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### ERISA—On the Edge of Equity: Can “Appropriate Equitable Relief” Be Capped?

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## ERISA—ON THE EDGE OF EQUITY: CAN “APPROPRIATE EQUITABLE RELIEF” BE CAPPED?

### I. INTRODUCTION

A hardworking union laborer goes to a local establishment to get a drink.<sup>1</sup> An intoxicated man pulls a knife and stabs him in the stomach.<sup>2</sup> The resulting injuries cause nearly \$40,000 in medical treatment, lost wages, and disability.<sup>3</sup> Because the attacker has been criminally prosecuted and has no assets, the only viable recovery is a dramshop action under state law, which would provide for compensation from the drinking establishment if it served the tortfeasor liquor to the point of intoxication.<sup>4</sup>

Damages in dramshop actions are capped by state law at approximately \$40,000 and can be difficult to prove.<sup>5</sup> The man has only a few hundred dollars in out-of-pocket medical expenses that were not covered by his health insurance and, due to his pain and suffering, lost wages, and disability, he

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1. This introduction is based on the federal case *Trustees of the Carpenters' Health and Welfare Trust Fund of St. Louis v. Brunkhorst*, No. 05-382-DRH, 2006 U.S. Dist. LEXIS 38107 (S.D. Ill. 2006).

2. *Id.* at \*5 n.3.

3. *Id.* at \*5, \*7.

4. While a civil action could be brought against an incarcerated person with no assets, there is a low likelihood that any judgment would be collectible. *See Kauk v. Matthews*, 426 N.E.2d 552, 555 (Ill. App. Ct. 1981) (explaining that only after assets or income of a judgment debtor have been discovered may an Illinois court take action to execute and collect the judgment). Because the applicable statute of limitations on any potential civil action for assault and battery will likely expire prior to the termination of the incarceration period, it would be risky to file any civil action against the tortfeasor in this situation. *See Montague v. George J. London Mem'l Hosp.*, 396 N.E.2d 1289, 1293 (Ill. App. Ct. 1979) (stating that a two-year statute of limitations would govern a civil case for assault and battery in Illinois). Because civil assault and battery cases are typically taken by attorneys on a contingency fee basis, there is no reasonable likelihood that an attorney would bring such an action against an incarcerated individual with no assets. *See* STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 143–45 (7th ed. 2005).

5. Liquor Control Act of 1934 § 6-21, 235 ILL. COMP. STAT. 5/6-21 (2006). *See also* ILLINOIS STATE COMPTROLLER, *DRAM SHOP LIABILITY LIMITS* (2009), available at [http://www.ioc.state.il.us/ioc-pdf/Dram\\_Shop\\_Liability\\_2003\\_-\\_2009.pdf](http://www.ioc.state.il.us/ioc-pdf/Dram_Shop_Liability_2003_-_2009.pdf) (presenting a yearly schedule of liability limits in dramshop actions calculated by the Comptroller of the State of Illinois pursuant to section 6-21(a) of the Liquor Control Act of 1934 in accordance with the consumer price index-u (CPI-U) during the preceding 12-month calendar year).

decides to hire an attorney who will proceed on the dramshop action for a contingency fee. After discovery, it is revealed that the bartender on duty that night could not be found and other witnesses are either equivocal or were intoxicated, leaving the case difficult to prove. The attorney, therefore, successfully negotiates a settlement for approximately half of the capped value of the lawsuit.<sup>6</sup> Because of the limited amount of funds recovered, the attorney files a motion asking the state court to allocate the settlement.<sup>7</sup> The court enters an order dividing the settlement in the following way: \$9,151.31 for attorney's fees and expenses; \$6,282.90 to repay the health insurance company; \$200 to pay an outstanding medical bill; and \$5,365.79 to the injured party.<sup>8</sup>

After the case is settled, a letter from the health insurance company arrives demanding reimbursement of the full settlement amount, pursuant to the terms of the health plan which is governed by the Employment Retirement Income Security Act [hereinafter "ERISA"].<sup>9</sup> If the money is not paid, the insurance company threatens to stop paying the family's health insurance benefits until the entire settlement amount is recovered.<sup>10</sup> According to this letter, although the insurance company has received \$6,292.90, the man would still owe \$14,717.10, the remainder of his settlement that was previously distributed by the court.<sup>11</sup> In the letter, insurance plan provision is quoted:

As a condition of payment of any benefits to or on behalf of a Participant, and to the extent of such benefits paid, the Fund shall be subrogated to all rights of the Member against any individual, entity, organization or association for damages on account of the injury or illness for which the Fund paid such benefits.

