "contractual language [i]s not as sacrosanct as it is normally considered to be when applying breach of contract principles at common law." *Id.* From that errant premise, the panel concluded that "the importance of the written benefit plan is not inviolable, but is subject—based upon equitable doctrines and principles—to modification and, indeed, even equitable reformation under Section 502(a)(3)." *Id.*

That conclusion does not follow from *CIGNA*. *CIGNA* suggested only that a court could reform an ERISA plan to prevent *fraud or mistake*. That reformation power is entirely consistent with U.S. Airways' view of Section 502(a)(3) because where there is fraud or mutual mistake there are no mutually agreed "terms" to "enforce." 29 U.S.C. § 1132(a)(3). *See* 4 Pomeroy § 1375, at 999 (reformation "establishes the real contract"). But *CIGNA*

went no further than fraud or mistake. And correctly so, for "it is well settled * * * 'that a court of equity, in the absence of fraud, accident, or mistake, *cannot change the terms of a contract.*' " *Manufacturers' Fin. Co.* v. *McKey*, 294 U.S. 442, 449 (1935) (quoting *Hedges* v. *Dixon County*, 150 U.S. 182, 189 (1893)) (emphasis added); *accord* Restatement (Second) of Contracts § 153 (1979). It is equally well settled, as we explain *infra* at 31-37, that a court of equity enforcing an equitable lien by agreement enforces the parties' agreement as written absent carefully circumscribed exceptions—one of which is fraud. *CIGNA* is consistent with that nearly 200-year-old jurisprudence; the Third Circuit's sweeping expansion of *CIGNA* is not.

In short, *CIGNA* does not give federal courts the power to rewrite the general terms of an agreement. Rather, the Court's analysis of the fraud principle explicitly underscored the controlling nature of the "real contract" to which the parties agreed. 131 S. Ct. at 1880 (quoting 4 Pomeroy § 1375, at 999). And nothing in *CIGNA* casts doubt on the command of Section 502(a)(3): Courts may do equity only to "enforce * * * the terms of the plan." 29 U.S.C. § 1132(a)(3). The Third Circuit's use of fraud principles to justify reformation of agreements where there is *no* fraud should be rejected.

B. Petitioner's Approach To Section 502(a)(3) Honors ERISA's Purpose And Design.

Petitioner's approach to Section 502(a)(3) is especially compelling—and Respondents' approach all the more unacceptable—because the former honors ERISA's purpose and design, while the latter does not.

1. ERISA "is built around reliance on the face of written plan documents." *Curtiss-Wright*, 514 U.S. at 83. That statutory purpose is served by enforcing unambiguous plan terms as written. It is *not* served by eliminating or rewriting lawful plan provisions. Much less is it served by eliminating or rewriting lawful plan provisions in the guise of applying a congressional directive to "enforce * * * the terms of the plan." 29 U.S.C. § 1132(a)(3). To accept Respondents' approach would "frustrate, rather than effectuate, ERISA's 'repeatedly emphasized purpose to protect contractually defined benefits.' " *O'Hara*, 604 F.3d at 1237 (quoting *Russell*, 473 U.S. at 148).

The point carries special force in reimbursement cases, like this one. As courts have observed, reimbursement provisions amount to an exchange for value. *See Shank*, 500 F.3d at 839. The plan commits to pay a participant's medical bills. The participant makes premium payments, and promises to reimburse the plan for its payments on his behalf *if* he receives any judgment or settlement from third parties. Given that quid pro quo, it does not serve ERISA's purposes—and indeed it is neither "appropriate" nor "equitable"—to permit the participant to rewrite the agreement after the fact so that he keeps the benefit to which he agreed but shirks the burdens. As the Eighth Circuit put it: "Having received medical benefits in accordance with the [written plan], we will not permit a participant to deny the corresponding responsibilities and obligations that are clearly imposed on the participant in the same document—what is good for the goose is good for the gander." *Administrative Comm. of Wal-Mart Stores, Inc.* v. *Gamboa*, 479 F.3d 538, 545 (8th Cir. 2007); *accord Ryan* v. *Federal Express*, 78 F.3d 123, 127-128

(3d Cir.1996) ("[I]t would be inequitable to permit the Ryans to partake of the benefits of the Plan and then * * * invoke common law principles to establish a legal justification for their refusal to satisfy their end of the bargain"). Quite so. If ERISA is built around reliance on the written plan, that reliance should redound to *both* parties' benefits.

2. The Third Circuit's rule also runs counter to ERISA's design to induce employers to offer benefits by assuring "a predictable set of liabilities," "uniform standards of primary conduct," and "a uniform regime" of remedies in the event of a violation. *Rush Prudential*, 536 U.S. at 379.

As this Court has recognized, "[u]niformity is impossible * * * if plans are subject to different legal obligations in different States." *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 148 (2001). But that is precisely the result under the Third Circuit's rule: The hundreds of federal judges who populate the nearly 100 federal judicial districts *all* would enjoy the discretion to enforce reimbursement provisions as they see fit. Plan providers thus would have to "calculate benefit levels * * * based on liability conditions" that vary state-by-state, judge-by-judge. *FMC Corp.* v. *Holliday*, 498 U.S. 52, 60 (1990). That would be a burdensome task, to put it mildly. As "a group of prominent actuaries" explained to this Court in *Conkright*: "[I]t is impossible even to determine whether an ERISA plan is solvent * * * if the plan is interpreted to mean different things in different places." 130 S. Ct. at 1649. "Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement." *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142 (1990).

