No. 11-1285

In the Supreme Court of the United States

U.S. AIRWAYS, INC., IN ITS CAPACITY AS FIDUCIARY AND PLAN ADMINISTRATOR OF THE U.S. AIRWAYS, INC. EMPLOYEE BENEFITS PLAN, PETITIONER

v.

JAMES E. MCCUTCHEN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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QUESTIONS PRESENTED

Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(3), authorizes a participant, beneficiary, or fiduciary to bring a civil action to enjoin any act or practice that violates ERISA or the terms of an ERISA plan or "to obtain other appropriate equitable relief to redress such violations or to enforce any provisions of [ERISA] or the terms of the plan." In this case, a fiduciary brought an action under Section 502(a)(3) to enforce a plan term requiring a participant to reimburse the plan for plan-paid medical expenses out of any funds recovered from a third party responsible for the participant's injuries.

The questions presented are:

1. Whether the participant's reimbursement obligation is subject to a pro rata reduction under general unjust enrichment principles because he did not receive a full recovery from the third party.

2. Whether the equitable common-fund doctrine should govern the allocation of responsibility for the attorney's fees the participant incurred in securing the recovery from which the fiduciary seeks reimbursement.

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INTEREST OF THE UNITED STATES

The questions presented in this case concern the scope of "appropriate equitable relief" available in a civil action by a plan fiduciary under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(3). The Secretary of Labor (Secretary) has primary enforcement authority under ERISA and similar authority to bring a civil action for "appropriate equitable relief" under Section 502(a)(5) of the statute, 29 U.S.C. 1132(a)(5). Accordingly, the Court's consideration of the term "appropriate equitable relief" may affect not only the scope of private civil actions under Section 502(a)(3), which are a necessary complement to actions by the Secretary,

but also the scope of the Secretary's own authority under Section 502(a)(5).

STATEMENT

1. In January 2007, James McCutchen (respondent) suffered serious injuries when another driver lost control of her car and struck the car respondent was driving. Pet. App. 3a, 19a. At the time, respondent was an employee of U.S. Airways and a participant in the company's self-funded health plan (the plan). *Id.* at 19a. The plan paid $66,866 in accident-related medical expenses on respondent's behalf. *Id.* at 3a.

Respondent, through attorneys at Rosen, Louik & Perry, P. C. (also respondents here), filed a negligence suit against the other driver. Pet. App. 3a. In June 2007, Ingenix Subrogation Services notified respondent's attorneys that it had been retained by the plan to recover the accident-related medical benefits the plan had paid on respondent's behalf. *Id.* at 19a.[1] The plan relied on the following provision in its Summary Plan Description (SPD), titled "Subrogation and Right of Reimbursement":

> The purpose of the Plan is to provide coverage for qualified expenses that are not covered by a third party. If the Plan pays benefits for any claim you incur as the result of negligence, willful misconduct, or other actions of a third party, the Plan will be subrogated to all your rights of recovery. You will be required to reimburse the Plan for amounts

[1] If petitioner's plan had been insured, Pennsylvania law would have barred subrogation. See *FMC Corp.* v. *Holliday*, 498 U.S. 52, 61 (1990) (discussing 75 Pa. Cons. Stat. § 1720 (1987)). Because petitioner's plan is self-funded, however, that state law is preempted. See *id.* at 65.

> 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. In addition you will be required to assist the administrator of the Plan in enforcing these rights and may not negotiate any agreements with a third party that would undermine the subrogation rights of the Plan.

Id. at 4a-5a (emphasis omitted).[2]

The other driver had limited insurance coverage, and three people in addition to respondent were seriously injured or killed in the accident. Pet. App. 3a, 20a. Accordingly, respondent settled his claim against the other driver for only $10,000. *Id.* at 3a. With assistance from his attorneys, respondent and his wife received from his own automobile insurer another $100,000, which was the maximum available under his underinsured driver coverage. *Id.* at 3a, 20a.

After paying expenses and a 40% contingency fee to his attorneys, respondent's net recovery was approximately $66,000. Pet. App. 3a. Respondent's attorneys, who "reason[ed] that any lien [by the plan] found to be valid would have to be reduced by a proportional amount of legal costs," placed $41,500 in a trust account for possible payment to the plan and disbursed additional funds to respondent. *Id.* at 4a, 20a.

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[2] The SPD "provide[s] communication with beneficiaries *about* the plan, but * * * [its] statements do not themselves constitute the *terms* of the plan," *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866, 1878 (2011), and the plan itself is not in the record. Nonetheless, the parties and courts below have treated the SPD provisions as accurately reflecting the relevant plan terms.

2. After respondent did not comply with the plan's reimbursement demand, U.S. Airways, in its capacity as the plan administrator and therefore a plan fiduciary (petitioner), sued respondent and his attorneys under ERISA Section 502(a)(3). Pet. App. 4a. As relevant here, that provision authorizes a civil action by an ERISA "fiduciary * * * to enjoin any act or practice which violates any provision of [Subchapter I of ERISA] or the terms of the plan, or * * * to obtain other appropriate equitable relief * * * to redress such violations or * * * to enforce any provisions of this subchapter or * * * the terms of the plan." 29 U.S.C. 1132(a)(3). Petitioner sought as "appropriate equitable relief" the $66,866 in plan-paid medical expenses, *i.e.*, the $41,500 held in trust plus $25,366 from respondent. Pet. App. 4a-5a.

The district court granted summary judgment to petitioner, rejecting each of respondent's arguments for limiting petitioner's recovery to less than the full amount it sought. Pet. App. 18a-35a.

4. The court of appeals vacated the district court's order and remanded for further proceedings. Pet. App. 2a. The court reasoned that although petitioner sought "equitable relief" under 29 U.S.C. 1132(a)(3), courts must exercise their discretion to limit that relief to what is "appropriate." Pet. App. 9a. In the court's view, that meant that a plan cannot equitably enforce a plan term if traditional equitable principles would deny or limit such relief. *Id.* at 9a-12a.

