

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   US AIRWAYS, INC., IN ITS CAPACITY :

4   AS FIDUCIARY AND PLAN               :

5   ADMINISTRATOR OF THE               :

6   US AIRWAYS, INC. EMPLOYEE           :   No. 11-1285

7   BENEFITS PLAN,                       :

8                            Petitioner               :

9                            v.                               :

10   JAMES E. McCUTCHEN, ET AL.         :

11   - - - - - x

12   Washington, D.C.

13   Tuesday, November 27, 2012

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15                           The above-entitled matter came on for oral

16   argument before the Supreme Court of the United States

17   at 10:02 a.m.

18   APPEARANCES:

19   NEAL KUMAR KATYAL, ESQ., Washington, D.C.; on behalf of

20    Petitioner.

21   JOSEPH R. PALMORE, ESQ., Assistant to the Solicitor

22    General, Department of Justice, Washington, D.C.; for

23    United States, as amicus curiae, in support of

24    neither party.

25   MATTHEW W.H. WESSLER, ESQ., Washington, D.C.; on behalf

1 of Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 11-1285, US Airways v. McCutchen.

Mr. Katyal.

ORAL ARGUMENT OF NEAL KUMAR KATYAL

ON BEHALF OF THE PETITIONER

MR. KATYAL: Thank you, Mr. Chief Justice, and may it please the Court:

ERISA permits plan fiduciaries to seek appropriate equitable relief to enforce the terms of the plan.

Six years ago, this Court, in Sereboff, concluded that reimbursement actions by ERISA plans, such as the one at issue here, seek equitable liens by agreement. And because the plan's claim here is one for an equitable lien by agreement, that means one parcel of equitable defenses, those derived from unjustment enrichment, offer no help to Respondents.

JUSTICE SOTOMAYOR: Mr. Katyal, if you go to equity, why aren't you bound by equity?

MR. KATYAL: We certainly are, Justice Sotomayor, bound by equity. Our contention is not that, once you say the magic words "equitable lien by agreement," that somehow transforms into a "we win" as

1 plaintiffs at all.

2 JUSTICE SOTOMAYOR: Well, but that's exactly  
3 what your bottom line is, which is you have someone else  
4 do the work for you and you don't pay them.

5 MR. KATYAL: Quite to the contrary, Justice  
6 Sotomayor, our position is that the rules of equity bind  
7 equitable liens by agreement, just as they bind anything  
8 else. We're not trying to say that the equity  
9 doesn't apply --

10 JUSTICE SOTOMAYOR: So why does your lien  
11 have priority to the attorney's lien that is normally  
12 created at the commencement of the litigation? Why is  
13 the attorney bound by the agreement you signed with the  
14 beneficiary?

15 MR. KATYAL: So our position is that the  
16 attorney doesn't -- there is no lien created with the  
17 attorney; that, once Mr. Sereboff signed -- entered into  
18 an agreement with US Air, that agreement said --  
19 provided for 100 percent reimbursement rights.

20 And there is no -- essentially, what  
21 happened is Mr. Sereboff -- excuse me -- Mr. -- Mr.  
22 McCutchen double-promised his money. He promised it  
23 first to -- first to the US Airways plan, and then he  
24 promised it to -- to his attorneys.

25 And that's a problem that he might have with

1 his attorneys, although, as I understand the facts here,  
2 maybe that debt has been forgiven, but it is not  
3 something that creates an independent lien on the money  
4 that's at issue here.

5 That is, the rules in equity say that it is  
6 the agreement that controls -- when we're talking about  
7 an -- when we're talking about an equitable lien by  
8 agreement --

9 JUSTICE GINSBURG: With Sereboff, that  
10 you -- you referred to, that -- that certainly describes  
11 the lien you rely on, but there's a footnote toward the  
12 end that leaves open the make-whole doctrine and, I  
13 assume, also the common fund doctrine, so -- so it's --  
14 it's an open question.

15 MR. KATYAL: Right. So our position is not  
16 that Sereboff's letter controls this case. We do think  
17 the reasoning of Sereboff essentially does decide the  
18 question because what Sereboff said, Justice Ginsburg --  
19 and this is at page 368 of the opinion in the text -- it  
20 said -- the Sereboffs had argued the make-whole  
21 doctrine.

22 And the -- in response, what this Court said  
23 is, quote, "Mid Atlantic's claim is not considered  
24 equitable because it is a subrogation claim.  
25 Mid Atlantic's action qualifies as an equitable remedy

1 because it is indistinguishable from an action to  
2 enforce an equitable lien established by agreement of  
3 the sort epitomized by our decision in Barnes.  
4 Mid Atlantic need not characterize its action as a  
5 freestanding action for equitable subrogation.  
6 Accordingly, the parcel of equitable defenses the  
7 Sereboffs claim accompany any such action are beside the  
8 point." Beside the point.

9           And our position is, once the Court has  
10 decided that the type of action that is at issue here is  
11 an equitable lien by agreement, the relevant doctrine --  
12 and this is a further answer to you, Justice Sotomayor --  
13 that the Court is to look to is how are equitable liens  
14 by agreement evaluated in equity?

15           And those rules in equity say that, again,  
16 the general rules of equity apply and govern that; but  
17 the one place -- the one set of defenses that aren't  
18 governed, are those that sound an unjust enrichment.

19           JUSTICE KENNEDY: I -- I recognize that  
20 we're talking about a matter of Federal law here. What  
21 about the law of most of the States?

22           Suppose there's an agreement with an insurer  
23 and an insured, that says the insured gets 100 percent  
24 of the proceeds. I would think that the law of most  
25 States gives a superior lien to the attorney for the

1 contingent fee, notwithstanding the agreement.

2 I'm not sure of that. It's just an  
3 assumption.

4 MR. KATYAL: That -- that is true, in some  
5 subrogation States. However, even with respect to that,  
6 when you have -- as long as it's not abrogated by  
7 statute or something like that. But if you simply have  
8 an agreement by an insured and it provides for 100  
9 percent reimbursement and abrogation of the common fund,  
10 even there, Justice Kennedy, the -- the agreement is  
11 enforced.

12 So State Farm v. Clinton, which is a case  
13 cited in our brief, as long as -- as well as the Dobbs  
14 case and other decisions -- the Arkansas Supreme Court  
15 in 1969, the Arkansas court in 1931 -- have all said  
16 that, if you have an insurance agreement that abrogates  
17 the common fund doctrine, that that agreement is  
18 enforced.

19 And, here, of course, we're dealing --

20 JUSTICE GINSBURG: Where is that  
21 abrogation -- where is that abrogation in this -- not  
22 the plan description, but the plan itself -- what clear  
23 language in the plan bars the -- the --

24 MR. KATYAL: Justice Ginsburg, the -- the  
25 district court at pages 30A to 32A of the petition



1 appendix had two pages that found the agreement clear  
2 and unambiguous with respect to abrogation of the common  
3 fund doctrine. And the plan itself is found at Joint  
4 Appendix page 20.

5 That finding by the district court was never  
6 appealed to the Third Circuit. It was not appealed to  
7 this Court. And, indeed, the brief in opposition  
8 conceded this issue.

9 JUSTICE GINSBURG: But that --

10 JUSTICE KENNEDY: That -- that's the summary  
11 of the plan that's at A20. That's not the plan --

12 MR. KATYAL: Yes. The summary plan  
13 description is at page --

14 JUSTICE GINSBURG: I'm asking about the plan  
15 itself because the plan controls if there's a  
16 discrepancy.

17 MR. KATYAL: Exactly. And so the plan  
18 itself was submitted, I believe, a few days ago. The  
19 Respondents have now made an issue of it.

20 JUSTICE GINSBURG: Yes. And I -- and I  
21 don't -- you -- you make a distinction between  
22 reimbursement clause and the subrogation clause. And  
23 this -- as far as I can tell from the plan, is no  
24 reimbursement clause.

25 The only one that's there is labeled

1 "subrogation." And I looked at what's in the plan, and  
2 I don't see language that clearly abrogates the common  
3 fund.

4 MR. KATYAL: Your Honor, I suppose that --  
5 that they could have made this an issue when they  
6 appealed the district court's finding on this. They  
7 didn't. And, indeed, there was discovery --

8 JUSTICE KENNEDY: Well, I mean, you -- you  
9 want us to decide a case without looking at the plan?

10 I have before me the same language that I  
11 believe Justice Ginsburg is looking at, and I think  
12 she's quite correct, that the word "abrogation," of  
13 course, is not used, but neither is the concept.

