No. 11-1285

IN THE

Supreme Court of the United States

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

Petitioner,

v.

JAMES MCCUTCHEN AND ROSEN, LOUIK & PERRY, P.C.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICUS CURIAE CONSUMER WATCHDOG IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amicus Consumer Watchdog addresses only this question:

> Whether a court responding to an equitable claim under Section 502(a)(3) of ERISA should apply the common fund doctrine, which requires that all parties benefiting from a settlement fund share in the costs of its creation.

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INTEREST OF AMICUS[1]

Consumer Watchdog is a nonprofit, nonpartisan consumer advocacy organization with offices in California and Washington, D.C., specializing in the application of state and federal consumer protection laws, including enforcement of the landmark California insurance reform measure, Proposition 103, and other insurance and health care statutes and regulations. Founded in 1985, Consumer Watchdog advocates for the rights of consumers and seeks to hold corporations accountable in the legislature and the courts.

For over two decades, Consumer Watchdog has studied and reported on the application of ERISA to health care and insurance laws, and in particular ERISA's impact on consumers. As explained below, Consumer Watchdog urges that ERISA be interpreted as Congress desired: to preserve traditional equitable principles, such as the common fund doctrine, that encourage claimants and their attorneys to pursue meritorious claims and ensure that injured consumers obtain the recoveries to which they are entitled.

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1 This brief is filed under the parties' blanket consents filed with the Court. No person other than amicus Consumer Watchdog or its counsel authored this brief or provided financial support for it.

STATEMENT

On January 24, 2007, respondent James McCutchen was involved in a three-car accident caused by a negligent driver. He sustained serious physical injuries, including a concussion and loss of consciousness, a fracture and dislocation of his hip, extensive lacerations, and neck and back injuries. He underwent emergency surgery and ultimately received a total hip replacement. He continues to suffer from severe chronic back pain that has rendered him disabled. Jt. App. 60-61. At the time of the accident, McCutchen was a participant in petitioner U.S. Airways' self-funded health benefit plan. Jt. App. 4. U.S. Airways paid for McCutchen's medical expenses from the accident, which totaled $66,865.82. Jt. App. 5.

After the accident, McCutchen retained a law firm, respondent Rosen, Louik & Perry, P.C., to pursue claims relating to the accident. Jt. App. 6. McCutchen and his attorneys entered into a contingency fee agreement. Pet. App. 3a. Under that agreement, the lawyers agreed to cover all expenses related to McCutchen's claims, and McCutchen agreed to pay his lawyers 40% of any recovery they obtained, plus expenses. Pet. App. 3a.

Because three other people were seriously injured or killed in the accident and the negligent driver had limited insurance coverage, McCutchen received only $10,000 in settlement with the negligent driver. Pet. App. 3a, 20a. With the help of his attorneys, McCutchen also obtained $100,000 from his underinsured motorist coverage. Jt. App. 11, 12. After deducting attorney's fees and expenses, McCutchen was left with less than $66,000. Pet. App. 3a.

U.S. Airways waited until these settlements were completed and then sued McCutchen and his attorneys in federal district court under ERISA Section 502(a)(3), demanding full reimbursement of the medical bills it paid for McCutchen. Pet. App. 4a. It relied on a provision in its ERISA plan contract that purports to require participants to "reimburse the Plan for amounts paid for claims out of any monies recovered from a third party, including, but not limited to, a beneficiary's own insurance company as the result of a judgment, award, settlement, or otherwise." Jt. App. 7. The district court granted summary judgment to U.S. Airways, requiring McCutchen and his attorneys to pay $66,865.82 to U.S. Airways, $865.82 more than McCutchen's total recovery after attorney's fees. Pet. App. 18a-35a.

The Third Circuit reversed. Noting that ERISA Section 502(a)(3) authorizes only "appropriate equitable relief," the court concluded that allowing U.S. Airways full reimbursement would be inequitable because that reimbursement would "exceed[] the net amount of McCutchen's third-party recovery." Pet. App. 16a. The Third Circuit remanded to the district court to apply equitable principles, including the common fund doctrine, to determine the appropriate distribution of the settlement fund. Pet. App. 17a.

SUMMARY OF ARGUMENT

The common fund doctrine is a well-established rule of equity, designed to prevent the unjust enrichment of those who passively accept the benefits of settlements and judgments procured by others. Courts have consistently applied the doctrine in insurance subrogation and reimbursement cases like this one to prevent insurers from accepting proceeds of a settlement fund without sharing in the costs of its creation.

U.S. Airways argues that the common fund doctrine does not apply in this case because McCutchen waived his right to reimbursement for attorney's fees when he agreed to the terms of his ERISA plan. But U.S. Airways' argument ignores basic equitable principles and the nature of the common fund doctrine.

U.S. Airways' claim, as required by Section 502(a)(3), is one for equitable, not legal, relief. As such, its claim is subject to the maxim "he who seeks equity must do equity." A party who asks the court for equitable relief cannot hide behind the terms of a contract, unenforceable at law, to avoid the application of established equitable principles like the common fund doctrine.

Moreover, even if McCutchen could waive his own rights under the common fund doctrine, he cannot waive the rights of his attorneys, respondent Rosen, Louik & Perry. The common fund doctrine grants a successful claimant *and his attorney* independent rights to recover reasonable attorney's fees from passive beneficiaries. Rosen, Louik & Perry was not party to the ERISA contract and has not waived its rights to recovery.

