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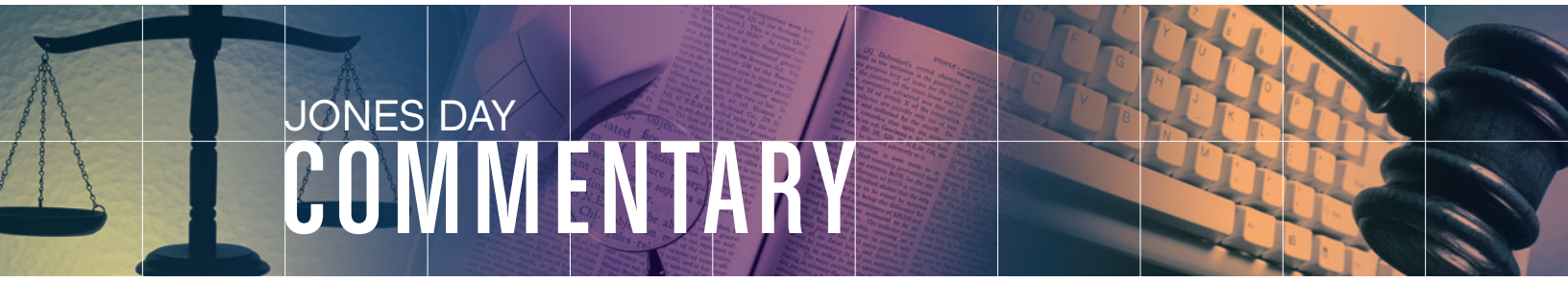

US AIRWAYS v. MCCUTCHEN: WHEN SILENCE IS NOT GOLDEN

Sponsors and administrators of self-insured health and welfare plans, as well as insurance companies that offer insured health and welfare products, take out your scrivener devices! In *US Airways v. McCutchen*,[1] the U.S. Supreme Court again addressed the right of a welfare plan to reimbursement of funds that a participant recovers from a third party. In the process, sponsors and insurers received a split decision. On the one hand, the Court held that equitable principles—notably the unjust enrichment doctrine—cannot override the terms of a benefit plan. Thus, where a plan administrator seeks to enforce an "equitable lien by agreement," a participant cannot defend against application of the plan's lien requirement by resort to equitable defenses.

On the other hand, the Court held that where a plan document is silent on a question—in this case, the allocation of attorney's fees that the participant expends in obtaining the third-party recovery—equitable principles (notably, the common-fund doctrine) may be looked to in filling the gap. Only if the plan is drafted so as to expressly address the question may it resolve it at odds with equitable principles.

Thus, the impact of *McCutchen* is to once again put a premium on comprehensive plan drafting. If a sponsor or insurer wants to limit its financial risk, it better clearly indicate those limits in the plan document. If it fails to do so, by silence or use of ambiguous language, it runs the risk that equitable principles (which may not favor its interests) will be applied to "provide[] the best indication of the parties' intent."[2]

ANALYSIS

In 2007, James McCutchen and his wife suffered serious injuries in an automobile accident. At that time, Mr. McCutchen was an employee of US Airways and a participant in its self-insured group health plan, which paid $66,866 for his accident-related medical expenses. The plan included subrogation and reimbursement provisions that required participants to reimburse the plan "out of any monies recovered

from [the] third party, including ... as the result of judgment, settlement, or otherwise." The plan documents did not expressly address whether the plan or the participant would be responsible for paying any attorney's fees incurred in obtaining such recovery.

Mr. McCutchen's overall recovery (from a settlement with the driver who caused the accident and underinsured motorist benefits available under his own automobile insurance policy) was limited to $110,000. Of that sum, $44,000 was then paid to his lawyer, leaving a $66,000 recovery, slightly less than the amount the US Airways' health plan had covered in medical bills. US Airways then demanded reimbursement of its total expense of $66,866, and when Mr. McCutchen refused, US Airways, as fiduciary and plan administrator, filed suit to enforce the plan's subrogation and reimbursement provisions. The district court granted judgment to US Airways, but the Third Circuit reversed. It held that the principle of unjust enrichment overrode the plan's reimbursement clause, because otherwise it would leave US Airways with a windfall. The Supreme Court then granted certiorari to resolve the matter.

The Court had little problem reversing the Third Circuit and rejecting the notion that equitable principles could be raised as a defense to application of the terms of a benefit plan. Relying on its earlier decision in *Sereboff v. Mid-Atlantic Medical Services*,[3] the unanimous Court held that benefit plan contracts have primacy over equitable doctrines. More specifically, and as Justice Kagan explained, lien provisions that "arise[] from and serve[] to carry out a contract's provisions" may not be superseded by equitable doctrines. For the Court, "[t]he agreement itself becomes the measure of the parties' equities; so if a contract abrogates the common-fund doctrine, the [sponsor or insurer] is not unjustly enriched"—it merely is "claiming the benefit of its bargain."[4] Arguments of unjust enrichment were thus beside the point when the plan administrator was simply demanding what was called for under the plan terms.

