

No. 11-1285

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In The  
**Supreme Court of the United States**

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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.*

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

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

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**STATEMENT OF INTEREST  
OF AMICUS CURIAE<sup>1</sup>**

The Pennsylvania Association for Justice is a non-profit organization with a membership of over 2,300 men and women of the trial bar of the Commonwealth of Pennsylvania. For over forty years, the Association has promoted the rights of individual citizens by advocating the unfettered right to trial by jury, full and fair compensation for innocent victims, and the maintenance of a free and independent judiciary.

The Association has a strong interest in the application of equitable principles when determining the amount of third-party reimbursement from a judgment or settlement. It believes that equitable reimbursement fosters the pursuit of meritorious cases, the resolution of cases through settlement, and the fair distribution of funds to all stakeholders in a tort settlement. The Association submits this brief to advance that perspective.



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<sup>1</sup> This brief is submitted with the consent of the parties. It was prepared on behalf of the Pennsylvania Association for Justice by its undersigned counsel. It was not authored in whole or in part by counsel for any party. No person or entity other than the Pennsylvania Association for Justice or its counsel made a monetary contribution to the preparation or submission of the brief.

## **SUMMARY OF ARGUMENT**

The Pennsylvania Association for Justice fully supports Respondents' argument that Section 502(a)(3) of the Employee Retirement Income Security Act ("ERISA") allows courts to consider equity when determining the scope of an ERISA plan's reimbursement rights against a tort settlement. It writes separately to emphasize that Respondents' analysis is well supported by practical considerations. Considering equity heightens the likelihood that meritorious cases will be pursued and that cases will be settled rather than tried to a jury (saving the litigation system the burdens of trial). At the same time, Petitioner's hard-line approach reduces the likelihood that third-party payors will obtain reimbursement in individual cases. Petitioner's approach also invites conflict as plaintiffs are incentivized to challenge third-party reimbursement through other channels. For these reasons, and those set forth in Respondent's brief, the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.



## **ARGUMENT**

The brief of Respondents amply states the reasons this Court should affirm the Third Circuit's decision. This submission additionally highlights the

salutary benefits of an equitable approach to resolving third-party claims, and suggests that Petitioner and supporting amici have missed crucial points when arguing to the contrary.

**I. An equitable approach to third-party reimbursement promotes the filing of meritorious cases.**

Third-party reimbursement is an ever-present component of personal injury litigation. It happens routinely that people suffer injury through the tortious conduct of others. When this happens, governmental or private ERISA plans often pay for resulting medical care. If the injured person sues, and obtains a settlement or judgment, it is well-established that such third parties are entitled to some level of reimbursement for their payments on the injured person's behalf. As such, a first step in evaluating a potential claim is determining whether any third parties have paid for the injured person's medical care.

Plaintiffs' lawyers must determine the existence of third-party claims initially for process reasons. For example, if a complaint is actually filed, those third-party payors must be notified so they may assert their rights against a resulting fund. The existence of third-party payments also may shape the proofs to be introduced at trial regarding past medical expenses. In addition, resolving of third-party claims can be

complex and hence negotiation between plaintiff and the third party may need to commence long before settlement of the tort claim itself; nobody wants a settlement complicated by last-minute disputes concerning a third-party claim. It should be added that since enactment of the Medicare, Medicaid and SCHIP Extension Act, *see* 42 U.S.C. § 2495y(b), certain insurers and defendants are subject to reporting requirements regarding settlements to ensure that that government payors are appropriately reimbursed for medical expenditures. *See id.* These procedural considerations provide ample incentive for plaintiffs' lawyers to determine immediately whether any third-party claims may exist.