The "unfortunate consequences" U.S. Airways claims might result if courts apply equitable principles are either red herrings or do not apply to the common fund doctrine. Evidence suggests that a reduction in reimbursement and subrogation recoveries would have, at most, a tiny (<1%) effect on the premiums paid by ERISA plan participants.

Eliminating the common fund doctrine would, on the other hand, have serious negative consequences for plan participants. By deterring plan members' legitimate claims, it would reduce recovery for plan participants generally, and place a particularly high financial burden on participants who are most in need—individuals, like McCutchen, who have sustained serious injuries. Many injured plan members with valid claims against negligent third parties would be unable to enforce them at all. ERISA was designed to protect the rights of plan participants, not undermine them.

ARGUMENT

I. The common fund doctrine is a well-settled rule of equity that applies to this type of case.

The common fund doctrine is a long-standing rule of equity that has consistently been applied by both federal and state courts since 1881. *See, e.g., Internal Imp. Fund Trustees v. Greenough*, 105 U.S. 527, 537 (1881) (establishing the doctrine); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991) (affirming the equitable power of federal courts to award attorney's fees for the creation of a common fund); *Appeal of Harris*, 186 A. 92, 95 (Pa. 1936). The doctrine requires all beneficiaries of a fund to share proportionately in the costs of its creation. 7A C.J.S. *Attorney & Client* § 416 (2012).

All of the required elements of the common fund doctrine are present in this case, and U.S. Airways should be required under that doctrine to pay its proportionate share of McCutchen's attorney's fees.

A. The common fund doctrine seeks to prevent the unjust enrichment of free riders, and U.S. Airways is a quintessential free rider.

The common fund doctrine was designed to prevent a particular form of unjust enrichment, sometimes referred to as "free-riding." *See, e.g.*, *duPont v. Shackelford*, 369 S.E.2d 673, 677 (Va. 1988) ("In short, the common fund doctrine is aimed at preventing 'free rides.'"). Free-riding occurs when an attorney creates a fund by performing legal services and someone other than the attorney's client benefits from the fund without contributing to its creation. 1 Dan B. Dobbs, Law of Remedies: Damages-Equity-Restitution § 3.10(2) (2d ed. 1993). The common fund doctrine is employed in these situations to spread the cost of dispute resolution equitably among all fund beneficiaries. It ensures that "the active beneficiary is not forced to bear the burden alone and the 'stranger' (i.e., passive) beneficiaries do not receive their benefits at no cost to themselves." *Means v. Montana Power Co.*, 625 P.2d 32, 37 (Mont. 1981).

In this Court's first case to recognize the doctrine, the plaintiff, a holder of bonds in the Florida Railroad Company, sued to protect the fund that secured the bonds, which was being wasted by unscrupulous trustees. *Greenough*, 105 U.S. at 528-29. He was successful and managed to save the fund to the benefit of all bondholders. *Id.* at 529. Those bondholders were able to collect their shares of the fund as the result of the plaintiff's litigation. *Id.*

Recognizing that it would be unjust to place the entire burden of the litigation on the one bondholder willing to take the initiative and save the fund while allowing other bondholders to free ride, the Court adopted a new rule of equity. *See id.* at 532; *see also, e.g., Gibbs v. Blackwelder*, 346 F.2d 943, 945 (4th Cir. 1965) (holding that an equity court has full power to award counsel fees to the "trail blazer" so that "one who led in hewing the path to victory is not left saddled with extensive attorney fees" which were not incurred "by his more timid fellows who held back until the fruits of the pioneer's success were laid before them"). Drawing on examples from the English common law of trusts, *Greenough* held that when a plaintiff "recovers a fund for the general benefit," his costs "are to be paid either out of the fund or *pro rata* by all the creditors who partake of the benefit of the suit." 105 U.S. at 533.

ERISA plan fiduciaries making reimbursement claims, like U.S. Airways here, are quintessential free riders. Under its ERISA plan contract, U.S. Airways had a right to join McCutchen's settlement negotiations or bring a suit directly against the negligent driver who caused McCutchen's injuries. *See* Jt. App. 20 (U.S. Airways Health Benefit Plan for Employers) (granting U.S. Airways full subrogation rights); 46A C.J.S. *Insurance* § 1993 (2012) (describing the rights available to an insurer in subrogation). U.S. Airways exercised none of these rights. Instead, it sat back and waited, allowing McCutchen to assert claims against the negligent driver and her car insurance company. Once McCutchen and his attorneys successfully negotiated a settlement, U.S. Airways swooped in and demanded to be fully reimbursed out of the settlement fund.

If U.S. Airways is allowed to collect from the settlement fund without paying its proportionate share of the cost of creating the fund, it will be unjustly enriched. This is exactly the situation the common fund doctrine was designed to remedy.

