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## **Subrogation or Equity: An Examination of Subrogation Clauses in ERISA Qualified Health Plans**

### **I. Introduction**

Lawsuits related to sports injuries are becoming increasingly common at both the professional and amateur level. Current and former players are suing both the National Collegiate Athletic Association (NCAA) and the National Football League (NFL) for injuries related to concussions.<sup>1</sup> Sports-related lawsuits are also very common at the non-professional level and high schools across the country are facing suits by students for permanent sports related injuries.<sup>2</sup> What these players may not be aware of, however, is that their health insurance contracts almost certainly contain a subrogation clause that entitles their health plan's administrator to recover any monies received as a result of a successful tort judgment or settlement to reimburse the health plan for any money paid in treating the player for the injury.

Black's Law Dictionary defines subrogation as "the substitution of one thing for another, or of one person into the place of another with respect to rights, claims, or securities."<sup>3</sup> The health plan can assert this right of subrogation even after the beneficiary has undertaken the cost of pursuing the lawsuit against the tortfeasor. The rights of the health plan often extend so far as to

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<sup>1</sup> Mary Pilon, *Former Soccer Player Joins Lawsuit Against N.C.A.A.*, THE NEW YORK TIMES COLLEGE SPORTS BLOG, (Sept. 24, 2012), <http://thequad.blogs.nytimes.com/2012/09/24/former-soccer-player-joins-lawsuit-against-the-n-c-a-a/>; Michael Clinton, *Former Jaguars Sue NFL Over Concussions*, THE JACKSONVILLE BUSINESS JOURNAL (Sept. 21, 2012 1:13 PM), <http://www.bizjournals.com/jacksonville/news/2012/09/21/multiple-former-jaguars-sue-nfl-over.html>.

<sup>2</sup> Tom Dowd, *Concussion Care a Heavy Burden for Staten Island High School Coaches*, (Sept. 20, 2012, 8:00 AM),

[http://www.silive.com/sports/advance/dowd/index.ssf/2012/09/tom\\_dowd\\_concussion\\_care\\_a\\_he.html](http://www.silive.com/sports/advance/dowd/index.ssf/2012/09/tom_dowd_concussion_care_a_he.html).

<sup>3</sup> BLACK'S LAW DICTIONARY 712 (9th ed. 2009).

allow the plan administrator to sue the insured individual to recover any money the plan spent on medical treatment following the injury from a tort judgment or settlement.<sup>4</sup> Often the subrogation clause does not allow for any deduction for premiums paid to the health plan, attorney fees or costs of the suit.<sup>5</sup> Essentially, the plan will be reimbursed in full if there is a recovery even though the plan did not contribute to the recovery in any way. In many situations, this leaves the injured party with no recovery for his injuries after paying the costs of the suit and attorney fees. Furthermore, in some situations, the plan administrator can recover from the tort judgment or settlement from the portion of the award for pain and suffering or emotional distress.<sup>6</sup>

Many states have recognized the inequity of subrogation that leaves an injured party without recovery and have either eliminated the right to subrogation or have limited its scope.<sup>7</sup> However, because many of these health plans are ERISA-qualified they are governed by federal law.<sup>8</sup> The Employee Retirement Income Security Act (ERISA) is a federal statute that governs all actions related to a health insurance contract that is provided by an employer.<sup>9</sup> When a plan administrator wants to sue to recover money from a tort judgment or settlement, he will use ERISA to get around the state's anti-subrogation law and either bring the action in federal court or apply federal ERISA law in state court.

Most plaintiffs cannot avoid ERISA preemption unless they provide their own insurance. In the case of a professional athlete, more likely than not, his employer, such as the NFL or individual sports team, will provide his health insurance as part of a group plan. This plan will

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<sup>4</sup> See Roger Baron, *Subrogation: A Pandora's Box Awaiting Closure*, 41 S.D. L. REV. 237 [insert date]

<sup>5</sup> *Id.*

<sup>6</sup> *Mein v. Pool Co. Disabled Intern. Employee Long Term Disability Ben. Plan*, 989 F. Supp. 1337 (D. Colo. 1998); *Davis v. John Alden Life Ins. Co.* 746 F. Supp. 44 (D.C. Kan. 1990).

<sup>7</sup> *Perreira v. Rediger*, 169 N.J. 399 (N.J. 2001); *Valora v. Pennsylvania Employees Benefit Trust Fund*, 595 Pa. 574 (Pa. 2007).

<sup>8</sup> *US Airways, Inc. v. McCutchen*, 663 F.3d 671, 676 (3d Cir. 2011) *cert. granted*, 133 S. Ct. 36 (2012).

<sup>9</sup> 29 U.S.C. § 1132 (2012).

almost certainly contain a subrogation clause. Therefore, his health plan is ERISA preempted and state law does not control the plans right to subrogation. In the case of a nonprofessional student athlete, often his health insurance is provided by his parents who it turn receive health benefits from their employer.<sup>10</sup> Since most health plans in the United States are provided by an employer,<sup>11</sup> ERISA preemption is an inescapable dilemma facing many potential plaintiffs.

