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William Baker

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COMMENT

PHENOMENAL COSMIC POWERS, ITTY-BITTY LIVING SPACE: ERISA-GOVERNED HEALTHCARE PLANS SEEKING “APPROPRIATE EQUITABLE RELIEF” AGAINST WORKERS’ COMPENSATION SETTLEMENTS

William Baker[†]

ABSTRACT

The Employee Retirement Income Security Act of 1974 (ERISA) safeguards the financial well-being and equitable administration of employer-provided benefit plans but also interferes with the ability of employees to obtain workers’ compensation benefits in some circumstances. The Supreme Court has allowed employers to weaponize ERISA’s remedy provisions, giving ERISA plan administrators an unfettered ability to enforce the private law of fringe benefit contracts with the power of federal statute.

ERISA authorizes a cause of action, enforceable exclusively in federal court, for plan administrators to obtain appropriate equitable relief to enforce the terms of the plan. One term contained in most employer-provided health care plans requires a person who has received benefits under the plan to reimburse the plan for any benefits paid in the event of any recovery from a third party. The Supreme Court has decided four cases where a plan sought reimbursement from a plan participant who received a third-party tort settlement. These decisions gave employers the ability to create one-sided plan terms. The employee carries the burden of paying all the costs of obtaining a third-party recovery, while ERISA preemption removes any state-law obstacles to a plan’s ability to receive full reimbursement.

An ERISA plan can seek similarly unencumbered reimbursement from workers’ compensation benefits paid by the employer or its insurer. Workers’ compensation benefits are calculated to pay just enough to keep an injured worker from destitution. But an obligation to reimburse the full amount of past medical treatment can prevent an employee from obtaining any real relief in the event of a disputed compensation claim. An employee desiring health care coverage from an employer is faced with an unforeseeable Hobson’s choice: either to forego a chance at obtaining workers’ compensation benefits if the entitlement is arguable or to reject the adhesion

[†] J.D. Candidate 2020, Liberty University School of Law. Many thanks to B. Patrick Agnew and Judge Paul M. Spinden for their invaluable input.

contract of the employer's health plan and forego any premium-sharing fringe benefit.

This result cannot be what Congress intended when enacting ERISA in order to protect employee benefits. The Supreme Court's jurisprudence on "appropriate equitable relief" under ERISA has little equity in it. Granting equitable relief to an employer-funded health plan must account for the full bargain between the employee and employer, a bargain that includes the obligation of the employer to provide compensation benefits to employees injured in the line of duty. The maxims of equity require no less.

Equitable relief under ERISA should be tempered by proper contractual construction, whether as written or as reformed. Relief could also take the form of estoppel: holding an ERISA plan to the terms of a settlement between the employee and employer, or to the background of state law that formed the basis of the employment relationship. A final option would be Congress amending ERISA's remedies provisions, wiping clean the slate of tortuous judicial interpretation, and leveling the playing field under ERISA for employers and employees.

I. INTRODUCTION

On September 2, 1974, President Ford signed the Employee Retirement Income Security Act of 1974 (ERISA) into law. Upon signing, he said, "It is certainly appropriate that this law be signed on Labor Day, since this act marks a brighter future for almost all the men and women of our labor force."¹ The "almost" is somewhat surprising—after all, President Kennedy did not say "We choose to go *most of the way* to the moon"²—but it was also prescient. Some of the labor force's men and women whose futures ERISA has not made brighter are injured workers whose compensation claims are disputed.

In all fifty states, workers' compensation acts obligate employers to pay medical expenses and a portion of lost wages to employees who suffer a work-related injury or an occupational disease.³ Often, the employer controverts a

1. 1 RONALD J. COOKE, ERISA PRACTICE AND PROCEDURE § 1:1 (October 2018 update) (citing Remarks by President Gerald Ford on the Signing of HR 2, (Pub. L. No. 93-406, 88 Stat. 829), The Employee Retirement Income Security Act and Related White House and Labor Department Documents (Sept. 2, 1974), reprinted in 1974 Pens. Rep. (BNA) No 1, at R-1 (Sept. 16, 1974)).

2. John F. Kennedy, Remarks of the President, Rice University Stadium, Houston, Texas 3 (Sept. 12, 1962), *in* Press Release, Office of the White House Press Secretary (Sept. 12, 1962) (on file with the John F. Kennedy Presidential Library and Museum).

3. 1 LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 1.01 (Matthew Bender, Rev. Ed. 2018).

compensation claim and must file a notice with the state's administrative agency.⁴ Around 90% of claims are disposed of without proceeding to a formal contest—usually by agreement or settlement between the employee and employer.⁵ By the very nature of a settlement, the agreed-upon amount is “apt to be less than the full statutory amount” of benefits.⁶ For many employees, the story does not end there.

If an employee's health coverage paid any medical expenses, the health plan might seek reimbursement from the workers' compensation settlement proceeds. If the health plan is maintained by the employer, it is governed by ERISA.⁷ Because of a series of Supreme Court rulings, and as long as the plan terms so provide, the ERISA-governed health plan (ERISA plan) can obtain reimbursement from the full amount of the settlement, regardless of how much of that settlement actually represents past medical expenses.⁸ Because even a full award of statutory workers' compensation benefits are intended only to keep injured workers from destitution⁹ and because a settlement is, by definition, an amount less than a full award, an ERISA plan's uninhibited right to reimbursement can prevent an injured employee from obtaining practical relief.

While scholarly criticism of ERISA abounds, little attention has been given to the problems ERISA plan reimbursement presents to a workers' compensation claimant.¹⁰ While overlooked, the problem has the potential to be pervasive because ERISA governs most private-sector health plans.¹¹ In 2013, the Supreme Court issued its ruling allowing employers merely to insert plan language and thereby trump any defense that would reduce the

4. *Id.* § 126.01.

5. *Id.* § 132.01.

6. *Id.* § 132.03.

7. 29 U.S.C. § 1002(1) (2017).

8. *See infra* Section III.A.

9. 13 LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 133.01 (Matthew Bender, Rev. Ed. 2018); Jay M. Zitter, Annotation, *Validity, Construction, and Effect of Statutory Exemptions of Proceeds of Workers' Compensation Awards*, 48 A.L.R.5th 473 (1997).

10. *See, e.g.*, Kristen S. Cross et al., *ERISA-Governed Healthcare Liens*, 78 ALA. LAW. 346, 349 (2017); Jonathan M. Feigenbaum, *Summary Overview of Short-Term-Disability Benefits, Long-Term-Disability Benefits and Co-Ordination with Other Benefits and Settlements Under the Employee Retirement Security Act of 1974*, MASS. EMP. LAWS. ASS'N (Mar. 22, 2017), <https://www.erisaattorneys.com/wp-content/uploads/2015/01/MELA-STD-LTD-Presentation.pdf>; Jill Bollwek, *ERISA Health Plan Reimbursement in Workers' Compensation Cases*, MO. DEP'T LAB., <https://labor.mo.gov/sites/labor/files/Understanding-and-Resolving-ERISA-Handout.pdf> (last visited Feb. 8, 2019).

11. *Health Plans & Benefits*, U.S. DEP'T LAB., <https://www.dol.gov/general/topic/health-plans> (last visited Dec. 2, 2018).

amount reimbursed to reflect either the cost of obtaining a settlement or a claimant's true recovery.¹² As more plans adopt favorable language, the number of injured workers unable to obtain practical relief will grow. A local workers' compensation attorney has had several cases where an ERISA plan asserts a full right to recovery against a compromise settlement—sometimes years after the settlement agreement is made—and attests that many of his colleagues have faced similar situations.¹³

Part I sets forth the issue. Part II explains generally how workers' compensation works: its origin and rationale, the basis and extent of compensation benefits, and some procedural aspects of compensation claims. Part II also explains why ERISA was enacted and how Congress made its enforcement an exclusively federal matter. Part III walks through a series of Supreme Court cases that provide a framework for how an employer-provided healthcare plan may use ERISA's remedies provisions to enforce its right of reimbursement. Part IV explores how an injured worker may effectively be unable to obtain relief due to the Supreme Court's interpretation of ERISA's remedies. Part V interprets how the Supreme Court's reimbursement framework might apply differently when a plan seeks reimbursement against a workers' compensation settlement rather than against a third-party tort recovery. Part VI proposes solutions for how to equitably resolve the injured worker's dilemma.

II. BACKGROUND

The particular problem at issue arises at the intersection of workers' compensation schemes and ERISA. The substance and purpose of both are set forth below.

A. *Workers' Compensation Insurance*

Worker's compensation acts are state laws¹⁴ that mostly came into effect in the early twentieth century.¹⁵ After Hawai'i adopted its system in 1963, all states have now enacted compensation acts.¹⁶ Soon after, a doomed attempt

12. *US Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013).

13. Interview with B. Patrick Agnew, partner at Agnew, Johnson & Rosenberger, PLLC, in Lynchburg, Va. (Feb. 7, 2019).

14. An exception is the Longshore and Harbor Workers' Compensation Act. 33 U.S.C. §§ 901–950.

15. 1 LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 2.07 (Matthew Bender, Rev. Ed. 2018).

16. *Id.* § 2.08.

was made at imposing at least some uniform standards at the federal level.¹⁷ There are legislative and administrative differences between every state's compensation scheme,¹⁸ but they are largely similar.

Essentially, workers' compensation acts automatically entitle an employee who suffers a "personal injury by accident arising out of and in the course of employment" or an "occupational disease" to certain benefits.¹⁹ Employees are covered, but workers classified as independent contractors are not.²⁰ Entitlement to compensation is a form of strict liability: the test of liability is not the negligence or fault of the parties, but whether the injury is connected with the employment.²¹

The strict liability plan of compensation schemes later became known as a "grand bargain"²² between employers and laborers. In the grand bargain, employees gave up their right to any claim of negligence against their employers in order to receive automatic medical and wage benefits (the "exclusive remedy" provision).²³ Employers gave up common-law defenses that would have protected them against an action by employees, such as contributory negligence, assumption of risk, and the fellow-servant doctrine, in order to reduce liability exposure to only lost wages and medical care.²⁴ The underlying social theory is to provide "fixed, certain and speedy" relief "at a time when most needed"²⁵ to provide support and prevent destitution.²⁶

This grand bargain has reverberations throughout the whole of compensation acts and administration. Workers' compensation awards wage-loss benefits, not in full, but between half and two-thirds of the employee's average weekly wage.²⁷ Wage-loss benefits are also subject to

17. *Id.* (describing the National Commission on State Workmen's Compensation Laws, which submitted its report in July 1972).

18. *Id.*

19. *Id.* § 1.01.

20. *Id.*

21. 1 LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 1.03 (Matthew Bender, Rev. Ed. 2018).