B. This case meets all of the requirements of the common fund doctrine.

The common fund doctrine requires the establishment of three elements: (1) a party must successfully resolve a dispute, resulting in a fund over which the court has jurisdiction and from which fees can be awarded; (2) the creation, preservation, or enhancement of the fund must be a proximate result of the efforts of counsel for that party; and (3) an outside party must demand or receive benefits of the fund, without contributing to its creation. *See United Services Auto. Ass'n v. Hills*, 109 N.W.2d 174, 177 (Neb. 1961); *see generally* Johnny Parker, *The Common Fund Doctrine: Coming of Age in the Law of Insurance Subrogation*, 31 Ind. L. Rev. 313, 322-23 (1998).

This case meets all of the requirements. First, McCutchen's settlement satisfies the requirement of a "successful termination" that resulted in a fund from which fees could be awarded. *See, e.g.*, *Hills*, 109 N.W.2d at 178. Second, the creation of a fund—in this case, the settlement fund—was the direct result of McCutchen's attorneys' efforts. *See* Pet. App. 20a. Finally, U.S. Airways has demanded $66,866 from that settlement fund without participating in its creation. *See* Pet. App. 20a.

Courts have consistently held that application of the common fund rule is appropriate in cases where, as here, an insurer is claiming reimbursement from a fund created by an insured. John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 Harv. L. Rev. 1597, 1622 (1974) (citing relevant cases from a variety of jurisdictions); Parker, *supra*, 31 Ind. L. Rev. at 334 (same). But insurers are not helplessly bound to pay the fees negotiated by their plan participants. Only passive beneficiaries of a fund are subject to the common fund doctrine. An insurer that "actively participates," either by participating in settlement negotiations, intervening in a legal action, or bringing an independent "subrogated" claim on its own behalf, has no obligation to contribute to the insured's attorney's fees. *See* Dawson, *supra*, 87 Harv. L. Rev. at 1647 (noting that a beneficiary who hires his own attorney and takes part in litigation "becomes a contributor to the final result, so that two essential bases of the *Greenough* doctrine are eliminated").

It is only the passive free rider, who contributes nothing to the fund's creation and then demands a share of it, who must pay a proportionate share of the claimant's legal expenses. U.S. Airways is just such a passive free rider. Having contributed nothing to McCutchen's efforts, U.S. Airways cannot now claim the benefits of the fund without sharing in the costs of its creation.

II. An ERISA plan's contractual language cannot override the application of the common fund rule.

U.S. Airways has argued that the language in McCutchen's ERISA plan effectively bars the application of equitable principles that would otherwise be available to McCutchen, including the common fund doctrine. This argument fails for two reasons.

First, because U.S. Airways is bringing an equitable claim—the only type of claim available under ERISA Section 502(a)(3)—not a legal claim, it must abide by the equitable maxim "he who seeks equity must do equity" and submit its claim to all clearly-defined equitable principles, including the common fund doctrine. *See Manufacturers' Fin. Co. v. McKey*, 294 U.S. 442, 449 (1935) (explaining the maxim).

Second, even if McCutchen could have contractually waived his own rights under the common fund doctrine, he had no authority to waive the rights of his *attorneys* under that doctrine. McCutchen's attorneys have an independently enforceable right to reimbursement for their services that cannot be waived by a contract to which they are not parties.

A. U.S. Airways cannot bring its "purely equitable claim" against McCutchen without affording him his "correlative equitable rights."

The equitable powers of a court cannot be limited by contract. When one party invokes the court's equitable powers by requesting equitable relief, she necessarily subjects her claim to all the equitable principles that would usually apply. As this Court explained in *McKey*, purely equitable rights "shall not be enforced in favor of one who affirmatively seeks their enforcement except upon condition that he consent to accord to the other his correlative equitable rights." 294 U.S. at 449. Because U.S. Airways' claim is purely equitable—and, again, only equitable claims are permissible under ERISA Section 502(a)(3)—it must afford McCutchen and his attorneys their correlative equitable rights, which in this case includes the common fund doctrine.

1. U.S. Airways' claim, like all claims arising under Section 502(a)(3), is "purely equitable."

In the days of the divided bench, not all claims raised in a court of equity were equitable in nature. "Purely equitable" claims were distinguishable from "essentially legal" claims that nonetheless had to be raised in a court of equity. *See McKey*, 294 U.S. at 448-49 (discussing the distinction). Nearly all claims arising from a breach of trust, for example, had to be raised in a court of equity, whether they were equitable or legal in nature. *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993) (citing *Lessee of Smith v. McCann*, 16 L.Ed. 714 (1861)).

A party who was obliged to go into a court of equity to enforce an "essentially legal" contractual right could be secure that the terms of the contract would not be changed absent fraud, accident, or mistake. *McKey*, 294 U.S. at 448-49. "Legal rights," this Court has explained, "are as safe in chancery as they are in a court of law." *Id.* at 449 (internal quotations omitted).

