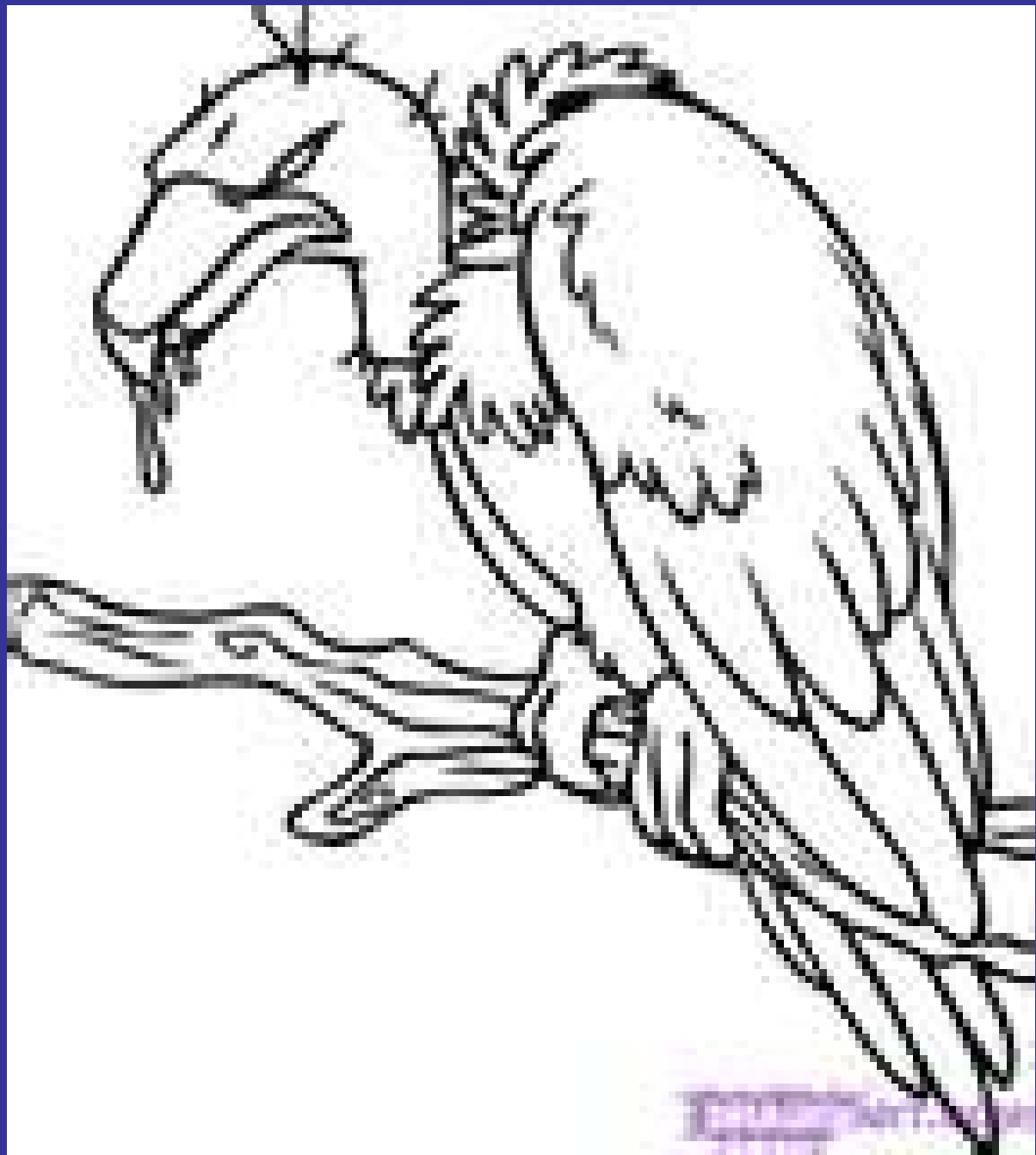
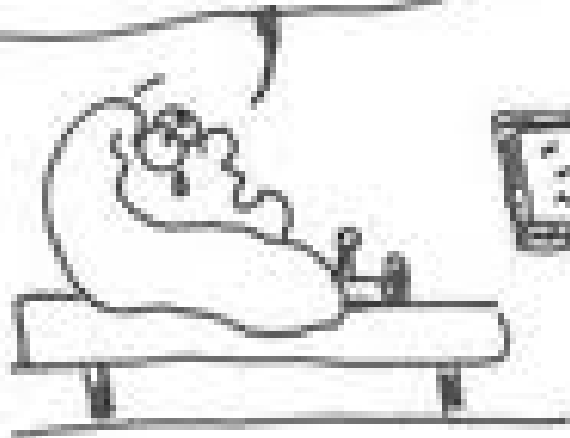




# Employee Retirement Income Security Act (ERISA)



Nobody understands  
me.