22. *See, e.g.,* *Gibby v. Hobby Lobby Stores, Inc.*, 404 P.3d 44, 46–47 (Okla. 2017).

23. 1 LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 1.03 (Matthew Bender, Rev. Ed. 2018).

24. *Id.*

25. *Humphreys v. Boxley Bros. Co.*, 135 S.E. 890, 891 (Va. 1926).

26. 1 LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 1.02 (Matthew Bender, Rev. Ed. 2018); Jay M. Zitter, Annotation, *Validity, Construction, and Effect of Statutory Exemptions of Proceeds of Workers' Compensation Awards*, 48 A.L.R.5th 473 (1997).

27. 1 LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* §§ 1.01, 1.03 (Matthew Bender, Rev. Ed. 2018).

arbitrary limits, or caps, so as to prevent malingering.²⁸ Claims are handled administratively in almost all states.²⁹ Relaxed rules of procedure and evidence apply: compared to a trial court, discovery is more expansive regarding medical information, but otherwise more restrictive.³⁰ While the social policy motivating compensation law ignores the concept of fault long enough to get the injured worker relief, workers' compensation does not exonerate every at-fault party.³¹ An employee cannot pursue relief against the employer but may do so against a third party.³² If an employee does recover against a third party, the employer typically has a right to receive its outlay from the employee, preventing double recovery by the employee.³³

While compensation acts are creatures of state governments, the compensation system is a private one, composed of transactions between employers, insurance carriers, and employees.³⁴ All states require employers to secure their compensation liability, though the permissible means vary significantly, and all but two states allow self-insurance.³⁵ Although the cost of providing workers' compensation is to be borne by the employer "as a part of the expense of the business,"³⁶ the consumers of the products or services created by the employer ultimately bear the cost of this grand bargain.³⁷

The final relevant aspect of compensation law is what happens when a compensation claim is disputed. Though relief is to be "swift and sure,"³⁸ the claimant must still prove either an "injury by accident" or an "occupational disease" "arising out of" and incurred "in the course of" employment.³⁹ These

28. *Id.* § 1.03.

29. 11 LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 124.01 (Matthew Bender, Rev. Ed. 2018).

30. J. Randolph Ward, *Primary Issues in Compensation Litigation*, 17 *CAMPBELL L. REV.* 443, 444 (1995).

31. 10 LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 110.01 (Matthew Bender, Rev. Ed. 2018).

32. *See, e.g.*, *Mich. Mut. Ins. Co. v. Smoot*, 149 F. Supp. 2d 229 (E.D. Va. 2001) (applying Virginia law); *Smith v. Payne*, 753 P.2d 1162 (Ariz. 1988); *Chesapeake Haven Land Corp. v. Litzenberg*, 785 A.2d 859 (Md. Ct. Spec. App. 2001).

33. 10 LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 110.02 (Matthew Bender, Rev. Ed. 2018).

34. *Id.*

35. 14 LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 150.01 (Matthew Bender, Rev. Ed. 2018).

36. *Humphrees v. Boxley Bros. Co.*, 135 S.E. 890, 891 (Va. 1926).

37. 1 LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 1.03 (Matthew Bender, Rev. Ed. 2018).

38. *Rorie v. Holly Farms Poultry Co.*, 295 S.E.2d 458, 460 (N.C. 1982).

39. 1 LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 1.01 (Matthew Bender, Rev. Ed. 2018).

elements, while illuminated by state case law, provide plenty of room for dispute, and result in the practical reality that a claimant might need to obtain an attorney. The grand ideal of compensation law is that benefits issue automatically once statutory prerequisites are met.⁴⁰ But because compensation involves complex issues (with the need to sift through state case law and evidentiary problems), a claimant has the right to counsel.⁴¹ In most states, a claimant's attorney's fee is deducted from the award, which might be seen as a necessary evil because it reduces an award already calculated to provide minimum support.⁴² An attorney's ability to obtain higher awards and settlements, and a better likelihood of prevailing, offset that reduction of relief.⁴³

B. *ERISA-Governed Healthcare Plans*

Unlike workers' compensation coverage, healthcare plans do not arise by operation of a statute. Health benefits, like any other fringe benefit, arise by contract between employee and employer. If an employer offers a healthcare benefit plan, it is governed by ERISA.⁴⁴ While the "retirement" in ERISA's name suggests a relation to retirement, its regulatory reach extends to all employer-maintained benefit plans. ERISA came about because of the poor financial decisions of the American company Studebaker in the early 1960s.

1. The Purpose of ERISA

After the Studebaker-Packard Corporation closed its South Bend, Indiana, auto manufacturing plant, many thousands of employees soon discovered that the company's pension plan was essentially nonexistent.⁴⁵ The scandal of

40. 13 LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 133.05 (Matthew Bender, Rev. Ed. 2018).

41. *Id.*

42. *Id.* § 133.01.

43. "[I]t is unrealistic to expect that workers will receive prompt, equitable, and adequate benefits, or anything approaching them, if they are left without the opportunity to obtain legal representation. Even if defense attorneys were also eliminated, there would remain the need of inexperienced claimants for assistance in having to contend with professionals [insurance company employees] on issues arising under a complicated and unfamiliar law." 13 LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 133.05 n.7 (Matthew Bender, Rev. Ed. 2018) (alterations in original) (quoting National Comm'n on State Workmen's Comp. Laws, *Compendium on Workmen's Compensation*, ch. 13, at 212 (1973)).

44. Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 *HASTINGS L.J.* 131, 136 (2009).

45. James A. Wooten, "*The Most Glorious Story of Failure in the Business*": *The Studebaker-Packard Corporation and the Origins of ERISA*, 49 *BUFF. L. REV.* 683, 683-84 (2001).

Studebaker's employees losing pensions that they had spent their careers earning was the political motivation for federal pension reform.⁴⁶

The broad and detailed declaration of congressional policy for ERISA provides "that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of [employee benefit] plans" and that "minimum standards be provided assuring the equitable character of such plans and their financial soundness."⁴⁷ Though prompted by pension reform, ERISA governs not only pension plans but also "any plan, fund, or program . . . maintained by an employer . . . for the purpose of providing . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, [or] disability."⁴⁸ ERISA covers most private-sector health plans.⁴⁹ Plans maintained solely for workers' compensation coverage are not covered by ERISA.⁵⁰ ERISA established procedural standards for reporting, disclosure, and fiduciary responsibility for these employee welfare benefit plans, but does not regulate the substantive content of the plans.⁵¹ ERISA plans typically designate an administrator, though the employer is the default by statute, and the administrator is "generally an alter-ego of the employer."⁵²

2. Exclusive Federal Jurisdiction of ERISA

Federal courts have confirmed that Congress "intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans."⁵³ Congress did so by, *inter alia*, providing statutory causes of action

46. *Id.*

47. 29 U.S.C. § 1001(a) (2017).

48. 29 U.S.C. § 1002(1) (2017).

49. *Health Plans & Benefits*, U.S. DEP'T LAB., <https://www.dol.gov/general/topic/health-plans> (last accessed Dec. 28, 2018).

50. 29 U.S.C. § 1003(b)(3) (2017).

51. *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 732 (1985).

52. 29 U.S.C. § 1002(16)(A) (2017); Dana Muir & Norman Stein, *Two Hats, One Head, No Heart: The Anatomy of the ERISA Settlor/Fiduciary Distinction*, 93 N.C. L. REV. 459, 520 (2015).

53. *Amato v. Bernard*, 618 F.2d 559, 567 (9th Cir. 1980).

enumerated in 29 U.S.C. § 1132(a),⁵⁴ exclusive federal jurisdiction for all actions brought under ERISA Title I,⁵⁵ and broad preemption of state law.

ERISA's preemption clause provides that "the provisions of this title . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."⁵⁶ The Supreme Court has given ERISA broad preemptive power, holding that "[a] law 'relates to' an employee benefit plan . . . if it has a connection with or reference to such a plan."⁵⁷ The "insurance savings clause,"⁵⁸ a major exception to state-law preemption, specifies that state laws regulating insurance, banking, or securities survive ERISA preemption.⁵⁹ But those surviving state laws do not reach ERISA-governed plans that are funded by the employer as opposed to merely insured. This route to preemption, under ERISA's "deemer clause,"⁶⁰ is gaining significance as more employers create self-funded plans to avoid state regulation.⁶¹ The Supreme Court case *FMC Corp. v. Holliday* illustrates the interaction of these preemption provisions.⁶² In *Holliday*, the Court found that ERISA preempted a state anti-subrogation law that prohibited reimbursement of healthcare benefits from a claimant's tort recovery.⁶³ The state law survived preemption thanks to ERISA's insurance savings clause but

54. Each cause of action authorized under the statute describes the proper plaintiff. Potential plaintiffs consist of four groups: plan participants, plan beneficiaries, plan fiduciaries, and the Secretary of Labor. David M. Cook & Karen M. Wahle, *Procedural Aspects of Litigating ERISA Claims*, A.B.A. (2000), <http://apps.americanbar.org/labor/lel-aba-annual/papers/2000/wahle.pdf> (last visited Feb. 8, 2019).

55. 29 U.S.C. § 1132(e)(1) (2017). There is one exception wherein an action brought under 29 U.S.C. § 1132(a)(1)(B) to recover benefits under the terms of a plan may be filed in state or federal court.

56. 29 U.S.C. § 1144(a) (2017).

57. *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 96–97 (1983).

58. 29 U.S.C. § 1144(b)(2)(A) (2017).

59. Edward Albuero Morrissey, *Deem and Deemer: ERISA Preemption Under the Deemer Clause As Applied to Employer Health Care Plans with Stop-Loss Insurance*, 23 J. LEGIS. 307, 308 (1997).

60. The clause provides that "an employee benefit plan . . . shall [not] be deemed to be an insurance company or other insurer . . . in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies." 29 U.S.C. § 1144(b)(2)(B) (2017). Any healthcare plan "established or maintained by an employer" is an employee benefit plan under ERISA. 29 U.S.C. § 1002(1) (2017).

61. *Secunda*, *supra* note 44, at 131, 145 (citing COLLEEN MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 307 (2d ed. 2007) (stating that in 2006, 55% of workers with employer-sponsored healthcare coverage were participants in a partially or fully employer-funded plan)).

62. *FMC Corp. v. Holliday*, 498 U.S. 52 (1990).

63. *Id.* at 65.

ultimately did not benefit the claimant because the law, as applied to a self-funded plan, fell within ERISA's deemer clause.⁶⁴

III. SUPREME COURT JURISPRUDENCE ON ERISA REMEDIES FOR PLAN REIMBURSEMENT

A series of Supreme Court cases provides a framework for the right of an ERISA plan to seek reimbursement for medical expenses paid to a plan participant (i.e., participating employee) who later receives a collateral recovery for those expenses. Scholars have been critical of both the reasoning and the consequences of those rulings, not least because Congress may never have intended what the Court has imputed to it.