On the other hand, a party who seeks purely equitable relief cannot avoid the application of established equitable principles, by contract or otherwise. *See* Parker, *supra*, 31 Ind. L. Rev. at 338 n.115 ("[J]udicial discretion to respond to equity cannot be bargained away. Thus, the principle of equity is subject to judicial review even where the parties have otherwise entered into an agreement."); *Fosdick v. Schall*, 99 U.S. 235, 253 (1878) (mortgagee seeking equitable remedy of receivership, though entitled under mortgage to a lien on all receipts, cannot complain when court allows receiver to apply receipts towards current debts). By asking the court to use its equitable powers to grant relief, a party consents to "accord to the other his correlative equitable rights." *McKey*, 294 U.S. at 449.[2]

2 *Cf. Daniels v. Johnson*, 351 S.W.2d 853, 855 (Ark. 1961) (plaintiff seeking equitable remedy cannot invoke statute of limitations to avoid defendant's correlative lien); 2 S. Symons, Pomeroy's Equity Jurisprudence § 385, at 59 (5th ed. 1941) (noting that a party seeking equitable relief cannot invoke the

U.S. Airways' claim against McCutchen, like all claims arising under Section 502(a)(3), is equitable and not legal in nature. Section 502(a)(3) authorizes a fiduciary to bring a civil action to obtain "appropriate equitable relief." 29 U.S.C. § 1132(a)(3). As this Court explained in *Mertens*, relief under Section 502(a)(3) is limited to "those categories of relief that were *typically* available in equity" and does not include legal remedies that could have been granted by a common-law equity court. 508 U.S. at 256 (emphasis in original).

U.S. Airways has framed its claim as one for an "equitable lien by agreement," rather than one for breach of contract. An equitable lien is, as its name indicates, an equitable, not a legal, remedy. *See* 1 G. Palmer, Law of Restitution § 1.4, at 17; § 3.7, at 262 (1978). Fashioning its claim in this way enables U.S. Airways to shoehorn a contract claim into the equitable demands of Section 502(a)(3). But it also places the claim squarely within the rule that a party who seeks equity must do equity. By bringing an equitable, rather than legal, claim, U.S. Airways consented to accord McCutchen and his lawyers their correlative equitable rights.

U.S. Airways has argued that an equitable lien by agreement must always be enforced strictly according to its terms. The sources cited in its brief (at 33-36), however, do not support such a broad assertion. To be sure, a court of equity will, in appropriate cir-

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statute of limitations to avoid a defendant's correlative rights).

cumstances, "seek[] to effectuate the intention of parties to contracts, and will, to that end, aid their defective execution." *Bernard v. Lea*, 210 F. 583, 595 (4th Cir. 1913). But no court of equity will enforce an agreement that would result in unjust enrichment or any other inequity. *See* 27A Am. Jur. 2d *Equity* § 84 (2012) ("A court of equity is never required to render, or justified in rendering, an inequitable decision or decree.").

Not a single case or treatise cited by U.S. Airways demonstrates that the terms of a contract, unenforceable at law, as the contract is here, can nonetheless be enforced in equity without the application of established equitable principles. U.S. Airways' claim, like all equitable claims, is subject to the correlative equitable rights of McCutchen and his attorneys.

2. McCutchen's right to reimbursement under the common fund doctrine is a correlative equitable right.

As explained above, when a plaintiff raises an equitable claim, he must accord the defendant his correlative equitable rights. Those rights include all rights "growing out of or necessarily involved in the subject matter of the controversy." 2 S. Symons, Pomeroy's Equity Jurisprudence § 385, at 52 (5th ed. 1941); *see also* 30A C.J.S. *Equity* § 101 (2012) ("[A]ny person seeking the aid of equity . . . will be compelled to accord, to the other party all the equitable rights to which the other is entitled *in respect of the subject matter involved*.") (emphasis added).

For example, after rescinding a contract for the purchase of land, a court will order repayment by the seller of the purchase price, but it will also require the buyer seeking the equitable rescission to pay an amount equal to the fair rental value of the property during the time of possession. *See Cardiac Thoracic and Vascular Surgery, P.A. Profit Sharing Trust v. Bond*, 840 S.W.2d 188, 193-94 (Ark. 1992). The seller's claim for fair rental value arises directly from the buyer's claim for rescission. *See id.*

McCutchen's claim for partial recoupment of his attorney's fees likewise arises directly from U.S. Airways' claim for reimbursement. In the rescission example, the buyer would be unjustly enriched if she were allowed to rescind the contract without compensating the seller for the time he occupied the property. U.S. Airways would likewise be unjustly enriched if it were allowed to share in the benefits of the fund without sharing in the cost of the fund's creation.

In sum, the unjust enrichment that the common fund doctrine was designed to remedy arises as a direct result of U.S. Airways' equitable claim and is inseparable from it. McCutchen's right to reimbursement under that doctrine is thus a correlative equitable right that must be honored under ERISA Section 502(a)(3).

B. Even if McCutchen could contractually waive his own rights under the common fund doctrine, he cannot waive his attorneys' independent right to recover fees under that doctrine.

McCutchen's attorneys, respondent Rosen, Louik & Perry, have a right to recover their reasonable attorney's fees that is independent of McCutchen's right to reimbursement under the common fund doctrine. Even if McCutchen could contractually waive his own rights under the common fund doctrine—and for the reasons explained above, he has not—he lacked authority to waive his attorneys' rights, and his attorneys, as non-parties to the contract, cannot be bound by the contract's terms.

The attorneys' right to their reasonable fees is secured by a first-priority lien on the fund, and their interest must be satisfied before any distribution can be made. Thus, any distribution from the fund to U.S. Airways must be reduced by U.S. Airways' pro rata share of Rosen, Louik & Perry's reasonable attorney's fees.

1. McCutchen's attorneys have an independently enforceable right to recover their reasonable attorney's fees from each party that benefits from the fund, including U.S. Airways.