14 JUSTICE SCALIA: I didn't think we took this  
15 case to review the plan. Is -- is that what the Supreme  
16 Court took the case for, to say what this particular  
17 individual plan said?

18 MR. KATYAL: Absolutely not, Justice Scalia.

19 JUSTICE SCALIA: Had that -- had that point  
20 been raised, we would not have taken the case.

21 MR. KATYAL: And much to the -- and much to  
22 the contrary, Justice Scalia, exactly, this is the way  
23 that they framed the brief in opposition. The question  
24 presented is this: "Whether a seriously injured ERISA  
25 beneficiary must reimburse his ERISA plan for

1 100 percent of his medical expenses simply because the  
2 plan language so provides."

3 JUSTICE KENNEDY: Well, "simply because the  
4 plan language." I mean, obviously, we have to look at  
5 the plan language to see what the -- you're -- you're  
6 relying on the plan language. And you cite the summary,  
7 but you don't cite the main plan.

8 MR. KATYAL: Two things, Justice Kennedy.  
9 First, that brief in opposition goes on to say that that  
10 plan was clear with respect to the common fund doctrine  
11 and others at page 5.

12 But, second, if you're concerned --

13 JUSTICE SOTOMAYOR: Counsel, are you  
14 conceding --

15 JUSTICE SCALIA: I'm sorry. Maybe --

16 JUSTICE SOTOMAYOR: -- the plan doesn't say  
17 it?

18 JUSTICE SCALIA: Excuse me, please. The  
19 second point?

20 MR. KATYAL: The second point is, even if  
21 you are concerned about any discrepancy, point -- 4.2 of  
22 the actual plan itself -- and this is page 22 of the PDF  
23 that was submitted by -- lodged by my friends on the  
24 other side a few days ago -- has essentially an  
25 anti-Amara clause in it.

1           It says that the benefits that are provided  
2 under the plan are those put forth in the summary plan  
3 description. So there is no discrepancy between the SPD  
4 in the plan in this case, unlike in Amara where there  
5 very well was a discrepancy.

6           So here --

7           JUSTICE SOTOMAYOR: I'm sorry, the phrase  
8 that you just read says that the benefits are the same.  
9 It doesn't say that the reimbursement and subrogation  
10 language are the same.

11           So go back to Justice Ginsburg's question  
12 and point out in the plan what words you're relying  
13 upon, not the summary, but the plan.

14           MR. KATYAL: So the plan has, in 4.7, two  
15 things. It has, "The plan" -- quote, "The plan shall  
16 have the right to recover from any participant the  
17 amount of any benefits paid by this plan for expenses  
18 which were recovered from or paid by a source, other  
19 than this plan."

20           And then later, in 4.6, it says,  
21 participants are -- quote, "are obligated to avoid doing  
22 anything that would prejudice the plan's right of  
23 recovery."

24           So I don't think that there is any  
25 discrepancy, Justice Sotomayor. And to the extent that

1 this Court were concerned about it, there were 4 years  
2 for them to have made this an issue, but this is just  
3 about as procedurally barred as -- as anything --

4 JUSTICE BREYER: So if I were -- if I were  
5 Joe Smith, and a plan -- the plan pays me 100 -- I have  
6 medical expenses of \$100,000. And, actually, the --  
7 the -- there was a driver who caused this problem. And  
8 later, I collect 100,000, but I have to pay 50,000 to  
9 get the 100,000.

10 So I am left with 50,000 net because I had  
11 to pay my lawyers, I had to pay expert witnesses, there  
12 were a lot of different things I had to pay. I'm left  
13 with 50,000 now. So in comes the plan and says, we  
14 want 100,000. I say, what? Then I look at the  
15 language. The language allows them to get back expenses  
16 which were recovered from the third-party.

17 I didn't recover 100,000 from the  
18 third-party. I recovered 50,000 from the third-party  
19 because it cost me 50 to get the 100.

20 Now, if I were a judge and listening to  
21 that, I'd say, assuming they wanted a reasonable  
22 interpretation of this language, it sounds pretty  
23 reasonable to me.

24 MR. KATYAL: All right. And,  
25 Justice Breyer, if you were the district court judge in

1 this case, I suppose you could have reached that result.  
2 The district court here --

3 JUSTICE BREYER: It's a little tough, since  
4 nobody had the plan.

5 MR. KATYAL: Well, they -- they had the  
6 summary plan description, and they did not make an  
7 issue of it. They had all sorts of discovery  
8 requests, but never made a request for that --

9 JUSTICE BREYER: All right. But, I mean,  
10 wouldn't the normal result of such a case, like any  
11 contract case, where you have language, even if it was  
12 the word "any," it doesn't mean wheat grown on Mars,  
13 okay?

14 And so you'd say -- if it says you can  
15 recover anything, that "any expense," it means, yes, you  
16 can recover that which was paid, but not money that you  
17 had to pay to get the amount paid.

18 MR. KATYAL: Justice Breyer, we absolutely  
19 agree that a plan could be written in order to  
20 embrace --

21 JUSTICE BREYER: But this is a plan that  
22 they wrote and that US Air --

23 MR. KATYAL: -- but I think it would be  
24 highly unusual for this Court, indeed, I think,  
25 procedurally unavailable for this Court to --

1 JUSTICE SCALIA: Counsel, I guess your  
2 opponent could have raised that point.

3 MR. KATYAL: Absolutely.

4 JUSTICE SCALIA: And didn't raise it.

5 MR. KATYAL: Absolutely.

6 JUSTICE SCALIA: And we took this case on  
7 the assumption that there is an issue of law involved --

8 JUSTICE BREYER: All right. So I can --

9 JUSTICE SCALIA: -- and not -- not on the  
10 assumption that --

11 JUSTICE BREYER: What is the issue of law?

12 The issue of law is what happens if we have a plan which  
13 says, Joe Smith, my employee, if you have to spend  
14 \$90,000 to get back 92,000, you have to give us back all  
15 92, even though you only have 2 in pocket. And we are  
16 supposed to assume that's what the contract said. Is  
17 that right?

18 And then -- and then we say, now, can you  
19 override that with the principle of equity? Is that the  
20 issue you see before us?

21 MR. KATYAL: So, again, we're not overriding  
22 with the principle of equity. We're saying that the  
23 rules of equity, if they have in the plan an abrogation  
24 of the common fund, as that is here, in the way this  
25 case comes to the Court, then that is what settles the

1 question.

2 Now, you could have a Sereboff plan, which  
3 says the reverse, which says, we're going to have a  
4 common fund doctrine and avoid that problem at the  
5 outset. The parties evaluate the valuation of the  
6 transfer of assets at the outset, and that's what  
7 controls. And if they want to buy into the common fund,  
8 as this Court said in Sereboff, that's absolutely  
9 enforceable.

10 And so it's not a contract around, Justice  
11 Sotomayor, doctrines of equity. It's simply a  
12 reflection of the general rule that, in equity, if --  
13 when we're talking about equitable liens by agreement,  
14 it is the agreement that controls, that starts the ball  
15 game.

16 CHIEF JUSTICE ROBERTS: Was the plan  
17 available to the employee at any time before this  
18 litigation?

19 MR. KATYAL: Sure. If they had asked for  
20 the plan, it could have been provided to them. They  
21 have --

22 CHIEF JUSTICE ROBERTS: Are they -- are they  
23 advised that they can ask for the plan?

24 MR. KATYAL: I -- I'm not quite sure about  
25 that. I will look into that and try and get you an



1 answer on that.

2 JUSTICE SOTOMAYOR: I thought it took most  
3 of the litigation for the plan to be provided.

4 MR. KATYAL: Justice Sotomayor, at the  
5 outset, they asked for the summary plan description or  
6 the plan. The summary plan description was provided.  
7 Only --

8 JUSTICE SCALIA: You say, "they." I assume  
9 you mean their lawyer?

10 MR. KATYAL: Their lawyer.

11 JUSTICE SCALIA: This is not -- you know, an  
12 ignorant layman who knows nothing about the law.

13 MR. KATYAL: That's correct.

14 JUSTICE SCALIA: The lawyer, you say, did  
15 not ask for the plan.

16 MR. KATYAL: And -- and I should say, the  
17 minute that US Air found out that a tort -- a  
18 plaintiff's lawyer was hired, they sent a letter to that  
19 lawyer saying, we assert a right of reimbursement.

