ERIC BUCHANAN AND ASSOCIATES

ERIC BUCHANAN & ASSOCIATES, PLLC
Attorneys at Law

ERISA & DISABILITY BENEFITS NEWSLETTER

VOLUME 4, ISSUE 7, JULY 2012

ABOUT OUR FIRM

Eric Buchanan & Associates, PLLC is a full-service disability benefits, employee benefits, and insurance law firm. The attorneys at our firm have helped thousands of disabled people who have been denied social security disability benefits, ERISA LTD benefits, health insurance, life insurance and other ERISA employee benefits, as well as private disability and health insurance benefits.

For more Information about Eric Buchanan & Associates, PLLC, visit our website at www.buchanandisability.com.

Eric L. Buchanan and R. Scott Wilson are certified as Social Security Disability Specialists by the Tennessee Commission on CLE and Specialization.

MCCUTCHEN: BITTERSWEET RELIEF FOR INJURED CLIENTS - JULIE E. MOYA

Personal injury is a complicated practice. ERISA does not make it any easier. This article will discuss a bittersweet shift in ERISA subrogation law that occurred in the recent case, *US Airways v. McCutchen*, 663 F.3d 671, 672-673 (3d Cir. 2011), which has recently been granted certiorari to the Supreme Court. *US Airways, Inc. v. McCutchen*, 2012 U.S. LEXIS 4727 (2012).

To recap from our January 2010 article on subrogation[1], the common definition of subrogation is when one party "steps into the shoes of another." Black's Law Dictionary defines it specifically as "The principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy."

McCutchen involved a type of subrogation attempt. The Third Circuit summarized the facts of *McCutchen* nicely:

> After Appellant James McCutchen suffered a serious automobile accident, a benefit plan administered by US Airways paid $66,866 for his medical expenses. McCutchen then recovered $110,000 from third parties, with the assistance of counsel.
>
> Then, US Airways, which had not sought to enforce its subrogation rights, demanded reimbursement of the entire $66,866 it had paid without allowance for McCutchen's legal costs, which had reduced his net recovery to less than the amount it demanded.
>
> US Airways filed this suit against McCutchen for "appropriate equitable relief" pursuant to § 502(a)(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1132(a)(3)(B).
>
> The issue before us is whether McCutchen may assert certain equitable limitations, such as unjust enrichment, on US Airways ' equitable claim. We conclude that he may. We therefore vacate the District Court's order requiring McCutchen to pay US Airways the entire $66,866 and remand the case for that Court to fashion "appropriate equitable relief."

US Airways, Inc. v. McCutchen, 663 F.3d 671, 672-673 (3d Cir. 2011)(underline for clarity).

As for the "unjust enrichment," McCutchen argued because

[1]Written by Jeremy Bordelon; a copy can be found at http://www.buchanandisability.com/Assets/Category/0001/0001/92/ERISA___Disability_Benefits_Newsletter_Volume_2_Issue_1.pdf.

that the plan administrator did not exercise its subrogation rights in the tort case, it bore none of the attorney's fees, but was reaping all the benefits (by getting fully reimbursed). *McCutchen*, 663 F.3d at 676.

However, the plain language of the health benefit policy allowed for the ERISA plan administrator to recover the entire amount of medical bills paid:

> You will be required to reimburse the Plan for amounts paid for claims out of any monies recovered from a third party, including, but not limited to, your own insurance company as the result of judgment, settlement, or otherwise.

McCutchen at 673.

The question before the 3rd Circuit was: Is US Airways entitled to relief under contract law or equitable law? Clearly, 502(a)(3) of ERISA allows for equitable relief. However, 502 (a)(3) modifies "relief" with two qualifiers. The relief must be: 1) "appropriate," and 2) "equitable."

The Third Circuit recognized that in *Sereboff v. Mid Atlantic Medical Services, Inc*., the Supreme Court decided that an insurer could enforce its subrogation clause as an "an equitable lien by agreement." *McCutchen* at 675 (citing *Sereboff v. Mid Atl. Med. Servs*., 547 U.S. 356, 368 (2006)). Therefore, such relief was "equitable." However, *Sereboff* left open the definition of "appropriate." This is the task assumed by the Third Circuit in US Airways. *McCutchen* summarized:

> This case squarely presents the question that *Sereboff* left open: whether § 502(a)(3)'s requirement that equitable relief be "appropriate" means that a fiduciary like US Airways is limited in its recovery from a beneficiary like McCutchen by the equitable defenses and principles that were "typically available in equity."

McCutchen at 675-676.

> The Third Circuit started its analysis of "appropriate" with the premise that:
>
> "…equitable relief' must mean something less than all relief."

McCutchen at 676.

Therefore, the insurer was not immediately entitled to full relief simply because it could characterize its claim as equitable (as it was essentially allowed to do in *Sereboff*). The Third Circuit concluded:

> Applying the traditional equitable principle of unjust enrichment, we conclude that the judgment requiring McCutchen to provide full reimbursement to US Airways constitutes inappropriate and inequitable relief. Because the amount of the judgment exceeds the net amount of McCutchen's third-party recovery, it leaves him with less than full payment for his emergency medical bills, thus undermining the entire purpose of the Plan. At the same time, it amounts to a windfall for US Airways, which did not exercise its subrogation rights or contribute to the cost of obtaining the third-party recovery. Equity abhors a windfall.

McCutchen at 679.

Oddly, at the end of the Third Circuit's decision, it told the district court to pay more attention to the facts of the McCutchen case, including the distribution of the settlement between McCutchen and his attorneys. *McCutchen*, 663 at 679. Specifically, the Third Circuit stated:

> On remand, the District Court should 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."

McCutchen at 679 (underline for emphasis). The Third Circuit's underlying reasoning is not at all explained in this opinion. However, the implication is clear: asking for review of a subrogation can result in a review of the amounts received by *all* parties, including attorneys.

In conclusion, at least one circuit seems to be paying more attention to equitable defenses like unjust enrichment. Rather than simply pointing out that a subrogation is unfair, an affected beneficiary may soon be able to defend himself on the basis that the insurer should have helped with legal costs or that the insurer will experience some other type of windfall. However, the Third Circuit seems to be warning attorneys that their fees may be the next target of ERISA subrogation law.