As for predictability, it goes out the window under the Third Circuit's rule. Any judge can reach any result with respect to reimbursement obligations, based on any and all fairness considerations that can be shoehorned within the rubric of "unjust enrichment." That, too, runs counter to ERISA's goals. As one court observed, criticizing the Third Circuit's decision in this case: "An untamed sense of 'equity,' detached from ERISA's purpose and context, is antithetical to ERISA because every man's notion of equity is uncertain and variable." *Schwade* v. *Total Plastics, Inc.*, 837 F. Supp. 2d 1255, 1276 (M.D. Fla. 2011). "Although perhaps momentarily gratifying to the sensibilities of a judge, foisting an involuntary and unpredictable obligation on an ERISA plan endangers both the statutory ERISA regime and the salutary benefits broadly available as a result of the regime." *Id.* at 1279. It is the opposite of what Congress intended.

3. The Third Circuit's rule also undercuts ERISA by favoring one particular individual at the expense of all other plan participants. ERISA is "primarily concerned" with "remedies that * * * protect the entire plan, rather than with the rights of an individual beneficiary," *Russell*, 473 U.S. at 142, and plans must "preserve assets to satisfy future, as well as present, claims." *Varity*, 516 U.S. at 514. But the rule adopted below runs in exactly the opposite direction. Where a beneficiary is "relieved of his obligation to reimburse [a plan] for the medical benefits it paid on his behalf, the cost of those benefits [will] be defrayed by other plan members and beneficiaries in the form of higher premium payments." *O'Hara*, 604 F.3d at 1238; *accord Shank*, 500 F.3d at 838; *Harris* v. *Harvard Pilgrim Health*

Care, Inc., 208 F.3d 274, 280-281 (1st Cir. 2000); *Cutting* v. *Jerome Foods, Inc.*, 993 F.2d 1293, 1297 (7th Cir. 1993) (Posner, J.) ("Without subrogation," the insured "pays more for the insurance[.]"); H. Dagan & J.J. White, *Governments, Citizens, & Injurious Industries*, 75 N.Y.U. L. Rev. 354, 390 n.149 (2000); M.C. Campbell, *Non-Consensual Suretyship*, 45 Yale L.J. 69, 100 (1935). Undercutting reimbursement rights thus "harm[s] other plan members and beneficiaries by reducing the funds available to pay th[eir] claims." *O'Hara*, 504 F.3d at 1238.

4. Finally, the rule adopted below cannot be reconciled with Congress' decision to give employers broad control over plan design. Congress in ERISA deliberately chose not to "mandate what kind of benefits employers must provide if they choose to have * * * a plan," *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996); employers thus "have large leeway to design disability and other welfare plans as they see fit." *Nord*, 538 U.S. at 833. Exercising that leeway, plans with reimbursement provisions make a choice—often driven by cost concerns—to provide *conditional* benefits: Participants have the right to receive payments from the plan and to keep those payments unless and until they collect from a third party. That is an affirmative choice about the quantum of benefits to offer. And it is the choice U.S. Airways made in this case: Its plan documents made clear that "the purpose of the Plan is to provide coverage for qualified expenses *that are not covered by a third party*." J.A. 20 (emphasis added).

Congress chose to embrace plans' freedom to make that choice. The rule adopted below eliminates that freedom, effectively recalibrating plans' benefit levels

against their will. That, again, is not what Congress had in mind.

For all of these reasons, the approach advanced by Respondents and adopted below cannot be squared with ERISA's text or purposes.

II. THE APPROACH ADOPTED BELOW CANNOT BE SQUARED WITH THE EQUITABLE LIEN BY AGREEMENT.

The Third Circuit's approach must be rejected for a second, independent reason: Even if Section 502(a)(3) did not expressly direct courts to "enforce * * * the terms of the plan," the particular equitable remedy at issue here directs just that.

The treatises and cases dating to the days of the law-equity divide establish that the equitable lien by agreement exists for one purpose: to "enforce" the terms of an "agreement of the parties." 1 Dan B. Dobbs, *Law of Remedies* § 4.3(3), at 601 (2d ed. 1993) (Dobbs); 4 Pomeroy § 1234, at 694-695. Indeed, the equitable lien by agreement "cannot be invoked to create a right contrary to the agreement of the parties." *Good*, 76 S.E. at 702. It accordingly does not permit the freewheeling equitable adjustments the Third Circuit thought acceptable.

The Third Circuit's contrary conclusion was based on a mistake of law: It conflated the equitable lien *by agreement* with the equitable lien imposed to *avoid unjust enrichment*, and then grafted principles that have been applied to the latter onto the former. But as this Court explained in *Sereboff*, the two types of liens "[a]re different species of relief," and the principles the Third Circuit found controlling accordingly are "beside the point." 547 U.S. at 364-

365, 368. For this reason, too, the decision below cannot stand.

A. The Relief At Issue Here Is An Equitable Lien By Agreement.

1. In *Sereboff*, this Court held that where a plan pursues recovery pursuant to a reimbursement provision, the equitable relief being sought is the "equitable lien 'by agreement.'" 547 U.S. at 364-365; *id.* at 368. The Court unanimously described the contours of the equitable lien by agreement by looking to treatises and "case law from the days of the divided bench." *Id.* at 363. It explained that under an equitable lien by agreement, "'a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing.'" *Id.* at 363-364 (quoting *Barnes* v. *Alexander*, 232 U.S. 117, 121 (1914)). And it explained that a reimbursement provision creates an enforceable equitable lien by agreement so long as it "specifically identifie[s] a particular fund, distinct from the [participant's] general assets" and "a particular share of that fund to which [the plan] was entitled." *Id.* at 364.