The law in this area may be undergoing a change following the United States Court of Appeals for the Third Circuit's decision in *US Airways, Inc. v. McCutchen*.<sup>12</sup> The *McCutchen* court held that "appropriate equitable relief" under Section 502(a)(3) of ERISA required that the plan administrator receive something less than total relief and that injured beneficiaries are entitled to assert equitable principals, such as unjust enrichment against the plan administrator who did not contribute to the tort settlement.<sup>13</sup> The Third Circuit's reasoning was adopted by the Ninth Circuit Court of Appeals in *CGI Technologies and Solutions Inc. v. Rose*.<sup>14</sup> The *McCutchen* case has received certiorari from the Supreme Court and hopefully will help resolve the numerous circuit splits that exist on this issue.<sup>15</sup>

This article will argue that ERISA is subject to equitable principals such as unjust enrichment and other equitable defenses and that plan administrators should not be unjustly enriched by rights to reimbursement without any contribution to recovery or at the very least without any

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<sup>10</sup> *Primax Recoveries Inc. v. Goss*, 240 F. Supp. 2d 800, 801 (N.D. Ill. 2002).

<sup>11</sup> Elise Gould, *A Decade of Declines in Employer-Sponsored Health Insurance Coverage*, ECONOMIC POLICY INSTITUTE, (Feb. 23, 2012), <http://www.epi.org/publication/bp337-employer-sponsored-health-insurance/>.

<sup>12</sup> *McCutchen*, 663 F.3d at 676 *cert. granted*, 133 S. Ct. 36 (2012). [Note: I see that for the rest of your paper you refer to the 3d Circuit *McCutchen* decision and the 2012 Supreme Court case. You might want to consider differentiating between the two. i.e. "*McCutchen I*" and "*II*" – see the Blue Book on these rules first though. For now I am just going to convert the following citations of *McCutchen* to short cites for your reference going forward.]

<sup>13</sup> *Id.*

<sup>14</sup> *CGI Technologies & Solutions Inc. v. Rose*, 683 F.3d 1113 (9th Cir. 2012).

<sup>15</sup> *McCutchen*, 133 S. Ct. 36.

reduction for premiums paid into the plan. Part II of this article will give an overview of the law on subrogation in the various circuits as well as Supreme Court precedent and state law. Part III will examine Congressional intent in passing ERISA and how this intent supports limiting subrogation rights. Part IV will examine the *US Airways, Inc. v. McCutchen* case as well as its reasoning and holding and the impact this decision will have if it is upheld or reversed. Part V will go over criticisms of the *McCutchen* decision as outlined by other courts and will offer several responses. Part VI will offer this article's conclusion.

## **II. Overview of the Law**

29 U.S.C. § 1132(b)(3) provides that a civil action may be brought: “by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.”<sup>16</sup> Plan administrators have relied on this section of ERISA to enforce subrogation agreements in the federal courts.

Even if a plan is not preempted by ERISA, some states will enforce subrogation clauses. State and federal law is equally varying on the issue of subrogation. States have developed a wide variety of approaches in handling subrogation claims in the tort field.<sup>17</sup> Some states have preserved common law rules and eliminated subrogation.<sup>18</sup> Some of the states following this approach include New Jersey, Arizona, and Missouri.<sup>19</sup> Furthermore, numerous other alternatives

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<sup>16</sup> 29 U.S.C. § 1132(b)(3).

<sup>17</sup> Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation*, 70 MO. L. REV. 723, 737 (2005). (providing a separate analysis for each state's approach).

<sup>18</sup> See Baron, *supra* note 4.

<sup>19</sup> See *id.*



have been adopted by the states that either limit subrogation or eliminate it altogether in specific circumstances.<sup>20</sup> These anti-subrogation principles have been adopted by the courts and state legislatures alike.<sup>21</sup> In addition to these judicially and legislatively created defenses to subrogation, some states maintain the common law defenses of the make whole doctrine<sup>22</sup>, pro rata loss sharing<sup>23</sup>, equitable apportionment and the common fund doctrine.<sup>24</sup> Some of these defenses will be discussed further below.

State and federal law has recognized several defenses to the plan administrator's subrogation rights as they exist in equity. First, the specific-fund doctrine. In *Sereboff v. Mid Atl. Med. Services, Inc.*,<sup>25</sup> the Supreme Court held that an ERISA carrier is able to enforce its plan's third-party recovery provision under federal law as long as the plan "specifically identifie[s] a particular fund, distinct from [the plan beneficiaries'] general assets [namely, the settlement proceeds themselves] ... and a particular share of that fund to which [the plan] was entitled [meaning up to the amount the plan paid for injury-related care.]"<sup>26</sup> This language is critical to all ERISA plans, and it will make or break an ERISA lien right from the start.<sup>27</sup>

The second defense is the make-whole doctrine. This doctrine is a common law rule that limits an insurer's right to subrogation. The Fourth Circuit has explained it this way:

Generally, under the doctrine, an insurer is entitled to subrogation of an insured's recovery against a third party only to the extent that the combination of the proceeds the insurer has already paid to the insured and the insured's recovery from the third party exceed the insured's actual damages. In other words, the

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<sup>20</sup> See *id.* at 240 (discussing Oklahoma, Pennsylvania, Nevada, and Kansas).

<sup>21</sup> *Id.*

<sup>22</sup> Parker, *supra* note 17 at 737 (providing a separate analysis for each state's approach).

<sup>23</sup> *Id.*

<sup>24</sup> See Baron *supra* note 4. (providing a separate analysis for each state's approach).

<sup>25</sup> *Sereboff v. Mid Atl. Med. Services, Inc.*, 547 U.S. 356, 359 (2006).

<sup>26</sup> *Id.* at 363.