I have to admit,  
you're right,  
EEISA.  
You're right.



*Mills*

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# Federal ERISA Statute

- a. **Employee Retirement Income Security Act of 1974**
- b. **Federal pre-emption of state laws**
- c. **There is no express subrogation provision**
- d. **Section 502(a)(3) of the Act is the civil enforcement provision**
- e. **It authorizes the pursuit of a civil action to “obtain other appropriate equitable relief”**

## Case Law

- a. *Knudson* interpreted the law as only those remedies typically available in equity. Because the funds were in the Special Needs Trust, the action was one at law, not equity, and so not allowed.
- b. *Sereboff* said that the Plan could claim an equitable lien from the identifiable portion of the third-party recovery for medical bills it had paid.

# **ERISA Subrogation Claims Gone Wild**

- a. Plan language called for first dollar recovery**
- b. Plan language called for elimination of the Made Whole rule**
- c. Plan language called for elimination of the Common Fund Doctrine**
- d. Plan language called for no consideration for comparative negligence**
- e. Plan language created obligations on Plaintiff counsel**
- f. Plan language refused to pay for proportionate share of attorney fees and costs**

**The Key Footnote in *Sereboff* is footnote 2 which states that the parties did not raise the issue below and the court expressly declines to address whether “appropriate equitable relief” encompasses equitable defenses.**



# PUBLIC JUSTICE®

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 10-3836

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US AIRWAYS, INC., in its capacity as Fiduciary and Plan  
Administrator of the US Airways, Inc. Employee Benefits  
Plan

v.

JAMES E. MCCUTCHEN; ROSEN LOUIK & PERRY,  
P.C.,  
Appellants

---

On Appeal from the District Court  
for the Western District of Pennsylvania  
(No. 2-08-cv-01593)

District Judge: Honorable David Stewart Cercone

Argued July 11, 2011

Before: SLOVITER, FUENTES, and VANASKIE, Circuit  
Judges

(Opinion Filed: November 16, 2011)

By Paul Stritmatter of Stritmatter Kessler Whelan  
Coluccio. All rights reserved.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CGI TECHNOLOGIES AND SOLUTIONS  
INC, in its capacity as sponsor and  
fiduciary for CGI Technologies  
and Solutions, Inc Welfare Benefit  
Plan

*Plaintiff-Appellee,*

v.

RHONDA ROSE; NELSON LANGER  
ENGLE PLLC,

*Defendants-Appellants.*

No. 11-35127  
D.C. No.  
2:10-cv-00298-RSM

CGI TECHNOLOGIES AND SOLUTIONS  
INC, in its capacity as sponsor and  
fiduciary for CGI Technologies  
and Solutions, Inc Welfare Benefit  
Plan,

*Plaintiff-Appellant,*

v.

RHONDA ROSE; NELSON LANGER  
ENGLE PLLC

Defendant.

No. 11-35128  
D.C. No.  
2:10-cv-00298-RSM

OPINION

Appeal from the United States District Court  
for the Western District of Washington  
Ricardo S. Martinez, District Judge, Presiding

Argued and Submitted  
February 9, 2012—Seattle, Washington

Filed June 20, 2012

**SUPREME COURT OF THE UNITED STATES**

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No. 11–1285

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

v.

MCCUTCHEN, et al.