Those criteria were met in *Sereboff*, the Court held, because the reimbursement provision at issue identified a particular fund distinct from general assets—namely, "all recoveries from a third party"—and a particular share to which the plan was entitled—namely, "that portion of the total [tort] recovery which is due [to the plan] for benefits paid." *Id.* The Court rejected the participant's attempt to characterize the plan's reimbursement provision as invoking other sorts of equitable remedies, such as equitable restitution or equitable subrogation. As the Court explained: "[The plan's] claim is not considered

equitable because it is a subrogation claim. * * * [It] qualifies as an equitable remedy because it is indistinguishable from an action to enforce an equitable lien established by agreement, of the sort epitomized by our decision in *Barnes*." *Id.* at 368.

2. The U.S. Airways Plan's subrogation provision creates an enforceable equitable lien by agreement. The provision, just like the one at issue in *Sereboff*, requires participants to reimburse the Plan in full when they obtain recoveries from third parties. J.A. 20. It identifies a particular fund distinct from McCutchen's general assets—namely, "any monies recovered from a third party." *Id.* And it identifies a particular share of that fund to which U.S. Airways was entitled—namely, the "amounts paid for claims." *Id.* Indeed, Respondents never challenged the fact that U.S. Airways' claim meets those elements. The relief U.S. Airways seeks thus "is indistinguishable from an action to enforce an equitable lien established by agreement," *Sereboff*, 547 U.S. at 368, and U.S. Airways could "follow a portion of the recovery into [McCutchen's] hands as soon as [the settlement fund] was identified." *Id.* at 364 (quoting *Barnes*, 232 U.S. at 123) (quotation marks omitted).

B. Equitable Liens By Agreement Enforce Parties' Agreements By Their Terms.

The fact that Petitioner seeks equitable relief by agreement is fatal to Respondents' position. That is so because the *raison d'etre* of the equitable lien by agreement is *to enforce agreements by their terms*.

1. The equitable lien by agreement is premised on the maxim that "equity will regard that as done which was agreed to be done." *Runstetler*, 11 D.C. at 384; *accord* 4 Pomeroy § 1235, at 696-698; Dobbs

§ 4.3(3), at 601; 51 Am. Jur. 2d Liens § 40. The equitable lien thus enforces the agreement that the parties actually made, not a different agreement that a judge sitting in equity thinks the parties *ought* to have made.

That principle has been recognized widely for well over a century, including by this Court. Thus, for example, in *Wheeler* v. *Insurance Co.*, 101 U.S. 439, 442 (1879), this Court explained in an equitable-lien-by-agreement case that "[o]f course the mortgagee's equity will be governed by the scope and object of the agreement." In *Parlin & Orendoff Implement Co.* v. *Moulden*, 228 F. 111, 113 (5th Cir. 1916), the Fifth Circuit wrote in an equitable-lien-by-agreement case that the lienors "were entitled to have the proceeds of the insurance policies applied as the bankrupt agreed that they should be applied—to treat that as having been done which had agreed to be done." In *Bernard* v. *Lea*, 210 F. 583, 595 (4th Cir. 1913), the Fourth Circuit wrote in an equitable-lien-by-agreement case that "[e]quity seeks to effectuate the intention of the parties to contracts and will, to that end, aid their * * * execution." And in *Daggett* v. *Rankin*, 31 Cal. 321, 326 (1866), the California Supreme Court explained that "[t]he maxim of equity upon which this doctrine rests is that equity looks upon things agreed to be done as actually performed."

The list goes on.[7] And in every case the basic principle of the equitable lien by agreement is described

---

[7] *See*, *e.g.*, *Alden* v. *Garver*, 32 Ill. 32, 35 (1863) ("When intendments are made, it is for the purpose of effectuating the real intention of the parties."); *Foster Lumber Co.* v. *Harlan County Bank*, 80 P. 49, 50 (Kan. 1905) ("Equity treats that as done which a party, under his agreement, ought to have done"); *Standorf* v. *Shockley*, 111 N.W. 622, 623 (N.D. 1907) ("Equity

the same way: "[E]quity will treat as done that which by agreement is to be done." *United States Fidelity & Guar. Co.* v. *Fidelity Trust Co.*, 153 P. 195, 199 (Okla. 1915).[8] A court recognizing an equitable lien by agreement accordingly does not stop to ask whether it should recalibrate the parties' bargain based on some after-the-fact notion of fairness. The court enforces the lien under the terms of the agreement—just as the parties had intended.

The "standard current works," *Knudson*, 534 U.S. at 217, concur. As Pomeroy observes, "[t]he theory of equitable liens has its ultimate foundation * * * in contracts, express or implied." 4 Pomeroy § 1234, at 695; *accord* Dobbs § 4.3(3), at 601 (equitable liens by agreement are "created by express or at least implied-in-fact agreement of the parties" and are "recognized and enforced in the courts of equity"). Thus "in a large class of executory contracts * * * equity recognizes, in addition to the personal obligation, a peculiar right over the thing concerning which the contract deals, which it calls a 'lien.' " 4 Pomeroy § 1234, at 695. And "by means of" the equitable lien by agreement, "the plaintiff is enabled to follow *the identical thing*, and to enforce the defendant's obliga-

---

comes to the aid of the parties * * * and gives effect to their intention"); *Hovey* v. *Elliot,* 73 Sickles 124, 136 (N.Y. 1890) ("In equity [the contract] had effect as a lien * * * upon the principle that what is agreed and ought to be done is regarded as done."); *Southern Ice & Coal Co.* v. *Alley*, 154 S.W. 536, 539 (Tenn. 1913) (quoting *Daggett*).