<sup>27</sup> *Id.*

insured must be made whole before the insurer can exercise his right of subrogation.<sup>28</sup>

There currently exists a circuit split as to whether the make-whole doctrine should be applied as the default rule in ERISA subrogation. The Fourth Circuit recently rejected the doctrine as the default rule, reasoning that “such a rule would frustrate the purposes of ERISA by requiring plan drafters to inject legalese into plans rather than use clear, ordinary language explaining the plan’s provisions.”<sup>29</sup> Other circuits taking a similar position include the First, Third, and Eighth.<sup>30</sup>

The third defense is the “common-fund” or “common benefit” doctrine. This doctrine demands that the plan administrator contribute to attorney fees.<sup>31</sup> According to the Seventh Circuit, the underlying theory is that to “allow [the insurer] to obtain full benefit from the plaintiff’s efforts without contributing equally to the litigation expenses would be to enrich [it] unjustly at the plaintiff’s expense.”<sup>32</sup> Reductions for attorney fees are virtually routine with respect to other liens, which is why many attorneys expect the same of ERISA liens. However, the majority of federal circuits have ruled that an ERISA plan need not contribute to attorney fees where its own plain language gives it an unqualified right to reimbursement.<sup>33</sup>

These equitable defenses, adopted by some of the circuits and rejected by others, show the nature and severity of the split on this issue. Depending on a plaintiff’s location he may be entitled to assert several defenses in equity or none at all against a plan administrator seeking

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<sup>28</sup> *In re Paris*, 211 F.3d 1265 (4th Cir. 2000).

<sup>29</sup> *Id.*

<sup>30</sup> *Admin. Comm. of Wal-Mart Stores, Inc. Associates' Health & Welfare Plan v. Gamboa*, 479 F.3d 538 (8th Cir. 2007); *Qualchoice, Inc. v. Williams*, 14 F. App'x 417 (6th Cir. 2001).

<sup>31</sup> *Blackburn v. Sundstrand Corp.*, 115 F.3d 493 (7th Cir. 1997).

<sup>32</sup> *Citing Hall v. Cole*, 412 U.S. 6 (1943).

<sup>33</sup> *See Kress v. Food Employers Labor Relations Assn.*, 291 F.3d 563, 569 (4th Cir. 2004); *Harris*, 208 F.3d at 279; *Walker v. Wal-Mart Stores, Inc.*, 159 F.3d 938, 940 (5th Cir. 1998); *Ryan v. Federal Express Corp.*, 78 F.3d 123, 127 (3d Cir. 1996).

reimbursement. Take for example the situation of Neil Goss, a student athlete covered by an ERISA plan, who sustained seriously injury in a sports accident.<sup>34</sup> Goss's injuries resulted in medical bills of nearly \$500,000, which his health plan paid.<sup>35</sup> Goss was sued by his health plan for a lien on any potential judgment or settlement obtained through a tort action.<sup>36</sup> Because Goss lived in Illinois, his case was governed by Seventh Circuit precedent, and the lien was granted even before funds were recovered.<sup>37</sup> Had Goss lived in another jurisdiction the end result may have been different. The circuit splits are so varying and the explanations offered by the courts so intricate that a full examination is not possible in this article. However, a brief overview helps underline the murkiness of ERISA preempted subrogation litigation.

The circuits have split on whether strict adherence to the terms of an ERISA plan that disclaims the application of traditional equitable defenses constitutes "appropriate equitable relief." Several circuits, and notably the Eleventh, Eighth, Seventh and Fifth Circuits, have stressed the primacy of an ERISA plan's express language, and have decided that in balancing the equities, simple contract interpretation that provides for full reimbursement per the plain terms of a plan that disclaims the application of traditional equitable defenses such as the make-whole doctrine and the common fund doctrine, constitutes "*appropriate equitable relief*" under § 502(a)(3).<sup>38</sup> In *Zurich Am. Ins. Co. v. O'Hara*, the Eleventh Circuit stated that the application of "federal common law to override the Plan's controlling language, which expressly provides for reimbursement regardless of whether [the beneficiary] was made whole by his third-party

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<sup>34</sup> *Primax Recoveries Inc.*, 240 F. Supp. 2d at 801.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Green v. Holland*, 480 F.3d 1216 (11th Cir. 2007); *Northcutt v. Gen. Motors Hourly-Rate Employees Pension Plan*, 467 F.3d 1031 (7th Cir. 2006); *ACS Recovery Services, Inc. v. Griffin*, 676 F.3d 512 (5th Cir. 2012).



recovery, would frustrate, rather than effectuate, ERISA's 'repeatedly emphasized purpose to protect contractually defined benefits.'"<sup>39</sup>

In *Admin. Comm. of Wal-Mart Stores, Inc. Associates' Health & Welfare Plan v. Shank*, the Eighth Circuit stated that "[n]othing in the statute suggests Congress intended that section 502(a)(3)'s limitation of the [plan's] recovery to "appropriate equitable relief" would upset these contractually-defined expectations [such as a make-whole rule disclaimer]."<sup>40</sup> Indeed, ERISA's mandate that '[e]very employee benefit plan shall be established and maintained pursuant to a written instrument,' 29 U.S.C. § 1102(a)(1), establishes the primacy of the written plan."<sup>41</sup>

The Seventh Circuit, in *Administrative Committee of Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Varco*, held that in an action under § 502(a)(3),

[I]t is inappropriate to fashion a common law rule that would override the express terms of a private plan unless the overridden plan provision conflicts with statutory provisions or other policies underlying ERISA.... Those cases which have applied the federal common fund doctrine in the favor of individual ERISA participants have done so, correctly, only in the absence of controlling plan language<sup>42</sup>

In *Wal-Mart Stores, Inc. Assocs.' Health and Welfare Plan v. Wells*, the Seventh Circuit went on to suggest that in an action under § 502(a)(3), the parties to an ERISA plan could, by contract, alter the "background of common-sense understandings and legal principles [such as the common fund doctrine] that ... operate as default rules to govern in the absence of a clear expression of the parties' intent that they not govern."<sup>43</sup>

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<sup>39</sup> *Zurich Am. Ins. Co. v. O'Hara*, 604 F.3d 1232, 1238 (11th Cir.2010)

<sup>40</sup> *Admin. Comm. of Wal-Mart Stores, Inc. Associates' Health & Welfare Plan v. Shank*, 500 F.3d 834, 839 (8th Cir. 2007).