A. *Appropriate Equitable Relief*—*Mertens and Its Progeny*

ERISA itself has no provision granting covered plans a right of subrogation or reimbursement. ERISA does provide a cause of action authorizing a participant, beneficiary, or fiduciary “to obtain . . . appropriate equitable relief . . . to enforce any . . . terms of the plan,” also known as the “catchall provision.”⁶⁵

1. ERISA Authorizes Only “Equitable” Relief

In *Mertens v. Hewitt Associates*, a pension plan sponsor defaulted on some benefits.⁶⁶ The injured beneficiaries pursued compensatory damages under 29 U.S.C. § 1132(a)(3) against a nonfiduciary, an actuarial firm, for willingly participating in an ERISA-specified fiduciary's breach of duty.⁶⁷ The Supreme Court skirted the certified question regarding nonfiduciary liability in holding that “equitable” relief under ERISA did not authorize consequential monetary damages.⁶⁸ Justice Scalia, for the majority, wrote that the term “equitable relief” refers to the “categories of relief that were typically available in equity (such as injunction, mandamus, and restitution).”⁶⁹ Because compensatory damages were the classic form of *legal*, as opposed to equitable relief, ERISA's catchall provision did not authorize them.⁷⁰ The struggle to

64. Morrissey, *supra* note 59, at 309–10.

65. 29 U.S.C. § 1132(a)(3) (2017).

66. John H. Langbein, *What ERISA Means by “Equitable”*: *The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COL. L. REV. 1317, 1348–49 (2003).

67. *Id.*

68. *Id.* at 1349–50.

69. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993).

70. *Id.* at 248.

determine what relief sought under ERISA falls in an *equitable* category began with *Mertens*.

2. Reimbursement of Health Plans Under ERISA

Next, in *Great-West Life & Annuity Insurance Company v. Knudson*, the Supreme Court reaffirmed the *Mertens* conception of equitable relief as encompassing the forms of relief typically available in equity.⁷¹ The Court established a two-prong test for whether a plaintiff seeks “equitable relief” under ERISA: both “the basis for [the plaintiff’s] claim” and the nature of the underlying remedies sought” must be equitable.⁷² In order to satisfy those prongs, Justice Scalia recommended consulting standard current works on equity.⁷³ *Great-West* sought an injunction to compel the payment of money past due under a contract.⁷⁴ The basis for that claim was not equitable, but legal.⁷⁵ *Great-West* alternatively sought restitution, which it characterized as equitable relief.⁷⁶ The Court held that restitution could be either legal or equitable; the nature of the remedy sought by *Great-West* was not equitable because it sought personal liability and not a lien against a particular fund.⁷⁷

The Supreme Court’s 2006 decision in *Sereboff* expanded healthcare plans’ power to receive reimbursement.⁷⁸ The *Sereboffs* suffered injuries from an auto accident, and Mid Atlantic paid their medical expenses under a plan covered by ERISA.⁷⁹ After the *Sereboffs* settled a tort suit with third parties, Mid Atlantic sued the *Sereboffs* under 29 U.S.C. § 1132(a)(3) to enforce the “Acts of Third Parties” reimbursement provision in the plan.⁸⁰ Pending outcome of the suit, the *Sereboffs* set aside the amount claimed in an investment account.⁸¹ The *Sereboff* Court distinguished *Great-West* on the ground that in *Great-West*, the funds claimed were in a trust and not in the defendant’s possession.⁸² Instead, the Court relied on *Barnes v. Alexander*⁸³

71. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002).

72. *Id.* at 213 (alteration in original) (citation omitted).

73. *Id.* at 217.

74. *Id.* at 210.

75. *Id.* at 211.

76. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002).

77. *Id.* at 212–14.

78. Kristin L. Huffaker, *Where the Windfall Falls Short: “Appropriate Equitable Relief” after Sereboff v. Mid Atlantic Medical Services, Inc.*, 61 OKLA. L. REV. 233, 234 (2008).

79. *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 360 (2006).

80. *Id.*

81. *Id.*

82. *Id.* at 362.

83. *Barnes v. Alexander*, 232 U.S. 117 (1914).

in holding that Mid Atlantic's claim was indistinguishable from an "equitable lien by agreement" and that Mid Atlantic could "follow" a portion of the recovery into the Sereboffs' hands as soon as the fund was identified.⁸⁴ Thus, the *Sereboff* decision authorized healthcare plans to assert any right of reimbursement provided for by the plan terms against any "specifically identifiable" funds that are "within the possession and control" of the participant.⁸⁵

Next, the Supreme Court decided *US Airways, Inc. v. McCutchen*, where a health plan pursued reimbursement of \$66,866 from a participant who received \$66,000 after subtraction of the attorney's fee from a third-party settlement.⁸⁶ McCutchen argued that unjust enrichment principles should reduce the plan's recovery.⁸⁷ Specifically, McCutchen contended that in equity, an insurer could recover no more than an insured's "double recovery": that which was received from the third party that compensated for the same loss as the insurance already covered.⁸⁸ McCutchen also argued that the "common-fund doctrine" should apply, reducing the amount paid to the insurer by the proportion of the attorney's fee, and therefore accurately reflect the cost of obtaining the recovery.⁸⁹ The Court followed *Sereboff* in holding that the agreement itself (the ERISA plan's terms) governs since the nature of the lien was an "equitable lien by agreement."⁹⁰ The plan term requiring reimbursement was as follows:

If [US Airways] pays benefits for any claim you incur as the result of negligence, willful misconduct, or other actions of a third party, . . . [y]ou will be required to reimburse [US Airways] for amounts paid for claims out of any monies recovered from [the] third party, including, but not limited to, your own insurance company as the result of judgment, settlement, or otherwise.⁹¹

But even though the terms of the plan will control subrogation rights and defenses, the silence of the plan may allow equitable defenses, such as the

84. *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 364–65 (2006).

85. *Id.* at 362–63.

86. *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 92 (2013).

87. *Id.* at 95–96.

88. *Id.*

89. *Id.* The common-fund doctrine is supposed to prevent freeloading. T. Leigh Anenson, *Equitable Defenses in the Age of Statutes*, 36 REV. LITIG. 659, 666 n.17 (2018).

90. *McCutchen*, 569 U.S. at 98.

91. *Id.* at 92 (alterations in original).

common-fund doctrine, as an appropriate default understanding of the parties' intent.⁹²

The effect of *McCutchen* was dramatic. If the plan terms so provide (and after *McCutchen* there is no reason why they would not),⁹³ an ERISA plan administrator is armed with a right to reimbursement enforceable solely in federal court. That reimbursement is not subject to reduction by either state laws restricting subrogation nor by equitable defenses that reflect the reality of the cost of obtaining a settlement.

3. Right of Reimbursement Against a Workers' Compensation Settlement

A health plan can seek reimbursement from a workers' compensation settlement.⁹⁴ In an unpublished decision, a federal trial court followed *Holliday* in finding that ERISA preempted a state law prohibiting health plans from imposing a lien against workers' compensation awards.⁹⁵ Although decided before *McCutchen*, the court in *Tackett* used the same reasoning in holding that the terms of the plan control, and that the term at issue was "crystal clear."⁹⁶ The plan term at issue was as follows:

[A] plan participant must repay plan benefits when "you or your covered Dependent *achieve any recovery whatsoever*, through a legal action or settlement in connection with any sickness or Injury alleged to have been caused by a third party, *regardless* of whether or not some or all of the amount recovered was specifically for the Medical or Dental expenses for which Plan benefits were paid[.]"⁹⁷

Although the settlement documents stipulated that no portion of the settlement represented payment for medical expenses, the court found that the \$105,000 settlement undercut that representation and that the language

92. *Id.* at 101–102.

93. "Federal case law has provided plan sponsors of the Employee Retirement Income Security Act of 1974 (ERISA) covered plans with the ability to insert plan provisions that are more favorable to the plan sponsor rather than the plan participant or beneficiary." Kathryn J. Kennedy, *Protective Plan Provisions for Employer-Sponsored Employee Benefit Plans*, 18 MARQ. BENEFITS & SOC. WELFARE L. REV. 1, 1 (2016).

94. *Graphic Commc'ns Nat'l Health & Welfare Fund v. Tackett*, No. 07-cv-0123-MJR, 2008 U.S. Dist. LEXIS 38121 (S.D. Ill. May 9, 2008).

95. *Id.* at *7.

96. *Id.*

97. *Id.* at *7–8 (alteration in original).

was an attempt to circumvent the plan's lien.⁹⁸ The court regretted that the reimbursement caused the injured workers to receive less money for their injuries, but said that the situation could have been avoided if the health plan had been invited to the negotiation table.⁹⁹ The *Employer's Guide to Self-Insuring Health Benefits* noted that this decision adds workers' compensation awards to the types of funds accessible to reimbursement actions.¹⁰⁰

This line of Supreme Court decisions has practical ramifications for workers' compensation claimants. The claimant must entice the ERISA plan administrator to the negotiation table along with the employer and workers' compensation insurer. If the ERISA plan does not agree to abide by the settlement's allocation of past medical expenses, it has a Supreme-Court-approved right to recover against the full settlement proceeds, an amount that might be significantly reduced by a claimant's need for speedy relief to feed hungry mouths at home. While the settlement's allocation of past medical expenses in *Tackett* was plainly a sham,¹⁰¹ the Supreme Court gives a more honest claimant no greater likelihood of protection.

B. *Scholarly Criticism of the Supreme Court's Framework*

Many scholars have been critical of the Supreme Court's jurisprudence on "equitable relief" under ERISA. A more colorful critic, Professor Secunda, wrote that the *Mertens* definition of "equitable relief" led to fifteen years of Supreme Court cases that were "bizarre and contrary to the original purposes of ERISA."¹⁰²

1. A High Court Schism

Professor Secunda described a decades-long Supreme Court battle, beginning in *Massachusetts Mutual Life Insurance Co. v. Russell*, between a literalist approach, strictly limiting ERISA remedies based on structural arguments, and a remedialist approach, seeking to establish ordinary trust law as the touchstone for ERISA's remedies.¹⁰³ Professor Muir, whose work on ERISA remedies was cited in *Great-West*,¹⁰⁴ gave a milder reproach when

98. *Id.* at *9.

99. *Id.* at *11.

100. EMPLOYER'S GUIDE TO SELF-INSURING HEALTH BENEFITS § 720 (2019).

101. *Graphic Commc'ns Nat'l Health & Welfare Fund v. Tackett*, No. 07-CV-0123-MJR, 2008 U.S. Dist. LEXIS 38121, at *9 (S.D. Ill. May 9, 2008).

102. Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L.J. 131, 149 (2009).

103. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985); Secunda, *supra* note 102, at 159–60.

104. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212–213, 215 (2002).

she said that evaluating whether a remedy was typically available in equity is a “quixotic mission.”¹⁰⁵ Justice Ginsburg, dissenting in *Great-West*, criticized the literalist majority as “exhum[ing] . . . an ancient classification unrelated to the substance of the relief sought; and . . . obstruct[ing] the general goals of ERISA.”¹⁰⁶

Following *Great-West*, Professor Langbein wrote an oft-cited article criticizing the literalists’ approach to “equitable relief.”¹⁰⁷ His criticism had two parts: first, the Supreme Court fumbled its technical understanding of historical equity practice, and second, the Court ignored Congress’s intention to subject covered plans to pre-existing trust law. In *Mertens*, Justice Scalia listed injunction, mandamus, and restitution as the typical categories of equitable relief, but he was obliged to walk back that characterization of restitution in *Great-West*, while mandamus was exclusively a legal remedy—“a gaping historical error.”¹⁰⁸ Professor Langbein explained that Congress made every benefit plan a trust, specified the ways in which a person becomes a fiduciary thereof, described the essentials of fiduciary law, and created the means for federal courts to develop a common law of ERISA plans,¹⁰⁹ only for its remedies, which track traditional trust remedies, to be gutted by restrictive Court decisions.¹¹⁰

Professor Secunda cataloged some glaring instances of particularly unjust results from the intersection of ERISA’s preemption provisions and judicial interpretation of its remedial provisions.¹¹¹ For example, in *Corcoran v. United Healthcare, Inc.*, a patient with a high-risk pregnancy was denied an extended hospital stay by her health plan against the recommendation of her doctor.¹¹² After she returned home, she lost the baby.¹¹³ She and her husband filed a wrongful death lawsuit based on the negligence of the health plan, which the defendants removed to federal court on ERISA preemption grounds.¹¹⁴ The Fifth Circuit held that the only possible remedy was a benefits

105. Dana Muir, *From Schism to Prism: Equitable Relief in Employee Benefit Plans*, 55 AM. BUS. L.J. 599, 624 (2018).

106. *Great-West*, 534 U.S. at 224.

107. John H. Langbein, *What ERISA Means by “Equitable”*: *The Supreme Court’s Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317 (2003).

108. *Id.* at 1321.

109. *Id.* at 1324–33.

110. *Id.* at 1355.

111. Secunda, *supra* note 102, at 155–58.

112. *Corcoran v. United Healthcare*, 965 F.2d 1321, 1324 (5th Cir. 1992), *abrogated on other grounds by Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993).

113. *Id.*

114. *Id.* at 1324–25.

eligibility determination under ERISA § 1132(a)(1)(B), and that compensatory and punitive damages were wholly unavailable.¹¹⁵

2. The Drafter's Intent as to ERISA Remedies

Statements from individuals involved in creating ERISA have suggested that the Supreme Court's convoluted pronouncements of "equitable" relief are merely due to clumsy drafting. Frank Cummings, counsel for the Senate Labor Committee and involved with early drafts of ERISA,¹¹⁶ criticized the *Mertens* decision when he said "we knew damn well you could get money in equity" because he practiced in Maryland before the merger of law and equity.¹¹⁷ Robert Nagle, the General Counsel of the Senate Committee on Labor and Public Welfare during the period before the passage of ERISA,¹¹⁸ said:

[ERISA] Section 502(a)(3)¹¹⁹ . . . was clearly intended . . . to provide any sort of appropriate relief. . . . [D]rafting carelessness gave Scalia the opening to do what he did. . . . [I]t was an inadvertent mistake. If anybody had said in our drafting group, "wait a minute, we've got legal and equitable everywhere else, let's put . . ." we would have said, "of course." I mean there was no intention whatsoever to restrict the sort of relief.¹²⁰

Regardless of what the drafters intended, a party seeking recovery under an ERISA cause of action must hew to Supreme Court guidance on available remedies.

3. A Refined Understanding of *Great-West's* Two-Prong Test

In *Great-West*, the Supreme Court established a two-prong test for whether a plaintiff seeks "equitable relief" under ERISA: both "the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought"

115. *Id.* at 1338.

116. *Panel 1: Setting the Stage: History Before the Ninety-Third Congress*, 6 DREXEL L. REV. 265, 267 & n. 3 (2014).

117. *Panel 4: ERISA and the Fiduciary*, 6 DREXEL L. REV. 359, 374 (2014).

118. *Panel 2: Making Sausage—the Ninety-Third Congress and ERISA*, 6 DREXEL L. REV. 291, 296 (2014).

119. Codified at 29 U.S.C. § 1132.

120. *Panel 6: Benefit Disputes and Enforcement Under ERISA*, 6 DREXEL L. REV. 409, 421–22 (2014).

must be equitable.¹²¹ Professor Muir sheds some light on this test by discussing an exploration of fifteen years of Supreme Court equity cases conducted by Professor Bray.¹²² The Court gradually shifted in its law of remedies over eleven different cases during that timeframe, including *Great-West*, *Sereboff*, and *McCutchen*.¹²³ According to Professor Bray, the historical investigation encouraged by the Court is “a fool’s errand.”¹²⁴ The fundamental questions the Court answers are “Is the requested relief equitable?” and “What principles shape the availability of equitable relief?”¹²⁵ Professor Muir applies this understanding to *Great-West*’s test: the “nature of the underlying remed[y]” prong asks whether the requested relief is equitable, and the “basis of the claim” prong asks what principles shape the availability of equitable relief.¹²⁶

The Supreme Court has not applied its two-prong test consistently in each successive case.¹²⁷ Rather than using its own test as a test, the Court has used it as a sandbox to “construct[] an idealized history of equity.”¹²⁸ However, Professor Bray considers this to be good jurisprudence:¹²⁹ it allows a middle ground between Justice Scalia’s historical and unpersuasive “static approach”¹³⁰ and Justice Ginsburg’s unhelpful appeal to the “grand aims of equity.”¹³¹ By exploring whether the nature of the underlying remedy sought is equitable, or stated another way, whether the requested relief is equitable, relief under ERISA’s remedies provisions can be shaped according to equitable principles.

IV. AN INJURED WORKER’S QUAGMIRE

Although the Supreme Court has dealt four times with reimbursement of an ERISA plan in the context of a third-party *tort* recovery,¹³² it is unlikely to

121. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002) (alteration in original) (citation omitted).

122. Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997 (2015); Muir, *supra* note 105, at 650–53.

123. Bray, *supra* note 122, at 999.

124. *Id.* at 1016–17.

125. *Id.* at 1008.

126. Muir, *supra* note 105, at 650–53.

127. *Id.* at 650.

128. Bray, *supra* note 122, at 1014.

129. *Id.* at 1020.

130. *Id.* at 1019.

131. *Id.* at 1012.

132. *Montanile v. Bd. of Trs. of Nat’l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 656 (2016); *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 92 (2013); *Sereboff v. Mid Atlantic*

revisit the issue in the context of a workers' compensation claim. A contested compensation claim subject to reimbursement by an ERISA plan is unlikely to go to a trial, let alone go through the several appeals needed to clarify or refine Supreme Court precedents in the specific context of a workers' compensation settlement. Workers' compensation relief is not a windfall. A looming ERISA lien compounds the risks, delays, and expenses that might make the difference between the time when relief is most needed and when relief might come too late.

A. *The Difficulty of Obtaining Relief*

A diligent lawyer will generally avoid settling one lawsuit only to expose a client to another. Therefore, a lawyer should inquire into any obligation to reimburse a healthcare plan before resolving a compensation claim. This inquiry broadly involves three steps.¹³³ First, if medical expenses have already been paid, the lawyer should determine whether ERISA governs the healthcare plan; if the plan is employer-provided, then ERISA likely covers it.¹³⁴ Second, the lawyer must "determine how the [ERISA] plan is funded," requiring investigation into ERISA-mandated federal filings.¹³⁵ Funding is relevant to determine whether relevant state law is preempted.¹³⁶ Third, the lawyer should investigate the healthcare plan's terms by issuing an ERISA document request to determine the extent of the right of subrogation or reimbursement and whether common-law equitable defenses have been exempted by the plan.¹³⁷ Guidance for plan drafters urges "explicit subrogation and reimbursement rights" along with the refutation of any common-law equitable defenses.¹³⁸ After *McCutchen*, there is a significant incentive for the employer to include such provisions in the plan, with no downside.¹³⁹

If the lawyer has found an obligation on the part of the client to reimburse the plan, obtaining a settlement involves a calculation that has very little

Med. Servs., Inc., 547 U.S. 356, 360 (2006); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 207 (2002).

133. Kristen S. Cross et al., *ERISA-Governed Healthcare Liens*, 78 ALA. LAW. 346, 349 (2017).

134. *Id.*

135. *Id.*

136. See *supra* text accompanying notes 60–64.

137. Cross, *supra* note 133, at 349.

138. Kathryn J. Kennedy, *Protective Plan Provisions for Employer-Sponsored Employee Benefit Plans*, 18 MARQ. BENEFITS & SOC. WELFARE L. REV. 1, 49 (2016); EMPLOYER'S GUIDE TO SELF-INSURING HEALTH BENEFITS ¶ 720 (database updated Mar. 2016).

139. Kennedy, *supra* note 138, at 48–49.

margin. As part of the “grand bargain” underlying the compensation system, a claimant’s recovery consists solely of medical benefits and wage-loss benefits.¹⁴⁰ If the potential medical benefits are subject to reimbursement without reduction, then the potential recovery for wage-loss benefits alone must cover all the expenses involved in making a claim. Those expenses include the costs of the action, such as medical witness fees.¹⁴¹ Expenses also include, in effect, any reduction in recovery due to a settlement.¹⁴² They must also include an attorney’s fee, whether paid as a contingency from a settlement or as a statutorily set amount from an award of benefits.¹⁴³

Finally, the client needs to have something left over to compensate, at least partially, for the loss sustained. Even before deducting the expenses of bringing a claim, wage-loss benefits merely keep an injured worker from destitution.¹⁴⁴ Furthermore, a claimant’s pre-injury average weekly wage dictates any wage-loss benefits, so the margin is even smaller for a lower-wage claimant.¹⁴⁵ Under the weight of the costs of an action, the price of an attorney, and the inherent compromise of a settlement, a claimant who is obligated to pay an unreduced reimbursement to a healthcare plan is less likely to receive any real compensation. The claimant will be unable to obtain a settlement and is left only with the risk of an all-or-nothing award decision. Furthermore, if an appeal after the initial compensation hearing and decision becomes necessary, then the prospect of a positive outcome becomes even more marginal, and an appeal less likely. Therefore, a compensation claimant will probably never come before the Supreme Court, and lower courts are left with the black-and-white logic of *McCutchen*: the plan terms exclusively control whether a reimbursement can be reduced.