"Applying the traditional equitable principle of unjust enrichment," the court "conclude[d] that the judgment requiring [respondent] to provide full reimbursement to [petitioner] constitutes inappropriate and inequitable relief." Pet. App. 16a. The court was

of the view that full reimbursement would "amount[] to a windfall for [petitioner], which did not exercise its subrogation rights or contribute to the cost of obtaining the third-party recovery." *Ibid.* The court further stated that full reimbursement would "undermin[e] the entire purpose of the Plan," "[b]ecause the amount of the judgment exceeds the net amount of [respondent's] third-party recovery" after the deduction of attorney's fees and "leaves him with less than full payment for his emergency medical bills." *Ibid.*

The court declined to "decide on appeal what *would* constitute appropriate equitable relief for [petitioner] because 'equity calls for full factual findings rather than [the court of appeals'] speculation.'" Pet. App. 17a (citation omitted). Instead, the court remanded to the district court to "exercise its discretion under § 502(a)(3)." *Ibid.* (quoting *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866, 1880 (2011)).

SUMMARY OF ARGUMENT

Section 502(a)(3) of ERISA authorizes "appropriate equitable relief * * * to enforce * * * the terms of [an ERISA] plan." 29 U.S.C. 1132(a)(3). The provision is best read to recognize both the centrality of plan terms to ERISA and their enforceability, while at the same time preserving the historic powers of equity courts to equitably allocate attorney's fees.

1. Section 502(a)(3) authorizes "appropriate equitable relief," not in the abstract, but to enforce "any provision of this subchapter or the terms of [a] plan." 29 U.S.C. 1132(a)(3). The Court has explained that a plan may invoke this provision to enforce a plan term requiring a participant to reimburse the plan for covered expenses when the participant recovers from a third party for the accident that caused them. Such a

suit seeks "appropriate equitable relief" because it is analogous to a suit in equity to enforce an equitable lien by agreement. See *Sereboff* v. *Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 363-364 (2006).

Equitable liens by agreement are fundamentally different than equitable liens imposed as a restitutionary remedy to prevent unjust enrichment. As the name suggests, the basis for enforcement of an equitable lien by agreement is the agreement itself. Accordingly, in such an enforcement action, the agreement, not general restitutionary principles of unjust enrichment, provides the measure of relief due. This conclusion is confirmed not only by this Court's discussion of the scope of Section 502(a)(3) in *Sereboff*, but also by equity treatises this Court has consulted when construing that provision.

This analysis is unaltered by Section 502(a)(3)'s requirement that "equitable relief" be "appropriate." 29 U.S.C. 1132(a)(3). Contrary to the court of appeals' conclusion, inclusion of the word "appropriate" in this provision does not provide courts license to invalidate or decline to enforce plan provisions otherwise permitted by ERISA. Instead, the requirement that equitable relief be "appropriate" performs more limited roles under the Act. It ensures that a remedy is not provided under Section 502(a)(3), a "catch-all," if it should instead be pursued under one of ERISA's more specific remedial provisions. See *Varity Corp.* v. *Howe*, 516 U.S. 489, 515 (1996). It also contemplates that the court will choose a suitable remedy from among the range of possible "equitable relief." A court applying equitable principles would not have broad discretion to decline to enforce an equitable lien by agreement based on the court's case-specific judg-

ments about what fairness and equity require. Equity itself requires that the lien be enforced according to its terms.

Given the beneficiary's obligation "to reimburse the Plan for amounts paid for claims out of *any monies recovered* from a third party," Pet. App. 4a, respondent has no right to pro rata reduction in his reimbursement obligation on the ground that his recovery for his accident did not fully compensate him for his losses. And, in any event, enforcing the plan's reimbursement provision as written to require respondent to fully reimburse petitioner would not be inconsistent with equitable principles. Enforcement of the plan term is equitable to participants and beneficiaries as a class because it reduces plan expenses, and is equitable to respondent in particular because the reimbursement obligation was part of a quid pro quo for his immediate receipt of plan benefits even though a third party was responsible for his injuries.

2. Respondent's claim that the attorney's fees he incurred in securing his third-party recovery should be equitably apportioned with petitioner stands on a different footing than his more general invocation of equitable principles. In that limited area, the historic powers of the equity court to require parties that received a valuable benefit from litigation to share in the expense of procuring it is not overridden by plan terms that purport to negate those powers.

"The common-fund doctrine reflects the traditional practice in courts of equity." *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 478 (1980). That doctrine, first articulated 130 years ago in *Trustees* v. *Greenough*, 105 U.S. 527 (1882), and applied repeatedly since, authorizes courts in equity to require an absent party to

contribute to a litigant's attorney's fees when that litigant secures a fund or other valuable benefit for the absent party. The doctrine is rooted in the understanding that such attorney's fees are properly shared because they were necessary for the very creation and maintenance of the fund at issue. In that regard, the Court has analogized a litigant's entitlement to fees to a trustee's entitlement to be reimbursed for his expenses from the fund he administers.

Under the tort litigation that is the predicate for a reimbursement action, the beneficiary is effectively conducting litigation on behalf of the plan, and the plan, rather than exercising its subrogation rights to vindicate its own interests, decides to stand aside and accept that valuable benefit of representation from the participant. That is a familiar fact pattern at equity, and when confronted with it, courts applied the common-fund doctrine to account for the valuable benefit.

An action for "appropriate equitable relief" under Section 502(a)(3) takes the core powers of the court in equity as it finds them, and among those powers is the ability to apportion attorney's fees in cases like this one. A plan term cannot take that power away, just as a plan term could not purport to deprive the court of its power to issue an injunction or grant another traditional equitable remedy.

ARGUMENT

ERISA SECTION 502(a)(3) AUTHORIZES RELIEF THAT ENFORCES PLAN TERMS BUT RECOGNIZES SETTLED POWERS OF COURTS IN EQUITY OVER APPORTIONMENT OF ATTORNEY'S FEES

Section 502(a)(3) of ERISA authorizes a participant, beneficiary, or fiduciary to bring a civil action

"to obtain * * * appropriate equitable relief * * * to enforce * * * the terms of the plan." 29 U.S.C. 1132(a)(3). This provision allows a fiduciary to enforce the lawful "terms of the plan" conditioning the benefits it provides, while at the same time leaving undisturbed the core powers of a court of equity to equitably apportion attorney's fees.

