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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 E. MCCUTCHEN AND ROSEN LOUIK & PERRY, P.C.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF AMICUS CURIAE THE MICHIGAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The Michigan Association for Justice (MAJ) is an association of trial attorneys who represent individual plaintiffs in legal actions throughout the State of Michigan. MAJ members commonly represent our clients through contingent fee arrangements, and of particular relevance in this case, our members regularly represent motor vehicle accident victims who must navigate Michigan's bifurcated no-fault automobile insurance system in order to protect their rights and obtain appropriate compensation for their injuries. Under this system, all of the injured person's medical expenses are paid through his or her own no-fault insurance, and consequently, the negligent driver may be sued only for noneconomic damages that cannot include any compensation for medical expenses as a matter of law.

In this context, we frequently confront ERISA plan claims for reimbursement targeted at the tort recovery of noneconomic damages, despite the fact that such a tort recovery cannot include any compensation duplicating the ERISA plan's payment of

[1] No counsel for a party authored this brief in whole or in part. No party, or counsel for a party, made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, and its counsel have made any monetary contribution to the preparation or submission of this brief. This brief has been authored in its entirety by counsel for amicus curiae. Petitioner and Respondents have filed with the Clerk of the Court letters granting blanket consent to the filing of amicus briefs.

medical expenses. While many of us believe this type of reimbursement claim to be inequitable, district court judges often feel constrained to enforce the reimbursement provisions contained in ERISA plans without any consideration of equitable limitations on such claims. Petitioner in this case now has requested the court to adopt what amounts to a bright-line rule that the reimbursement terms of a benefit plan must be enforced without resorting to any equitable analysis of the reimbursement claim. We believe petitioner's analysis is actually backward, and contrary to petitioner's assertion, we contend that ERISA effectively forbids a plan sponsor from adopting plan terms that are inconsistent with the equitable remedies established under Section 502 of ERISA.

We also frequently confront arguments that ERISA plans are free to invade the contingent fees our members earn through their representation in automobile negligence tort actions, as petitioner claims in this case. We disagree and believe that our contingent fee agreements create equitable liens by agreement against the tort recovery that must be honored and enforced notwithstanding any contrary terms contained in an ERISA plan.

Therefore, we concur in the more detailed analysis put forward by respondent, urging the court to affirm the decision of the court of appeals, and we now write to highlight a few relevant points drawn from our experience in the Michigan no-fault context.

SUMMARY OF ARGUMENT

Section 502(a)(3) of ERISA authorizes plan participants, beneficiaries, and fiduciaries to obtain "appropriate equitable relief . . . to enforce any provisions of [ERISA] or the terms of the plan." Petitioner now essentially requests the court to adopt what amounts to a bright-line rule that the terms of a benefit plan may disclaim any equitable limitations embedded in the "appropriate equitable relief" authorized by ERISA. Petitioner seemingly believes that the terms of an ERISA plan, however inequitable and oppressive they may be, predominate over the equitable nature of the relief provided by the statute. In effect, Petitioner would read the statute to authorize equitable enforcement of inequitable plan terms. Under this theory, a plan may target its claimed right of reimbursement for medical expenses at any fund, no matter if it is unrelated to payment of medical bills, and the plan may insist that a court dishonor the contingent fee agreement of an attorney who represents a plan participant in a third party action. This theory is predicated in part on the proposition that a plan fiduciary such as petitioner must discharge its duties strictly "in accordance with the documents and instruments governing the plan" pursuant to Section 404(a)(1)(D) of the statute.

We believe this analysis is backward. Section 404(a)(1)(D) of ERISA includes a caveat limiting its mandate to plan documents insofar as they are consistent with ERISA itself. Consequently, there does not appear to be any basis for the proposition that a

plan may disclaim any features of the exclusive and comprehensive remedies authorized under Section 502. To the contrary, we believe that any plan term purporting to alter the nature of the equitable relief afforded by ERISA must be deemed unenforceable. While the plan establishes the substantive rights of participants and fiduciaries, the remedies are dictated exclusively by the statute.

We also believe that our members' contingent fee arrangements with their clients create equitable liens by agreement that are every bit as enforceable as an ERISA lien. There does not appear to be any sound basis for disregarding or dishonoring these lien rights, despite petitioner's claims to the contrary.