[8] This maxim is sometimes stated as "[e]quity regards as done that which ought to be done." *E.g.*, *Walker* v. *Brown*, 165 U.S. 654, 665 (1897). But notably, "that which ought to be done *is what the parties have contracted to do, but have not done*. It is not grounded on mere moral obligation[.]" *Stone* v. *First Nat'l Bank of Tillamook*, 198 P. 244, 244-245 (Or. 1921) (emphasis added); *accord Bair* v. *Willis*, 129 S.E.2d 774, 777 (Ga. 1963).

tion by a remedy which operates directly upon that thing." *Id.* (emphasis added). Nor does it matter if the property is "not yet in being at the time when the contract is made"; the lien is still "enforced in the same manner and against the same parties as a lien upon specific things existing and owned by the contracting party at the date of the contract." *Id.* § 1236 at 699-700; *accord* 51 Am. Jur. 2d Liens § 40.

The upshot: Courts long have understood that the agreement itself defines the rights and remedies available under an equitable lien by agreement. As the South Carolina Supreme Court put it, "[t]he rule that equity considers done that which should be done cannot be invoked to create a right contrary to the agreement of the parties." *Good*, 76 S.E. at 702.

2. Given that principle, it is unsurprising that as best as we can tell, courts sitting in equity have *never* done what the Third Circuit did here: interject vague principles of unjust enrichment or public policy to rewrite an equitable lien by agreement. Petitioner's counsel has reviewed several hundred equitable-lien-by-agreement cases from the days of the divided bench, including every such case cited in the Pomeroy treatise. In *none* did the court embrace such an approach, and in several the court squarely rejected attempts to invoke it.

In several cases, for example, defendants objected to an equitable lien by agreement on the ground that it was in derogation of their right to a homestead (a right based in public policy). The courts disagreed. Homestead owners, they explained, have "perfect liberty and freedom to so contract or not." *Adkinson & Bacot Co.* v. *Varnado*, 47 So. 113, 115 (Miss. 1908). Thus, although the "books are full of statements with respect to the law of establishment of homesteads,"

those laws, and the public policy they embody, "have no sort of application" where the defendants agreed to give the plaintiff their property or an interest in it. *Id.* at 116; *accord Parlin*, 228 F. at 113-114 (equitable lien by agreement not defeated by homestead rights); *Foster Lumber Co.* v. *Harlan Cnty. Bank*, 80 P. 49, 51 (Kan. 1905) (same).[9]

Indeed, *Barnes* v. *Alexander*—the case described at length in *Sereboff*—stands for the same basic proposition. There, an attorney had promised one-third of his contingency fee to two other attorneys. His widow refused to hand over the money to those attorneys as promised. Among other things, she argued that the lien should at least be reduced because she had not received her husband's full two-thirds share; some of it had been distributed to her husband's law partner. 232 U.S. at 122-123. This Court squarely rejected that argument. It held that "the moment the fund was received the contract attached to it as if made at that moment," and it observed that "[a]s the lien of the appellees attached to the whole two thirds of the [contingency fee], we

[9] One of the homestead cases echoes the circumstances here. In *Farmers' Mutual Insurance Ass'n* v. *Burch*, 25 S.E. 211 (S.C. 1896), defendants participated in a mutual insurance association in which members agreed to pay a share of other members' losses. *Id.* at 213. To secure that obligation, members granted the association a lien over their lands. *Id.* One member later protested that the lien infringed his homestead rights. *Id.* The court rejected the argument on technical grounds, but it also observed that the lien in fact *furthered* public policy by making sure funds were available to protect all members against loss. *Id.* at 214. The same policy applies here. *See supra* at 27. Plans must "preserve assets to satisfy future, as well as present, claims," *Varity*, 516 U.S. at 514, and reimbursement provisions "inure[ ] to the benefit of all participants * * * by reducing the total cost of the Plan." *O'Hara*, 604 F.3d at 1237-38.

do not see on what ground she could complain[.]" *Id.* at 121, 123. The Court, in other words, refused to reduce or rewrite the equitable lien by agreement based on a generalized concept of unjust enrichment or fairness. Rather, it determined that the prior agreement controlled. The same rule applies here.

3. Equity courts did discuss, and in some cases recognize, some other defenses to equitable liens by agreement. Those defenses fell into three discrete categories, none of which are relevant to this case or aid Respondents. First, some courts suggested that an equitable lien by agreement might be unenforceable where the agreement was the product of fraud or mistake or constituted usury. *See Burrows* v. *Hoveland*, 58 N.W. 947, 949 (Neb. 1894) (fraud); *Butts* v. *Broughton*, 72 Ala. 294, 297 (1882) (usury). Second, some courts suggested that an equitable lien by agreement would be unenforceable where the lienholder waived it or let it lapse, a defense akin to laches. *See Gill* v. *Clark,* 54 Mo. 415, 417-418 (1873) (waiver); *H.G. Fitzhugh* v. *Smith*, 62 Ill. 486, 492 (1872) (laches). Finally, some courts declined to enforce equitable liens by agreement where the current holder of the fund was a bona fide purchaser without notice or where the lien would constitute a fraudulent transfer. *See, e.g.*, *Walker* v. *Brown*, 165 U.S. at 654, 664-665 (1897); *Hanson* v. *W.L. Blake & Co.*, 155 F. 342, 360 (D. Me. 1907).