B. *An Employee Should Not Be Punished for Having a Disputable Claim*

A claimant described in the above section suffers a significant possibility that wage-loss benefits will be unrecoverable merely because some aspect of the claim is disputable, and an administrator has denied compensation benefits. But if the claimant has already had healthcare expenses paid, should

140. See *supra* text accompanying notes 22–24.

141. 13 LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW §§ 134.01, 134.02, 134.03 (Matthew Bender, Rev. Ed. 2019).

142. *Id.* at § 132.03.

143. See *supra* text accompanying notes 42–43.

144. 13 LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 133.01 (Matthew Bender, Rev. Ed. 2019); Jay M. Zitter, Annotation, *Validity, Construction, and Effect of Statutory Exemptions of Proceeds of Workers’ Compensation Awards*, 48 A.L.R.5th 473 (1997).

145. 8 LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 93.01(1)(a) (Matthew Bender, Rev. Ed. 2019).

the possibility of not recovering wage-loss benefits be an acceptable risk because the claim is tenuous? After all, in a *legitimate* claim, benefits are supposed to issue automatically.¹⁴⁶ Not quite: under employer-provided healthcare coverage, the employee pays any deductible, co-insurance, or co-pay out of pocket as specified by the plan. Under compensation coverage, the employee does not pay any medical expenses out of pocket, so long as the expenses are “reasonable and necessary” and caused by the work injury.¹⁴⁷ So, the employee is in a comparatively worse position if he is covered only by the healthcare plan. Also, there is still the same need to obtain “prompt, equitable, and adequate benefits” whether or not a portion of those benefits has already been paid.¹⁴⁸

The court in *Tackett*, which held that an ERISA plan could obtain a full reimbursement from a workers’ compensation settlement, felt that the injured worker’s quandary would have been obviated had he invited the health plan to the negotiation table.¹⁴⁹ However, this is not always the case. After *McCutchen*, a health plan armed with favorable terms has no legal obligation to reduce the amount of its lien against a workers’ compensation settlement. Accordingly, an injured worker has no leverage by which to ensure that he can recover at least some ultimate recovery from the compensation insurer.

V. ASCERTAINING THE PARAMETERS OF APPROPRIATE EQUITABLE REIMBURSEMENT

Although some might call it a fool’s errand, determining whether requested relief is equitable requires determining what relief a court of equity could provide.¹⁵⁰ That analysis requires more than citing cases that effectively grant a means to enforce the written terms of a contract. In *Sereboff*, the

146. See *supra* note 40 and accompanying text.

147. 8 LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 94.03(1) (Matthew Bender, Rev. Ed. 2019).

148. See *supra* note 43.

149. Graphic Commc’ns Nat’l Health & Welfare Fund v. Tackett, No. 07-CV-0123-MJR, 2008 WL 2020504, at *4 (S.D. Ill. May 9, 2008).

150. This is the starting point of the inquiry, but it is not the end. “[The Supreme Court] ha[s] long rejected the argument that ‘equitable relief’ under § 502(a)(3) [codified at 29 U.S.C. § 1132(a)(3)] means ‘whatever relief a court of equity is empowered to provide in the particular case at issue,’ including ancillary legal remedies.” *Montanile v. Bd. of Trs. of Nat’l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 660 (2016) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993)). The remedy must be *distinctively* equitable. Historically, equity courts could award distinctively legal relief as part of their ancillary jurisdiction. *Id.* at 661. According to the Supreme Court, these distinctively legal remedies are not authorized by 29 U.S.C. § 1132(a)(3). *Id.*

Court found that Mid Atlantic sought to enforce a lien based on an agreement.¹⁵¹ In *McCutchen*, the Court looked exclusively to the plan terms to determine the parties' agreement, saying "if the agreement governs, the agreement governs."¹⁵² But to ascertain the true nature of an agreement, a court of equity will ultimately look to the intent of the parties.¹⁵³

A. *The Adhesive Nature of an ERISA Plan*

According to *McCutchen*, express terms of the contract prevail over background equitable principles.¹⁵⁴ But would a court of equity enforce a provision in health plan boilerplate language when the party against whom the provision is enforced could not reasonably have understood its impact?

1. Adhesion Contracts

When obtaining employer-provided health care, an employee is faced with a take-it-or-leave-it contract. The provisions contained within the fine print of an employee fringe benefit are not dickered terms. The plan sponsor—the employer—"unilaterally set[s the plan] terms," including subrogation and reimbursement provisions.¹⁵⁵ This sort of contract acquired the label "adhesion contract" in the twentieth century after the industrial revolution prompted the ubiquity of take-it-or-leave-it form contracts.¹⁵⁶ Raymond Saleilles, who coined the term, defined an adhesion contract as "preformulated stipulations in which the offeror's will is predominant and the conditions are dictated to an undetermined number of acceptants and not to one individual party."¹⁵⁷ Characteristics added by later commentators include:

(a) [T]he continuing and general nature of the offer, (b) the monopolistic position or at least the great economic power of the offeror, (c) a widespread demand for the goods or services offered, and (d) the use of standard forms of type contracts, the stipulations of which serve mostly the interests

151. *Sereboff v. Mid Atlantic Med. Servs., Inc.*, 547 U.S. 356, 364 (2006).

152. *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 99 (2013).

153. *See infra* Section V.B.

154. *McCutchen*, 569 U.S. at 103.

155. Dana Muir, *From Schism to Prism: Equitable Relief in Employee Benefit Plans*, 55 AM. BUS. L.J. 599, 661 (2018).

156. Vera Bolgár, *The Contract of Adhesion – A Comparison of Theory and Practice*, 20 AM. J. COMP. L. 53, 55 (1972).

157. *Id.* at 54.

of the offeror and the reading, let alone the understanding of which, presents difficulties to the offeree.¹⁵⁸

There can be no doubt that the terms of an employee fringe benefit fall squarely within this definition. The ERISA plan sponsor, the employer, offers healthcare as a fringe benefit to whomever it determines is eligible. The employee has no negotiating power over the ERISA plan's terms and must take them as they are to receive benefits for medical care, a most basic and widespread human need.¹⁵⁹ Unless the offeree–employee happens to be a lawyer familiar with equitable defenses, the offeree doubtlessly has difficulty in reading and understanding what a plan means when it excludes the made-whole rule and the common-fund doctrine within its subrogation provision.

The presence of an adhesion contract in contract enforcement is relevant for two broad reasons: a contract's validity according to the adhering party's assent thereto, and public policy that shields an adhering party from the form contract's consequences.¹⁶⁰ The official comment to the Uniform Commercial Code (UCC) section on unconscionability summarizes the public policy as “the prevention of oppression and unfair surprise . . . and not of disturbance of [the] allocation of risks because of superior bargaining power.”¹⁶¹ But the bar is high for a court to find a signed contract unconscionable, and courts are reluctant to interfere with express terms.¹⁶² Under the unconscionability section of the UCC, courts have voided all or part of a contract if there was manifest unreasonableness, oppression, unfair surprise, inconsistency with the contract's context, fine print obscuring disclaimers, parties' expectations contrary to the terms, or impairment of previous agreements.¹⁶³

2. In Framing “Equitable Relief” Under ERISA, the Supreme Court Has Not Considered the Adhesiveness of ERISA Plans

When the Supreme Court approved the validity of enforcing an equitable lien by agreement under ERISA, the two cases it relied upon “from the days of the divided bench” involved contracting parties exercising much more autonomy than an employee does in signing a form contract from a plan

158. *Id.*

159. Dana Muir & Norman Stein, *Two Hats, One Head, No Heart: The Anatomy of the ERISA Settlor/Fiduciary Distinction*, 93 N.C. L. REV. 459, 518–19 (2015).

160. Bolgár, *supra* note 156, at 55.

161. U.C.C. § 2-302 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

162. Bolgár, *supra* note 156, at 71.

163. *Id.* at 73.

sponsor.¹⁶⁴ In *Barnes v. Alexander*, two attorneys performed work for Barnes, who agreed to pay “one-third of the contingent fee” that he was to receive.¹⁶⁵ This created a lien that the other attorneys could recover once Barnes had the identified fund in his hands.¹⁶⁶ The bargain between the two attorneys was an archetypical arm’s-length business transaction. In *Walker v. Brown*, Brown transferred bonds worth \$15,000 in order to assist the corporation Lloyd & Co.¹⁶⁷ In order to facilitate business with a supplier, Brown agreed that the bonds would function as security for any debt the supplier had against Lloyd & Co.¹⁶⁸ This, too, was an arm’s-length transaction, established by a letter created for the purpose, and not by Brown adhering to a complex and lengthy set of terms as is found in an ERISA plan.

The Supreme Court in *McCutchen* pointed out that the defendant (against whom the insurer sought reimbursement) and the United States as *amicus curiae* “fail[ed] to produce a single case in which an equity court applied [equitable defenses] when a contract provided to the contrary. . . . [A]ll provisions of [an] agreement controlled.”¹⁶⁹ This reasoning is circular. The question is not whether equitable defenses should apply contrary to the agreement, but what terms constitute the actual agreement. When a health plan expressly excludes the common-fund rule and the made-whole doctrine, in as many words, has an employee truly agreed that he will reimburse the health plan out of any worker’s compensation settlement he receives, regardless of how much of that settlement represented past medical expenses? Unless the employee is well-acquainted with the meaning of equitable defenses or consults a lawyer before agreeing to employer-provided healthcare, the contention that he has made such an agreement is incredible.

An employee, even one who scrupulously reads an employer-provided health plan’s terms, might be surprised to learn that some of those terms impaired the ability to receive workers’ compensation relief.¹⁷⁰ The context of entering the health plan agreement is that of an employment relationship, which in all fifty states includes both the state-mandated fringe benefit of compensation for a work injury and the ability to contest a right to relief after an initial claim has been denied. Both parties—the employee and the plan

164. *Sereboff v. Mid Atlantic Med. Servs., Inc.*, 547 U.S. 356, 363 (2006).

165. *Barnes v. Alexander*, 232 U.S. 117, 121 (1914).

166. *Id.* at 123.

167. *Walker v. Brown*, 165 U.S. 654, 655 (1897).

168. *Id.* at 663.

169. *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 100 (2013).

170. See *supra* text accompanying notes 91 and 97 for the plan reimbursement language from *McCutchen* and *Tackett*.

sponsor—have the expectation of workers' compensation in the background, even though the plan terms do not mention it.