Courts have long recognized that attorneys have a right to recover reasonable fees from beneficiaries of a common fund. *See, e.g.*, *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 124-25 (1885) ("[W]hen an allowance to the complainant is proper on account of solicitors' fees, it may be made directly to the solicitors themselves, without any application by their immediate client."). This right is independent of the client's right to recover his own fees. Dawson, *supra*, 87 Harv. L. Rev. at 1605-06 (explaining that either a client or lawyer can secure a charge on a common fund). Thus, an attorney may have a claim under the common fund doctrine even if her client does not. *See Washington Gas Light Co. v. Baker*, 195 F.2d 29, 33-34 (D.C. Cir. 1951) (attorney can bring a common fund claim even though he agreed to serve his client gratuitously); *Wallace v. Fiske*, 80 F.2d 897, 909-11 (8th Cir. 1935) (denial of client's petition for contribution does not bar the lawyer's separate claim for a fee, chargeable to the fund).

McCutchen's attorneys, who are party to this action, have a right under the common fund doctrine, independent of McCutchen's own right, to require any beneficiary of the fund, including U.S. Airways, to pay its proportionate share of reasonable attorney's fees. *See, e.g.*, *Boeing Co. v. Van Gemert*, 444 U.S. 472, 476, 481 (1980) (upholding district court order requiring each beneficiary of a common fund to "carry its proportionate share of the total amount allowed for fees, expenses, and disbursements").

U.S. Airways has argued that an equitable lien by agreement "cannot be invoked to create a right contrary to the agreement of the parties," and thus must be enforced in accordance with the terms of the contract. Pet. Br. 4 (citation omitted). Even if that is true, it does not apply to the rights of McCutchen's attorneys. They are not parties to any contract with U.S. Airways and cannot be bound in equity or at law. Their right to recover is enforceable regardless of any waiver by McCutchen of his own right.[3]

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3 The only court to address the attorney's independent right in the ERISA reimbursement context held that the right could not be voided by ERISA plan terms. *See Bishop v. Burgard*, 764

2. The common fund doctrine grants the attorney who creates a fund a first-priority lien, which must be satisfied before any funds can be distributed.

The right of McCutchen's counsel to insist that all fund beneficiaries pay a proportionate share of their attorney's fees is secured by a first-priority lien on the settlement fund. *See* Dawson, *supra*, at 1606-07 ("[T]he claim for legal services is a first charge on the fund and must be satisfied before any distribution occurs."). That lien is superior to all other liens that may attach, including U.S. Airways' claimed equitable lien by agreement. *See, e.g.*, *Winslow v. Harold G. Ferguson Corp.*, 153 P.2d 714, 719 (Cal. 1944) (attorney's lien prevails over not only the claims of other creditors but also the lien of the federal government for income taxes); *United States v. Hubbell*, 323 F.2d 197, 200-01 (5th Cir.1963) (same); *Appeal of Harris*, 186 A. at 97 (attorney's lien is superior to pre-existing mortgage).

This outcome is consistent with the first-in-time, first-in-right rule for common-law liens. Common-law liens are granted priority based on the time of attachment. *Meyer v. United States*, 375 U.S. 233,

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N.E.2d 24, 30-32 (Ill. 2002). The issue was also raised in the Seventh Circuit, but the plan participant's attorney was not a party to the suit. The court declined to address the issue, suggesting that the plan participant did not have standing to enforce the attorney's right. *See Admin. Comm. of Wal-Mart Stores, Inc. Associates' Health & Welfare Plan v. Varco*, 338 F.3d 680, 690-91 (7th Cir. 2003). Because Rosen, Louik & Perry is a party here, standing is not an issue.

236 (1963). When the object of a lien by agreement is a fund not yet in existence at the time the contract is signed, the lien does not attach until the fund is created. *See Sereboff v. Mid Atl. Med. Services, Inc.*, 547 U.S. 356, 363-64 (2006).

Although U.S. Airways' contract with McCutchen preceded any action by McCutchen's attorneys, the attorneys' lien and U.S. Airways' lien both attached at the moment the settlement fund was created. *See Sereboff*, 547 U.S. at 364 (insurance reimbursement lien attaches at moment fund is created); *Metro. Life Ins. Co. v. Poliakoff*, 198 A. 852, 854 (N.J. Ch. 1938) (attorney's lien "fastens to the fund as soon as it takes form"); *Coughlin v. New York C. & H. R.R. Co.*, 27 Am. Rep. 75 (N.Y. 1877) (agreement to assign a portion of recovery "would attach itself to the judgment when recovered"). And, the attorney's lien historically has been given preference because of the attorney's indispensible role in creating the fund. *See Winslow*, 153 P.2d at 719-20 ("[S]uch counsel fees are customarily made senior to other claims against the fund" because the attorneys "brought into the protective custody of the court the trust assets."); *see also Appeal of Harris*, 186 A. 92 at 97 (although rights assigned by client would generally be subject to mortgage, the attorney is "not a mere assignee" of the fund because "his efforts contributed to its creation").

As noted, because the attorney's lien is a first-priority lien, it must be satisfied before any distribution can be made. *See* Dawson, *supra*, 87 Harv. L. Rev. at 1606-07. Any distribution to U.S. Airways thus must be reduced by its pro rata share of Rosen, Louik & Perry's reasonable attorney's fees. *See, e.g.*, *Hills*, 109 N.W.2d at 177-78 (reducing insurance company's recovery in subrogation by its pro rata share of attorney's fees).

