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# A trap for p.i. lawyers

## ERISA case prompts attorneys to check clients' plans

By Correy E. Stephenson

Personal injury lawyers whose clients have employee health benefit plans may want to pay attention to a new U.S. Supreme Court ERISA case, in order to protect their clients and themselves.

Practitioners need to check current cases to protect their attorney's fees and be prepared for plan administrators to begin changing plan language to take advantage of the high court's decision.

In *US Airways v. McCutchen*, the justices held that the terms of the ERISA plan issued by the airline to an employee allowed the plan to recoup all of the medical costs it had paid on the man's behalf after he recovered in a third-party personal injury suit.

The plan at issue was silent on whether the company was responsible for chipping in for attorney's fees, however, so the Court applied the "common fund" doctrine and reduced US Airways' recovery on a pro rata share.

That way, McCutchen would not serve as the airline's "collection agent" at no cost, Justice Elena Kagan wrote.

MILW photo by Douglas Levy

**TROY W. HANEY**

Scott Macey, president and CEO of the ERISA Industry Committee, an organization of plan sponsors that filed an amicus brief in support of US Airways, praised the decision for putting plan provisions above equitable remedies. "Plan provisions should always take precedence," he said, or parties will always be left wondering what will happen.

But for plaintiff's personal injury attorneys, the decision requires close scrutiny.

Robert B. June, a sole practitioner in Ann Arbor, urged PI attorneys to immediately familiarize themselves with clients' ERISA plans in any relevant cases.

"It is very, very important for plaintiffs' lawyers to get the official plan documents early in the process," he said. That information may impact the client's decision to even file suit, he explained, because if a plan will recoup most — or all — of a plaintiff's recovery, a lawsuit may be a waste of time.

Grand Rapids-based Troy W. Haney agreed, noting that attorneys who fail to do so could face a malpractice claim if a client ends up having to fund legal fees out of his or her own pocket.

With plan sponsors already updating language to abrogate the common fund doctrine out of their plans, Haney noted that attorneys may still have the option to negotiate a deal to allow lawyers, clients and a plan to recoup something.

**Contract trumps equity**

James McCutchen's dispute about ERISA liens and attorney's fees began with a car accident. He was injured by a third party's negligent driving and his employer-sponsored health benefits plan paid his medical bills, totaling $66,866.

McCutchen retained attorneys and sought to recover all of his accident-related damages, estimated at $1 million. But the case settled for just $10,000 because the driver had limited insurance and three other people had been seriously injured or killed. McCutchen also received $100,000 from his own insurer. Forty percent of his total $110,000 recovery went to his attorneys, leaving him with $66,000.

Pursuant to §502(a)(3) of ERISA, the plan sought reimbursement for its medical expenses with an equitable lien.

Relying on principles of equity, McCutchen argued that US Airways' right to reimbursement didn't kick in until he had recovered all of his total damages and — at the very least — the plan had to contribute its fair share towards attorneys' fees.

A Pennsylvania federal court disagreed but the 3rd U.S. Circuit Court of Appeals reversed, ruling for McCutchen.

The U.S. Supreme Court granted certiorari to settle a split among the federal appellate courts and issued a two-part ruling.

First, the justices embraced contract principles to hold that the plan language trumped equitable principles and that US Airways had a clear right to reimbursement.

McCutchen "cannot rely on theories of unjust enrichment to defeat US Airways' appeal to the plan's clear terms," Kagan wrote for the five-person majority. "Those principles … are 'beside the point' when parties demand what they bargained for in a valid agreement."

While the court emphasized that "if the agreement governs, the agreement governs," McCutchen's plan was silent as to the allocation of attorney's fees. Therefore, in the absence of plan language, the court looked to the common-fund doctrine as the appropriate default.

"Given the contractual gap, the common-fund doctrine provides the best indication of the parties' intent. No one can doubt that the common-fund rule would govern here in the absence of a contrary agreement," Kagan wrote. "Without cost sharing, the insurer free rides on its beneficiary's efforts — taking the fruits while contributing nothing to the labor."

The Court noted that in certain circumstances – including McCutchen's — a beneficiary could be worse off by pursuing a third party.

Instead of leaving McCutchen $866 in the hole, the justices remanded the case for a determination of US Airways' final reimbursement based on its contribution towards attorneys' fees.

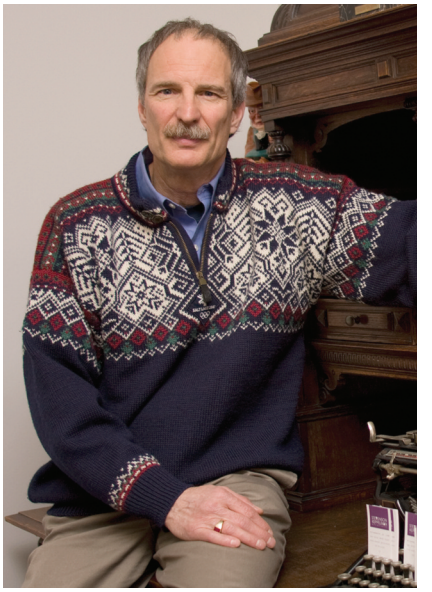
**'Put the skunk out on the porch'**

Not surprisingly, plan sponsor attorneys indicated they have already begun the process of updating plan language in light of the decision.

Mary Jo Larson, an ERISA attorney in Grand Rapids, said attorneys representing plan sponsors that do not raise the issue of attorney fee provisions with their clients "are not doing their jobs."

Macey said several plan sponsors indicated to him they are sitting down with counsel to review their plan language and update if necessary, although the decision to specifically address attorney's fees is a strategic one.

If plan language states that it will not contribute to a third-party claim, a beneficiary may decline to pursue it.



MILW photo by Douglas Levy

**ROBERT B. STEVENSON**

"Plan sponsors need to do a bit of soul-searching and ask themselves, 'Do we want our participants and beneficiaries who do achieve recoveries in tort claims to bear all of the attorney's fees in that effort?'" said Robert B. Stevenson of Ann Arbor. "We're going to contact all of our plan sponsor clients and ask them what they want to do."

Plans may choose from several options, Stevenson suggested, from either the plan or the participant bearing the entire cost to variations on a cost-sharing formula.

With plans updating or amending language to address the issue of attorney's fees, personal injury attorneys "must read the plan to know what their rights are," Haney emphasized.

However, *McCutchen* does not foreclose practical solutions to the problem of ERISA liens and attorney's fees, he said. Plaintiffs' attorneys should reach out to the plan early in the case and attempt to negotiate a deal where each party may get a piece of the recovery.

In a hypothetical case where the plan paid $150,000 in medical bills and the claimant has a $100,000 recovery, a plaintiff has no incentive to chase the money when he or she won't see any of it. Discuss with the plan reducing its lien so that the attorney and the client could also recover some money, Haney suggested.

"Put the skunk out on the porch" and try to broker a deal early in a case, he said.

Macey acknowledged that plan sponsors could be amenable to such a solution although the decision would be on a case-by-case basis.

June predicted that the Court's decision to use contract law as the guiding principle in ERISA interpretation could result in future litigation.

Previous cases from the high court interpreting the federal statute relied upon equitable remedies, he noted. So the use of contract law to address issues of attorney's fees presents some constitutional issues. For example, an attorney seeking payment of its contingency fee could argue that it has no privity with an ERISA plan and that the plan does not have the right to interfere with a client's legal contract with an attorney, June suggested, and could therefore receive payment of attorney's fees prior before the plan is reimbursed.