These issues are particularly significant to our members who represent victims of automobile negligence under Michigan's bifurcated no-fault automobile insurance system. Under Michigan law, all of the injured person's medical expenses are paid through his or her own no-fault insurance, without limitation in amount or duration. Separately, the negligent driver may be sued only for noneconomic damages that cannot include any compensation for medical expenses as a matter of law. Many of these automobile accident victims also have coverage under an ERISA health benefit plan, and disputes over reimbursement rights are common. Without the application of equitable principles, a plan apparently may dictate whether an injury victim receives any compensation from his or her no-fault insurer, and the plan may demand reimbursement of its payments from the injured person's

noneconomic tort recovery. This leaves the injured person in a position that is worse than having no ERISA benefit coverage at all.

Consequently, we request the court to affirm the decision by the court of appeals, acknowledging that equitable principles apply to ERISA reimbursement claims notwithstanding any contradictory terms contained in a benefit plan.

ARGUMENT

I. Our Experience In The Context Of The Michigan No-Fault System Illustrates The Inequity Of Permitting Unfettered Reimbursement Claims By ERISA Plans

One judge confronting the conflict between an ERISA reimbursement claim and the Michigan no-fault act has aptly noted "the adage that the only thing worse than having no insurance policy is having two." *Glover v. Nationwide Mutual Fire Ins. Co.*, 676 F.Supp.2d 602, 606 (W.D.Mich. 2009). Indeed, while the victim of an automobile accident in Michigan may be able to take some solace in the fact that he or she has two sources of medical benefit coverage, in addition to the separate right to recover noneconomic damages for pain and suffering, the reality is that the interplay of these statutes can result in a situation where the injured person must sacrifice the entirety of the tort award to payment of medical expenses.

Every automobile owner in Michigan is required to carry no-fault automobile insurance, under which insureds recover directly from their insurers, without regard to fault, for qualifying economic losses such as medical expenses arising from motor vehicle accidents. M.C.L. § 500.3101; M.C.L. § 500.3105. These no-fault benefits include all reasonably necessary medical expenses for the injured person's care, recovery, and rehabilitation, without any limit on amount or duration. M.C.L. § 500.3107(1)(a). In exchange for ensuring certain and prompt recovery of these economic expenses, the statute also limits tort liability. M.C.L. § 500.3135; *McCormick v. Carrier*, 487 Mich. 180, 189 (2010). An injured person may recover in tort only for noneconomic damages, and only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. *Id*. Thus, only severely injured accident victims are eligible for tort recoveries in addition to having their medical expenses covered.

The Michigan no-fault act also enables insurers to offer, at a reduced premium, medical expense coverage that is secondary to that of other health coverage. M.C.L. § 500.3109a. However, when the terms of a no-fault insurance policy and the terms of a self-funded ERISA plan each contain valid coordination clauses, the terms of the ERISA plan prevail as a result of preemption analysis, and the no-fault coverage remains primary. *Glover*, *supra*, 676 F.Supp.2d at 614, citing *American Med. Sec., Inc. v. Auto Club Ins. Ass'n of Mich.*, 238 F.3d 743, 754 (6th Cir. 2001).

However, in many cases the terms of the ERISA plan render it primary in priority of coverage, relieving the no-fault carrier of the obligation to pay the injured person's expenses. *Citizens Ins. Co. of America v. MidMichigan Health ConnectCare Network Plan*, 449 F.3d 688, 696 (6th Cir. 2006).

Unfortunately, some ERISA plans making themselves primary for medical expenses also contain terms granting the plan a right of reimbursement of all paid medical expenses from the injured person's potential noneconomic tort recovery. Under this scenario, it is entirely possible for an injured person to receive no benefit from his or her no-fault policy, and no benefit from the ERISA health benefit coverage unless and until the tort recovery fund is exhausted in reimbursing medical payments. This occurs despite the fact that the tort recovery cannot duplicate the ERISA plan's payment of medical expenses as a matter of law.

We believe that it is inequitable to assert a lien for medical benefits against a fund that cannot contain medical benefits, and we simply want to preserve our ability to make these equitable arguments, whether or not they ultimately succeed in a particular case. At the heart of the problem, however, is the proposition that the terms of an ERISA plan are always dispositive of the outcome of such a dispute, even if those plan terms seem inherently inequitable. Petitioner now seeks what amounts to a bright-line rule establishing the primacy of plan terms over any equitable limitations embedded in the "appropriate

equitable relief" authorized by Section 502(a)(3) of ERISA. 29 U.S.C. § 1132(a)(3). We urge the court to reject this request, instead affirming the decision of the court of appeals and acknowledging that equitable principles apply to ERISA reimbursement claims notwithstanding any contradictory terms contained in a benefit plan.