ERISA authorizes “appropriate equitable relief . . . to enforce any provisions of . . . the terms of the plan.”¹⁷¹ The *appropriate* equitable relief authorized under ERISA ought to be enforcement of the terms of the plan insofar as they reflect the agreement of the parties. When a plaintiff seeks to enforce a plan term, the nature of the underlying remedy sought is not equitable if the manner of the enforcement cuts against the intent of the parties in coming to an agreement.

B. *Equitable Maxims Applied to an ERISA Plan Agreement*

Judicial recognition of adhesion contracts, as well as the UCC, arose largely after the merger of the courts of law and equity. But the principles in play are well known to equity. The system of equity was founded “upon the eternal verities of right and justice” as condensed into ordered principles.¹⁷² Equitable maxims are pithy statements embodying the principles underlying equitable jurisprudence.¹⁷³ Two equitable maxims, “equity regards that as done which ought to be done” and “equity looks to the intent rather than to the form,” are inextricably related.¹⁷⁴ Equity must look to the intent and not merely to the form to ascertain what ought to be done.¹⁷⁵

Equity always attempts to get at the substance of things, and to ascertain, uphold, and enforce rights and duties which spring from the *real* relations of the parties. It will never suffer the mere appearance and external form to conceal the true purposes, objects, and consequences of a transaction.¹⁷⁶

Equitable liens arise from the operation of these two maxims. At law, a contract action could give, at most, a remedy of damages, while equity gives effect to the real intent of the parties by giving a lien upon specific property of the promisor.¹⁷⁷ The Supreme Court decisions in *Great-West* and

171. 29 U.S.C. § 1132(a)(3) (2012).

172. 1 POMEROY'S EQUITY JURISPRUDENCE § 59, at 75–76 (Spencer W. Symons ed., 5th ed. 2002).

173. 2 POMEROY'S EQUITY JURISPRUDENCE § 360, at 4–5 (Spencer W. Symons ed., 5th ed. 2002).

174. 2 POMEROY'S EQUITY JURISPRUDENCE § 378, at 41 (Spencer W. Symons ed., 5th ed. 2002).

175. *Id.*

176. *Id.* (emphasis in original).

177. *Id.* § 380 at 44.

Montanile denying reimbursement to health plans relied upon this aspect of equitable liens.¹⁷⁸

Another maxim of equity, “he who seeks equity must do equity,” expresses the foundational principle that a court of equity must determine rights and remedies in accordance with conscience and good faith.¹⁷⁹ Application of the maxim takes the more specific sense that in granting equitable relief, the court must acknowledge and concede all the equitable rights that belong to the defendant and relate to the controversy at hand.¹⁸⁰ Relief is conditional upon the plaintiff giving the defendant any corresponding equitable rights.¹⁸¹ For the equity belonging to the defendant to sufficiently “relate to” the relief sought by the plaintiff, it must “grow[] out of the very controversy before the court, or out of such transactions as the record shows to be a part of its history.”¹⁸²

When a court grants equitable relief in the form of reimbursement to a health plan, it ought to take into account the equities of the plan participant. Here, the situation of an injured worker who has obtained a workers’ compensation settlement diverges from the cases reviewed by the Supreme Court, where the party against whom reimbursement is sought has obtained a third-party tort settlement. The right to retain the proceeds of a third-party tort settlement does not arise out of any relationship between the plan participant and the health plan. The tort settlement contract is between the injured party and the tortfeasor. That transaction is not part of the history of any controversy between the employee and the employer. In contrast, the right to workers’ compensation benefits certainly is part of that history. The employment relationship is the critical link.

The operation of state law creates an implicit term in every employment contract that a worker has a right to receive wage-loss benefits and medical treatment for a work-related injury. The employer is obligated to provide those benefits, even though it usually shifts the burden of fulfilling that obligation to an insurer. A settlement agreement between the insurer and employee binds the employer: “the insurer is the employer’s alter ego.”¹⁸³ An

178. *Montanile v. Bd. of Trs. of Nat’l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 660 (2016); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002).

179. 2 POMEROY’S EQUITY JURISPRUDENCE § 385, at 51 (Spencer W. Symons ed., 5th ed. 2002).

180. *Id.* at 51–52.

181. *Id.* at 52.

182. *Id.* § 387 at 59.

183. 13 LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 132.06(2) (Matthew Bender, Rev. Ed. 2019).

employer must abide by the terms of a settlement agreement even if it is not directly a party to the agreement.

When an employee contracts to receive ERISA-governed health benefits, the bargain is with the employer. ERISA only governs benefit plans that are “maintained by the employer.”¹⁸⁴ Even though a plan administrator seeking reimbursement acts as a fiduciary for (i.e., on behalf of) the plan and its beneficiaries, ignoring the employment origin of the healthcare plan would be ignoring the “*real* relations of the parties.”¹⁸⁵ Commentators have made much of the distinction between a plan settlor¹⁸⁶ and a plan fiduciary for purposes of determining a breach of fiduciary duty.¹⁸⁷ Generally speaking, that distinction is relevant for the purposes of whether an employer, as plan sponsor, breaches any fiduciary duty under ERISA by amending the plan. But a plan fiduciary, in enforcing an existing plan, must abide by the terms of the plan as agreed between the employee-participant and the employer-sponsor. The expectation of the employee to receive, and of the employer to pay, workers’ compensation benefits lurks in the background of that agreement.

VI. EQUITABLE SOLUTIONS FOR THE WORKER’S QUAGMIRE

When Congress passed ERISA, it did so to protect employee benefits.¹⁸⁸ Congress could not have foreseen ERISA’s collateral interference with well-established employee benefit schemes. But until Congress issues a legislative remedy, injured workers must make do with judicial ones. To counter a health plan’s action to enforce an equitable lien against a workers’ compensation settlement under 29 U.S.C. § 1132(a)(3), an employee could raise several defenses. First, the health plan’s terms should be construed or reformed so as not to extend the right of reimbursement to the proceeds of a workers’ compensation settlement because the employer itself, not a third party, paid the settlement. Second, the health plan should be estopped by the terms of the settlement.

184. 29 U.S.C. § 1001(a) (2012).

185. 2 POMEROY’S EQUITY JURISPRUDENCE § 378, at 41 (Spencer W. Symons ed., 5th ed. 2002) (emphasis in original).

186. The plan sponsor, i.e., the employer, who funds the plan and writes its terms. BLACK’S LAW DICTIONARY (11th ed. 2019) defines “settlor” as “[s]omeone who makes a settlement of property; esp., one who sets up a trust.”

187. Muir & Stein, *supra* note 159, at 478.

188. 29 U.S.C. § 1001(a) (2012). “The overarching theme of ERISA was to protect reasonable employee benefit expectations.” Muir & Stein, *supra* note 159, at 521.

A. *Properly Construing the ERISA Plan Agreement*

When a health plan seeks to enforce its right of reimbursement against a participant who has received a third-party settlement, it asks the court for “appropriate equitable relief . . . to enforce . . . the terms of the plan.”¹⁸⁹ The terms of the plan are contained within the plan documents.¹⁹⁰ The appropriate equitable relief to enforce those terms is indistinguishable from an equitable lien by agreement.¹⁹¹ Therefore, the party who seeks enforcement of the plan terms may obtain relief to the extent that an agreement giving effect to the plan terms exists.

1. Enforcement of Contracts in Equity

The touchstone of contract interpretation is the intent of the parties—“equity regards substance rather than form.”¹⁹² While the law “holds parties strictly and literally” to the exact words of an agreement, the considerations of equity in contract enforcement are different than those at law.¹⁹³ Reformation of a contract is an ordinary power of equity, which regards reformation as a “preparatory step” that “establishes the real contract.”¹⁹⁴ In order for a court of equity to reform a contract, a party must show either a mutual mistake, where the written contract does not reflect the actual agreement (the “meeting of the minds”); or a “mistake of one party” along with inequitable conduct or fraud of the other parties.¹⁹⁵ In equity, a mistake means a mental error, induced by a misunderstanding of the truth, but short of negligence.¹⁹⁶ A mistake may be of fact or of law. A mistake of law can take two forms: a party might be ignorant about his existing legal rights but fully understand the effect of the transaction at issue, or a party might be correct about existing legal rights and be mistaken about the effect upon them of the

189. 29 U.S.C. § 1132(a)(3) (2012).

190. 29 U.S.C. § 1102(a)(1) (2012).

191. *Sereboff v. Mid Atlantic Med. Servs., Inc.*, 547 U.S. 356, 364 (2006).

192. 2 POMEROY’S EQUITY JURISPRUDENCE § 378, at 40 (Spencer W. Symons ed., 5th ed. 2002).

193. 4 POMEROY’S EQUITY JURISPRUDENCE § 1297 at 857 (Spencer W. Symons ed., 5th ed. 2002).

194. *CIGNA Corp. v. Amara*, 563 U.S. 421, 441 (2011) (citing 4 POMEROY’S EQUITY JURISPRUDENCE § 1375, at 999 (Spencer W. Symons ed., 5th ed. 2002)).

195. 4 POMEROY’S EQUITY JURISPRUDENCE § 1376, at 1000–01 (Spencer W. Symons ed., 5th ed. 2002).

196. 3 POMEROY’S EQUITY JURISPRUDENCE § 839, at 284–85 (Spencer W. Symons ed., 5th ed. 2002).

transaction into which he enters.¹⁹⁷ A court of equity might hesitate to grant relief for a unilateral “pure and simple” mistake of law, but the balance of justice inclines toward one who is mistaken when the mistake is accompanied by another’s inequitable conduct.¹⁹⁸ Such inequitable conduct need not be intentionally misleading.¹⁹⁹ Equity will not aid a party who knows of another’s mistake and does not correct it, or who induces a mistake by “misrepresentation, imposition, concealment, undue influence, breach of confidence reposed, mental weakness, or surprise.”²⁰⁰

In the days of the divided bench, adhesion contracts were not yet well-recognized. But equity’s treatment of mistakes of law foreshadowed the judicial scrutiny applied to agreements wherein one party has little to no negotiating power and must conform to the agreement as drafted by the stronger party. The contemporary rule is adhesion contracts are enforceable unless unconscionable.²⁰¹ To avoid a contract on grounds of unconscionability, a party must show that he lacked a meaningful choice and that the terms unreasonably favored the drafting party.²⁰² The comment to the UCC unconscionability provision notes that courts have indirectly policed unconscionable contracts by adverse construction of language.²⁰³ The rule of adverse construction, “*in dubio contra proferentem* (the terms are interpreted against the drafting party),” applies to ambiguous terms in a contract of adhesion.²⁰⁴ The overarching goal of courts in enforcing adhesion contracts is “vindication of the free will of the individual,” in consideration of fairness and equity.²⁰⁵

2. Application to ERISA Plan Reimbursement Language

To aid in the task of interpreting reimbursement language, consider this sample subrogation and reimbursement language from the *Employer’s Guide to Self-Insuring Health Benefits*:

Another party may be liable or legally responsible for expenses incurred by a covered person for an illness, a

197. 3 POMEROY’S EQUITY JURISPRUDENCE § 841, at 288 (Spencer W. Symons ed., 5th ed. 2002).