Notably, none of these defenses authorized courts to rewrite the parties' bargain to deviate from their actual agreement. None involved roving inquiries into unjust enrichment. And none allowed the equitable lien to be modified by letting the defendant make payments to third parties—here, McCutchen's attorneys—out of recovered funds before the plaintiff

could receive reimbursement. On the contrary, an equitable lien by agreement "create[s] a lien * * * as soon as [the fund] [i]s identified," making the defendant merely "a trustee as soon as he gets a title to the thing," *Sereboff*, 547 U.S. at 364 (quoting *Barnes*, 232 U.S. at 121-123), and that lien is superior to other obligations the defendant may have incurred. Dobbs § 4.3(3), at 600. The money recovered by a plan participant therefore is the plan's property from the moment it is recovered, and that entitlement defeats others' claims.

Thus even if the "parcel of equitable defenses" applicable to equitable liens by agreement are cognizable under Section 502(a)(3), *Sereboff*, 547 U.S. at 368, those equitable defenses do not salvage the Third Circuit's opinion. Respondents do not advance any of the arguments that might even conceivably void an equitable lien by agreement in equity law. Instead, they have argued that the courts should draw from generalized notions of equity to impose a "proportionality" principle on Petitioner's recovery and to make Petitioner share, "common fund"-style, in McCutchen's attorney's fees. That approach is simply not grounded in any doctrine that equity courts have applied to equitable liens by agreement. And it is a far cry from the standard this Court has employed in "interpret[ing] 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*, 131 S. Ct. at 1878 (quoting *Sereboff*, 547 U.S. at 361).

C. The Third Circuit Reached A Different Result By Applying The Wrong Equitable Principles.

The Third Circuit came to a different conclusion. It held that "the principle of unjust enrichment is broadly applicable to claims for equitable relief," that that principle accordingly must apply to the equitable relief sought here, and that it authorizes a court to recalibrate the parties' bargain however the court sees fit. Pet. App. 11a, 16a-17a. But "the principle of unjust enrichment" is *not* applicable here—at least not in the freewheeling form the Third Circuit envisioned. The Third Circuit reached a contrary conclusion because it erroneously equated an equitable lien by agreement with an equitable lien to prevent unjust enrichment.

1. In *Sereboff*, this Court was careful to distinguish the equitable lien by agreement from two other forms of relief: equitable restitution and equitable subrogation. The Court explained that "an equitable lien sought as a matter of restitution[ ] and an equitable lien 'by agreement' * * * [a]re different species of relief." 547 U.S. at 364-365. And it recognized that the "equitable lien established by agreement" is distinct from "equitable subrogation," such that "the parcel of equitable defenses * * * accompany[ing] any such action [for equitable subrogation] are beside the point." *Id.* at 368.

Not only this Court, but the equity treatises, too, draw a sharp line between these forms of relief. Dobbs, for example, makes special mention of the equitable lien by agreement "to distinguish it from the equitable lien imposed by the courts to prevent unjust enrichment"; the latter—also described generally as equitable restitution—is imposed "not as a

matter of contract, but to prevent unjust enrichment." Dobbs § 4.3(3), at 601; *compare* 51 Am. Jur. 2d Liens §§ 40-44 (equitable liens by agreement) *with id.* §§ 47-50 (equitable liens imposed to prevent unjust enrichment). Likewise, Dobbs and the other treatises treat equitable liens by agreement and equitable subrogation as two different remedies. *See, e.g.*, Dobbs § 4.3(3)-(4), at 600-608; 1 George E. Palmer, *The Law of Restitution* § 1.5(a)-(b), at 20-24 (1978); *compare* 4 Pomeroy §§ 1233-43, at 691-710 (equitable liens by agreement), *with id.* § 1419, at 1072-75 (equitable subrogation). Like equitable restitution, equitable subrogation is "used to prevent unjust enrichment and to give effective relief to the plaintiff." Dobbs § 4.3(4), at 604.

2. The Third Circuit failed to take heed of these distinctions. As a result, it relied for its sweeping conclusions about unjust enrichment not on treatise sections discussing equitable liens by agreement, but on those discussing the *other* two remedies—equitable restitution and equitable subrogation. Here is the key passage from the Third Circuit's opinion:

> These [treatises cited in *Knudson*] all support McCutchen's position that the principle of unjust enrichment is broadly applicable to claims for equitable relief. *See* 1 Dan Dobbs, Law of Remedies § 4.3(3), at 602 (2d ed. 1993) (noting that equitable remedies such as constructive trusts and equitable liens are all "invoked for the same reason, to prevent unjust enrichment"); 1 Palmer, *Law of Restitution* § 1.1, at 4 ("In equity the principal remedy is constructive trust; but equitable lien, subrogation, and accounting are techniques fre-

quently used to prevent unjust enrichment.”). [Pet. App. 11a].