A. In A Section 502(a)(3) Enforcement Action, The Parties' Benefits-Based Obligations To Each Other Are Defined By The Plan

1. This Court has interpreted the phrase "equitable relief" in 29 U.S.C. 1132(a)(3) to encompass, in a suit against a non-fiduciary, only those categories of relief that "were *typically* available in equity" before the merger of law and equity, such as "injunction, mandamus, and restitution." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 256 (1993); see *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866, 1878 (2011). Although courts at equity also had the power under certain circumstances to "establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of [their] authority," the Court has interpreted Section 502(a)(3) not to incorporate such legal remedies. *Mertens*, 508 U.S. at 256-257 (quoting 1 John N. Pomeroy, *A Treatise on Equity Jurisprudence* § 181, at 257 (5th ed. 1941)).

a. The Court has twice applied these principles to a suit, like this one, seeking reimbursement from a beneficiary. In *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002) (*Great-West*), the Court concluded that a plan sought legal relief not available under 29 U.S.C. 1132(a)(3) by seeking, "in essence, to impose personal liability on [participants]

for a contractual obligation to pay money–relief that was not typically available in equity." 534 U.S. at 210.

By contrast, in *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), the Court concluded that the "impediment to characterizing the relief in [*Great-West*] as equitable [was] not present" because the plan sought an "equitable lien on a specifically identified fund, not from the [beneficiaries'] assets generally, as would be the case with a contract action at law." *Id.* at 362-363. The Court further concluded that the basis for the plan's claim was equitable because it was based on a "familiar rul[e] of equity" allowing enforcement of a contract to convey a specific object after it is acquired. *Id.* at 363-364 (quoting *Barnes* v. *Alexander*, 232 U.S. 117, 121 (1914)).

Sereboff emphasized that the equitable remedy authorized by Section 502(a)(3) in those circumstances is based on the specific terms of the plan, not general unjust enrichment or other restitutionary principles. The plan beneficiaries in that case contended that the plan had no equitable remedy against them because the plan's claim did not "satisf[y] the conditions for 'equitable restitution' at common law." 547 U.S. at 364. The Court concluded that the beneficiaries' premise was incorrect: "an equitable lien sought as a matter of restitution" was not at issue in the case. *Id.* at 364-365. Instead, the plan sought "an equitable lien 'by agreement,'" which is a "different species of relief." *Ibid.* Accordingly, "the restitutionary conditions" that applied in equity to a claim for equitable restitution were inapposite to the plan's suit for reimbursement. *Id.* at 365.

The Court in *Sereboff* likewise rejected the beneficiaries' contention that the plan could not enforce the

plan's reimbursement obligation "without imposing various limitations that they sa[id] would apply to 'truly equitable relief grounded in principles of subrogation.'" 547 U.S. at 368. Again, the beneficiaries' premise was incorrect: the plan's "claim [was] not considered equitable because it [was] a subrogation claim." *Ibid.* Instead, enforcement of the plan's reimbursement provision "qualifie[d] as an equitable remedy because it [was] indistinguishable from an action to enforce an equitable lien established by agreement." *Ibid.* The Court explained that "the parcel of equitable defenses" offered by the beneficiaries, including their argument that they should not be required to reimburse the plan because they had not yet been "made whole" for their injuries, was thus "beside the point"—those defenses did not apply even as a matter of equity. *Ibid.*

b. The availability of a remedy for enforcement of a plan's reimbursement provision under Section 502(a)(3), so long as it satisfies the conditions for some form of typical equitable relief, is consistent with ERISA's overall focus on the centrality of plan terms. See *Sereboff*, 547 U.S. at 363 ("ERISA provides for equitable remedies *to enforce plan terms*, so the fact that [an] action involves a breach of contract can hardly be enough to prove relief is not equitable; that would make § 502(a)(3)(B)(ii) an empty promise."); see generally *Amara*, 131 S. Ct. at 1878-1882. Section 502(a)(3) "does not, after all, authorize 'appropriate equitable relief' *at large*, but only 'appropriate equitable relief' for the purpose of 'redress[ing any] violations or . . . enforc[ing] any provisions' of ERISA or an ERISA plan." *Mertens*, 508 U.S. at 253 (quoting 29 U.S.C. 1132(a)(3)).

"As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature.'" *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (quoting *Clark* v. *Smith*, 38 U.S. (13 Pet.) 195, 203 (1839)). And one of those policies under ERISA is "to protect contractually defined benefits." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 148 (1985). ERISA thus provides that a fiduciary is to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and * * * *in accordance with the documents and instruments governing the plan* insofar as" they are consistent with ERISA. 29 U.S.C. 1104(a)(1) (emphasis added). The statute also requires that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. 1102(a)(1).

"ERISA comprehensively regulates, among other things, employee welfare benefit plans," and "[t]he civil enforcement scheme of § 502(a) is one of the essential tools for accomplishing the stated purposes of ERISA." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 44, 52 (1987). ERISA, however, does not generally "regulate the substantive content of welfare-benefit plans." *Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka, & Santa Fe Ry.*, 520 U.S. 510, 515 (1997) (quoting *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 732 (1985)).[3] And this Court has resisted

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[3] Congress has amended ERISA to impose certain requirements on group health plans. See 29 U.S.C. 1181-1185b (2006 & Supp. IV. And, under certain circumstances, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1513, 124 Stat. 253-256, will impose assessable payments on large employers that, begin-

encroachment of state and federal common law principles that "might obscure a plan administrator's duty to act 'in accordance with the documents and instruments.'" *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 303 (2009) (quoting 29 U.S.C. 1104(a)(1)). It would be inconsistent with Congress's judgment generally eschewing regulation of the substantive content of ERISA plans to give such authority to courts in the guise of broad equitable discretion not to enforce the terms of the plan as written.

2. The court of appeals nonetheless concluded that Section 502(a)(3)'s requirement that equitable relief be "appropriate" gave courts discretionary authority to apply their views of general equitable principles to limit relief to enforce lawful plan terms. Pet. App. 9a-12a; see *Sereboff*, 547 U.S. at 368 n.2 (declining to address participant's argument that relief was not "appropriate" under Section 502(a)(3) "in that it contravened principles like the make-whole doctrine"). The court was mistaken. The word "appropriate" in Section 502(a)(3) does not grant courts broad powers to decline to enforce plan terms governing benefits and the conditions attaching to their provision. Instead, the requirement that equitable relief be "appropriate" serves more circumscribed purposes.