III. Permitting an ERISA plan to eliminate the common fund rule would have perverse consequences.

U.S. Airways has suggested that anything short of a hard-and-fast, contract-always-controls rule would have "unfortunate consequences," including increased premiums for plan participants and unnecessary litigation. Pet. Br. 16. Evidence indicates that applying equitable principles would have no such impact. Eliminating the common fund doctrine, on the other hand, would have a very real negative impact on plan participants. By creating a powerful disincentive for both participants and their attorneys to assert legitimate claims, elimination of the rule would reduce recoveries for participants in general, and for injured participants in particular. Those effects would be at odds with ERISA's principal purpose of protecting plan participants.

A. U.S. Airways' argument that the application of equitable principles would result in increased premium rates and protracted and costly litigation is not supported by evidence.

U.S. Airways' claim that the reduction of subrogation and reimbursement recoveries would increase costs for plan participants and ultimately threaten the financial viability of plans is unfounded. Numerous scholars have concluded that insurance plans consistently fail to factor subrogation and reimbursement recoveries into rate calculations.[4]

Even if insurance companies were to increase participants' premiums because of a reduction in reimbursement recoveries, the effect would be very small. *See* E. Farish Percy, *Applying the Common Fund Doctrine to an ERISA-Governed Employee Benefit Plan's Claim for Subrogation or Reimbursement*, 61 Fla. L. Rev. 55, 96-97 (2009). In 2000, the largest subrogation services provider reported that it recovered an average of $4.80 in subrogation and reimbursement per covered person per year. *See id.* at 97. Even if that entire recovery were eliminated—and only a fraction of it would be affected by the common fund doctrine—ERISA plans could make up for the

4 *See, e.g.,* John F. Dobbyn, Insurance Law in a Nutshell 384 (4th ed. 2003) (arguing that subrogation has not reduced insurance rates because "[i]nsurers consistently fail to introduce the factor of such recoveries into rate-determining formulae, but rather apply such recoveries to increasing dividends to shareholders"); Roger M. Baron, *Public Policy Considerations Warranting Denial of Reimbursement to ERISA Plans: It's Time to Recognize the Elephant in the Courtroom*, 55 Mercer L. Rev. 595, 627-31 (2004) (explaining that insurers do not consider subrogation when setting insurance rates); Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation*, 70 Mo. L. Rev. 723, 737 (2005) ("[S]ubrogation has not led to lower premium costs for the insured." (citing various sources)); Brendan S. Maher & Radha A. Pathak, *Understanding and Problematizing Contractual Tort Subrogation*, 40 Loy. U. Chi. L.J. 49, 58 n.31 (2008) ("[I]t is likely that insurers will not offer lower subrogation adjusted rates even though they will grant themselves a subrogation right").

deficit by charging each plan participant an extra $4.80 per year in premiums.

The statistics presented by Petitioner's amicus, Central States, Southeast and Southwest Areas Health and Welfare Fund, paint the same picture. Central States reported its average annual reimbursement recoveries at $5.7 million, only one half of one percent of the approximately $1 billion it pays in benefits each year.[5] Thus, even complete elimination of Central States' reimbursement rights—and, again, only a fraction would be affected by the common fund doctrine—would increase the plan's costs by less than 1%.

Nor would the common fund rule result in unnecessary or protracted litigation. The only litigable issue U.S. Airways has pointed to in the common fund context is the reasonableness of attorney's fees. But courts in insurance subrogation cases generally presume the reasonableness of the client's contingency fee. *See, e.g., Klacik v. Kovacs*, 268 A.2d 305, 308 (N.J. App. Div. 1970); *Tenn. Farmers Mut. Ins. Co. v. Pritchett*, 391 S.W.2d 671, 675 (Tenn. Ct. App. 1964); *State Farm Mut. Auto. Ins. Co. v. Elkins*, 451 S.W.2d

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5 *See* Central States Br. 3 (stating average reimbursement recoveries); Central States, Southeast and Southwest Areas Health and Welfare Fund, Comments on the Proposed and Interim Rules Relating to Internal Claims and Appeals and External Review Processes Under the Patient Protection and Affordable Care Act 2 (Sept. 24, 2010), *available at* http://www.dol.gov/ebsa/pdf/1210-AB45-0087.pdf (reporting annual benefit payments).

528, 531-32 (Tex. Ct. Civ. App. 1970). As Judge Posner has explained, a fee negotiated at arms length—as contingency fees are in these cases—is the most appropriate measure of reasonableness. *In re Continental*, *Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992); *see also* American Law Institute, *Contrasting Approaches in Awarding Attorneys' Fees*, C852 ALI-ABA 257, 264 (1993) ("[T]he attorney should receive a fee comparable to that which the beneficiaries would have to pay in the marketplace for the legal services.") We know of no evidence showing much, if any, litigation over the reasonableness of personal-injury contingency fees, and U.S. Airways points to none.