The Dobbs and Palmer excerpts quoted in this passage, however, are not about equitable liens by agreement at all. They deal instead with equitable *restitution*—i.e., equitable liens to remedy unjust enrichment. And as this Court made clear in *Sereboff*, that is a “different species of relief.” 547 U.S. at 364-365. Ignoring this key distinction, the Third Circuit failed to recognize that the equitable lien by agreement is governed by different rules that are based on the agreement itself. It is not imposed after the fact to remedy unjust enrichment; it exists from “the moment the fund was received,” *Barnes*, 232 U.S. at 121, and it “treat[s] that as having been done which had agreed to be done.” *Parlin*, 228 F. at 113. Nothing in the treatises on which the Third Circuit relied is to the contrary.

The Third Circuit’s failure to distinguish between different forms of equitable relief is in this respect similar to the analytic mistake of the plan participants in *Sereboff*. The participants “assume[d] that *Knudson* endorsed application of all the restitutionary conditions * * * to every action for an equitable lien under § 502(a)(3),” but as the Court explained, that “assumption [wa]s inaccurate” because principles applicable to one form of equitable relief do not necessarily apply to “all the circumstances in which equitable liens were available in equity.” 547 U.S. at 365-366. Quite so here as well. The Third Circuit’s assumption that the principles governing equitable restitution and subrogation apply here is wrong. The equitable lien by agreement, like Section 502(a)(3) itself, contemplates that courts will enforce agreements by their terms.

Finally, even if the Third Circuit had been correct to import generalized unjust-enrichment principles here, its decision still could not stand for two reasons. First, as discussed *supra* at 25-26, there is nothing equitable about letting a participant enjoy the benefit of the parties' bargain and then shrink from the responsibilities imposed by that same bargain. Second, equity does not open the door to judicial rewriting of contractual terms on unjust-enrichment grounds. On the contrary, "the terms of an enforceable agreement *normally displace any claim of unjust enrichment within their reach*." Restatement (Third) of Restitution & Unjust Enrichment § 2 cmt. c (emphasis added). That is so because "one who is enriched by what he is entitled to under a contract or otherwise is not unjustly enriched." Dobbs § 2.4(5), at 111, § 4.1(2), at 558; *accord Craig* v. *Bemis Co.*, 517 F.2d 677, 684 (5th Cir. 1975) ("[E]nrichment [is] not 'unjust,' where it is allowed by the express terms of the Plan."). So it is here. A "plaintiff's contract should not be rewritten to avoid hardship to the defendant." Dobbs § 2.4(5), at 111.

* * *

Ultimately, the Third Circuit made a basic legal error: It confused two different lines of equity cases, borrowing principles from one that have never been applied to the other. That is particularly inappropriate given this Court's warning in *Sereboff* to avoid conflating these very lines of authority. The decision below fails to honor the equitable principles applied in "the days of the divided bench," *Sereboff*, 547 U.S. at 363, and should be reversed.

III. THE DECISION BELOW THREATENS THE STABILITY OF SELF-FUNDED ERISA PLANS AND INCREASES THE BURDENS ON LITIGANTS AND COURTS.

Even setting aside the statute's text and purposes, as well as equitable principles long since settled, there are considerable policy reasons to reject the Third Circuit's rule. The rule would reduce reimbursement collections and pose a real threat to plan solvency. It would substantially increase litigation burdens on plans. It would unduly burden the courts. And it would encourage gamesmanship by participants, who could avoid reimbursement obligations by structuring third-party tort settlements to allocate only a *de minimis* portion to medical expenses. All of these incentives are antithetical to the policies underlying the statute.

A. The Third Circuit's Approach Discourages Employers From Offering Benefits.

1. As already discussed, the rule adopted below would substantially undermine the uniformity and predictability that Congress had in mind when it designed ERISA. *See supra* at 26-27. These are not mere abstract academic problems. On the contrary, this Court has observed that a "patchwork scheme of [judicial] regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 11 (1987).

The Third Circuit's opinion invites just that result. Estimates suggest that plans recover more than $1 billion annually under reimbursement provisions. *See* Br. of Amicus Curiae America's Health Ins.

Plans, Inc. et al. in Support of Respondent, *Sereboff*, 547 U.S. 356 (No. 05-260), 2006 WL 460877, at *3 n.3. The rule adopted below will cost plans some portion of those reimbursements. And even a small increase in plan costs has potentially serious adverse effects: "[E]ach one percent increase in managed care plans' costs * * * results in a potential loss of insurance coverage for about 315,000 individuals." Health Economics Practice, Barents Group, LLC, *Impacts of Four Legislative Provisions on Managed Care Consumers: 1999-2003*, at iii (1998).[10]

2. The Third Circuit rejected this argument out of hand. In response to the "practical concern" raised by Petitioner "that the application of equitable principles will increase plan costs and premiums," the panel wrote: "U.S. Airways cannot plausibly claim it charged lower premiums because it anticipated a windfall." Pet. App. 16a.

That response is doubly flawed. First, it turns a blind eye to the many authorities, set forth above, that recognize that "[r]eimbursement inures to the benefit of all participants and beneficiaries *by reducing the total cost of the Plan*." *O'Hara*, 604 F.3d at 1237-38 (emphasis added); *see supra* at 27-28. Indeed, even critics of plan reimbursement rights admit that reimbursement protects plan solvency: "[A]n insuring entity * * * that receives substantial subrogated recoveries into its coffer will be financially healthier than one that lacks those recoveries." R.M. Baron, *Public Policy Considerations Warranting Denial Of Reimbursement to ERISA Plans: It's Time to Recognize The Elephant In The Courtroom*,

---

[10] *Available at* http://www.uhia.net/web-storage/webstorage5/Impact%20of%20Four%20Legislative%20Provisions%20-%20Barrents%20Group.pdf.