20 JUSTICE KAGAN: But, Mr. Katyal, could I ask  
21 you about the legal argument that you are making, the  
22 distinction you are making between reimbursement  
23 agreements and subrogation agreements, which you  
24 think -- seem to think is critical here. And -- you  
25 know, once you put it in one box, rather than another,

1 some result follows -- different results follow.

2 MR. KATYAL: Yes.

3 JUSTICE KAGAN: So -- so how do you know  
4 whether you have a reimbursement agreement or a  
5 subrogation agreement? And what follows from that  
6 categorization?

7 MR. KATYAL: So, Justice Kagan, there are  
8 two very distinct rights. Subrogation is the right to  
9 stand in someone else's shoes. And so the insured --  
10 the plan says, we are going to inherit all of the  
11 benefits and burdens of the insured in bringing an  
12 action. It's a vicarious -- it's a kind of vicarious  
13 notion.

14 Reimbursement's an entirely different  
15 concept. It's the idea that, look, we're not obligated  
16 to give you this money because we're not at fault in  
17 this accident, but we're going to essentially advance it  
18 to you, but you've got to reimburse us for it. And  
19 so --

20 JUSTICE KAGAN: So if this were a  
21 subrogation agreement, what would follow?

22 MR. KATYAL: So if it were a subrogation  
23 agreement, I think my friend's case on the other side  
24 gets a lot stronger because there are subrogation cases  
25 that -- that have different rules.

1           But when you talk about reimbursement, which  
2 is not the right to stand in someone's shoes, but a  
3 first priority absolute agreement between the parties to  
4 get money, it's just simply a dispute about that money.  
5 And you can't --

6           JUSTICE KAGAN: So if your friend's argument  
7 would get a lot stronger if it were a subrogation  
8 agreement, how do we tell that this agreement is a  
9 reimbursement agreement, rather than -- are we supposed  
10 to just take that because that's the way the Court --  
11 it's come to us? Or -- or is there an argument about  
12 why there is a reimbursement?

13           MR. KATYAL: There is an argument. And,  
14 indeed, all I think you have to do, Justice Kagan, is  
15 look at what happened in Sereboff because, in Sereboff,  
16 you had essentially the same thing, a plan that had both  
17 a reimbursement provision and a subrogation provision.  
18 And the -- the beneficiaries in Sereboff were saying,  
19 hey, this is subrogation, this is subrogation.

20           And the language that I've read to  
21 Justice Ginsburg at page 368, as well as earlier  
22 language in the opinion, said, no, this is actually a  
23 claim for an equitable lien by agreement that does not  
24 sound in subrogation, that sounds in reimbursement.

25           And so all you have to do here is precisely

1 what this Court unanimously did in *Sereboff*, which is to  
2 say, look at the nature of the action, is this an action  
3 that seeks personal liability, does it specify a  
4 particular fund, the typical hallmarks of an action for  
5 an equitable lien by agreement; and, if those are  
6 present, as they are here, that is enough.

7 JUSTICE ALITO: Are you, in effect, asking  
8 for a windfall because Mr. McCutchen and his attorneys  
9 didn't understand what ERISA means in this context?

10 If they understood that things would work  
11 out the way you think they should work out and they saw  
12 that the limits of the insurance policies against which  
13 they could collect were \$110,000, wouldn't they have  
14 realized that this was a suit that wasn't worth  
15 pursuing? There would be no point in doing it because  
16 nothing would be -- nothing would be gained for  
17 Mr. McCutchen or for the attorneys.

18 MR. KATYAL: Not at all, Justice Alito. Two  
19 things. One, the rule on ERISA -- and this rule has  
20 been the rule in the Third Circuit since *Federal Express*  
21 *v. Ryan* in 1996, this is a long-established rule -- if  
22 an attorney comes and takes a case, knowing that there  
23 is a -- an ERISA plan at stake, seems to me they're at  
24 least on inquiry notice that there would be some  
25 sort of --

1 JUSTICE ALITO: Well, perhaps they should  
2 have realized it. But, if they realized it, they have  
3 no incentive to pursue this litigation or to pursue the  
4 tort decision --

5 MR. KATYAL: Not so. This is both in our  
6 brief, as well as the Blue Cross amicus brief.

7 What usually happens in these situations is  
8 that an agreement is struck in advance, before the  
9 lawsuit is filed, between the plan and the plaintiff's  
10 attorney to reach some accommodation. After all, the  
11 plan has an incentive in some sort of action being  
12 brought --

13 JUSTICE SOTOMAYOR: In this case, he  
14 wrote -- the attorney wrote to you any number of times  
15 and finally said, look, unless you come and tell me what  
16 your position is, I'm going to go forward.

17 So what are attorneys supposed to do in  
18 those situations, just drop the lawsuit?

19 MR. KATYAL: Your Honor, I don't think that  
20 quite is an accurate statement of the facts. That was  
21 precisely what the district court evaluated on the  
22 summary judgment motion. They had made a big issue  
23 about our failure to communicate and so on. The  
24 district court rejected all of those arguments --

25 JUSTICE SOTOMAYOR: Rejected it because it

1 had nothing to do with the agreement, but it didn't  
2 reject them as a factual matter, that you were  
3 contacted.

4 MR. KATYAL: I do -- I do think that there  
5 were lots -- and this is in Joint Appendix, pages 50 to  
6 64 -- lots of communications between the two.

7 Now, here's -- there was one place where  
8 there wasn't communication, which was they went and  
9 negotiated a secret settlement of \$100,000. And when US  
10 Air found out about it --

11 JUSTICE SOTOMAYOR: Counsel, were they  
12 supposed to -- if the insurance limit was \$100,000, are  
13 you suggesting that that was a bad-faith settlement?

14 MR. KATYAL: I am suggesting that we didn't  
15 have the opportunity, Justice Sotomayor, that we  
16 typically do in the lion's share of cases, as I was  
17 saying to Justice Alito, where you work these things out  
18 in agreement -- in advance with clear lines of  
19 communication. And so --

20 JUSTICE KENNEDY: Justice Kagan's question  
21 had two parts. She said, tell me about the two boxes,  
22 subrogation and reimbursement.

23 I think there is quite a bit to your  
24 argument that this is not subrogation. The plan is  
25 rather confusingly drafted. The plan calls it

1 subrogation. I don't think it really means subrogation.

2 If it's not subrogation, Justice Kagan's  
3 question was, what then? The -- the common fund rule  
4 still does not apply? Because?

5 MR. KATYAL: Because the common fund rule --  
6 and, this, we are in agreement on, the parties -- the  
7 common fund rule is a doctrine based in unjust  
8 enrichment. This is what they say at page 26. This is  
9 what all the courts say common fund is.

10 And, indeed, up until six months ago, seven  
11 different circuit courts had evaluated this question of  
12 whether the agreement can trump the common fund  
13 doctrine. 21 of 21 circuit court judges all said it  
14 did.

15 JUSTICE KENNEDY: But you are still in  
16 equity, pursuant to the statute.

17 MR. KATYAL: Yes.

18 JUSTICE KENNEDY: And are you saying that  
19 there is no discretion in the equitable decrees that the  
20 judge made?

21 MR. KATYAL: That -- that is precisely  
22 right. The agreement sets the evaluation of the  
23 parties. That's what the State Farm case says, what  
24 their own treatise says, what the Arkansas Supreme Court  
25 says.

1 JUSTICE SCALIA: That's -- that's not  
2 unusual. The motto is equity follows the law.  
3 Doesn't -- doesn't that usually -- isn't that usually  
4 the case?

5 MR. KATYAL: That -- that is correct.

6 JUSTICE SCALIA: Where there is a legal  
7 right, equity cannot overcome it.

8 MR. KATYAL: That is correct. And as the  
9 Solicitor General says, at page 17, quoting the  
10 Restatement, "A valid contract defines the obligations  
11 of the parties as to matters within its scope, displacing  
12 to that extent any inquiry into unjust enrichment." Any  
13 inquiry.

14 If I could reserve the balance of my time?

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
16 Mr. Palmore.

17 ORAL ARGUMENT OF JOSEPH R. PALMORE,  
18 FOR UNITED STATES, AS AMICUS CURIAE,  
19 IN SUPPORT OF NEITHER PARTY

20 MR. PALMORE: Thank you, Mr. Chief Justice,  
21 and may it please the Court:

22 As this Court's cases recognize, Section  
23 502(a)(3) invokes the equitable powers of the district  
24 court. All of the remedial powers of a court in equity  
25 are available that -- under Section 502(a)(3), that



1 would have been available when an analogous claim was  
2 brought. And --

3 JUSTICE SCALIA: Equitable powers to enforce  
4 the agreement?

5 MR. PALMORE: Yes.

6 And so we agree with Mr. Katyal in what  
7 we've characterized as the first question presented,  
8 that we think is essentially decided by this Court's  
9 case in *Sereboff*.