<sup>41</sup> *Id.*

<sup>42</sup> *Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Varco*, 338 F.3d 680, 691–92 (7th Cir.2003).

<sup>43</sup> *Wal-Mart Stores, Inc. Assocs.' Health and Welfare Plan v. Wells*, 213 F.3d 398, 402 (7th Cir. 2000).

In *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot and Wansbrough*, the Fifth Circuit stated that “the Plan's terms not only give it the right to recover benefits ‘to the extent of any and all’ settlement payments, but explicitly state that the participant must bear the fees and costs associated with his tort action...”<sup>44</sup> The court even went so far as to state that “... neither the federal nor Texas common fund doctrine may be invoked to prevent or reduce the Plan's recovery of the funds that it advanced to [the beneficiary] up to the full amount of his recovery from the tortfeasor.”<sup>45</sup>

The Supreme Court has handed down several decisions that shed light on the extent of a health plan administrators right of subrogation. A brief overview of these decisions is therefore appropriate. In *FMC Corp. v. Holliday*,<sup>46</sup> an action involving subrogation under a self-funded ERISA governed employee benefit plan, the Court held that a Pennsylvania statute providing that: in tort actions arising out of the use of a motor vehicle, there shall be no subrogation or reimbursement from a claimant's tort recovery with respect to benefits payable under any program, group contract, or other arrangement, was preempted by ERISA.<sup>47</sup> Noting that ERISA supersedes all state laws insofar as they relate to any employee benefit plan, the court observed that although the Pennsylvania statute fell within ERISA's saving clause permitting states to regulate insurance, an ERISA plan shall not be deemed an insurance company, an insurer, or engaged in the business of insurance for purposes of any state law purporting to regulate the insurance industry.<sup>48</sup> 29 U.S.C. § 1144(b)(2)(B) exempts self funded ERISA plans from state

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<sup>44</sup> *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot and Wansbrough*, 354 F.3d 348, 361 (5th Cir.2003).

<sup>45</sup> *Id.*

<sup>46</sup> *FMC Corp. v. Holliday* 498 US 52 (1990).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

laws regulating insurance.<sup>49</sup> This rationale has been applied by other courts to bar the application of a state's anti-subrogation statute to ERISA qualified plans.<sup>50</sup>

The most important decision on the issue of subrogation rendered by the Supreme Court was *Great-W. Life & Annuity Ins. Co. v. Knudson*.<sup>51</sup> In *Knudson*, Janette Knudson was rendered a quadriplegic by a car accident occurring June 1992.<sup>52</sup> Because her husband, Eric Knudson, was employed by Earth Systems, Inc., Janette was covered by the Health and Welfare Plan for Employees and Dependents of Earth Systems, Inc. (Plan).<sup>53</sup> The Plan covered \$411,157.11 of Janette's medical expenses, of which all except \$75,000 was paid by petitioner Great-West Life & Annuity Insurance Co. pursuant to a "stop-loss" insurance agreement with the Plan.<sup>54</sup> The Plan included a subrogation provision which provided

[T]he Plan shall have 'the right to recover from the [beneficiary] any payment for benefits' paid by the Plan that the beneficiary is entitled to recover from a third party. Specifically, the Plan has 'a first lien upon any recovery, whether by settlement, judgment or otherwise,' that the beneficiary receives from the third party, not to exceed 'the amount of benefits paid [by the Plan] ... [or] the amount received by the [beneficiary] for such medical treatment...'<sup>55</sup>

The Supreme Court held that the provision of ERISA authorizing plan participants and fiduciaries to bring civil actions to obtain "appropriate equitable relief" did not authorize the employee benefit plan to bring an action for *specific performance* of reimbursement provision of plan, and to compel a plan beneficiary who had recovered from alleged third-party tortfeasor to make restitution.<sup>56</sup> This holding relied on the court's reading of ERISA and its provision that the

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<sup>49</sup> *Id.*

<sup>50</sup> *Danowski by Dawnoski v United States*, 924 F Supp 661(D.N.J. 1996).

<sup>51</sup> *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 207, (2002).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

plan administrator could get only equitable relief.<sup>57</sup> Because specific performance did not exist at equity, the plan could not sue for specific performance.<sup>58</sup> “[A]n injunction to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation, was not typically available in equity.”<sup>59</sup>

Unfortunately, *Knudson* did not resolve the subrogation issue. It simply eliminated a plan administrator’s ability to sue for specific performance or other remedies not existing at equity.<sup>60</sup> Plan administrators, however, can still sue to enforce the plans terms or for equitable relief. In *Sereboff v. Mid Atlantic Medical Services, Inc.*,<sup>61</sup> the Court again considered an ERISA plan administrator’s claim for reimbursement under the terms of the plan and § 502(a)(3).<sup>62</sup> This time the plan administrator was able to overcome the initial hurdle of identifying specific funds within the beneficiary’s possession and control.<sup>63</sup> Accordingly, the Court proceeded to consider whether there was a basis in equity for the administrator’s reimbursement claim.<sup>64</sup> It held that the claim could be based on an equitable lien by agreement.<sup>65</sup> Such a lien is not subject to the asset tracing requirements imposed on liens sought as a matter of equitable restitution.<sup>66</sup> Nor is it inherently subject to the particular equitable defenses that accompany a freestanding action for equitable subrogation, which may only be asserted after a victim has been made whole for his injuries.<sup>67</sup> Thus, the Court held that the plan administrator in *Sereboff* properly sought “equitable relief”

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<sup>57</sup> *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 207, (2002)..