More fundamentally, the existence of third-party claims can impact whether a case is filed in the first place. Consider the following hypothetical to illustrate the point. Suppose that a tort victim suffered \$180,000 in medical expenses and no other compensable injuries as a result of a car accident. Pennsylvania's Department of Public Welfare has paid \$180,000 in Medical Assistance (supported by Medicaid funds) toward the victim's past medical care. Under Pennsylvania law, the Department is entitled to reimbursement against a resulting settlement. *See* 62 Pa.C.S. § 1409(b). However, the Department generally must reduce its reimbursement claim by a proportionate share of the plaintiff's attorneys' fees and costs. *See* 62 Pa.C.S. § 1409(b)(7). Further, if the plaintiff were to recover exactly \$180,000 in litigation, the Department would be required to limit its

reimbursement claim to one-half of the recovery after deducting its proportionate share of attorneys' fees and costs. *See* 62 Pa.C.S. § 1409(b)(11).

Thus, assuming no costs and a one-third contingency fee agreement:

- The Department would receive \$40,000 (\$60,000, or one-third of the \$180,000 settlement, reduced further by one-third for the proportionate payment of fees and costs).
- The plaintiff would receive \$80,000 (\$120,000 minus the Department's share).
- The plaintiff's counsel would receive \$60,000 (one-third of the settlement based on the fee agreement).

Against those expectations, the plaintiff might reasonably conclude that the case was worth pursuing: she could reap \$80,000 from the case even taking into account the Department's prior payments on the plaintiff's behalf. Likewise, plaintiff's counsel might be interested in pursuing the case because her fee may be fully paid notwithstanding the Department's prior payments. This arrangement incentivizes both plaintiff and counsel to move forward with a meritorious case. This heightens the likelihood that the Department will obtain at least partial reimbursement for its Medical Assistance payments.

Let us now change the scenario. Suppose that the Department were entitled to 100% reimbursement of



its prior Medical Assistance payments – the arrangement that Petitioner advocates here. Now the economic incentive to bring suit is eviscerated. Even if Plaintiff could recover the full \$180,000 of her damages, every penny of that recovery would be paid to the Department. The plaintiff would receive nothing. The plaintiff’s counsel would receive nothing. Neither plaintiff nor her counsel has any reason to move forward in those circumstances, and the meritorious case will not be pursued. Regrettably, the Department will receive nothing as a result – a bad deal as compared to the \$40,000 the Department would receive under the first scenario.

These convenient illustrations highlight a reality of tort practice: plaintiffs and their counsel decide to pursue (or not pursue) litigation based on expected outcomes. By reducing the likelihood that plaintiffs or their counsel will benefit from litigation, Petitioner’s 100% reimbursement rule will cause meritorious cases to be abandoned. This result harms more than the plaintiffs. It also harms the third party that otherwise would receive reimbursement from a settlement fund. This is the supreme irony of Petitioner’s position: in seeking full reimbursement without compromise, Petitioner undermines the likelihood that third-party plans will obtain any reimbursement in some cases. The plans would get nothing at all because their position rendered the suit economically unviable.

## **II. An equitable approach also promotes settlement without trial.**

Not only does Petitioner's approach undermine the incentive for plaintiffs and counsel to pursue meritorious cases (with deleterious effects for third-party payors), it also pressures plaintiffs to try cases that otherwise might settle, imposing risks and burdens across stakeholders in the litigation system.

We can illustrate this through a revised scenario. Suppose that a tort case has a fair settlement value of \$100,000. At trial, there is a 25% chance of a \$400,000 jury award in plaintiff's favor but a 75% chance of a defense verdict. A third-party payor has paid \$100,000 for the plaintiff's past medical care.

If the third-party payor must be reimbursed for every penny of the \$100,000 it spent on plaintiff's medical care, there is *no* incentive for plaintiff to resolve the case for the fair value of \$100,000. This is because neither plaintiff nor counsel would receive money from the settlement; everything would go to the third party. The plaintiff instead is incentivized to try the case. At trial, the plaintiff has a 25% chance of a \$400,000 award. If successful, and assuming a one-third contingency fee and \$10,000 in case costs, the plaintiff would retain approximately \$156,667 after paying attorneys' fees and costs and after reimbursing the third party on its \$100,000 claim. While the outcome of trial is uncertain, a 25% chance at something represents a better option than the 100% certainty of a "fair" settlement that leaves the plaintiff

with nothing and requires her counsel to work for free. Of course, if the plaintiff loses at trial, the third party will obtain nothing.