As the Court has explained, Section 502(a)(3) plays a special role in ERISA's remedial scheme. It is a "catchall," affording relief for violations that the other subsections of Section 502 do not adequately remedy. *Varity Corp.* v. *Howe*, 516 U.S. 489, 512 (1996). Ac-

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ning in 2014, do not offer adequate group coverage to full-time employees. See 26 U.S.C. 4980H (Supp. IV 2010); see also 26 U.S.C. 4980D (imposing tax on failure of group health plan to meet certain requirements).

cordingly, "we should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief." *Id.* at 515. Under those circumstances, "relief normally would not be 'appropriate'" under Section 502(a)(3). *Ibid.* That is because contractually-defined benefits are normally obtained under Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B), in a suit by a participant or beneficiary "to recover benefits due to him under the terms of his plan," while a suit to recover losses to a plan caused by a fiduciary's failure to follow plan terms is to be brought under Section 502(a)(2), 29 U.S.C. 1132(a)(2). Neither of those enforcement provisions lends itself to a suit by a fiduciary to enforce a plan's reimbursement rights against a participant or beneficiary. Thus, in this case, equitable relief on the part of the plan is "appropriate" under Section 502(a)(3) because no other remedial provision of ERISA provides a more specific mechanism for enforcing respondent's reimbursement obligation.

Moreover, because a court in a Section 502(a)(3) suit can invoke a broad array of remedies typically available in equity, the word "appropriate" serves the further purpose of directing the court to choose a particular remedy that is well suited to the circumstances. Here, under *Sereboff*, there can be no question that enforcement of an equitable lien by agreement is an "appropriate" remedy in this sense as well.

3. Because petitioner's suit under Section 502(a)(3) is one to enforce an equitable lien by agreement, respondent's obligation to petitioner is determined by the plan, not by general unjust enrichment or other principles of equitable restitution.

As the Court explained in *Sereboff*, a claim for reimbursement like this one does not seek enforcement of "an equitable lien sought as a matter of restitution" but instead an "equitable lien '*by agreement*.'" 547 U.S. at 364-365 (emphasis added). The sources that this Court consults when construing the phrase "appropriate equitable relief" in Section 502(a)(3) (see *Great-West*, 534 U.S. at 217; *Amara*, 131 S. Ct. at 1879) make clear that enforcement of an equitable lien by agreement entails enforcement of the agreement as written, not imposition of general unjust enrichment principles.

Dobbs's remedies treatise explains that, in equity, the term "equitable lien" is used in "two fairly disparate senses." Dan B. Dobbs, *Law of Remedies* § 4.3(3), at 401 (2d ed. 1993) (Dobbs). An equitable lien by agreement is "'equitable' in the sense that [the liens] may have failed to comply with some requirement for establishment of a 'common law' lien" and could therefore be "recognized and enforced in the courts of equity." *Id.* at 402. But the basis for such a lien, and the parties' respective obligations under it, is in the agreement itself. See *ibid.* The equitable lien by agreement is thus distinct from the second category of equitable lien, which a court in equity could apply without an agreement in order "to prevent unjust enrichment." *Ibid.*[4]

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[4] Dobbs also notes that subrogation at equity had similarly parallel meanings. "Subrogation, like lien, trust, and contract, may arise by express or implied-in-fact agreement of parties, in which case it is called conventional subrogation." Dobbs § 4.3(4), at 405. In contrast, "[s]ubrogation may also arise because it is imposed by courts to prevent unjust enrichment, in which case it is called legal or equitable subrogation." *Ibid.*

The Pomeroy treatise likewise distinguishes between the two types of equitable liens. That treatise notes that equitable liens may be "created by executory contracts which, in express terms, stipulate that property shall be held, assigned, or transferred as security for the promisor's debt or other obligation." 4 John N. Pomeroy, *A Treatise on Equity Jurisprudence* § 1239, at 711 (5th ed. 1941). Equitable liens may also be created "without agreement therefor between the parties," and, in that second category of liens, the parties "must recognize and admit the equitable rights of the opposite party directly connected with or arising out of the same subject-matter." *Id.* § 1239, at 711-712; see 1 George E. Palmer, *The Law of Restitution* § 1.5(a), at 20 (1978) (contrasting lien that "arise[s] out of agreement" from one imposed as a "remedial device, used * * * to enforce a right to restitution"). Accordingly, while various equitable doctrines might serve to limit recovery when enforcement of an equitable lien is sought as a restitutionary remedy, the same is not true when a party seeks enforcement of an equitable lien by agreement. In that setting, traditional equitable principles dictate that the agreement itself controls.

In this case, the lien on respondent's recovery that petitioner seeks to enforce is an equitable lien by agreement. The plan terms, not unjust enrichment principles from the law of restitution that might apply absent an agreement, therefore define the parties' rights and responsibilities. Cf. Restatement (Third) of Restitution and Unjust Enrichment § 2(2), at 15 (2011) ("A valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment.").

4. Because respondent's obligation is defined by the terms of the plan, not general unjust enrichment principles, his argument for a pro rata reduction of his reimbursement obligation under the plan to reflect his failure to secure complete relief for his accident fails.[5]

In any event, denying respondent the pro rata reduction he seeks would not lead to unjust enrichment or otherwise be inequitable. This Court confronted an analogous situation in *United States* v. *Lorenzetti*, 467 U.S. 167 (1984). That case involved a provision of the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.*, that imposes a reimbursement obligation on federal employees who receive accident-related compensation payments from the federal government and who later recover for the accident from a

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[5] Respondent asserts that the total damages he and his wife suffered came to at least $1 million, including not only past medical expenses but also "economic damages for past lost wages, future lost wages and loss of earning capacity, and non-economic damages for pain and suffering, embarrassment and humiliation, loss of enjoyment of life, and disfigurement." Br. in Opp. 3-4. "Because [respondent] only recovered 11% of his damages," *i.e.*, $110,000 as compared with the $1 million to which he claims he was entitled, he argues that petitioner's "recovery is similarly limited to that same proportion of the medical expenses it paid." Resp. C.A. Br. 26. That would result in petitioner's recovery of only $7,355.24 of the $66,866 it paid on respondent's behalf (subject to a further reduction for attorney's fees). *Id.* at 6. The parties have assumed that the plan's reimbursement provision forecloses such a reduction, so this case does not present any issue of plan interpretation.