10 At equity, when there was a -- an equitable  
11 lien by agreement, that agreement was generally  
12 enforceable according to its terms. It was like a  
13 mortgage, is the classic case, and the mortgage gave a  
14 security interest in land; and, if the debt was not paid  
15 off, then the lienholder could -- could foreclose on  
16 that land.

17 JUSTICE KAGAN: Mr. Palmore, do you agree  
18 with Mr. Katyal's view of this distinction between  
19 subjugation -- subrogation agreements and reimbursement  
20 agreements and which this agreement is?

21 MR. PALMORE: I think that's a -- the --  
22 there is certainly a distinction, and the Couch  
23 Insurance treatise talks about the -- the distinction.  
24 But the Couch Insurance treatise also explains that the  
25 terms are often used interchangeably in a confusing way.

1           So I don't think that the bright line that  
2 Mr. Katyal seeks to establish between subrogation and  
3 reimbursement is necessarily reflected in all the cases  
4 and all the --

5           JUSTICE SCALIA: Well, I think you can say  
6 that about any legal rule, that some courts bollox them  
7 up. I mean, that means the rule doesn't exist because  
8 it's sometimes used in a confusing way?

9           MR. PALMORE: No, I think it's just the fact  
10 that the courts do use these terms interchangeably.

11          JUSTICE SCALIA: What's the rule? What's  
12 the rule? Do you acknowledge that that is the rule?

13          MR. PALMORE: We acknowledge that, when  
14 there is a -- when there is a contractual plan-based  
15 reimbursement provision like this, it is enforceable as  
16 an equitable lien by agreement, in the same way that an  
17 equitable lien by agreement would have been --

18          JUSTICE KAGAN: Well, but I think Mr. Katyal  
19 said that, if this were a subrogation agreement,  
20 Mr. McCutchen would have a much better argument because  
21 a different set of rules would apply. And so that makes  
22 this categorization question quite meaningful.

23          Now, you could say, well, we don't see it as  
24 all that meaningful. We think, no matter what you call  
25 this agreement, the same rules apply. Or you could say,

1 yes, different rules apply with respect to these two  
2 different kinds of agreements, and your job is to figure  
3 out which kind of agreement this is.

4 MR. PALMORE: Right. We think -- as the --  
5 as the case comes to the Court, this is a case for  
6 reimbursement. This is just like Sereboff, and this is  
7 a reimbursement agreement.

8 What -- what adds to the confusion is  
9 that -- and if you look at more modern insurance  
10 decisions, they're bringing in all kinds of concepts  
11 from State law, from insurance law, from public policy  
12 of the State. They don't necessarily reflect what would  
13 have happened in a court in equity at the time of the  
14 divided bench, and that's the import --

15 JUSTICE BREYER: But that's my exact  
16 question. I think, now, what we're being asked to  
17 decide is, from your point of view, does the common fund  
18 doctrine apply?

19 I take it the common fund doctrine says, if  
20 this victim here got some money back from the person who  
21 caused the accident, that that money goes into a common  
22 fund, in the sense that those who share in the fund must  
23 share as well in the cost of producing the fund.

24 So if it costs 50,000 to produce 100,000,  
25 which is in the fund, that we have to have US Air, as

1 well, pay part of the cost of producing the fund. That  
2 sounds very fair.

3 But I hear the argument, fair though it is,  
4 we have here an agreement, and in this agreement, it  
5 says, it's as if it said, and you shall not apply the  
6 common fund doctrine or any other equitable doctrine,  
7 such as he who seeks equity must do equity, etc. And I  
8 think that's the question that's being asked.

9 And so what is your response to that? In  
10 particular, why do you say the common fund doctrine  
11 applies, though the contract says it doesn't, we assume,  
12 but all these other equitable doctrines don't apply?

13 MR. PALMORE: Because we think the  
14 equitable -- equitable doctrines that apply are the  
15 equitable doctrines that would have applied at equity.

16 JUSTICE BREYER: Good. So now, we have 18th  
17 century authority which says that, in the 18th century,  
18 Lord Cooke or someone said that the common fund doctrine  
19 applies, but the other doctrines don't. And the -- and  
20 the name and citation to that authority is?

21 MR. PALMORE: Well, there is not one  
22 authority that is going to give you both -- both  
23 answers. But the equitable lien by agreement cases from  
24 the time of equity, as I mentioned before, were  
25 typically mortgage cases or a promise to provide future

1 acquired funds to discharge a debt.

2 And it's clear, under those cases, that that  
3 could be executed, according to its terms. The unjust  
4 enrichment principles that Respondent is invoking were  
5 in a -- really a different silo involving equitable  
6 restitution. And this Court in Sereboff said, we are  
7 not going to look at equitable restitution principles,  
8 we are going to look at equitable lien by agreement  
9 cases.

10 Now, there is a separate line of authority  
11 involving the common fund that we talk about in our  
12 brief. And, as Mr. Katyal said, it has at times been  
13 characterized as an unjust enrichment doctrine, but its  
14 roots are different. Its roots are actually in an  
15 analogy to trust law.

16 If you look back to the principal case that  
17 established this, the Greenough case that we talk about  
18 in our brief, the Court said that the -- Mr. Vose,  
19 who -- the bondholder who had secured a benefit for all  
20 the bondholders, had -- while not a trustee, had acted  
21 the part of a trustee. And it was a well-settled  
22 principle of trust law, both then and now, that a  
23 trustee is entitled to reimbursement for reasonable  
24 expenses from the trust itself.

25 JUSTICE SCALIA: Was there an agreement that

1 contradicted that?

2 MR. PALMORE: There was no agreement in --  
3 in Greenough that contradicted that.

4 JUSTICE SCALIA: Well, but we have an  
5 agreement here, so how does -- how does that line of  
6 authority apply?

7 MR. PALMORE: Because, Justice Scalia,  
8 I -- I --

9 JUSTICE SCALIA: We have an agreement, which  
10 says that the insurance company gets all the money. So  
11 you either say that that agreement can be overcome by  
12 equity, or else, you -- you say the agreement prevails.

13 MR. PALMORE: There are two answers,  
14 Justice Scalia. One is that -- that a plan can't add to  
15 or subtract from the powers of the court in equity,  
16 under Section 502(a)(3). A plan couldn't disclaim a  
17 claimant's ability to get an injunction --

18 JUSTICE SCALIA: But it only has the powers  
19 to enforce the agreement.

20 MR. PALMORE: The powers to enforce --

21 JUSTICE SCALIA: There are various equitable  
22 powers, and it can use various of them to enforce the  
23 agreement.

24 MR. PALMORE: But we don't think --

25 JUSTICE SCALIA: That's quite different from

1 rewriting the agreement, which is what you are using it  
2 for here.

3 MR. PALMORE: No, we -- we are saying that  
4 Section 502(a)(3) takes the settled powers of the court  
5 in equity as it finds them. And the -- and the plan  
6 can't divest the Court of those powers, it can't add to  
7 those powers, like this Court held in Great-West; it  
8 also can't take away from them.

9 But, if I could go to an equity answer,  
10 because I think this is important --

11 JUSTICE SCALIA: Excuse me. Do you really  
12 think that if -- if an equity court finds the agreement  
13 to be unfair, it can say, he who seeks equity must do  
14 equity, and rewrite the agreement, so that it's fairer?

15 MR. PALMORE: Not on general unfairness  
16 grounds, but it was a settled principle at trust -- of  
17 trust law, and remember, Greenough based the common fund  
18 doctrine on trust law that if, for instance, a trust  
19 document had said, the trustee shall take his expenses  
20 from the trust corpus, not from the income -- or  
21 vice-versa, says the trustee shall take his expenses  
22 from the income, but not from the trust corpus -- if  
23 that proved unworkable or unfair and the trustee  
24 couldn't discharge his obligations to maintain the  
25 trust, the court of equity had broad reformation powers

1 and was not bound by that trust document.

2 CHIEF JUSTICE ROBERTS: Counsel, the -- the  
3 position that the United States is advancing today is  
4 different from the position that the United States  
5 previously advanced. You make their point in footnote 9  
6 of your brief. You say that, in prior case, the  
7 Secretary of Labor took this position. And then you say  
8 that, upon further reflection, the Secretary is now of  
9 the view -- that is not the reason.