In the rare circumstance where parties find it necessary to litigate the issue, it could be resolved in a simple hearing, where evidence is presented on the market rate for lawyers in the area, the amount of time spent, and the expenses incurred in the course of litigation. There would be no need to hold a full-blown trial or conduct extensive factual investigation.[6]

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6 Amicus Blue Cross Blue Shield Association suggests that there may be litigation over whether or not the insurance plan actually benefited from the efforts of beneficiaries' attorneys because the insurance plan may have been able to recover directly from the tortfeasor at a lower cost. BCBSA Br. 8. This argument is more than a little ironic coming from the friend of a party who could have brought its own litigation but instead sat by and let the insured and its lawyers do all the work. In any event, no court has ever required that a third party benefit in this broad, existential sense. When a party demands money

Experience also demonstrates that apportionment of attorney's fees does not result in excessive litigation. As the United States points out (U.S. Br. 28-30), reimbursement obligations are limited by attorney's fees in other circumstances. For example, under both Medicare regulations and the Federal Employees' Compensation Act, participants' reimbursement obligations are reduced by the costs of the suit, including a reasonable attorney's fee. *See* 5 U.S.C. § 8132. The Longshore and Harbor Workers' Compensation Act prohibits reimbursement payments to employers from exceeding the employee's net amount recovered after reasonable attorney's fees and expenses are deducted. *See* 33 U.S.C. § 933(f). U.S. Airways has not pointed to any evidence of extensive litigation over reasonable attorney's fees in these situations.

In sum, the supposed harms to plan participants from applying the common fund doctrine are at best insubstantial and possibly non-existent. And, as we now explain, the harms of eliminating the rule would be substantial.

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from a fund, it is seeking a benefit. *See supra* at 8-9 (discussing elements of common fund doctrine); *see also* Dawson, *supra*, 87 Harv. L. Rev. at 1627 (When the litigation brought against a tortfeasor has succeeded, "the question will be whether it has conferred a benefit *on a fund*.") (emphasis added).

B. Eliminating the common fund doctrine would discourage injured plan members and their counsel from bringing meritorious claims.

1. Expansive insurance reimbursement rights generally discourage legitimate claims by injured plan participants.

When deciding whether to assert a claim against a tortfeasor, plan participants and their attorneys must weigh the potential for recovery from a successful settlement or trial against the associated expenses and risk.

Attorneys are sensitive to this balancing of risk and reward. The vast majority of accident claims are brought by attorneys acting under a contingency fee agreement. James D. Dana & Kathryn E. Spier, *Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation*, 8 J. L. Econ. & Org. 349, 349 (1993) (96 percent of plaintiffs paid their attorneys on a contingency fee basis). Under those agreements, attorneys cover all of the costs of asserting the claim and dedicate their own time without charging the client. *Id.* In exchange, they are entitled to a percentage of the client's recovery. *Id.* An attorney deciding whether to take on a contingency-fee client has to consider not only the strength of the client's claim, but also the amount of potential recovery and how it compares to the time and cost that a successful resolution will require. A client with a strong claim to recovery may still have trouble finding an attorney if the potential recovery is limited. *See id.* at 350 ("When an attorney is paid a contingency fee, however, then she will . . . pursue only those cases with a sufficiently high expected return.”).

Because attorneys are sensitive to changes in the value of potential recovery, any reduction in the potential recovery, from a looming ERISA plan reimbursement claim or otherwise, will reduce the incentive of both attorney and client to bring the claim in the first place. *See* Brendan S. Maher & Radha A. Pathak, *Understanding and Problematizing Contractual Tort Subrogation*, 40 Loy. U. Chi. L.J. 49, 88 (2008) (“[U]nless a plaintiff burdened by a first-dollar recovery rule envisions a very high likelihood of a complete or near complete recovery, there is little incentive to expend resources and incur the risk associated with a lawsuit.”); Karen Ertel, Insurer May Take Share of Damages Award, Supreme Court Rules, Trial, July 2006, at 92 (lawyers “simply will walk away” from personal-injury cases involving potentially large ERISA reimbursement claims) (quoting attorney).

2. Abrogating the common fund doctrine would have a particularly strong deterrent effect.

Although any right to reimbursement will discourage meritorious claims, the effect of eliminating the common fund doctrine would be particularly pronounced.

The common fund doctrine creates an important backstop for cases involving large insurance plan reimbursement claims. Any time the ERISA plan claims less than the entire fund, the plan member will at least be entitled to some portion of the recovery. Here, for example, U.S. Airways has claimed \$66,866, or approximately 60% of the total \$110,000 recovery. Under the common fund doctrine, U.S. Airways would thus be responsible for 60% of the attorney's fees, or around \$26,000. The leftover \$43,134 would go to McCutchen, who would pay the other 40% of attorney's fees, or around \$18,000. McCutchen would recover about \$25,000, which could go towards his ongoing out-of-pocket medical expenses.

So long as the common fund doctrine is operating, an accident victim like McCutchen can bring a claim confident that, worst-case scenario, the insurance plan would take all of his recovery. If the insurance plan is entitled to reimbursement of the full amount of recovery, the insurance plan will have to pay all of the claimaint's attorney's fees.

This outcome would be far from ideal for someone, like McCutchen, who has suffered serious injuries and is unable to work. It may be a disastrous result for many people struggling to support themselves after a serious injury. But the possibility of walking away empty handed probably would not deter most claimants. That is because the claimant's risk under a contingency fee agreement is low. He has to dedicate his time, and may be emotionally invested, but he does not have to invest cash.