II. ERISA Does Not Authorize Plan Sponsors To Adopt Plan Terms That Are Inconsistent With The Remedies Established Under Section 502

In a nutshell, petitioner and its amici argue that plan terms trump the equitable nature of the relief authorized under ERISA. As petitioner puts it: "ERISA, in short, sets up a 'straightforward rule' of 'hewing to' the contractual 'plan documents.'" Pet. Br., p. 6, citing *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 300 (2009). Of course, the *Kennedy* case relied on Section 404 of ERISA, requiring plan fiduciaries to act "in accordance with the documents and instruments governing the plan *insofar as such documents and instruments are consistent with the provisions of [Title 1] and [Title IV] of [ERISA].*" *Id.*, quoting 29 U.S.C. § 1104(a)(1)(D) (emphasis added). Consequently, petitioner's analysis begs the question of whether plan terms disclaiming equitable limitations on equitable remedies are consistent with the provisions of ERISA.

It is well established that: "The six carefully integrated civil enforcement provisions found in § 502(a) . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). Where a statute provides such particular remedies, "a court must be chary" of altering it. *Id.*, at 146-47. As the court has further explained in the preemption context: "The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). As a result, ERISA preempts any state law that "duplicates, supplements, or supplants the ERISA civil enforcement remedy" because it "conflicts with the clear congressional intent to make the ERISA remedy exclusive." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004).

Like the preemption of state laws, there is no reason to believe that Congress meant to authorize plan sponsors to alter the remedial structure of Section 502. Congress also enumerated the requisite and optional features of plan documents in Section 402(b) of ERISA, and there is nothing in this provision or any other part of ERISA that could be construed as authorizing plans to alter the statute's exclusive remedial scheme. 29 U.S.C. § 1102(b). Simply put, the "appropriate equitable relief" authorized by Section

502(a)(3) cannot be modified or undermined by the terms of the plan document. While the plan terms establish the substantive rights of participants, the statute exclusively controls the remedies available to redress violations of those rights.

It would seem absurd to suggest that a plan may simply adopt terms that reject or override the equitable remedies of the statute in favor of preferential contract remedies, yet this appears to be the core of the argument posited by petitioner and its amici. We certainly recognize that an agreement may give rise to an equitable lien in appropriate circumstances. *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356, 363-64 (2006); citing *Barnes v. Alexander*, 232 U.S. 117 (1914). But this does not mean that such agreements are somehow exempt from the equitable limitations inherently applicable to "appropriate equitable relief" under Section 502, and it clearly does not convert the remedy to one sounding in contract. See *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209-10 (2002); citing *Mertens v. Hewitt Associates*, 508 U.S. 248, 258 n.8 (1993). And unlike other types of agreements, plan documents must remain consistent with the statutory provisions of ERISA.

Therefore, we urge the court to reject petitioner's effort to adopt a bright-line rule authorizing plan sponsors to adopt plan terms that are inconsistent with the remedies established under Section 502.

III. A Contingent Fee Arrangement Creates An Equitable Lien By Agreement That Must Be Honored And Enforced Notwithstanding Contrary Terms Of An ERISA Plan

In addition to seeking reimbursement from the ultimate fund obtained by an injured person, petitioner has taken the position that it is entitled to invade the contingent fee earned by the attorney, claiming that its lien is paramount under *Sereboff*. Pet. Br., pp. 30-31. However, petitioner overlooks the fact that this situation involves another equitable lien by agreement resulting from the attorney's contingent fee agreement that is arguably superior to the lien claimed by the ERISA plan.

After all, the *Sereboff* decision was based on a contingent fee case. *Sereboff*, *supra*, 547 U.S. at 363-64, citing *Barnes*, *supra*, 232 U.S. at 123. There can be no dispute, therefore, that an attorney's contingent fee agreement establishes an equitable lien on the fund created by the attorney's work. *Wylie v. Coxe*, 56 U.S. 415, 420 (1854). It is difficult to see how such a lien could be dishonored under *Sereboff*.

Our members are not contracted to the ERISA plans, of course, and there is no basis for suggesting that plans may unilaterally dissolve an attorney's lien. Rather, the resolution of any such lien dispute must be made by application of equitable principles, such as the common fund doctrine, as explicated in detail by respondent. Resp. Br., pp. 26-31. This is

what equity requires, and therefore, it is what ERISA requires. 29 U.S.C. § 1132(a)(3).

CONCLUSION

For the foregoing reasons, in addition to those stated by respondent, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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