55 Mercer L. Rev. 595, 630 (2004). It is far more than "plausibl[e]," Pet. App. 16a, that the constriction of reimbursement rights can lead to higher premiums. It is both obvious and widely recognized.

Second, the court's characterization of reimbursement recovery as a "windfall" is wrong. It bears repeating that employee benefit plans have the freedom to choose what benefits to offer, and the Plan here—like many others nationwide—chose to offer *conditional* benefits in cases like this one: The Plan pays up front, and the participant pays the Plan back if he recovers from a tortfeasor. Under that arrangement, the first $66,866 recovered by McCutchen belonged to the Plan the moment McCutchen settled his case. As the *Schwade* court put it: "How can a plan obtain a 'windfall' by merely enforcing a contractual right that protects plan assets? 'Windfall' means unearned money; McCutchen's ERISA plan sought reimbursement of money paid by the plan and owed by McCutchen." 837 F. Supp. 2d at 1278.

Indeed, the Third Circuit's "windfall" rejoinder is particularly inapt in the context of a "self-funded" plan like the one here, in which the employer "does not purchase an insurance policy from any insurance company in order to satisfy its obligations to its participants." *FMC Corp.*, 498 U.S. at 54. Because self-funded plans cover their own costs and tend to be more exposed to the effects of a single catastrophic loss, "[r]eimbursement and subrogation provisions are crucial to the[ir] financial viability." *Shank*, 500 F.3d at 838. Thus, as even Respondents' preferred commentator has conceded, "in the self-funded plan scenario, * * * there is no windfall as a result of the subrogated recovery." R.M. Baron, *Subrogation: A*

Pandora's Box Awaiting Closure, 41 S.D. L. Rev. 237, 260 (1996); *cf.* Brief in Opposition 31 n.8 (citing same article).

The Third Circuit's "windfall" observation may have resulted from the court's view that McCutchen would end up paying slightly more to the plan than his net recovery from the lawsuit—i.e., his recovery minus the later-negotiated attorney's fees. Of course, it is not at all clear that McCutchen's recovery actually *would* be "negative" in that narrow sense. (It could never be negative in the absence of attorney's fees, since the Plan is entitled only to reimbursement out of monies recovered.) The record on the net-recovery point is inconclusive, *see supra* at 10 & n.3, and Respondents themselves never advanced that argument below. But even assuming the accuracy of the Third Circuit's premise, there is nothing unfair about holding participants to their agreement in the rare case where the result is a negative recovery after attorney's fees. Plan participants and their attorneys typically control third-party tort litigation. They decide whether to sue and settle and on what terms, and how to structure fees. And they typically are aware very early in the third-party litigation of how much insurance is available to cover a tort claim. *See* Fed. R. Civ. P. 26(a)(1)(A)(iv) (requiring prompt production of "any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action"). Reimbursement provisions and initial disclosure requirements thus put participants on notice of what they must recover to make litigation worth their while. As one district court explained: "[I]f the small size of the potential award leaves no attorney willing to share the beneficiary's

risk, this merely shows that the beneficiary correctly chose an immediate and safe benefit from the plan rather than an uncertain tort award (and the cumbrous, enervating, and expensive machinery of litigation) as the means of paying his medical bill." *Schwade*, 837 F. Supp. 2d at 1280.

Moreover, the purported "unfairness" is just as (if not more) likely to run in the other direction. Take, for example, the Ninth Circuit's recent decision in *CGI*. There the plan paid $32,000 for a participant's medical expenses. The participant subsequently recovered *$376,906*. Yet the participant refused to reimburse the plan on the theory that she had not been "made whole," and the panel agreed, remanding for the District Court to craft a remedy. 683 F.3d at 1116, 1124. That sort of outcome—patently unfair to plans, and contrary to ERISA's goals of certainty and plan solvency—will be the norm if Respondents' theory becomes law.

B. The Third Circuit's Rule Imposes Heavy Litigation Burdens On Plans And Courts.

The rule adopted below would not just cut down on reimbursements and make administration less predictable; it also would dramatically increase the litigation burden on plans and courts alike. That, too, undermines ERISA's core goals.

1. The Third Circuit's approach would multiply proceedings in reimbursement actions. To see why, consider the course of proceedings below in this case:

- Respondents argued that the Plan was entitled to the "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." Third Circuit Opening Br. 6.

- The Third Circuit instructed the District Court to consider "factors such as the distribution of the third-party recovery between McCutchen and his attorneys at Rosen Louik & Perry, the nature of their agreement, the work performed, and the allocation of costs and risks between the parties." Pet. App. 17a.

- The Third Circuit ordered the District Court to "engage in any additional fact-finding it finds necessary." *Id.* Likewise, the Ninth Circuit in *CGI*—the case that joined *McCutchen* in creating a circuit split—suggested that the district court would need to hold "further hearings and take further evidence" to determine what constituted "appropriate equitable relief" in that case. 683 F.3d at 1124.