10 It wasn't further reflection. We have a new  
11 Secretary now under a new administration, right.

12 MR. PALMORE: We do have a new Secretary  
13 under a new administration. But that --

14 CHIEF JUSTICE ROBERTS: I think it would be  
15 more candid for your office to tell us when there is a  
16 change in position, that it's not based on further  
17 reflection of the Secretary. It's not that the  
18 Secretary is now of the view -- there has been a change.  
19 We are seeing a lot of that lately.

20 It's perfectly fine if you want to change  
21 your position, but don't tell us it's because the  
22 Secretary has reviewed the matter further, the Secretary  
23 is now of the view. Tell us it's because there is a new  
24 Secretary.

25 MR. PALMORE: Well, with respect,



1 Mr. Chief Justice, the law has changed since that brief  
2 was filed nearly ten years ago in the Court's of Appeal.

3 And, of course --

4 CHIEF JUSTICE ROBERTS: Then tell us the law  
5 has changed. Don't say the Secretary is now of the  
6 view. It's not the same person. You cite the prior  
7 Secretary by name, and then you say, the Secretary is  
8 now of the view. I found that a little disingenuous.

9 MR. PALMORE: Well, I apologize for that,  
10 Your Honor, but we do cite in that footnote the Amara  
11 case, and that is a key element to our position here  
12 because Amara said that Section 502(a)(3) incorporates  
13 the traditional powers of the court at equity.

14 And it talked about, not only the ability to  
15 issue an injunction, but the ability to provide for a  
16 surcharge remedy, the ability to reform contracts --

17 JUSTICE SOTOMAYOR: The ability --

18 JUSTICE SCALIA: We never doubted that  
19 before. Was it thought before that all the equitable  
20 powers did not exist under ERISA?

21 MR. PALMORE: These cases weren't litigated  
22 in the way they are now before -- before Sereboff --

23 JUSTICE SCALIA: It seems to be self-evident  
24 that the court had all equitable powers. That's not a  
25 change in the law. It's just a restatement of the

1 obvious.

2 MR. PALMORE: And we think the court has all  
3 equitable powers and a plan term can't divest the court  
4 of those equitable powers, so among those equitable  
5 powers was the ability to enforce an equitable lien by  
6 agreement without looking at inapplicable unjust  
7 enrichment --

8 JUSTICE SOTOMAYOR: Or not to enforce it,  
9 meaning the equity is to enforce it or to stay your  
10 hand. And so the court could decide not to reach into  
11 the pocket of the plan participant to pay back money  
12 that the lawyer has.

13 MR. PALMORE: Well, we do agree with respect  
14 to the common fund doctrine, and we think that, to the  
15 extent this Court is willing to look at the -- at the --  
16 the purposes of ERISA, that the position that we've  
17 advanced strikes the right balance, and in particular,  
18 it avoids the -- the negative recovery scenario that is  
19 a particularly harsh result of Petitioner's position.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Wessler.

23 ORAL ARGUMENT OF MATTHEW W.H. WESSLER

24 ON BEHALF OF THE RESPONDENTS

25 MR. WESSLER: Mr. Chief Justice, and may it

1 please the Court:

2 Reimbursement claims that are based on an  
3 express subrogation agreement are subject to equitable  
4 principles of subrogation.

5 In equity, these claims were governed,  
6 according to the same principles that governed every  
7 other type of subrogation.

8 JUSTICE SCALIA: Your opponent says this is  
9 not a subrogation agreement, so that argument goes  
10 nowhere. He would concede that point. You have to tell  
11 us why this is a subrogation agreement, even though you  
12 conceded below that it isn't.

13 MR. WESSLER: Your Honor, it is a  
14 subrogation agreement. The claim, however, that  
15 Petitioners have pursued here, is a reimbursement claim.  
16 And -- but it's based on an express subrogation clause.

17 And in equity, reimbursement claims, which,  
18 to be clear, are distinct from subrogation claims  
19 because they involve a suit directly against the  
20 insured, as opposed to against the tortfeasor, are  
21 governed by the same principles of subrogation that  
22 equity treated -- equity used that -- to apply to all  
23 claims that involved an insurer who is seeking to  
24 recover money from either an insured or a tortfeasor.

25 And so we concede, absolutely, Your Honor,

1 that the claim is one for reimbursement for monies  
2 recovered out of a fund obtained by the insured. But  
3 it's -- it's based on an expressed subrogation --

4 JUSTICE SCALIA: That's not what I say  
5 you've conceded. That's the common fund doctrine. Your  
6 opponent denies that the common fund doctrine applies.  
7 And it says this is an equitable lien by agreement, so  
8 that the common fund doctrine doesn't apply.

9 Now, you -- you say it is not an equitable  
10 lien by agreement? Is that your position?

11 MR. WESSLER: No, Your Honor. We -- it --  
12 to be clear, it is an equitable lien by agreement, but  
13 it arises within the doctrine of subrogation, which is,  
14 as Couch and Palmer and other treatises explain, is an  
15 umbrella term that is used to describe all of the rights  
16 and rules that govern claims by insurers for money back  
17 after they've paid it out under a policy.

18 Now, the form of the action in this case is  
19 a -- is a claim for reimbursement out of a fund, but the  
20 mere fact that that's the form of the action, which, in  
21 Sereboff, this Court called an equitable lien by  
22 agreement, does not alter the underlying rule that  
23 equity courts in the days of the divided bench would  
24 have applied to the claim.

25 JUSTICE KAGAN: But doesn't Sereboff suggest

1 not? I mean, I realize that Sereboff has this footnote,  
2 but if you read the text in Sereboff, it says, these  
3 affirmative defenses that would arise in a normal  
4 subrogation context are beside the point. So how are  
5 they not the beside the point?

6 MR. WESSLER: They are not beside the point  
7 for -- for one reason, and let me -- let me explain why.  
8 What the Court actually said in Sereboff was that the  
9 parcel of equitable defenses accompanying a  
10 free-standing claim or free-standing action for  
11 equitable subrogation are beside the point. A  
12 free-standing action for equitable subrogation is not  
13 one based on an agreement. It's an implied claim, a  
14 claim for subrogation or reimbursement based on the mere  
15 fact that the insurer has paid the money.

16 JUSTICE KAGAN: So is that true that, in  
17 Sereboff, there was no agreement?

18 MR. WESSLER: There was, but what this  
19 Court -- there was absolutely an agreement, just as  
20 there is an agreement in this case. What the -- the  
21 distinction the Court drew in Sereboff was it said that  
22 whatever principles apply to free-standing claims are  
23 beside the point, because -- precisely because the claim  
24 was based on an agreement. That is absolutely correct.

25 And it's perfectly consistent with our

1 position because we believe that the principles in  
2 equity that governed exactly the kinds of claims that  
3 were at issue in Sereboff and are at issue here,  
4 reimbursement claims based on an express agreement, are,  
5 in fact, governed by the same principles of unjust  
6 enrichment.

7 JUSTICE KAGAN: I guess I don't understand  
8 that because it seems to me that, when Sereboff said it  
9 was beside the point, they were refuting the arguments  
10 that the insured party was making, that the insured  
11 party was saying, hey, look, we have these great  
12 defenses.

13 And -- and you are saying they had an  
14 agreement, but they also said they have these great  
15 defenses, and the Court said, too bad, those defenses  
16 don't work for you here.

17 MR. WESSLER: The Court -- the -- the  
18 beneficiary, Your Honor, in Sereboff, argued that the  
19 defenses that applied to a -- a freestanding or implied  
20 claim for equitable subrogation should control the --  
21 the measure of relief available in the case.

22 They said -- it -- the contract doesn't  
23 matter. The -- the agreement makes no difference. What  
24 the plan is trying to obtain here is a pure,  
25 freestanding claim for subrogation. And -- and look at

1 all these great rules that apply to that -- to that kind  
2 of claim.

3 And the Court said, absolutely correctly, in  
4 Sereboff, whatever those principles are doesn't matter  
5 because this is a claim based on an agreement. And --  
6 but what our view in this case is --

7 JUSTICE SOTOMAYOR: So what -- what's the  
8 difference between the two? Meaning -- I take your  
9 argument to be that the Court was right before, that  
10 freestanding subrogation claims have one set of remedies  
11 or rights, and subrogation, by agreement, have another.  
12 So what do you see as the differences between the two?