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OPINION

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Argued November 27, 2012

Decided April 16, 2013



- 1. McCutchen suffered serious injuries;**
- 2. Estimated value of case was \$1 million;**
- 3. ERISA Plan paid \$66,866 in medical expenses;**
- 4. Because of limited insurance, McCutchen recovered \$10,000 from third-party liability carrier;**

- 5. McCutchen recovered \$100,000 from his own UIM policy;**
- 6. Attorney fee was 40% which equaled \$44,000;**
- 7. Attorneys placed \$41,500 in escrow account pending resolution of the dispute;**
- 8. ERISA suit asked for \$41,500, plus \$25,366 from McCutchen.**

# EQUITABLE DEFENSES

1. Unjust enrichment –
  - a. Double-Recovery rule
  - b. Make Whole doctrine
2. Common Fund doctrine

# SUPREME COURT DECISION

- 1. Equitable lien by agreement. That type of lien serves to carry out a contract's provisions.**
- 2. Equitable principles are “beside the point” when parties demand what they bargained for in a valid agreement.**
- 3. Principles of unjust enrichment give way when a court enforces an equitable lien by agreement.**
- 4. The relief is to enforce the terms of the plan. That limitation reflects ERISA's principle functions: to protect contractual defined benefits.**



# **YOU HAVE GOT TO BE KIDDING ME**

- 1. These Plans are not armed length bargained for transactions;**
- 2. The Plans amend the documents with no input whatsoever from the beneficiary.**
- 3. This leaves a markedly injured person without a tort remedy because of the overreaching of this health benefit plan.**

**WHAT DO WE DO  
NOW?**

**STEP ONE**

# **Write the Plan**

**Administrator informing it of your representation and ask for all documents relating to the billings received and the payments made.**

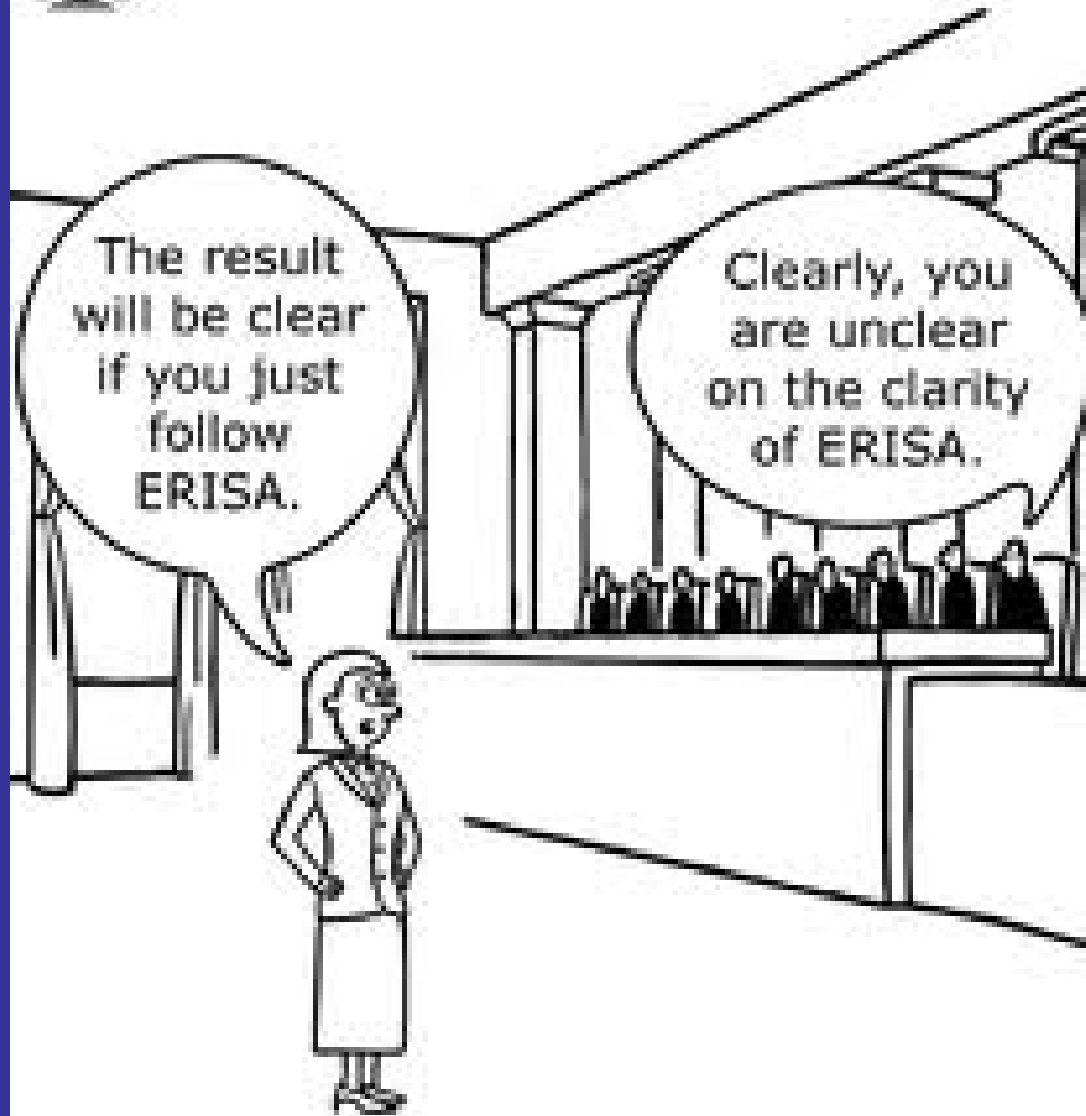
**You can obtain the  
name and address of  
the Plan Administrator  
at [www.freeerisa.com](http://www.freeerisa.com)**