The complications likely to arise under this approach are vast. After all, few of the factors set forth above are susceptible of easy resolution: What were the "overall damages" suffered by the participant? What proportion of his recovery was allocated to medical expenses? Were the attorney's fees reasonable? How does one determine "the allocation of costs and risks between the parties"? These questions would require federal courts to take additional evidence, and potentially to conduct additional hearings.

The "overall damages" inquiry would be particularly fraught with difficulty. Where the plaintiff has settled with the tortfeasor, no one knows if the settlement is the make-whole value of the plaintiff's claim or some compromised value representing the uncertainties of trial. *See* T.L. Fulks, *The Made-Whole Doctrine: Its Effect on Tennessee Tort Litigation And Insurance Subrogation Rights*, 32 U. Mem-

phis L. Rev. 87, 117-118 (2001). Faced with that problem in the context of state-regulated insurance (outside the purview of ERISA), some states have created a burdensome solution: a mini-trial between the plan member and plan, where the "trial court proceeds as it would in the damages phase of a normal bifurcated tort trial." *Id.* at 122-123 (citing *Rimes* v. *State Farm Mut. Auto Ins. Co.*, 316 N.W.2d 348, 356 (Wis. 1982)). Thus even where beneficiaries had "settled their tort claims in order to eliminate the risks and burdens of litigation," the Third Circuit's approach "would necessitate that their claims nonetheless be litigated in the district court * * * to determine whether," among other things, the beneficiaries "were fully or only partially compensated by the * * * tort settlement." *Harris*, 208 F.3d at 281.

Similar complications would arise with any attempt to allocate attorney's fees. Under the typical "common fund" cost calculation, the attorney is entitled to a "reasonable fee under the circumstances"—but importantly, that fee is not "fixed by the terms of [the attorney's] contract with [the plan member]." Restatement (Third) of Restitution & Unjust Enrichment § 29 illus. 26 (2011). Thus, 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.* The Third Circuit has already sketched out how this might work, telling the District Court to consider (among other things) "the distribution of the third-party recovery between McCutchen and his attorneys," "the nature of their agreement," and "the work performed." Pet. App. 17a. Such a nebulous test would flood the courts

with petitions to determine an attorney's reasonable fee in every tort case where the plaintiff is covered by a self-funded ERISA plan.

2. These factual inquiries would impose substantial burdens on plans, participants, and courts alike. The inquiries 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.

This Court already has rejected approaches to ERISA that have that effect. The Court explained in *Conkright*, for example, that ERISA "encourag[es] resolution of benefits disputes through internal administrative proceedings rather than costly litigation." 130 S. Ct. at 1649; *accord FMC Corp.*, 498 U.S. at 65 (quoting 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits)) (ERISA is designed to "avoid 'endless litigation,'" not to multiply it). For that reason, the Court reviewed and reversed a decision that had the effect of "interject[ing] other additional issues into ERISA litigation," thereby "increas[ing] litigation costs." *Conkright*, 130 S. Ct. at 1649-50.

Indeed, the disapproving descriptions *Conkright* offered of the rule at issue there fit here, too. The Court wrote that respondents' rule would "weigh an indeterminate number of factors, which would only further complicate ERISA proceedings." *Id.* at 1650. And it wrote that the answer to the question respondents wanted to pose would rarely be "clear" and would "force the parties to litigate this * * * complicated * * * question." *Id.* The Third Circuit's rule can be described in the same terms. It would create multiple uncertainties. It would drive up litigation costs. And it would "unduly discourage employers

from offering welfare benefit plans in the first place." *Varity*, 516 U.S. at 497.

C. The Third Circuit's Rule Encourages Gamesmanship.

Finally, the Third Circuit's rule encourages gamesmanship by plan participants when they structure settlements with third-party tortfeasors. Take this case, for example: McCutchen argued not just that the Plan's reimbursement should be limited by the ratio of his recovery to what he had sought, but also that it should be limited to the portion of the recovery "that is reasonably allocable to the medical expenses that [the Plan] paid." Third Circuit Opening Br. 6. He argued, in other words, that if the recovery he obtained did not compensate him for his medical expenses, then the Plan would get nothing. The incentive this creates is obvious. As the United States recognized in its brief in *Sereboff*: "[T]he full reimbursement provision avoids the potential for strategic behavior in structuring a settlement by the insured and tortfeasor, who generally will have little reason to resist classifying damages as flowing from something other than medical costs." U.S. Sereboff Br., 2006 WL 460876, at *30 n.15.

* * *

Schwade examined the policy issues discussed above and summarized which way they cut: "If *McCutchen*'s ungoverned notion of equity becomes pandemic, consistent plan operation becomes impossible, inconsistent judicial ruling becomes commonplace, and some beneficiaries become profiteers at the expense of others." 837 F. Supp. 2d at 1278-79. Exactly. The Third Circuit's decision does a disservice to plans and participants alike.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

NEAL KUMAR KATYAL*
CATHERINE E. STETSON
DOMINIC F. PERELLA
MARY HELEN WIMBERLY
SEAN MAROTTA
HOGAN LOVELLS US LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5528
neal.katyal@hoganlovells.com

NOAH G. LIPSCHULTZ
LITTLER MENDELSON, P.C.
80 S. 8th Street
Minneapolis, MN 55402
(612) 630-1000

SUSAN KATZ HOFFMAN
LITTLER MENDELSON, P.C.
1601 Cherry Street
Suite 1400
Philadelphia, PA 19102
(267) 402-3000

Counsel for Petitioner
**Counsel of Record*

August 2012