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 210-11.

<sup>60</sup> *Id.*

<sup>61</sup> *Sereboff*, 547 U.S. 356 .

<sup>62</sup> *Id.* at 359.

<sup>63</sup> *Id.* at 362-63.

<sup>64</sup> *See id.* at 363-64.

<sup>65</sup> *Id.* at 364-65, (citing *Barnes v. Alexander*, 232 U.S. 117 (1914)).

<sup>66</sup> *Sereboff*, 547 U.S. 356.

<sup>67</sup> *Id.* at 368.

under § 502(a)(3).<sup>68</sup> However, it expressly reserved decision on whether the term “appropriate,” which modifies “equitable relief” in § 502(a)(3), would make equitable principles and defenses applicable to a claim under that section.<sup>69</sup>

Therefore, the Court’s holdings in *Knudson* and *Sereboff*, did not definitively solve the issue. The *Knudson* decision was specifically limited to the issue of specific performance and what remedies are available under ERISA. Particularly relevant in *Knudson* was the fact that the funds had been placed in trust and were not in the control of the insured.<sup>70</sup> While *Knudson* did not solve the issue, this decision is critical to the holding in *McCutchen*.

### III. Congressional Intent

Congress passed ERISA in 1974 with in order to address numerous deficiencies in insurance regulation and inconsistent state court decisions.<sup>71</sup> In drafting ERISA, Congress’s express goal was to protect:

[P]articipants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.<sup>72</sup>

This has made ERISA an extremely powerful piece of legislation as it has been held to preempt state legislation in most areas of employer provided health insurance regulation.<sup>73</sup> A review of the legislative history of ERISA, and particularly the enforcement provisions of § 502, sheds light on how the issue of subrogation should be resolved.

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<sup>68</sup> *Id.* at 369.

<sup>69</sup> *Id.* at 368 n. 2; *McCutchen*, 663 F.3d at 675.

<sup>70</sup> *Sereboff*, 547 U.S. at 357.

<sup>71</sup> 29 U.S.C. § 1132 ([date])

<sup>72</sup> *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44 (1987).

<sup>73</sup> *Holliday*, 498 U.S. at 64; *Levine v. United Healthcare Corp.*, 402 F.3d 156, 159 (3d Cir. 2005).



Section 502(a)(3) of ERISA states that a civil action may be brought “by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.”<sup>74</sup> The term “other appropriate equitable relief” has been interpreted to limit a health plan administrators rights those existing in equity.<sup>75</sup> Therefore, when suing to collect funds obtained from a tort judgment or settlement following a sports injury, plan administrators exercise their equitable rights under this section. However, it is unclear if this subjects the plan administrator to equitable defenses. The legislative history reveals that equitable principles permeated the drafting of ERISA and Congress intended all equitable defenses to be available to plan beneficiaries.

As the legislative history demonstrates, Congress was mindful of equitable considerations through the drafting of ERISA. In fact, the legislation was meant to strike “an appropriate and equitable balance between two opposing schools of thought-- those who advocate complete and stringent control of private pensions and those who oppose any form of government supervisory or regulatory control.”<sup>76</sup> Further, when creating rules for the distribution of plan funds after termination, Congress again applied equitable limitations to plan administrators:

The Committee also has made provision for contributory plans to equitably distribute any surplus funds remaining on plan termination to the participants in accordance with their rate of contribution....The Committee believes it is unfair to permit the complete recapture by employers of surplus funds in terminated contributory plans, without regard to the fact that contributions by the workers helped to generate the surplus....equitable principles require that this particular subject be governed by a specific rule which reflects what the Committee regards as essential protection for the interests of workers in such plans.<sup>77</sup>

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<sup>74</sup> 29 U.S.C. § 1132 ([date])

<sup>75</sup> *McCutchen*, 663 F.3d at 675.

<sup>76</sup> S. Rep. No. 127, 1974 U.S.C.C.A.N. 4838, 4850

<sup>77</sup> *Id.* at 4866

Considerations of equity permeated the legislative hearings surrounding the passage of ERISA, and this influenced the remedies Congress intended to create.

Most importantly, the legislative history reveals that ERISA's enforcement provisions were "designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of the Retirement Income Security for Employees Act as well as the amendments made to the Welfare and Pension Plans Disclosure Act."<sup>78</sup> The Senate report expressly states the intent of Congress in creating these broad enforcement provisions:

The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants.<sup>79</sup>

The Senate report makes it clear that these broad powers are intended for plan beneficiaries and not plan administrators. ERISA was meant to protect plan beneficiaries, not grant plan administrators additional rights or remedies outside of what existed at equity. Therefore, Congress used equitable principles to both expand the rights of beneficiaries and limit the powers of plan administrators.