13 MR. WESSLER: When it comes to the rules  
14 that govern relief, there is no difference. The same  
15 principle of unjust enrichment controls, and it limits  
16 an insurer to recovering out of the fund  
17 only --

18 JUSTICE SOTOMAYOR: So was the Court in an  
19 exercise of futility, in writing what it did in  
20 Sereboff?

21 MR. WESSLER: Not so, Your Honor. It did  
22 not reach the question in Sereboff of what rules apply  
23 to -- to reimbursement claims based on express  
24 agreement. That was footnote 2.

25 The Court said, all we're holding in

1 Sereboff is this is a --

2 JUSTICE SOTOMAYOR: Counsel, I understand  
3 the argument. It's a bit unsettling that you've got two  
4 kinds of rights, one implied and one express, and  
5 there's no difference between the two? You -- you've  
6 got to give them a little bit more body to have a  
7 persuasive argument.

8 MR. WESSLER: Your Honor, in equity, that  
9 was the rule. And I'll point this Court's attention to  
10 the leading treatise on equity. It's Palmer's treatise  
11 cited by this Court in Sereboff and in Great West.

12 And what Palmer says -- and he -- he  
13 discusses, precisely, this claim on pages 473 and 474 of  
14 his -- of his treatise, and it's cited on page 21 of our  
15 brief. And he says that, "The same principle of unjust  
16 enrichment controls claims for reimbursement arising out  
17 of an express agreement."

18 And I'm quoting here --

19 JUSTICE SOTOMAYOR: Isn't there another line  
20 after that, that says something --

21 MR. WESSLER: Yes, I'm about to quote that.

22 And he says that that principle, quote,  
23 "should serve to limit the effectiveness of contract  
24 provisions which in terms provide for reimbursement out  
25 of the insured's tort recovery, without regard to



1 whether or the extent to which that recovery includes  
2 medical expense."

3 CHIEF JUSTICE ROBERTS: Is this the part --  
4 I might be mixing this up with something else, but is  
5 this the part where he says, unfortunately, the courts  
6 don't agree with that?

7 (Laughter.)

8 MR. WESSLER: He -- he -- he identifies two  
9 decisions -- that -- you're correct, Your Honor -- he  
10 identifies two decisions, which did something contrary  
11 to that rule. But, in his view, that is the rule that  
12 governs these claims.

13 JUSTICE GINSBURG: Let's go back to what  
14 the -- the simple argument. We have an agreement here,  
15 and the plan is asking for what the agreement gives it.  
16 Why is the plan unjustly enriched by receiving exactly  
17 what the plan entitles it to receive?

18 MR. WESSLER: Because, Your Honor, these --  
19 these insurance reimbursement cases arose in a very  
20 different context from most other equitable lien by  
21 agreement cases.

22 And the core difference in -- between these  
23 cases and all 22 or -- or more of the cases that the  
24 Petitioner cites, is that they involve a third party,  
25 who has caused the loss both to the insurer and the

1 insured. And that third party, the tortfeasor, in these  
2 reimbursement cases is not the defendant.

3           And so, in two-party equitable lien by  
4 agreement cases, which are -- all of the cases that  
5 Petitioner cites involve two-party cases in which the  
6 defendant is also the wrongdoer, is the person who is  
7 culpable and who has caused the -- the Plaintiff's loss.  
8 In those cases, when courts awarded relief, they awarded  
9 relief that was consistent with the defendant's unjust  
10 enrichment, but was also co-extensive with or consistent  
11 with the loss under the contract.

12           In these three-party cases, however, because  
13 the defendant, who is -- who is a beneficiary, not --  
14 not the tortfeasor, did not actually trigger the loss,  
15 courts developed, in equity, a different set of rules to  
16 apply to -- to measure the relief available under the  
17 claim.

18           And what they said was, where there is a  
19 fund that is insufficient, where it cannot cover all of  
20 the losses suffered by all of the parties, that -- that  
21 all of the parties must share equally with -- of the  
22 loss. And the Palmer -- Palmer itself has an entire  
23 chapter devoted to third-party problems. And --

24           JUSTICE BREYER: Why -- why is it so unfair?  
25 I've been putting it in a way that looks unfair, which

1 favors your side. But US Air or the equivalent says,  
2 now, here is the deal, we'll pay your medical expenses.  
3 And now, if somebody causes those expenses, you come to  
4 us, and we decide whether we want to sue and get our  
5 expenses back, and any extra money, we give to you, and  
6 we pay our attorneys' fees extra. They don't count  
7 against the fund.

8 And if our lawyers tell us it isn't worth  
9 it, you're free to sue; but, I'll tell you what, your  
10 lawyer is going to be at the end of the queue. We're  
11 first, then comes your lawyer, and anything left over  
12 goes to you.

13 Now, if you can find a lawyer that takes it  
14 on those conditions, good for you. But he might because  
15 he might think he's going to get -- but our lawyers have  
16 already told us it's not going to work, so that's the  
17 situation.

18 Now, what's -- I'm not -- I think US Air's  
19 point would be, well, what's unfair about that?  
20 That's -- that makes sure we get our money back. That's  
21 what we want to do. And you're free to sue; it's just  
22 your lawyer who's going to come at the end of the queue,  
23 okay?

24 What's -- why is that unfair?

25 MR. WESSLER: Your Honor, it's unfair

1 because, in equity, parties could not defeat the rules  
2 that typically apply.

3 Now, if this were a legal case and that were  
4 a legal claim, there's nothing unfair about that. The  
5 parties can structure their contracts or agreements as  
6 they see fit. But the fact is that we are talking about  
7 the rules that equity applied in these situations.

8 JUSTICE SCALIA: So whenever you have a  
9 contract that explicitly, although -- you know, nowadays  
10 when the merged bars, I suppose, you wouldn't even have  
11 to say it, but let's assume it explicitly says that  
12 rights under this contract can be enforced in law or --  
13 at law or in equity.

14 Whenever -- whenever you have a contract  
15 like that, it's going to be up to the court of equity to  
16 decide whether it's fair?

17 MR. WESSLER: No, Your Honor. I -- I don't  
18 think that's right. And I would point the Court to --  
19 to its decision in McKee in 1935, in which it drew a  
20 distinction between a claim in equity that was a legal  
21 claim based on a contract, which could happen, and a  
22 claim in equity that was a, quote, "purely equitable  
23 claim," based on the contract.

24 JUSTICE SCALIA: Why isn't this a legal  
25 claim? It's -- it's a promise made in a contract.

1 Why -- why is that not a legal claim?

2 To be sure, the contract says that --  
3 that -- you know, all equitable remedies are available  
4 to enforce that claim. But why is it an equitable  
5 claim, not a legal claim?

6 MR. WESSLER: It -- it could be either, Your  
7 Honor. And we've cited -- cited to this Court cases  
8 in -- in the days of the divided bench, in which a party  
9 could have sought legal relief for breach for this exact  
10 kind of claim, but there was also a remedy that a party  
11 could seek in equity.

12 But in order to do that, in order to -- to  
13 enter equity's doors on this reimbursement theory, it --  
14 it had to agree to allow other parties their correlative  
15 rights in equity, and it also had to agree not to  
16 override or defeat the -- the rules in equity that  
17 typically would --

18 JUSTICE GINSBURG: Well, couldn't that party  
19 simply say, I want to go to the other side of the court?  
20 You just made a distinction between the remedy at law  
21 and at equity. This is the plan, and if the plan is  
22 told, well, if you go to equity, you get all these extra  
23 things. You could say, I'm asserting my rights at law.

24 MR. WESSLER: No, Your Honor. The -- the  
25 plan is in a bind here. And we know this from Sereboff

1 and Great West and Mertens. They cannot seek legal  
2 relief under this contract.

3 The only remedy -- the only provision in  
4 ERISA's enforcement section that allows that is Section  
5 502(a)(1)(b). And it says, a party has rights to -- has  
6 the right to enforce the terms of the plan. But -- but  
7 fiduciaries like Petitioner are not allowed to pursue  
8 relief under that provision, so all they get is purely  
9 equitable relief under 502(a)(3).

10 JUSTICE KENNEDY: The general rule in equity  
11 was that the equity court would not give a specific  
12 performance decree to pay a certain amount of money, was  
13 the general rule. Were there exceptions?