198. 3 POMEROY’S EQUITY JURISPRUDENCE § 847, at 304–05 (Spencer W. Symons ed., 5th ed. 2002).

199. *Id.* at 304.

200. *Id.* at 305.

201. *E.g.*, Smith, Bucklin & Assocs. v. Sonntag, 83 F.3d 476, 480 (D.C. Cir. 1996).

202. *Id.*

203. U.C.C. § 2-302 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM’N 1977).

204. Bolgár, *supra* note 156, at 76–77.

205. *Id.* at 78.

sickness or a bodily injury. Benefits may also be payable under this Plan for such expenses.

....

By accepting benefits the plan participant agrees the Plan shall have an equitable lien on any funds received by the plan participant and/or their attorney from any source and said funds shall be held in trust until such time as the obligations under this provision are fully satisfied.

....

As a condition to participating in and receiving benefits under the Plan, the plan participant agrees to assign to the plan the right to subrogate and pursue any and all claims. The Company may, at its option:

- take over the covered person's right to receive payment of the benefits from the third party.

....

- recover from the plan participant any benefits paid under the Booklet [SPD] which the plan participant is entitled to receive from another party. The company will have a first lien upon any recovery, whether by settlement, judgment or otherwise, that the covered person receives from: (1) the responsible party; (2) the third party's insurer or guarantor; (3) the plan participant's uninsured or underinsured motorist insurance; (4) any first party insurance through medical payment coverage, personal injury protection, no-fault coverage; (5) worker's compensation; or (6) any other source, including but not limited to any school insurance coverage.

This lien will be for the amount of benefits paid by the Company for the treatment of the illness or bodily injury for which the third party is liable or legally responsible. If the Covered Person: (1) makes any recovery as set forth in this provision; and (2) fails to reimburse the Company fully for any benefits paid under this provision; then he will be personally liable to the Company to the extent of such recovery up to the amount of the first lien. The Covered

Person must cooperate fully with the Company in asserting its right to recover.²⁰⁶

Although not included within its sample language, the explanation thereof recommends that “[t]he plan language should specifically reject the ‘made-whole rule’ and ‘common-fund doctrine.’”²⁰⁷ Similarly to the plan language in *McCutchen*, this sample language provides an allocation formula contradicting the equitable double-recovery rule, which would have given the plan participant “first dibs” on the portion of a third-party recovery compensating for losses not covered by the plan.²⁰⁸ Here, the plan has a lien on “any funds received . . . from any source,” the plan shall recover “any benefits paid” out of “any recovery,” and the amount of the lien equals “the amount of benefits paid.”

The context of the ERISA plan agreement is critical to understanding its content. The immediate context is an employment relationship; by definition, ERISA only governs plans “maintained by an employer.”²⁰⁹ An employer offers health coverage to qualifying employees as an integral part of a compensation package: the expense of health benefits is far too great to be a mere gratuity. An employee, seeking to avoid incurring the expense of maintaining his own health coverage, must take or leave the terms of the plan as the employer gives them. An employee’s negotiating power may extend to salary amount, the duration of an employment contract, and perhaps even to a few other particulars. As far as health coverage, an employee may have a choice of insuring either himself or his whole family and might be able to select from a menu of deductible or co-insurance options. By no means does an employee have the power to pick and choose contract boilerplate terms. A reimbursement provision is thus an imposition.

The language of most reimbursement provisions invites a mistake of law on the part of the contracting employee. In all fifty states, an employee and an employer enter their relationship according to the terms of the grand bargain of workers’ compensation²¹⁰ wherein an employee has a right to prompt relief for a work-related injury or disease, and an employer is free from claims of negligence and accompanying tort damages. This implicit agreement constitutes the parties’ existing legal rights before entering the

206. EMPLOYER’S GUIDE TO SELF-INSURING HEALTH BENEFITS ¶ 720 (database updated Mar. 2016); see also text accompanying notes 91 and 97 for the plan reimbursement language from *McCutchen* and *Tackett*.

207. *Id.*

208. *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 103 (2013).

209. 29 U.S.C. § 1002(1) (2012).

210. See *supra* notes 22–33 and accompanying text.

health plan agreement. Even if a diligent employee were to read the contract boilerplate, he would be mistaken as to the effect the contract would have on his existing legal rights.

First, in the sample language excerpted above, reimbursement of a health plan depends upon *another* party becoming responsible for expenses incurred. This recalls the reimbursement language from *McCutchen*, which referred to the “negligence” or “willful misconduct” of “a third party.”²¹¹ Yet workers’ compensation benefits are not derived from *another* party. The employer is obligated to pay workers’ compensation benefits, just as the employer is the offeror of the health plan to which the employee must adhere.

Secondly, the employee might be mistaken as to the extent of the plan’s lien. In order to defeat the gist of the double-recovery rule, the language is not clear on exactly what funds the plan is entitled to enforce its lien against. Though the introductory language says that “[a]nother party may be . . . responsible for expenses incurred . . . for an illness, a sickness, or a bodily injury,” the plan has a lien on funds “from any source.” The lien is upon “any recovery” from five enumerated sources or from “any other source.” Under this language, an enterprising plan might pursue a lien against a participant’s wages or against an inheritance. Such a right would, of course, be manifestly unreasonable. A reasonable interpretation would link “another party[’s]” responsibility “for an illness, a sickness, or a bodily injury” with the plan’s right to “recover . . . any benefits paid . . . which the plan participant is entitled to receive from another party.” Such an interpretation would mirror the double-recovery rule, wherein a right of reimbursement only applies to the amount of a recovery that compensated for the covered loss. The effect of the above-quoted reimbursement provision upon the employee’s existing legal rights is that any compensation benefits representing lost wages or future medical expenses would be subject to health plan reimbursement, along with the portion representing past medical expenses.

A court of equity might not reform a contract if a mistake of law is merely unilateral, but it would do so if the other party knows of the mistake and does not correct it, or induces it by “misrepresentation, imposition, concealment, undue influence, breach of confidence reposed, mental weakness, or surprise.”²¹² The sample language above seeks to exclude the made-whole rule by defining the amount of the lien as the amount of benefits paid. This language suggests a link between the lien and the benefits paid, and thus to the portion of the recovered funds representing such benefits. Much clearer

211. *McCutchen*, 569 U.S. at 92.

212. 3 POMEROY’S EQUITY JURISPRUDENCE § 847, at 305 (Spencer W. Symons ed., 5th ed. 2002).

language would express the fact that the plan may recover against the participant regardless of whether the funds sought were actually compensation for the loss that the paid benefits covered. The ambiguity as to a third-party recovery and as to the funds that the lien seeks constitutes a misrepresentation and concealment of the participant's rights under the agreement. The unsuspecting employee is faced with an unenviable choice: either to accept coverage for the basic human need of healthcare at the risk of compromising compensation benefits, or to preserve state-mandated compensation benefits by rejecting health coverage. This is not a meaningful choice.

If a court of equity were to reform the plan contract, it must do so with regard to the rights of both parties, for “[e]quity suffers not a right to be without a remedy.”²¹³ Equity should preserve a right to reimbursement for the plan, while recognizing a corresponding right in the participant to retain compensation payments made by the employer that represented losses other than those which the employer's health plan covered.

B. *Estopping the Plan from Asserting Its Right to Recovery*

When an ERISA plan seeks to enforce a lien against a workers' compensation settlement, the participant could argue that the plan should be estopped from doing so. As the Supreme Court has noted in an ERISA remedies case, estoppel is another traditional equitable remedy, alongside contract reformation.²¹⁴ Equitable estoppel is defined as the preclusion of a party, by the party's own conduct, from asserting rights against another person who has relied on such conduct and changed his position so as to acquire some corresponding right.²¹⁵ In equity, satisfaction of the elements of fraud is not required for estoppel, though, in a sense, a party's assertion of rights contradicting his former conduct is a fraud upon the rights of the person benefitted by the estoppel.²¹⁶

A workers' compensation settlement often maintains the denial of the claim in exchange for the release of the employer's liability. The terms of the settlement may admit that the employer's health plan has paid medical expenses for the employee's injuries while denying that the settlement

213. *CIGNA Corp. v. Amara*, 563 U.S. 421, 440 (2011) (quoting R. FRANCIS, *MAXIMS OF EQUITY* 29 (1st Am. ed. 1823)).

214. *Id.* at 441.

215. 3 POMEROY'S *EQUITY JURISPRUDENCE* § 804, at 189 (Spencer W. Symons ed., 5th ed. 2002).

216. 3 POMEROY'S *EQUITY JURISPRUDENCE* § 803, at 184–85 (Spencer W. Symons ed., 5th ed. 2002).

compensates for those injuries. The parties to a settlement make these stipulations in order to circumvent state laws prohibiting waiver of statutory compensation rights: if a settlement is made for less than the full statutory benefits (which, by definition, a settlement is), then that agreement would be invalid.²¹⁷ The employer's offer of payment, along with stipulations preventing the invalidity of the agreement, induces the employee to accept the settlement. The employee, in accepting the settlement, changes his position because, in releasing the employer from compensation liability, he is no longer entitled to full statutory benefits. The employer has satisfied the elements of equitable estoppel such that, when seeking to enforce its right of reimbursement, the employer's health plan should be estopped by its stipulation in the compensation settlement that the payment did not compensate for any injury or medical expenses.

An ERISA plan participant and workers' compensation claimant made an estoppel argument in *Brantley v. Pepsi Bottling Group, Inc.*²¹⁸ The ERISA-governed plan was a long-term disability plan rather than a healthcare plan.²¹⁹ The participant settled a workers' compensation claim for about \$35,000 to be "spread out over his actuarial life."²²⁰ According to the settlement, "the set off for . . . disability benefits shall be \$72.66 per month."²²¹ The long-term disability plan administrator reduced the payments by \$1,000, the full amount of payable benefits, in order to offset the workers' compensation settlement in thirty-five months.²²² The participant-claimant sued the employer and its plan's administrator under 29 U.S.C. § 1132(a)(1)(B), contending *inter alia* that the defendants were estopped to renounce the settlement's disability set off limitation.²²³ The court gave two reasons for denying estoppel. First, the plan's claim administrator was not a party to the settlement agreement.²²⁴ Second, although the employer was a party to the settlement, it was so only in its capacity as employer and not in its ERISA fiduciary capacity.²²⁵ The court explained that, with respect to an employer's

217. 13 LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 132.03 (Matthew Bender, Rev. Ed. 2019).