Congress passed ERISA because the prior existing law often left plan participants with only "traditional equitable remedies of the common law of trusts" when a dispute arose.<sup>80</sup> Further, Congress found that "[c]ourts strictly interpret the plan indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording."<sup>81</sup> One purpose of ERISA was to avoid inequitable results because of technical document wording and inequitable

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<sup>78</sup> *Id.* at 4871.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 4842.

agreements in health plans. For example, Congress adopted total retrospective vesting credit to ERISA governed plans “in the interests of complete equity...and to promote simplicity in the understanding and application of the vesting requirements of the bill...”<sup>82</sup> A subrogation clause, which is often highly technical, rarely read by plan participants and almost always part of a contract of adhesion, is exactly what Congress sought to avoid through its inclusion of equity in Section 502.

Plan administrators are therefore limited to equitable relief and this must mean only those remedies available at equity.<sup>83</sup> Given the importance that Congress gave equitable considerations when drafting ERISA, it should be inferred that Congress intended to include equitable defenses, such as unjust enrichment, when a beneficiary is defending against an administrator’s right to subrogation under the complex terms of a health plan’s language.

#### **IV. *McCutchen’s Analysis***

The Third Circuit Court of Appeals dramatically altered subrogation litigation for ERISA qualified plans when it concluded that “Congress intended to limit the equitable relief available under § 502(a)(3) through the application of equitable defenses and principles that were typically available in equity” despite the negation of such defenses and principles in an ERISA plan.<sup>84</sup> *McCutchen*, who participated in an ERISA-governed employee welfare benefits plan, was injured in a car accident and the plan paid \$66,866 in medical expenses on his behalf.<sup>85</sup> *McCutchen* recovered \$110,000 from third parties, via an action in tort, and the plan, based on a subrogation clause in the plan requiring full reimbursement, sought to recover the full

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<sup>82</sup> S. Rep. No. 127, 1974 U.S.C.C.A.N. 4838, 4856

<sup>83</sup> *McCutchen*, 663 F.3d at 675.

<sup>84</sup> *Id.* at 676.

<sup>85</sup> *Id.* at 672.

\$66,866 from McCutchen even though McCutchen's net recovery was less than that amount after paying a 40% contingency fee to his attorney.<sup>86</sup>

McCutchen argued that notwithstanding the plan terms, it was unfair to grant the plan full reimbursement because he was not fully compensated for his injuries and the plan did not contribute to attorneys' fees and costs.<sup>87</sup> The Third Circuit agreed, finding no indication in ERISA or in the Supreme Court's jurisprudence that Congress intended to limit relief under § 502(a)(3) to "traditional equitable categories" yet not limit relief "by other equitable doctrines and defenses that were traditionally applicable to those categories."<sup>88</sup> In other words, if a plan administrator's right to subrogation comes from equity then those rights are subject to the limitations and defenses that existed in equity.

The *McCutchen* court reasoned that an ERISA fund administrator seeking to enforce a plan's reimbursement provision must demonstrate that its claim to relief is equitable; "appropriate equitable relief" must be something less than all equitable relief, and may be limited through the application of equitable defenses and principles that are typically available in equity.<sup>89</sup> Therefore, a judgment requiring a plan participant to provide full reimbursement to a plan administrator for medical expenses which the administrator paid, constituted inappropriate and inequitable relief under ERISA, because the amount of the judgment exceeded the net amount of the participant's third-party recovery of damages arising from automobile accident. Therefore, it left him with less than full payment for his emergency medical bills, thus undermining the entire purpose of

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<sup>86</sup> *Id.* at 673.

<sup>87</sup> *Id.* at 674.

<sup>88</sup> *McCutchen*, 663 F.3d at 676–79.

<sup>89</sup> *Id.* at 676.

the plan, while at the same time, unjustly enriching administrator, which did not exercise its subrogation rights or contribute to the cost of obtaining the third-party recovery.<sup>90</sup>

The impact of the *McCutchen* decision is still not clear as the Supreme Court recently granted certiorari.<sup>91</sup> If the court's decision is upheld it would appear that many equitable considerations would be available to injured beneficiaries despite the plans subrogation terms. At the very least, plan administrators would see their recoveries reduced unless they participate in the recovery. The Third Circuit's instructions on remand offer further clarification of the effect its decision will have if it is upheld. On remand, the Third Circuit instructed the district court to:

Engage in any additional fact-finding it finds necessary. In addition to the considerations discussed above, 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 to this suit may inform the Court's exercise of its discretion to fashion "appropriate equitable relief."<sup>92</sup>

If the Supreme Court affirms *McCutchen* in its entirety, then plan administrators will be subject to defenses that will reduce their recovery to what is appropriate. Most likely this will force health plans to work with their insured members when they are seeking recovery from tortfeasors. Given that most health plans are large sophisticated entities, often with their own in-house litigation teams, this could dramatically improve the quality of tort litigation in the future. Not only can health plans offer legal advice and counsel to their insured beneficiaries, but insured members could also rely upon the plan's knowledge of legal professionals and recommend qualified attorney's and even help pay some of the litigation costs. All of this would vastly improve the overall field of tort litigation and vastly improve plaintiff's rights.

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<sup>90</sup> *Id.* at 679

<sup>91</sup> *McCutchen*, 133 S. Ct. 36 .