14 MR. WESSLER: Your Honor --

15 JUSTICE KENNEDY: And -- and if so, do those  
16 exceptions bear on this case?

17 MR. WESSLER: And there were -- there were  
18 exceptions, but we don't view this case as a specific  
19 performance case. And I'm not sure Petitioner --

20 JUSTICE KENNEDY: We -- you don't view the  
21 case as?

22 MR. WESSLER: As a specific performance  
23 case. That -- that was a specific type of -- of remedy.  
24 The remedy here that's being sought is an equitable lien  
25 by agreement, but -- but in our view, when an insurer

1 sought to enforce, through an equitable lien by  
2 agreement, a claim or a lien on a fund, it must agree to  
3 take that relief, subject to the way equity would have  
4 treated the claim.

5           And what Palmer and what Couch and -- and  
6 what the cases we've cited say is that, even for those  
7 reimbursement claims that are based or arise on an  
8 express agreement, that the relief available is limited  
9 in two concrete ways.

10           The -- the insurer could not get more out of  
11 the fund than its share of the fund that accounted for  
12 the medical expenses it paid, and it must have agreed to  
13 reduce proportionately for an amount of -- of fees and  
14 costs.

15           JUSTICE BREYER: Enter best case -- what is  
16 your best case? I'd love to find it. There's a case  
17 that says something like this.

18           MR. WESSLER: The Svea case, Your Honor,  
19 which is --

20           JUSTICE BREYER: Well -- well, let me tell  
21 you what I'm thinking of. The -- there is a contract,  
22 all written down. They forgot to put a seal on it.  
23 They forgot to put a seal on it. So I guess it's now  
24 1463 or some year like that. So they go into equity.

25           And now, they are in equity. And the

1 plaintiff says, judge, I want you to enforce this  
2 contract. He says, I'm a judge in equity. He says, I  
3 know, but we've agreed, and you enforce it in equity.

4           The contract says, give Smith all the wheat.  
5 And equity says -- you know, there are other people who  
6 would like some of this wheat, too, so we are not going  
7 to follow the contract. We are going to modify the  
8 contract according to equitable principles, which, as  
9 you say, they can do. And the other side says, no, they  
10 wouldn't. They'd follow the contract. They are just in  
11 equity because they forgot the seal.

12           Okay. What is your best case to show they  
13 did, indeed, modify it with the common fund doctrine or  
14 some other doctrine? I want to be sure to read it with  
15 a magnifying glass.

16           MR. WESSLER: Well, Your Honor, to be clear,  
17 there is not a single equitable lien case that -- that  
18 Petitioners have found in which a court has --

19           JUSTICE BREYER: I know, but I didn't ask  
20 you about what they found. I was asking what you found.

21           MR. WESSLER: So -- so, Your Honor, the Svea  
22 case, is -- is, I think, our best example. And in that  
23 case, the insurer had a subrogation agreement, which  
24 authorized it to recover -- authorized recovery to,  
25 quote, "the extent of its payment" out of, quote, "all



1 rights of recovery of the insured."

2           And in that case, there was an underlying  
3 settlement that the insured reached with the tortfeasor,  
4 the wrongdoer. And after that occurred, the insurer did  
5 not participate in that underlying proceeding at all.  
6 And after that occurred, the insurer then directly sued  
7 the insured.

8           This is exactly the kind of case we're  
9 talking about here, seeking recovery out of the fund.  
10 And they based that claim on their -- on their express  
11 subrogation agreement. And they said, we paid  
12 approximately \$3,000. You recovered something like  
13 \$9,000. We should get \$3,000 back.

14           And the court there said, no, because the  
15 fund was insufficient to cover all of the losses --  
16 the -- the insured did not recover for all of its  
17 losses, several other claimants did not recover for all  
18 of their losses -- and the court said that, because the  
19 fund was insufficient, the -- the insurer was limited to  
20 recovering -- and I'm quoting here -- "no more than its  
21 proportion of the amount recovered after deducting costs  
22 and fees."

23           And so they applied both the double recovery  
24 cap that we believe applied in every single case in  
25 equity in which an insurer --

1 JUSTICE SCALIA: What -- what case is this?

2 MR. WESSLER: This is the Svea case, Your  
3 Honor.

4 JUSTICE SCALIA: From what court, what --  
5 what year?

6 MR. WESSLER: The highest court in Maryland,  
7 I believe from 1901.

8 JUSTICE KAGAN: Mr. Wessler, would it be  
9 fair to say -- I mean, we're in this unusual position  
10 because we're supposed to be looking back to before the  
11 1930s sometime.

12 Would it be fair to say that we just don't  
13 have very many cases, and Mr. Katyal doesn't have any,  
14 and you don't have any, that raise this question that,  
15 where somebody walks into an equity court with a  
16 contract, and we try to figure out whether the equity  
17 court is going to use these unjust enrichment defenses?  
18 Would it be fair to say that we just don't know?

19 MR. WESSLER: I -- I think -- I think that  
20 it's fair to say that this did not arise that frequently  
21 in courts of equity.

22 JUSTICE KAGAN: Why didn't it?

23 MR. WESSLER: Be -- for -- for several  
24 reasons, Your Honor.

25 First, most of these claims arose simply as

1 freestanding or implied claims. So there was not --  
2 there was no need for an insurer to include in its  
3 insurance policy an expressed subrogation agreement.

4           However, that -- that changed approximately  
5 around the turn -- the mid-20th century, when medical  
6 insurance started to become an increasing commodity.  
7 When that occurred, most States had a -- a prohibition  
8 on the assignment of personal injury claims.

9           And so what insurers began to do to get  
10 around that prohibition was to insert in their -- in  
11 their policies an express clause allowing them to obtain  
12 reimbursement from the insured, in the event that the  
13 insured recovered money that it had paid.

14           Now, there is another reason in this case --  
15 or in these ERISA cases -- why these agreements need to  
16 be in the plan. And that's because Section 502(a)(3)  
17 itself does not allow for a plan, like Petitioner, to  
18 obtain a general right to equitable relief. All that  
19 the Petitioner can -- can seek here is equitable --  
20 appropriate equitable relief to enforce the terms of its  
21 plan.

22           And so, in the absence of an expressed  
23 provision, like a subrogation clause, it would not be  
24 entitled to pursue a -- a general right to subrogation.

25           It's a term -- that back-end reference is

1 a -- is a term of limitation that limits the types of  
2 claims that Petitioner can bring in these cases.

3 CHIEF JUSTICE ROBERTS: Counsel, can -- I  
4 want to give you an opportunity to respond to the  
5 argument that you've waived, the -- the -- your argument  
6 based on the distinction between the summary of the plan  
7 and the plan.

8 And there are two things that concern me  
9 about that, in particular. The summary of the plan,  
10 which you've had all the time, says, on page 1, "This is  
11 only a summary. Complete plan details are contained in  
12 a legal plan document. If there is any difference  
13 between the information in the summary and the legal  
14 plan, the legal plan" -- "the legal plan document will  
15 govern."

16 So when you had the summary, you were on  
17 notice that, if there were any difference between it and  
18 the plan, the plan would govern. You received a copy of  
19 the plan in June of 2012. Okay?

20 And as late as August 29th of 2012,  
21 two-and-a-half months afterward, you filed a Joint  
22 Appendix that didn't -- didn't contain the provision  
23 that you say now governs. So why shouldn't you be held  
24 to have waived that?

25 The first time we found out about that was

1 in your red brief that was filed -- June, July, August,  
2 September -- three months -- October -- four months  
3 after you had the plan.

4 So didn't you waive it?

5 MR. WESSLER: Well, I -- I don't think we  
6 waived it, Your Honor. It's in our opening brief on the  
7 merits to this Court, and --

8 CHIEF JUSTICE ROBERTS: Which was four  
9 months after you had the plan and -- and the plan was  
10 lodged with us last week for the first time.

11 MR. WESSLER: That's correct, Your Honor.  
12 In our view -- and -- and I think I need to be clear  
13 about this. I mean, the -- the fact that the plan  
14 contains a different set of rights than -- than the SPD,  
15 to us, is meaningful in -- in its -- in its effect that  
16 it will have on this case when this -- if and when this  
17 Court remands because -- because, in our view, the  
18 rights are different.

19 However, I -- it doesn't change the  
20 underlying nature of our argument, which is that, even  
21 the strong form argument that Petitioners have made  
22 here, which is that, on the SPD, it can defeat the --  
23 the rules that typically would have applied, that equity  
24 would not have allowed that. And so --

25 CHIEF JUSTICE ROBERTS: The problem is that

1 the district court interpreted the plan as precluding  
2 the claim you're making here. And your argument that  
3 that's not true is based not on the summary of the plan,  
4 but on the plan itself.