Respondent has abandoned another equitable contention, under which he argued that petitioner could not recover *any* of the funds it paid for respondent's medical care because his third-party settlement was inadequate to make him whole. See Pet. App. 9a n.2; Br. in Opp. 7 n.1. Even if preserved, that contention would fail for the same reason as his request for a pro rata reduction.

third party. See *Lorenzetti*, 467 U.S. at 168. In particular, FECA provides that if the employee "receives money * * * in satisfaction of [the third party's] liability as the result of suit or settlement," the beneficiary must "refund to the United States the amount of compensation paid by the United States." *Id.* at 170-171 (quoting 5 U.S.C. 8132); see *id.* at 171 n.2 (noting that the provision also entitles the employee to retain a minimum of one-fifth of the net amount of recovery); see also pp. 28-29, *infra* (discussing Section 8132's allowance for attorney's fees).[6]

The Court in *Lorenzetti* rejected an employee's argument, like respondent's here, that "the United States' right of reimbursement under § 8132 was confined to recovery out of damages awards or settlements for economic losses of the sort covered by FECA, and that an award or settlement confined to noneconomic losses like pain and suffering was immune from recovery under § 8132." 467 U.S. at 171. That provision, the Court explained, "expressly creates a general right of reimbursement that obtains without regard to whether the employee's third-party recovery includes losses that are excluded from FECA coverage." *Id.* at 174.

The Court in *Lorenzetti* noted that in FECA Congress expressed its "intent that federal employees 'be

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[6] By regulation, a claimant's own insurer is not a third party for FECA purposes. See 20 C.F.R. 10.718. Moreover, FECA considers some apportionment of a recovery to be appropriate to eliminate parts that represent damages to real or personal property, loss of consortium, wrongful death, and survival claims. 20 C.F.R. 10.711(a); see *Lorenzetti*, 467 U.S. at 174 n.3 (agreeing that FECA does not require reimbursement out of third-party compensation for property damage).

treated in a fair and equitable manner,'" 467 U.S. at 177 (quoting S. Rep. No. 1081, 93d Cong., 2d Sess. 2 (1974)), but the Court nonetheless interpreted FECA's reimbursement provision as precluding an argument analogous to respondent's. The Court acknowledged that "the goal of preventing double recoveries by injured employees does not demand that an employee * * * turn over a third-party payment confined to compensation for pain and suffering," but emphasized that enforcement of the statutory provision as written was consistent with the statutory purpose of "minimiz[ing] the cost of the FECA program to the Federal Government." *Ibid.*

The same analysis applies here. While respondent "himself will be in a better position if the subrogation provision is not enforced, plan fiduciaries must 'take impartial account of the interests of *all* beneficiaries,'" and "[r]eimbursement inures to the benefit of all participants and beneficiaries by reducing the total cost of the Plan." *Zurich Am. Ins. Co.* v. *O'Hara*, 604 F.3d 1232, 1237-1238 (11th Cir. 2010) (quoting *Varity Corp.*, 516 U.S. at 514), cert. denied, 131 S. Ct. 943 (2011); see *Administrative Comm. of Wal-Mart Stores, Inc.* v. *Shank*, 500 F.3d 834, 838 (8th Cir. 2007), cert. denied, 552 U.S. 1275 (2008).

Moreover, the plan's reimbursement provision "confers benefits on both parties." *Shank*, 500 F.3d at 839. "The purpose of [petitioner's] Plan is to provide coverage for qualified expenses that are *not covered by a third party*." Pet. App. 4a (emphasis added). Nonetheless, a plan participant "receive[s] the certainty that the [plan] would pay [his] medical bills immediately if [he] was injured," and, in return, the participant pays premiums and "promise[s] to reimburse

the [plan] for medical expenses in the event [he] was injured and received" a third-party recovery. *Shank*, 500 F.3d at 839. Under these circumstances, even if a court in a suit under Section 502(a)(3) to enforce a lien by agreement could look to general notions of unjust enrichment, enforcement of the plan's reimbursement provision as written creates no unjust enrichment on the part of the plan.

Finally, application of respondent's pro rata reduction theory to funds recovered in settlements with third parties would create opportunities for manipulation of the amounts apportioned for different categories of damage.[7] Under respondent's approach, the more a beneficiary was able to classify a third-party recovery as covering losses other than medical expenses (*e.g.*, non-medical pain and suffering or lost income), the more the beneficiary would be able to keep and the less the plan would receive in reimbursement. Not only would the apportionment percentages be subject to manipulation, but so too would the hypo-

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[7] The Court in *Arkansas Department of Health & Human Services* v. *Ahlborn*, 547 U.S. 268 (2006); see Br. in Opp. 2-3, found such manipulation concerns "colorable" but insufficient to trump the plain language of the federal Medicaid statute. See *Ahlborn*, 547 U.S. at 288. That statute "precludes" a State that paid medical benefits on behalf of a Medicaid beneficiary who was injured in an accident from recovering any portion of the beneficiary's third-party settlement designated for categories of damages beyond medical care. See *ibid.* The Court's holding in *Ahlborn* "interpret[ed] the language of the Medicaid statute" and "did not divine principles of universal application." *Hadden* v. *United States*, 661 F.3d 298, 303 (6th Cir. 2011), petition for cert. pending, No. 11-1197 (filed Mar. 30, 2012); see *Shank*, 500 F.3d at 839 ("*Ahlborn* * * * turned on the application of the federal Medicaid statute. ERISA, by contrast, does not limit [a plan's] right to reimbursement.").

thetical total losses to the participant, which might bear little or no relation to the amount the plan paid and for which it seeks reimbursement.[8] Pro rata apportionment could also prove costly and complex to adjudicate. Cf. *Kennedy*, 555 U.S. at 301 (ERISA values "simple administration") (citation omitted).

B. The Equity Court's Historic Power Over Common Litigation Funds Allows It To Make An Equitable Apportionment Of Fees

As just discussed, Section 502(a)(3) does not authorize a court to revise plan terms based on its own notions of fairness or to invoke general restitutionary unjust enrichment principles, rather than the terms of the plan, to define the parties' obligations to each other when they act in their core roles as provider and receiver of benefits defined by the plan.