One can adjust the numbers so they produce more subtle results, but the fundamental point remains: Petitioner's 100% approach imposes burdens that make settlement harder to achieve and heighten the risk of trial. These burdens would affect not only the plaintiff and her counsel. They would weigh on defendants and their liability insurers, who may have wanted settlement and now must incur the cost of trial and the risk of a sizable verdict in plaintiff's favor. They would weigh on the court system, which must devote judicial resources to managing the trial and resulting appeals. These burdens also would weigh on citizens who must serve as jurors, with all the resulting disruption in their lives, all because a third party did not equitably compromise its reimbursement claim.

These are not theoretical concerns. The existence, size, and negotiability of a third-party claim are vital considerations in whether a case is settled or tried. As such, Petitioner's "no compromise" stance does not promote stability and settlement. It does quite the opposite, with burdensome effects on parties, liability insurers, judges, and jurors. Petitioner's argument should be rejected for this reason as well.

### **III. Negotiation reduces the likelihood of post-settlement disputes.**

Petitioner and supporting amici argue that a rule of equity will promote litigation and controversy, while a fixed rule of 100% repayment will promote stability and order. This position is oddly divorced from the day-to-day realities of tort litigation. Plaintiffs' lawyers in Pennsylvania routinely file cases involving tort victims who have received medical care through such third-party payors as Medicare and the Department of Public Welfare. Those third-party claims are commonly negotiated and resolved in the ordinary course of business. They are successfully negotiated every day.

Occasionally, conflict arises about the scope of the third-party's reimbursement rights. *See, e.g., McKinney ex rel. Gage v. Philadelphia Housing Authority*, No. 07-4432, 2010 WL 3364400 (E.D. Pa. Aug. 24, 2010) (analyzing reimbursement rights under *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268 (2006)); *E.D.B. ex rel. D.B. v. Clair*, 987 A.2d 681 (Pa. 2009) (analyzing reimbursement rights of the Pennsylvania Department of Public Welfare regarding Medical Assistance payments where the parental claim for minors' medical expenses is time-barred). These occasional disputes refine the legal and equitable relationship between stakeholders and clarify expectations about the outcome of a given dispute. In doing so, they promote and hasten claims resolution in downstream cases. That will happen here if the Court affirms the Third Circuit's decision.

The parties will know the equity matters and adjust expectations accordingly. (It is not complicated to reduce a claim by a proportionate share of attorneys' fees and costs, for example.) The result will not be more litigation, but faster claims resolution.

Negotiation is a useful and effective tool for resolving litigation across the entire spectrum of stakeholders in a tort claim. Negotiation promotes the stable and controlled resolution of claims. It promotes the efficient and decent management of complex litigation. Petitioner decries negotiation as if the sky would fall if lawyers had to talk to one another. If the day-to-day reality of tort litigation is any measure, quite the opposite is true.

It should be emphasized that Petitioner's 100% reimbursement rule may not end tension with plaintiffs over the scope of third-party reimbursement. It instead may focus attention on other issues, such as the valid size of the third-party's claim. Sometimes a third party seeks reimbursement for a cost that is factually unrelated to the plaintiff's injury caused by the subject tort, or that would have been paid regardless of the tortious conduct. A plaintiff may contest such a charge as not properly reimbursable. Alternatively, perhaps the third party did not actually pay the amounts listed on the statement of claim, but paid some lesser amount, and only the lesser amount should be reimbursed.

These prosaic conflicts become more likely if third parties must be reimbursed to the exact tune of

their claim, as plaintiffs are incentivized to find other means for reducing claims when equity has no place at the table.

Petitioner's 100% reimbursement rule may not actually reduce tension with third-party payors. It may only change the points in contention. Surely it would be preferable to do what Section 502(a)(3) seems explicitly to contemplate: applying basic fairness when evaluating third-party reimbursement, for the benefit of all stakeholders to a tort settlement – not just for plaintiffs and their counsel, but also for defendants, liability insurers, judges, juries, and the judicial system as a whole.



## CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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