5 MR. WESSLER: That --

6 CHIEF JUSTICE ROBERTS: And what the  
7 district court does is it defers to the administrator's  
8 interpretation of the plan. So the district court found  
9 that the administrator's interpretation was not  
10 arbitrary and capricious.

11 So what your friend is arguing is that,  
12 well, you are kind of stuck with the district court  
13 interpretation, and you can't, at the last minute, argue  
14 that it shouldn't control because of some other  
15 document.

16 MR. WESSLER: Well -- well, we think we do  
17 have the right to argue that on remand, Your Honor.  
18 And -- and this Court's decision in Cigna only -- only  
19 arose in this case after the -- the briefs were complete  
20 to the Third Circuit.

21 And so it's -- I -- I think Cigna has  
22 changed the law to the extent that all parties are now  
23 on notice and know that the plan document will trump any  
24 contrary language --

25 CHIEF JUSTICE ROBERTS: Well, no, Cigna

1 didn't tell you that. The plan -- the summary told you  
2 that. It says, "Complete plan details are in the legal  
3 plan. If there is any difference between the summary  
4 and the plan, the plan controls." So you didn't need  
5 Cigna to tell you that.

6 MR. WESSLER: Well -- well, Your -- Your  
7 Honor, I mean, I -- I think that the -- the -- you know,  
8 that -- for us, that's an issue on remand. We're  
9 comfortable that our arguments in this case control,  
10 even -- even as it relates to the actual language in the  
11 SPD and that -- and that whatever differences between  
12 the SPD and the plan actually are don't necessarily  
13 change the rules that govern when a -- when a party in  
14 equity sought this kind of reimbursement relief directly  
15 from -- from an insured.

16 I'd like, just -- just for the last minute  
17 or so, to discuss the common fund rule because I do  
18 think it applies as a separate and distinct rule,  
19 regardless of how this Court interprets the agreement as  
20 governing the rights between Mr. McCutchen, the  
21 beneficiary, and the plan.

22 And I'd just like to point out that this  
23 Court, in Pettus, made clear that the common fund  
24 doctrine confers a separate lien on the attorney. And  
25 so whatever the agreements control between the

1 beneficiary and the plan has, it cannot defeat the  
2 rights that the attorney has, as a separate matter, to  
3 come into court and invoke its own lien on the fund as a  
4 first priority lien over the money.

5           And -- and I -- and I'd just like to point  
6 out that Petitioners have not responded to that  
7 argument. Nowhere in their reply brief did they explain  
8 why their theory would allow them to defeat the rights  
9 of a third-party defendant in this case, Mr. McCutchen's  
10 lawyers, who have their own separate right to the lien.

11           And -- and none of their equitable lien  
12 cases, Your Honor, involve any kind of common fund  
13 whatsoever. So they say precisely nothing about the  
14 rules that would have applied in equity to an attorney's  
15 attempt to -- to take their proportion out of the fund  
16 before it was distributed to any of the parties.

17           JUSTICE GINSBURG: I thought you were  
18 discussing the common fund would be the allocation  
19 between McCutchen and the plan. But now, you seem to be  
20 talking only about the attorney's right to come in  
21 first.

22           MR. WESSLER: The common fund, Your Honor,  
23 applied either to deduct -- either as -- as a deduction  
24 off the -- Your Honor, may I -- may I finish answering  
25 the question?



1 CHIEF JUSTICE ROBERTS: Sure.

2 MR. WESSLER: As a deduction out of the  
3 entire fund for the attorney's lien or it can be applied  
4 to reduce proportionately each of the claimant's claims  
5 to that fund. And in this case, it should be applied to  
6 reduce a Petitioner's claim on the fund, irrespective of  
7 McCutchen's own claim.

8 Thank you, Your Honor.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Katyal, you have 4 minutes remaining.

11 REBUTTAL ARGUMENT OF NEAL KUMAR KATYAL

12 ON BEHALF OF THE PETITIONER

13 MR. KATYAL: Thank you.

14 I'd like to begin where -- where Mr. Wessler  
15 left off, with the common fund, and make three quick  
16 points.

17 The first is that both equity law and ERISA  
18 law point in the same direction. Justice Scalia is  
19 absolutely right, that they have zero cases that say, if  
20 there's a preexisting agreement that settles the common  
21 fund doctrine, that that makes it not enforceable.

22 And Justice Ginsburg's absolutely right to  
23 say that when the plan -- the plan is not unjustly  
24 enriched, to get the money that they are entitled to get  
25 under the contract.

1           The second point I would make is that the  
2 Solicitor General says, well, this is now --

3           JUSTICE SOTOMAYOR: Put on the back of  
4 someone else, meaning --

5           MR. KATYAL: I agree.

6           JUSTICE SOTOMAYOR: -- I may or may not  
7 agree that, in terms of your split with the participant,  
8 the contract might control. But I still am having  
9 trouble with understanding how you can bind a third  
10 party, like a lawyer, who's done the effort to recover  
11 that fund -- more along Justice Breyer's question, which  
12 is not only in -- in all equity, lawyers are entitled,  
13 whether by contract or by unjust enrichment principles,  
14 to a -- to a percentage of their expenses in recovering  
15 something.

16           MR. KATYAL: Justice Sotomayor, that's  
17 precisely what cases like State Farm and the Arkansas  
18 case from 1969, the Maryland case from 1931, address,  
19 which is that situation. And the reason is that  
20 essentially here -- it's a mistake to see this as a  
21 third-party case.

22           This is really a situation created by  
23 Mr. McCutchen double-promising the same money to two  
24 entities, US Air and to his lawyers. And so it's  
25 essentially a dispute, really, among two parties, not

1 three.

2 Now, the Solicitor General says, well, this  
3 is rooted in -- in equitable doctrine. There is no case  
4 that they have that says that there's some equitable  
5 doctrine that trumps the preexisting agreement. And,  
6 indeed, the case that they cite, the Greenough case, is  
7 one that essentially relies on unjust enrichment  
8 principles.

9 Sure, the Court has an equity power when to  
10 remedy unjust enrichment. That is an inherent power of  
11 the Court. We're not disagreeing with that. What we  
12 are saying is that, when you have an agreement in  
13 advance, that means, per se, there is no unjust  
14 enrichment, that they are, to use this Court's language  
15 in Sereboff, a defense that it is beside the point.

16 JUSTICE SOTOMAYOR: Counsel, I'm assuming,  
17 because ERISA's in place now, that the many State laws  
18 that prohibit this kind of agreement, where insurance  
19 plans are seeking full reimbursement, despite an  
20 attorney's efforts, that those are void, that those  
21 would be enforceable.

22 MR. KATYAL: That is precisely --

23 JUSTICE SOTOMAYOR: The only one who can fix  
24 this problem now is Congress, if they --

25 MR. KATYAL: That is correct.

1 JUSTICE SOTOMAYOR: -- if they perceive it  
2 as a problem.

3 MR. KATYAL: Congress, in 1974, set it up  
4 this way. And I think that that's an important point,  
5 Justice Sotomayor. For 38 years, this Court has never  
6 embraced an idea that Federal common law allows  
7 rewriting of plan terms. It would be a very dangerous  
8 doctrine to do so. It'd be standardless.

9 And here is a very vivid example: They are  
10 saying that it is inequitable to have the Federal Blue  
11 Cross/Blue Shield plan, which governs 4.6 million  
12 people, including perhaps members of this Court, which  
13 has the exact same provisions as the US Air plan, an  
14 abrogation of common fund and a 100 percent  
15 reimbursement provision.

16 And they are saying that that would not be  
17 enforceable. That may create any number of problems for  
18 the government, I imagine, when it tries to enforce  
19 that.

20 JUSTICE BREYER: Suppose the expense weren't  
21 to pay the lawyer. Suppose, in order to get the  
22 100,000, you had, for example, to build a model car to  
23 demonstrate to the manufacturer what caused the injury,  
24 and it cost you 98,000 to do it. And they pay you  
25 100,000.

1                   You're saying that -- it wouldn't be unjust  
2 to say the 100,000 has to go to -- back to pay US Air?

3                   MR. KATYAL: Justice Breyer, if the  
4 agreement settled that in advance, yes, it would not be  
5 unjust. It is the agreement that controls.

6                   CHIEF JUSTICE ROBERTS: Thank you, counsel.  
7 Counsel.

8                   The case is submitted.

9                   (Whereupon, at 11:03 a.m., the case in the  
10 above-entitled matter was submitted.)

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