When it comes to the costs incurred by the beneficiary in bringing a tort action against a third party, however, different considerations bear on the analysis. In that setting, the terms of the plan do not control the equitable powers of the court to make an equitable apportionment of the costs the beneficiary incurred in the tort action. In the third-party tort litigation that is the predicate to a reimbursement action like this one, the plan participant is acting on behalf of the plan's interests in addition to his own. That litigation is not without considerable cost, which is generally assessed against the beneficiary's recovery in the form

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[8] This manipulation concern would be mitigated if the apportionment of damage categories or assessment of total damages was done by court judgment, rather than in an unsupervised settlement—at least if the plan was given an opportunity to participate or approve the apportionment.

of attorney's fees (and associated litigation costs). And the plan knowingly accepts a valuable benefit from its beneficiary when the plan declines to act on its own behalf by bringing a subrogation action directly against other liable parties or by participating in the beneficiary's suit.

Under those narrow circumstances, in which the predicate third-party action places plan and beneficiary in a special relationship that is well-recognized in equity litigation, the equity court's inherent authority to take account of that relationship comes to the fore. In particular, the court may draw on the longstanding equitable common-fund doctrine to require the plan to make an equitable contribution to the beneficiary for the expenses the beneficiary incurred for the services of the attorneys who secured them a common benefit.[9]

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[9] In *Sereboff*, the government argued that "nothing in ERISA prohibits a plan sponsor from adopting plan terms that require full reimbursement for payment of medical expenses, and ERISA's goal of minimizing the costs to employers of providing welfare benefits would be furthered by allowing it to do so." No. 05-260 Gov't Br. at 29. In that case, however, "the plan * * * paid its share of attorney's fees, and neither party * * * sought review of that issue." *Id.* at 29 n.14. Accordingly, the government noted that "[t]he Court * * * ha[d] no occasion to consider whether a plan in a reimbursement action should be charged a proportionate share of the attorney's fees a participant or beneficiary incurs in obtaining a third-party recovery," and the government did not address that question. *Ibid.*

Previously, in *Bombardier Aerospace Employee Welfare Benefits Plan* v. *Ferrer, Poirot & Wansbrough, PC*, 354 F.3d 348 (5th Cir. 2003), cert. denied, 541 U.S. 1072 (2004), the Secretary of Labor had filed an amicus brief in which she argued that where plan terms expressly provide for full reimbursement and expressly disclaim responsibility for attorney's fees and costs, courts should

1. "The common-fund doctrine reflects the traditional practice in courts of equity." *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 478 (1980); see *Sprague* v. *Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939) ("[T]he foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation."). This Court thus "has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co.*, 444 U.S. at 478.

The Court initially applied the common-fund doctrine in an equity suit by a holder of bonds secured by property held in trust. See *Trustees* v. *Greenough*, 105 U.S. 527 (1882). The bondholder, "at great expense and trouble," established that the trustees were fraudulently selling the property and obtained both an injunction against additional sales and appointment of a receiver to recover property already sold. See *id.* at 528-529, 532. The bondholder thereby obtained properties in trust for the benefit of other bondholders who had not participated in the litigation but who re-

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enforce the plan's plain terms and should not apply the common-fund doctrine. See *Bombardier* C.A. Br. of Amicus Curiae Elaine L. Chao, Secretary of Labor, at 17-21, available at http://www.dol.gov/sol/media/briefs/bombardier-9-11-03.pdf. Upon further reflection, and in light of this Court's discussion of ERISA's preservation of the equity court's core remedial powers in *Amara*, 131 S. Ct. at 1879-1880 (discussing remedies of contract reformation and surcharge), the Secretary is now of the view that the common-fund doctrine is generally applicable in reimbursement suits under Section 502(a)(3).

ceived a valuable benefit thanks to his work. See *id.* at 529.

Under these circumstances, the bondholder, although not formally a trustee, "ha[d] at least acted the part of a trustee in relation to the common interest." *Greenough*, 105 U.S. at 532. Because he "worked for [the absent bondholders] as well as for himself," the Court held that "if he cannot be reimbursed out of the fund itself, [the absent bondholders] ought to contribute their due proportion of the expenses which he has fairly incurred." *Ibid.* The Court grounded this contribution obligation in the "general principle that a trust estate must bear the expenses of its administration." *Ibid.*

The Court in *Greenough* recognized that Congress in 1853 had enacted a statute governing payment of court fees that "appear[ed] to be intended to cover the whole ground of taxation of costs at law and in equity." 105 U.S. at 535 (citing Act of Feb. 26, 1853, ch. 80, 10 Stat. 161). The Court, however, found that statute insufficient to answer the question before it because the statute "contain[ed] nothing which can be fairly construed to deprive the Court of Chancery of its long-established control over the costs and charges of the litigation, to be exercised as equity and justice may require, including proper allowances to those who have instituted proceedings for the benefit of a general fund." *Id.* at 536; see *id.* at 535 (referring to the historic "power of a court of equity, in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require").

In the 130 years since *Greenough*, the Court has applied the equitable common-fund doctrine in a vari-

ety of settings to allocate attorney's fees between litigating parties (and their attorneys) and absent parties. See, *e.g.*, *Central R.R. & Banking Co.* v. *Pettus*, 113 U.S. 116, 124-127 (1885) (applying doctrine to require equitable allocation of fees incurred in litigation that "was intended to be, and throughout was, conducted as a suit for the benefit, not exclusively of the complainants, but of the class to which they belonged," and was "so regarded by all connected with the litigation"); *Sprague*, 307 U.S. at 164 ("Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts."); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389-391 (1970) (applying doctrine to require apportionment of attorney's fees for stockholders who established that their corporation violated securities laws); *Hall* v. *Cole*, 412 U.S. 1, 5-8 (1973) (citing common-fund doctrine as support for award of attorney's fees under Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 412, where plaintiff "rendered a substantial service to his union as an institution and to all of its members"); *Boeing*, 444 U.S. at 479-482 (relying on the "well-recognized" common-fund doctrine to allow assessment of attorney's fees against unclaimed portion of fund created by a judgment); see also *United States* v. *Equitable Trust Co.*, 283 U.S. 738, 744 & n.7 (1931); *Harrison* v. *Perea*, 168 U.S. 311, 325-326 (1897); *Dodge* v. *Tulleys*, 144 U.S. 451, 456-458 (1892).