Take away the common fund rule, however, and the injured claimant risks *losing money even after bringing a successful claim*. In McCutchen's case, for example, U.S. Airways would still recover \$66,866 from the settlement fund, leaving McCutchen with

$43,134 before attorney's fees. But instead of splitting the attorney's fee, the entire $44,000 fee would fall on McCutchen. McCutchen would end up owing $866 more than his total recovery. The risk of a loss, even a small loss, would discourage many if not most claimants.

Attorneys face a similar dilemma. With the common fund rule in place, they can be certain that, so long as they are successful, they will be compensated for their effort and the expenses of prosecuting the claim. Whether it is the client or the client's insurance plan that benefits, the beneficiary will be obligated to pay the attorney's fee. Without the common fund doctrine, however, the plan could potentially claim the entire recovery. *See, e.g.*, *Walker v. Rose*, 22 F. Supp. 2d 343, 345, 352 (D.N.J. 1998) (insurance company claimed entire $600,000 settlement award; attorneys and insured received nothing). If that happens, the attorney either must waive her fee and take a loss on a claim that was pursued successfully or attempt to collect from her injured and likely judgment-proof client.

These problems do not arise in every case. Some participants will have claims against people with high insurance limits or substantial assets. And some cases may involve relatively small ERISA plan reimbursement claims. But in many cases where the reimbursement rights approach the limits of the potential recovery, both the injured party and the attorney will have little incentive to bring a legitimate claim without the security of the common fund doctrine. *See, e.g., Wal-Mart Stores, Inc. Assocs.' Health*

& Welfare Plan v. Wells, 213 F.3d 398, 402 (7th Cir. 2000) ("This prospect [that a plan will not have to pay its fair share of attorney's fees] might well deter a suit likely to result in a judgment or settlement not much larger than the benefits available under the plan."). In fact, the claims that are potentially the most valuable for the insurance plan, the ones where the reimbursable medical expenses are high, are the claims that will often be least attractive to the injured parties and their attorneys.

C. A reduction in legitimate claims would result in less recovery for participants generally and would have devastating effects on injured participants in particular.

In the short run, ERISA plans may benefit from elimination of the common fund doctrine. When a plan participant brings an accident claim, the plans would be able to recover all of their expenses from any recovery that the participant obtains without paying any attorney's fees.

In the long run, however, attorneys will adjust to the new rule. They will have to consider the added risks associated with bringing claims encumbered by ERISA plan reimbursement rights and advise their clients of those risks. Meritorious cases with high reimbursement values, which would have been brought were the common fund doctrine in effect, will go unpursued. ERISA plans may well end up recovering less than if the common fund doctrine still applied.

Regardless of the net impact on plan recovery, the elimination of the common fund doctrine would cost plan participants overall. By reducing the number of legitimate claims brought by injured parties, elimination of the common fund rule would reduce the total recovery available to the participants as a group. Whether the plan alone recovered more or less in the long run, the plan and the individual participants combined would recover less.

Moreover, ERISA participants who are most in need, those who have been seriously injured, would suffer the worst of these effects. Accident victims like McCutchen are often left permanently disabled, unable to work, and in need of ongoing personal and medical care. These participants will rarely be fully compensated by their own medical insurance. Even a small recovery can be very important in those circumstances, helping injured participants defray out-of-pocket medical expenses and weather periods of unemployment.

But, as noted earlier, if the common fund doctrine does not apply, many of these accident victims will be unable to find representation at all. Attorneys, concerned about the uncertainty created by large ERISA reimbursements, will be unwilling to take on their contingency-fee cases, even if the cases would otherwise be attractive.

Those who are able to find an attorney would recover substantially less than if the common fund doctrine were in place because they will be bearing the entire burden of the costs of creating the fund while receiving only a fraction of its proceeds. Some, like McCutchen, may even find themselves worse off than if they had not brought a claim at all.

D. The harms to participants that would result from eliminating the common fund doctrine are inconsistent with ERISA's purpose to protect plan participants.

ERISA was designed to protect the interests of plan participants and their dependents. 29 U.S.C. § 1001(a) (stating ERISA's purposes). Eliminating the common fund doctrine would reduce recovery for plan participants generally, and for injured participants in particular, which conflicts with that purpose.

U.S. Airways has argued that this harm to injured participants actually is consistent with ERISA's purpose because the reimbursement accrues to the benefit of other plan participants who pay lower premiums. As explained above (at 20-22), historically, reimbursement has resulted in little or no reduction in premium rates. Moreover, ERISA's legislative history indicates that Congress did not intend to sacrifice the welfare of individual injured plan members for the potential incremental benefit of the plan. Congress was motivated, at least in part, by "the absolute need that safeguards for plan participants be sufficiently adequate and effective to prevent the *numerous inequities to workers under plans which have resulted in tragic hardship to so many*." H.R. Rep. No. 93-533, at 9, 1974 U.S.C.C.A.N. 4639, 4647 (1974) (emphasis added).

Congress did not intend to reduce the benefits available to beneficiaries as a whole or to discourage recoveries for those beneficiaries who are most in need. Elimination of the common fund doctrine would enable ERISA plans to do just that.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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