218. *Brantley v. Pepsi Bottling Grp., Inc.*, 718 F. Supp. 2d 903 (E.D. Tenn. 2010).

219. *Id.* at 907.

220. *Id.* at 908.

221. *Id.* (citation omitted).

222. *Id.* at 909.

223. *Brantley v. Pepsi Bottling Grp., Inc.*, 718 F. Supp. 2d 903, 912 (E.D. Tenn. 2010); Complaint at ¶ 22, *Brantley v. Pepsi Bottling Grp., Inc.*, 718 F. Supp. 2d 903 (E.D. Tenn. 2010) (No. 3:09CV00470), 2009 WL 6825061.

224. *Brantley*, 718 F. Supp. 2d at 912.

225. *Id.*

ERISA plan, the employer has two hats; only when the employer's actions constitute "managing" or "administering" a plan does it wear its ERISA hat.²²⁶

The *Brantley* court concluded, without analysis, that the employer was not managing or administering the disability plan when it agreed to the workers' compensation settlement. An ERISA fiduciary is statutorily defined as any person who exercises any discretionary authority or control over management of the plan or its assets.²²⁷ Courts distinguish between actions that constitute managing or administering a plan and actions that are mere business decisions that affect the plan: the decision "to amend or terminate a welfare benefits plan" is not a fiduciary one.²²⁸ Plan design and termination are not fiduciary acts, but the implementation of those decisions are fiduciary acts.²²⁹ When an employer communicates with employees about plan benefits, it acts as a fiduciary; reasonable employees would assume that the employer is acting as administrator of the plan.²³⁰ Contrary to the *Brantley* court's conclusion that the employer did not act in a fiduciary role in making the compensation settlement, the employer's agreement regarding a set-off limitation for disability benefits could be interpreted as a communication about the disability plan's benefits. Similarly, an employer's acknowledgment in a workers' compensation settlement of medical benefits paid by its healthcare plan, along with its agreement that none of the settlement represents medical benefits, might be understood as a discretionary act of control over the healthcare plan's assets. Thus, the employer would be acting on behalf of the plan; any other plan administrator, as an alter ego of the employer, would be estopped by the employer's representations.

The *Brantley* case differs in other key respects from a suit by a healthcare plan to enforce a reimbursement provision. In *Brantley*, the participant sued the plan and not *vice versa*. The participant sued under 29 U.S.C. § 1132(a)(1)(B), which allows a participant "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."²³¹ That cause of action does not contain the "appropriate equitable relief" language of § 1132(a)(3), under which the Supreme Court in *Mertens* limited relief to

226. *Id.* (quoting *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 665 (6th Cir. 1998)).

227. 29 U.S.C. § 1002(21)(A) (2017).

228. *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 665 (6th Cir. 1998) (citing *Sutter v. BASF Corp.*, 964 F.2d 556, 562 (6th Cir. 1992)).

229. Dana Muir & Norman Stein, *Two Hats, One Head, No Heart: The Anatomy of the ERISA Settlor/Fiduciary Distinction*, 93 N.C. L. REV. 459, 485 (2015).

230. *Id.* at 489 (discussing *Varity Corp. v. Howe*, 516 U.S. 489 (1996)).

231. 29 U.S.C. § 1132(a)(1)(B) (2017).

the categories typically available in equity, and thereby began the line of cases conducting a historical equitable analysis.²³² When a party brings suit for appropriate equitable relief, a court must necessarily ask whether “he who comes into equity [has] come with clean hands.”²³³

C. *The Likelihood of Success of the Participant’s Arguments*

Given the current state of ERISA law, courts are unlikely to ratify any agreement that differs in any respect from the plan documents. Courts have inferred reasons for exclusive reliance on plan documents not expressed by Congress’s official statement of policy in ERISA. Employers can insert plan provisions that make traditional contractual construction impossible. The history of ERISA litigation demonstrates an inexorable pattern of deference to plan sponsors and administrators. Congress should amend or supersede ERISA with legislation that prevents ERISA plans from interfering with established employment benefits.

1. Courts Are Unwilling to Enforce Anything Other Than Plan Documents

The Supreme Court ratified the equitable power to reform an ERISA plan in *CIGNA Corp. v. Amara*.²³⁴ In *Amara*, however, the power to reform extended to enforcing benefits under a prior version of the plan when participants had insufficient notice of plan changes.²³⁵ Courts have repeatedly made written plan terms the be-all-end-all of employment fringe benefits: ERISA “is built around reliance on the face of written plan documents.”²³⁶ ERISA requires that “[e]very employee benefit plan shall be established and maintained pursuant to a written instrument.”²³⁷ That requirement is supposed to make employee benefit plans predictable and certain.²³⁸ Courts infer that Congress’s intent was that plan documents should “exclusively govern . . . employers’ obligations.”²³⁹ Allowing informal plan amendments would disincentivize employers to offer benefits.²⁴⁰ Altering a plan based on

232. See *supra* Section III.A.

233. 2 POMEROY’S EQUITY JURISPRUDENCE § 397, at 90 (Spencer W. Symons ed., 5th ed. 2002).

234. *CIGNA Corp. v. Amara*, 563 U.S. 421, 440–41 (2011).

235. *Id.* at 424–25.

236. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995).

237. 29 U.S.C. § 1102(a)(1) (2017).

238. *Sprague v. General Motors Corp.*, 133 F.3d 388, 402 (6th Cir. 1998).

239. *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988).

240. *Sprague*, 133 F.3d at 403.

communications outside the plan documents “would undermine ERISA.”²⁴¹ Strict adherence to plan documents, without examining other expressions of the parties’ intent, promotes simple administration.²⁴² If plan administrators must look outside the plan documents to determine how to distribute benefits, they will become embroiled in disputes and be dragged into court.²⁴³

Tempering relief according to equitable principles by limiting the reach of an ERISA plan’s right of reimbursement does not undermine ERISA. Congress specified that its intent in establishing ERISA was to prevent employees and their beneficiaries from being “deprived of anticipated benefits.”²⁴⁴ Congress specifically excluded workers’ compensation from ERISA coverage.²⁴⁵ Although preventing an ERISA plan from obtaining the wage-loss portion of workers’ compensation benefits does diminish the sum of assets in the plan’s coffer, “[a]ny overpayments received by participants typically are small relative to the size of the plan.”²⁴⁶ The marginal effect of reducing recovery against workers’ compensation settlements is not a serious threat to a plan’s financial integrity.

Furthermore, limiting reimbursement in accordance with the parties’ intent does not entail the administrative burden that distributing benefits according to external agreements would. Distributing benefits is the normal course of an administrator’s business and does not necessitate disputes or negotiations. When an administrator seeks reimbursement, it is the one instigating litigation. It would not be burdensome to follow a bright-line rule that only the “past medical expense” portion of benefits are available for reimbursement when those benefits are paid by the same employer whose plan seeks reimbursement.

2. ERISA Plans Are Exempt from Judicial Interpretation

Although an ERISA plan is a contract of adhesion, federal courts resist construing ERISA plan terms in favor of plan participants.²⁴⁷ The reason courts typically interpret contracts *de novo* is that courts presume both

241. *Moore*, 856 F.2d at 489.

242. *Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 301 (2009).

243. *Id.*

244. 29 U.S.C. § 1001(a) (2017).

245. 29 U.S.C. § 1003(b)(3) (2017).

246. Dana Muir, *From Schism to Prism: Equitable Relief in Employee Benefit Plans*, 55 AM. BUS. L.J. 599, 662 (2018).

247. Muir & Stein, *supra* note 229, at 519.

contracting parties acted in self-interest when making the plan.²⁴⁸ In an adhesion contract, the adhering party is unable to act in self-interest, thus giving rise to the rule of *contra proferentem*.²⁴⁹ The Supreme Court has authorized plan sponsors to include terms giving a plan administrator discretionary authority to construe the plan itself.²⁵⁰ This ability, along with reservation-of-rights clauses, limits judicial review to an “arbitrary and capricious” standard.²⁵¹ An employer’s “unchecked and unreviewable” ability to impose plan terms and interpret plan provisions is inconsistent with Congress’s intent in establishing ERISA.²⁵²

Interpretation of plan provisions at the discretion of the employer forecloses any argument that an employee’s understanding of the agreement, or his pre-existing legal rights, is relevant to how far a right of reimbursement extends under the plan terms. However, when a plan seeks reimbursement under 29 U.S.C. § 1132(a)(3), a court should determine whether an agreement exists that supports the plan terms. A court should exercise its equitable power to examine the true nature of the agreement. When a plan seeks to vindicate its nearly limitless power by obtaining equitable relief, it must accept the inherent limitations of the equitable jurisdiction, for “he who seeks equity must do equity.”²⁵³

3. Congress Should Amend or Supersede ERISA

Congress’s explicit and implicit purposes in adopting ERISA are mired in an array of conflicting judicial decisions.²⁵⁴ Congress should adopt legislation protecting the full scope of employee benefits. Congress previously attempted to adopt national standards for workers’ compensation law, but existing state plans were too entrenched for federal standards to be politically expedient.²⁵⁵ Congress should revisit workers’ compensation in order to protect compensation benefits from its own interference by the effects of

248. Donald T. Bogan, *ERISA: Re-Thinking Firestone in Light of Great-West—Implications for Standard of Review and the Right to a Jury Trial in Welfare Benefit Claims*, 37 J. MARSHALL L. REV. 629, 661 n.147 (2004).

249. See *supra* text accompanying note 204.

250. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 102 (1989).

251. *Muir & Stein*, *supra* note 229, at 519, 526.

252. *Id.* at 521.

253. 2 POMEROY’S EQUITY JURISPRUDENCE § 385, at 51 (Spencer W. Symons ed., 5th ed. 2002).

254. Dahlia Schwartz, *Breathing Lessons for the ERISA Vacuum: Toward a Reconciliation of ERISA’s Competing Objectives in the Health Benefits Arena*, 79 B.U. L. REV. 631, 659 (1999).

255. 1 Lex K. Larson, *LARSON’S WORKERS’ COMPENSATION LAW* § 2.08 (Matthew Bender, Rev. Ed. 2018).

ERISA. The task would not be impossible; for example, the Americans with Disability Act prohibits discrimination and supersedes ERISA.²⁵⁶ Congress can vindicate its objective of preventing deprivation of employees' anticipated benefits without upsetting the protections that ERISA has established.

256. Schwartz, *supra* note 254.