In particular, courts have long applied the common-fund doctrine to insurance reimbursement cases like this one, reducing the insurer's recovery amount by a proportionate share of the participant's litigation expenses when the participant has secured a valuable

benefit for both himself and the insurer. See Johnny Parker, *The Common Fund Doctrine: Coming of Age in the Law of Insurance Subrogation*, 31 Ind. L. Rev. 313, 329-337 (1998); see also Annot., *Right of Attorney for Holder of Property Insurance to Fee out of Insurance Share of Recovery from Tortfeasors*, 2 A.L.R. 3d 1441, §§ 2-3 (1965 & Supp. 2012) (contrasting numerous cases in which courts required insurer to pay a fee to the insured's attorney with "a very few cases" in which courts declined to do so); 16 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance 3d* § 223:113 (2000).

2. A court entertaining a request for "appropriate equitable relief" under Section 502(a)(3) to enforce a plan's reimbursement provision should apply the common-fund doctrine to equitably apportion attorney's fees. This result flows not from any free-floating power to apply unjust enrichment or other equitable principles to reduce the recovery in a suit to enforce the reimbursement provision in a plan, but instead from the relationship between the parties and the common-fund nature of the monies at issue.

As noted above, the parties' core relationship involving benefits, and the conditions attaching to them, is properly defined by the plan, not unjust enrichment principles. But the longstanding powers of the court in equity should come into play when the question shifts away from the scope of benefits and terms of the plan to the costs of litigation when a participant or beneficiary has conducted the litigation and the plan has benefited. As the above discussion of the common-fund doctrine demonstrates, that is a question that equity has long decided, and it is qualitatively different than the scope of benefits offered under an

ERISA plan. Accordingly, a court entertaining a request for "appropriate equitable relief" to enforce a reimbursement obligation should do so according to the terms of the plan, but should also apply common-fund principles to require an equitable apportionment of attorney's fees.[10]

This equitable power should be undisturbed even if the plan purports to limit it. Cf. *Dodge*, 144 U.S. at 456-457 (applying common-fund doctrine to award attorney's fees even though only trust provision allowing such fees was nullified by state law). The common-fund doctrine is rooted in the equity court's own "long-established control over the costs and charges of the litigation." *Greenough*, 105 U.S. 536. There is no indication in ERISA that the statute was intended to authorize an ERISA plan to override that deeply rooted power of a court exercising its authority to grant "appropriate equitable relief." See *Hall*, 412 U.S. at 10 (LMRDA's grant of power to award "appropriate" relief does not "deny to the courts the traditional equitable power to grant counsel fees in 'appropriate' situations"); *Mills*, 396 U.S. at 391 (Securities Exchange Act of 1934 did not "circumscribe the courts' power to grant appropriate remedies" including to award attorney's fees under common-fund doctrine); *Greenough*, 105 U.S. at 535 (stat-

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[10] Respondent is not necessarily entitled to a mechanical, pro rata apportionment of his attorney's 40% contingency fee. Instead, the district court on remand would have authority to make an equitable allocation and ensure that any fees that would reduce respondent's reimbursement obligation are reasonable. See Pet. App. 17a; see also *Pettus*, 113 U.S. at 128 (reviewing fee awarded under common-fund doctrine for reasonableness).

ute authorizing court costs does not "take away the power of a court of equity to permit counsel fees"); see also *Dodge*, 144 U.S. at 457 (state statute prohibiting courts of equity from awarding attorney's fees would not constrain federal court). Thus, a court's inherent power may not be nullified by an ERISA plan term, just as an ERISA plan could not nullify an equity court's power under Section 502(a)(3) to issue an injunction, "reform contracts" to prevent fraud, or impose a "surcharge remedy" to remedy an ERISA fiduciary's breach of trust. *Amara*, 131 S. Ct. at 1879-1880.

3. Some federal insurance and worker's compensation schemes include provisions requiring beneficiaries to make reimbursement payments when they recover from a third party for an accident that leads to covered expenses. Each scheme has a different statutory basis, and none is like ERISA in making reimbursement obligations enforceable only through an action for "appropriate equitable relief." 29 U.S.C. 1132(a)(3). Accordingly, the power of a court in equity to apply the common-fund doctrine and make an equitable allocation of attorney's fees is immaterial in actions brought under those statutes. Nonetheless, in some of those settings, Congress or an implementing agency has expressly limited the reimbursement obligation to account for attorney's fees.

a. As discussed above, FECA requires reimbursement to the government when a federal employee "receives money * * * in satisfaction" of a third party's liability for an accident that led to covered expenses, even if that recovery is denominated as for pain and suffering. *Lorenzetti*, 467 U.S. at 170-171 (quoting 5 U.S.C. 8132); see pp. 17-18, *supra*. FECA

expressly provides, however, that the extent of the employee's reimbursement obligation is measured "after deducting therefrom the costs of suit and a reasonable attorney's fee," *Lorenzetti*, 467 U.S. at 170-171 (quoting 5 U.S.C. 8132), and that the employee is entitled to retain "a reasonable attorney's fee proportionate to the refund to the United States," 5 U.S.C. 8132. See 20 C.F.R. 10.712.

b. The Medicare Secondary Payer (MSP) provisions reduce Medicare's costs by making Medicare secondary to other insurance coverage or payments by a third-party tortfeasor. Under the MSP provisions, payments that Medicare makes on a beneficiary's behalf are conditional and must be reimbursed if the beneficiary receives payment with respect to the same items or services from another party. See 42 U.S.C. 1395yb(2)(B)(ii). In implementing the MSP provisions, the Department of Health and Human Services (HHS) has expressly provided by regulation that it will reduce a participant's reimbursement obligation by an allowance for the costs of procuring the judgment or settlement. See 42 C.F.R. 411.37(c).[11]

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[11] HHS has also interpreted its regulations to provide that where a beneficiary's suit against a tortfeasor results in a "court order on the merits of the case" that awards one amount for medical expenses and a separate amount for other losses, Medicare will limit its claim for reimbursement to the amount designated for medical expenses. See *MSP Manual*, ch. 7, § 50.4.4 (2003). If, however, the beneficiary receives a settlement that resolves both medical-expense claims and other claims, such as pain and suffering, HHS interprets its regulations to require full reimbursement out of the settlement. See *ibid.*; see also *Hadden*, *supra*, n.7, 661 F.3d at 302-304, (agreeing with HHS's interpretation and rejecting Medicare beneficiary's argument that his reimbursement obligation

c. Under the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. 901 *et seq.*, longshore workers receive compensation payments from their employers when they suffer a disability or death resulting from an injury on navigable waters. See *Bloomer* v. *Liberty Mut. Ins. Co.*, 445 U.S. 74, 74 (1980). A worker may also sue the owner of the ship where the injury occurred for negligence, but any recovery is subject to a lien totaling the amount of longshore compensation paid by his employer. See *id.* at 75.