Unfortunately, however, for the sponsor and insurer community, this was not the end of the decision. Justice Scalia's dissent was correct in noting that the certiorari petition had assumed the plan's terms were unambiguous—indeed, the plan required a lien "on any monies recovered from [the] third party" (emphasis added). Accordingly, US Airways' lien right was thus not subject to an allocation of attorney's fees. This assumption also was made by the Solicitor General, because the United States argued in its amicus brief that the common-fund rule could be applied to override the plan's apparent requirement that no credit be given to Mr. McCutchen for the attorney's fees he expended in obtaining his recovery.[5]

Nonetheless, writing for a majority of five Justices, Justice Kagan assumed that because the plan's lien language did not expressly address the issue of allocation of attorney's fees, there consequently was an ambiguity in the plan, or as she put it, a "contractual gap." Rather than remand the case and instruct the lower court to determine the parties' intent respecting this "contractual gap," the majority went on to hold that where the plan is silent on an issue, courts may use otherwise applicable equitable doctrines to construe the plan. Specifically, the Court concluded that because the plan document was silent on the allocation of attorney's fees, the common-fund doctrine was the appropriate interpretive rule. Under that doctrine, a litigant who recovers a common fund for the benefit of persons other than himself (i.e., the plan) is entitled to reasonable attorney's fee from the fund as a whole, and thus from the plan's lien recovery.

The majority said that ordinary principles of contract interpretation warranted this application of equitable principles. In undertaking the proper interpretation of a plan, "a court properly takes account of legal background rules—the doctrines that typically or traditionally have governed a given situation when no agreement states otherwise." The majority reasoned that ignoring these rules was likely to frustrate the parties' intent and produce perverse consequences. With regard to the common-fund doctrine in particular, the majority concluded that "[a] party would not typically expect or intend a plan saying nothing about attorney's fees to abrogate so strong and uniform a background rule." Essentially, the Court assumed that plan sponsors intended to share the attorney's fee expenditure in connection with any third-party recovery.

The majority's blithe assumption that plan sponsors would necessarily intend to share attorney's contingent fee arrangements that tort lawyers negotiate with plan participants simply does not jibe with reality for many plan sponsors. The truth is that the application of "typical" or "traditional" legal doctrines like the "common-fund" rule often will have results that are not consistent with the plan sponsor's intent.

Yet the Court did essentially create two limits to this broad rule allowing application of equitable principles to fill ambiguities or gaps in plan language: first, the equitable doctrine could apply only if it "provides the best indication of the parties' intent"—although as noted above, it may well be a stretch to assume that application of the common-fund doctrine in these circumstances comported with the sponsor's intent. Second, and more crucially, the Court noted that if the plan sponsor (i.e., U.S. Airways) had wished to depart from application of equitable doctrines, it was free to draft its plan to say so.[6] In other words, if a plan sponsor does have an intent inconsistent with certain commonplace equitable doctrines, it can avoid application of those doctrines by expressly drafting around the issue in the plan itself.

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PLANNING CONSIDERATION.

This case once again emphasizes the important of having clear, concise, and comprehensive plan terms. In light of *US Airways v. McCutchen*, sponsors of health and welfare plans should revisit the subrogation and reimbursement provisions in their plan documents and SPDs to ensure that the common-fund doctrine (as well as "make-whole," apportionment, and other equitable doctrines) is adequately addressed.

In addition, in light of the Court's potentially broad-reaching statements about "background legal rules," sponsors of self-insured health and welfare plans also should review their plan documents and SPDs to ensure that there are no "gaps" in expressing the sponsor's intent—especially in areas where that intent might be at odds with "typical" or "traditional" common law principles.

ENDNOTES

1 569 U.S. ___ (2013) (slip op.), 2013 BL 101433.

2 569 U.S. ___ (slip op., at 14), 2013 BL 101433 at *9. Justice Kagan wrote the opinion for the Court. The holding that equitable principles cannot override the equitable lien terms of a benefit plan was unanimous. The holding that there was a gap in the plan respecting allocation of attorney's fees, and that the equitable common-fund doctrine should apply to interpret the plan, was a five-justice opinion. Justice Scalia, joined by the conservative wing of the Chief Justice and Justices Kennedy, Thomas, and Alito, dissented, arguing that the question presented presumed that the plan's terms were unambiguous and there was no "contractual gap" that equitable doctrines were necessary to fill.

3 547 U.S. 356 (2006).

4 569 U.S. ___ (slip op., at 11), 2013 BL 101433 at *7. The relevant language in this case came from the summary plan description ("SPD"). The Court reiterated its position in *CIGNA Corp. v. Amara* that an SPD is a communication about the plan and does not itself constitute the terms of the plan. *CIGNA Corp. v. Amara*, 563 U.S. ___, 131 S. Ct. 1866 (2011). Nevertheless, because all the parties in this case had treated the language in the SPD as though it came from the plan document throughout the lower court proceedings, the Supreme Court did so as well.

5 Brief for the United States as Amicus Curiae Supporting Neither Party, *US Airways, Inc. v. McCutchen*, 569 U.S. ___ (2013) (No. 11-1285).

6 569 U.S. ___ (slip op., at 16), 2013 BL 101433 at *10 ("Only if US Airways' plan expressly addressed the costs of recovery would it alter the common-fund doctrine.").