<sup>92</sup> *Id.*



## V. Criticisms of *McCutchen*

Several courts have offered criticisms of the holding in *McCutchen*. The strongest criticisms come from *Schwade v. Total Plastics, Inc.*<sup>93</sup> In *Schwade* the court was faced with a different scenario regarding subrogation litigation but offered a thorough criticism of the reasoning in *McCutchen*. *Schwade* involved a dispute over what health benefits were due under the terms of an ERISA qualified plan.<sup>94</sup> The insured beneficiary sued the health plan for healthcare benefits under the plan's terms.<sup>95</sup> The plan administrator argued that Schwade violated the plan by refusing to sign a subrogation agreement and was therefore not entitled to benefits.<sup>96</sup> Schwade, in turn, argued that subrogation clauses were unfair and based on the intervening law in *McCutchen*, did not bar her suit.<sup>97</sup> The court disagreed.

*Schwade* makes two main criticisms, neither of which is well founded. First, it states that *McCutchen* announces a broad, judicially manufactured alteration of ERISA (certain to increase the cost to each participant in each plan) based on a little-explained reading of several narrow Supreme Court decisions.<sup>98</sup> Second, *McCutchen* revises a plan over the objection of the plan's managers, contrary to the interests of other participants, and on behalf of a single beneficiary.<sup>99</sup> The court goes on to argue that *McCutchen* agreed to subrogation in exchange for a guarantee that his medical bills would be immediately paid by his health plan.<sup>100</sup> As stated previously, neither of these criticisms is well founded.

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<sup>93</sup> *Schwade v. Total Plastics, Inc.* 837 F. Supp. 2d 1255 (M.D. Fla. 2011).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1260. ; *Florida Health Sciences Ctr., Inc. v. Total Plastics, Inc.*, 12-11537, 2012 WL 5416539 (11th Cir. Nov. 6, 2012)

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1274.

<sup>100</sup> *Id.*

First, *McCutchen* does not alter ERISA, it simply gives power to some of its language, particularly the provision allowing the plan administrator to sue for equitable relief. If anything the *McCutchen* Court applied the statute exactly as written. The *McCutchen* analysis is also in line with Supreme Court precedent. As the Court made clear in *Knudson*, a plan administrator can only get equitable relief.<sup>101</sup> It would be illogical and unjust to assume that the Court intended to grant the health plan equitable rights without subjecting them to equitable defenses.

Second, upholding *McCutchen* will not increase the cost to the plan in any significant way. *McCutchen* did not eliminate the right of subrogation altogether. The plan will still be entitled to recovery. Its recovery will simply be reduced to what is equitable in light of the circumstances.<sup>102</sup> Therefore, plan administrators will be required to take a more active role in securing relief from tortfeasors and can no longer rely on their insured to undertake the expense of litigation. Furthermore, health plans do not count on their ability to recover via subrogation when determining health care premiums.<sup>103</sup> In fact, subrogation has been found to play no role in rate schedules.<sup>104</sup>

When an insurer pays a loss, the insurer will simply pay an anticipated loss that has already been distributed over a pool of similarly-situated individuals.<sup>105</sup> This is accomplished by using actuarial and statistical data.<sup>106</sup> When the insurer sets the initial premium that the insured will pay he takes into account the insured's pro-rata share of the total estimated losses for the pool as well as the insured's shares of the insurers profit to be realized from that individual

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<sup>101</sup> *Knudson*, 534 U.S. at 207 .

<sup>102</sup> See Third Circuits instructions on remand. [incorrect citation]

<sup>103</sup> Roger M. Baron & Delia M. Druley, *ERISA Reimbursement Proceeds: Where Does the Money Go?*, Minnesota Trial, Spring 2010, at 10.

<sup>104</sup> Baron, *supra* note 4 at 583.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

insured.<sup>107</sup> Therefore, the insurer will never suffer an actual loss when he does not recover payments made for any particular claim.<sup>108</sup>

Therefore, there is no windfall to the insured but rather to the health plan when they are entitled to subrogation.<sup>109</sup> Not only does the health plan obtain a windfall from subrogation in recovering its medical expenses, but it also obtains a windfall in not having to contribute to the costs associated with the recovery. *McCutchen* simply applied the well know axiom that “equity abhors a windfall.”<sup>110</sup>

Upholding *McCutchen* will be beneficial in several ways. First, health plans are sophisticated entities with access to superior counsel. Often larger health plans can retain counsel at a discounted hourly rate. This will substantially increase a plaintiff’s access to more experienced counsel at larger firms and would greatly level the playing field in tort litigation as defendants are often represented by large insurers that can better afford legal counsel. Second, health plans can better afford the costs associated with a lawsuit. Third, health plans have better access to medical professional who can be relied upon as experts in the tort litigation. Since most health plans use an HMO type system<sup>111</sup> to retain medical professionals, wherein they are paid a regular monthly fee to see the health plans patients<sup>112</sup>, these fee agreements can be used to require medical professionals to act as experts in tort litigation on behalf of the plan administrator. This would dramatically reduce the cost of litigation as expert’s fees are amongst the most costly expenses in tort litigation.

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *McCutchen*, 663 F.3d at 676–79.