In *Bloomer*, a longshore worker from whom an employer sought full reimbursement for benefits it had provided after he recovered from a ship owner contended "that the common-fund doctrine should be available to permit the employee to recover from the [employer] a proportionate share of the expenses of suit." 445 U.S. at 85. The Court rejected that argument, finding that Congress had supplanted the common-fund doctrine in the Longshore Act's remedial scheme. See *id.* at 85-88. The Court noted, however, that the case before it did not present circumstances under which "the recovery against the shipowner [was] less than the sum of the lien and the expenses of suit," such that complete enforcement of the employer's lien would result in a net loss for the worker. See *id.* at 86 n.13.

Four years after *Bloomer*, Congress amended the Longshore Act to expressly foreclose the net-loss scenario referred to by the Court. See Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 21, 98 Stat. 1652 (amend-

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should be subject to pro rata deduction because he recovered only 10% of his damages in tort settlement).

ing 33 U.S.C. 933(f)). The amendment provided that if a compensated employee brings a timely negligence action and recovers, the employer will be entitled to reimbursement to the extent its compensation payments do not exceed the employee's "net amount recovered." See *ibid.* The amendment further specified that "[s]uch net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees)." *Ibid.* The conference committee explained that this amendment was intended to give first priority to "litigation expenses, including reasonable attorney fees," but that "[t]he compensation lien on the *net* recovery remains inviolable, consistent with *Bloomer*." H.R. Rep. No. 1027, 98th Cong., 2d Sess. 36 (1984) (emphasis added).

d. The Federal Employees Health Benefits Act of 1959 (FEHBA), 5 U.S.C. 8901 *et seq.*, establishes a comprehensive program of health insurance for federal employees. The Act authorizes the Office of Personnel Management (OPM) to contract with private carriers to offer employees an array of health care plans. See 5 U.S.C. 8902(a) (Supp. IV 2010).

FEHBA does not include a provision governing the reimbursement rights of carriers, but OPM contracts include provisions governing reimbursement. See *Empire Healthchoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677, 685 (2006) (noting that all reimbursements obtained by the carrier under such reimbursement provisions are refunded directly to the Treasury). For example, the contract between OPM and the Blue Cross Blue Shield Service Benefits Plan (Blue Cross) obligates the carrier to make "a reasonable effort" to recoup amounts paid for medical care. *Id.* at 683.

Blue Cross's statement of benefits alerts enrollees that "[i]f another person or entity, through an act or omission, causes [enrollees] to suffer an injury or illness, and if [Blue Cross] paid benefits for that injury or illness," the enrollees are subject to a reimbursement obligation. 2012 Blue Cross Plan Brochure at 125 (Plan Brochure), http://www.opm.gov/insure/health/planinfo/2012/brochures/71-005.pdf. It also states that "[a]ll recoveries" enrollees "obtain (whether by lawsuit, settlement, or otherwise), no matter how described or designated, must be used to reimburse [Blue Cross] in full for benefits [it] paid." *Ibid.*

Blue Cross's FEHBA statement of benefits also expressly addresses attorney's fees. It states that the plan is "entitled under our right of recovery to be reimbursed for our benefit payments even if you are not 'made whole' for all of your damages in the recoveries that you receive"; that the plan's right of recovery is "not subject to reduction for attorney's fees and costs under the 'common fund' or any other doctrine"; and that the plan "will not reduce our share of any recovery unless, in the exercise of our discretion, we agree in writing to a reduction (1) because you do not receive the full amount of damages that you claimed or (2) because you had to pay attorneys' fees." Plan Brochure at 125.

Those contract provisions negating any judicially imposed common-fund apportionment of attorney's fees are valid and enforceable in the context of FEHBA, which does not include an "appropriate equitable relief" remedial provision. In a breach-of-contract action, like those brought by FEHBA carriers to enforce their policies' reimbursement provisions, normal contract rules in an action at law apply,

and the historic powers of the court in equity (including the power to apply the common-fund doctrine) are not at issue.[12]

[12] The Court in *McVeigh* held that there was no federal jurisdiction over reimbursement suits by FEHBA carriers to enforce such reimbursement provisions. See 547 U.S. at 683. In a recent letter to FEHBA carriers, OPM emphasized that, no matter where such reimbursement actions are brought, "FEHB Program contracts and the applicable statement of benefits (brochures) require enrollees to reimburse the plan in the event of a third party recovery" and that "[c]arriers are required to seek reimbursement and/or subrogation recoveries in accordance with the contract." OPM Letter No. 2012-18, at 1 (June 18, 2012). The letter also advises that state laws limiting FEHBA carriers' subrogation and reimbursement rights are preempted by federal law. See *id.* at 1-2; see also 5 U.S.C. 8902(m)(1) (FEHBA preemption provision); *McVeigh*, 547 U.S. at 697-698 (discussing one "plausible construction[]" of FEHBA preemption provision under which it would preempt state laws limiting subrogation and reimbursement, but finding it unnecessary to decide that question).

CONCLUSION

The judgment of the court of appeals should be affirmed to the extent it remands for application of the common-fund doctrine, but reversed to the extent it remands for application of other equitable theories that would limit respondent's reimbursement obligation to the plan.

Respectfully submitted.

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APPENDIX

29 U.S.C. 1132(a) provides:

Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought–

(1) by a participant or beneficiary–

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) 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;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable

relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), (8), or (9) of subsection (c) of this section or under subsection (i) or (*l*) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title[1] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts; or

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[1] So in original. Probably should be "subtitle".

(10) in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status under section 1085 of this title, if the plan sponsor–

(A) has not adopted a funding improvement or rehabilitation plan under that section by the deadline established in such section, or

(B) fails to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section,

by an employer that has an obligation to contribute with respect to the multiemployer plan or an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section and the funding improvement or rehabilitation plan.