# STEP TWO

**Obtain the Plan documents that were in effect when the medical bills were paid. Read the Plan documents carefully.**

**Do not take the word of the Plan Administrator that the Plan is entitled to a full recovery. For instance, does the Plan allow subrogation from a UIM policy?**





# STEP THREE

**Obtain the Summary Plan Description (SPD) and the formal plan documents. The SPD is the roadmap to the lien's validity and vulnerability to defenses. Make sure the two documents are the same.**

**If they conflict, the court may apply the provision that is more favorable to the participant. Ambiguities will also be construed in favor of the participant.**

# STEP FOUR

**Obtain the Amendments to the Plan documents for the relevant periods of time.**

**Case law has rejected Plan's efforts to retro-actively apply amended provisions.**

# STEP FIVE

**Obtain the copies of the  
Summary of Material  
Modifications (SMM)  
statements for the relevant  
periods of time. These will  
allow you to pinpoint the timing  
of amendments to the SPD.**



# STEP SIX

Obtain the 5500 filings of  
the Plan by going to  
[www.dol.wa.gov](http://www.dol.wa.gov) and inputting  
the name of  
the Plan or go to  
[www.freeerisa.com](http://www.freeerisa.com) and search  
by the employer's name.

**It can also be  
requested from the  
Plan Administrator  
under 29 U.S.C. §  
1024 (b)(4).**

**These forms will give you important information relating to what, if any, insurance is owned by the plan.**

# STEP SEVEN



**Obtain copies of  
all insurance  
policies owned by  
the Plan.**

**These may take the form of health insurance contracts, re-insurance, co-insurance, excess insurance, stop-gap insurance, stop-loss insurance, umbrella insurance or some other such name.**



**This should include any commercial insurance that may have been purchased by the Plan and is being used in whole or in part to pay the medical bills of your client.**



**A Plan Administrator is required to produce all insurance contracts under which the Plan was established or is operated.**

# STEP EIGHT

**Ask for an explanation of how any formula works for what portion of the medical bills are paid by the commercial insurer.**



# STEP NINE

**If an insurance company is administering the Plan, request a copy of the Administrative Service Contract between the employer and the insurer. Review this contract for evidence of the fact that the Plan is not self-funded.**



# STEP TEN

**Remind the Plan that it stands in a fiduciary position as to all participants and beneficiaries of the Plan, including your client.**



**Remind the Plan that it needs to appropriately consider at all times, the needs and interests of your client in order to fulfill those fiduciary duties.**



**UPDATES**

# ERISA

*Cigna v. Amara*  
(2011 WL 1832824)

# Resources

- **Subrogation**, by Paul Stritmatter (2011)  
(publication for PI attorneys online version)
  - [www.Stritmatter.com](http://www.Stritmatter.com) – “For Attorneys” section under “Resources” tab at  
<http://www.stritmatter.com/personal-injury-resources/seattle-personal-injury-lawyers/>
- **Fight Subro blog**
  - (check it for updates) at <http://fightsubro.com/blog/>

# Thank you.

By Paul Stritmatter of Stritmatter  
Kessler Whelan Coluccio.  
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