<sup>111</sup> Will describe HMO systems in this footnote. [Remember this for final draft]

<sup>112</sup> *Id.*

Another decision criticizing *McCutchen*, is *Iron Workers Locals 40, 361 & 417 Health Fund v. Dinnigan*,<sup>113</sup> an unpublished case from the Southern District of New York. In *Locals 40*, a union member's daughter was injured in an automobile accident, treatment for which was paid by his employer provided health plan.<sup>114</sup> Following a tort settlement, the health plan sued for subrogation. The court rejected the beneficiaries argument that it would be unjust enrichment for the health plan to be reimbursed from the settlement as it did not participate in the recovery.<sup>115</sup>

The court rejected *McCutchen* stating:

The Court has already determined that it is not unjust enrichment for Plaintiff to seek reimbursement for the health care expenses it incurred on behalf of the Dinnigans. Indeed, Plaintiff owes that much to other plan beneficiaries. But acknowledging Plaintiff's right to proceed does not mean that Plaintiff is entitled to a free ride. In seeking equity, Plaintiff must be prepared to do equity.<sup>116</sup>

The Southern District of New York also misread the decision in *McCutchen*. As the Third Circuit's instructions on *McCutchen*'s remand make clear, the health plan is still entitled to a recovery; its recovery is simply reduced by the cost undertaken by the beneficiary to secure the judgment or settlement.<sup>117</sup> Further, the plan beneficiary in *Locals 40*, already paid a higher premium than they otherwise would have, as the health plan took into account the cost of tort injuries when setting premiums in the first place.<sup>118</sup> Lastly, the court's statement that the plan beneficiaries owed subrogation to the other beneficiaries shows just how little the court understands about how most health plans operate.<sup>119</sup> Other beneficiaries will not see any reduction in premiums or any increase in benefits as a result of the plan's recovery via subrogation. Rather,

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<sup>113</sup> *Iron Workers Locals 40, 361 & 417 Health Fund v. Dinnigan*, 12 CIV. 2566 PAC, 2012 WL 5877426 (S.D.N.Y. Nov. 21, 2012)

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Dinnigan*, 2012 WL 5877426

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Baron, *supra* note 4 at 583.

the recovery will simply go to pay overhead expenses of the plan or bonuses to plan administrators.<sup>120</sup>

Therefore, a health plan can participate in tort litigation and even improve the quality of the plaintiff's counsel and experts at minimal costs. This will likely result in increased tort judgments against tortfeasors and higher recoveries for both the insured and the plan. The entire field of tort litigation would be improved by this change.

## VI. Conclusion

With the Supreme Court granting certiorari in *McCutchen*,<sup>121</sup> the Court has the opportunity to dramatically alter, and improve, the entire field of tort litigation. If the Supreme Court upholds *McCutchen*, plaintiffs suffering from sports injuries will no longer be hamstrung in their efforts to bring cases to trial or settlement as the looming specter of a subrogation lien will be less of a dispositive factor. Further, plan administrators will be presented with the opportunity to take a more active role in litigating these cases on behalf of their insureds, instead of sitting on the sidelines, avoiding contributing to the costs of the litigation, waiting to assert a lien on any judgment or settlement. As plan administrators are often sophisticated entities who, by nature of the volume of legal work they produce, can retain experienced counsel at discounted rates, they can provide their members with access to counsel for mutual benefit.

Contrary to arguments that have been presented, upholding *McCutchen* will not increase the costs to plan administrators or to members. Health plans use actuarial data to determine the amount of claims that they will need to pay out over a specified group of members.<sup>122</sup> This data

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<sup>120</sup> *Id.*

<sup>121</sup> *McCutchen*, 133 S. Ct. 36.

<sup>122</sup> Baron, *supra* note 4, at 583.



takes into account the amount of money the plan will need to spend when a member is injured in a tort, such as a sports injury.<sup>123</sup> Each group pays a premium that reflects the anticipated costs to the health plan.<sup>124</sup> When a health plan recovers additional funds via subrogation, members are not refunded any portion of their premium.<sup>125</sup> Instead, this windfall goes to cover administrative expenses or is rolled over to cover expenses in the next year.<sup>126</sup> Therefore, eliminating subrogation, or limiting a plan administrator's share in tort judgments or settlements to his contributions in the recovery, would not increase costs or harm the plan administrator in any way.

Additionally, applying equitable principals to subrogation rights is consistent with the Congressional intent underlying ERISA.<sup>127</sup> As most state laws already limit a health plan administrators subrogation rights<sup>128</sup>, ERISA has become the primary means by which plan administrators will attempt to assert subrogation rights. Because ERISA preempts health plans that are provided by an employer<sup>129</sup>, and most health plans are employer provided, ERISA is a major obstacle to a plaintiff seeking to avoid subrogation. As Congress never intended ERISA to become the primary tool for plan administrators to avoid equity in subrogation cases, *McCutchen* should be upheld. ERISA was not meant to protect plan administrators but rather offer greater protections to insured members.

Subrogation looms in the back of any tort case. In many circuits, plan administrators can sit on the sidelines, waiting for injured beneficiaries to undertake the significant expense of litigating a tort injury, then swoop in and demand subrogation, without ever contributing to the

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> S. Rep. No. 127, 1974 U.S.C.C.A.N. 4838, 4841 .

<sup>128</sup> *Gould, supra* note 11.

<sup>129</sup> 29 U.S.C.A. § 1132.

settlement or judgment. This practice is inequitable. Today with players suing the N.F.L.<sup>130</sup> and N.C.A.A.<sup>131</sup> for sports injuries and numerous high schools facing liability for concussions<sup>132</sup>, the amount of money at stake is immense. Only the Third Circuit has found a compromise that would reward plan administrators for contributing to tort judgments and settlements. This compromise would improve the entire field of tort litigation and bring harmony between the interests of plan administrators and their beneficiaries. . As plan administrators seek to squeeze every dollar they can out of their beneficiaries, it becoming increasingly clear that court must decide between equity, on the one hand, and subrogation on the other. Equity should be the primary concern of our courts, not subrogation.

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<sup>130</sup> Pilon, *supra* note 1; Clinton, *supra* note 1.

<sup>131</sup> *Id.*

<sup>132</sup> Dowd, *supra* note 2.