In the event that a Member shall recover any amount from a third party, by judgment, settlement or otherwise, for any act or omission causing an injury or illness for which the Fund paid benefits, then:

- a. The Member shall be obligated to immediately reimburse the Fund for the full amount of such benefits paid, up to the full amount of recovery *undiminished by attorney's fees* or otherwise; and
- b. The Fund shall have a lien on the gross recovery prior to all other claims or liens including those for attorneys' fees, in the amount necessary to satisfy the Fund's rights of subrogation and reimbursement.

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6. *Brunkhorst*, 2006 U.S. Dist. LEXIS 38107, at \*5-\*6.

7. *Id.* at \*6-\*7.

8. *Id.* at \*7.

9. *Id.* at \*5-\*7.

10. *Id.* at \*7.

11. *Brunkhorst*, 2006 U.S. Dist. LEXIS 38107, at \*7.

In the event that a Member shall fail to reimburse the Fund for any of all amounts due under this provision, the Trustees shall be entitled, in their discretion, to suspend further payment of benefits to or for such Member (whether or not related to the same claim), and to apply benefits otherwise payable in satisfaction of the obligations of the member hereunder.<sup>12</sup>

The injured man finds this provision unjust.<sup>13</sup> He believes that he has been working, paying health insurance premiums, and receiving health insurance benefits as a condition of his employment. He does not understand why it is fair for the health insurance company to take for itself the money he and his attorney worked to create for everyone's benefit. "Can they really keep the entire benefit and deprive others of their share?" he wonders. Ultimately, the court is unsympathetic to his plight and finds that the ERISA plan is entitled to reimbursement of the the full amount of his settlement.<sup>14</sup> The court even allows the ERISA plan to terminate any further health insurance benefits until the entire settlement amount is recouped.<sup>15</sup> Although the court calls the remedy provided to the insurance company "appropriate equitable relief," it makes no finding that the relief is appropriate and merely enforces the terms of the ERISA plan as written.<sup>16</sup>

Employee benefit plans are a vital part of the compensation packages of many employees.<sup>17</sup> ERISA was enacted in 1974 to protect important employment benefits, such as health insurance.<sup>18</sup> In response to broad societal, demographic, and economic trends, "the designs, features and types of benefits provided by employer-sponsored plans have evolved" since Congress enacted ERISA over thirty years ago.<sup>19</sup> Employers have responded to rising costs in health care "by replacing the traditional insured health care plan with health care plans" that are "self-insured" by the employer or managed care plans.<sup>20</sup> Although benefit plans have evolved to meet the changing needs of society, "ERISA's core statutory provisions that regulate employee benefit plans and provide for enforcement remedies have remained remarkably consistent since its enactment."<sup>21</sup> As a result, the federal courts "have struggled to apply

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12. *Id.* at \*13–\*14.

13. *Id.* at \*13–\*15.

14. *Id.* at \*24–\*26.

15. *Id.* at \*25.

16. *Brunkhorst*, 2006 U.S. Dist. LEXIS 38107, at \*25.

17. Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3)*, 39 J. MARSHALL L. REV. 827, 833 (2006).

18. *Id.* at 833–34.

19. *Id.* at 833.

20. *Id.* at 833–34.

21. *Id.* at 834.

ERISA's original statutory language to situations arising in today's" legal climate.<sup>22</sup>

ERISA provides for actions to obtain "appropriate equitable relief."<sup>23</sup> This article discusses actions for appropriate equitable relief by ERISA benefit plans for subrogation and reimbursement in cases where there are statutorily limited or capped recoveries. Part II provides a summary of ERISA and its purposes. Part III includes a discussion of the purposes of subrogation and reimbursement in the context of ERISA. Part IV discusses the Supreme Court's evolving interpretation of the civil enforcement of "appropriate equitable relief" under ERISA. Part V examines the conflict between the policies of ERISA and the policies of state legislatures in limiting or capping injury recoveries. Part VI analyzes equitable principles that should be considered when dealing with the intersection of ERISA subrogation and reimbursement claims against statutorily limited or capped recoveries. Part VII will present arguments and make a call for judicial action in the form of a changed interpretation of "appropriate equitable relief" under Section 502(a)(3) of ERISA.

## II. THE PURPOSES OF ERISA

Congress enacted ERISA in 1974 to address the failure and mismanagement of many employer-sponsored pension funds.<sup>24</sup> Congress determined that federal law should exclusively govern employee benefit plans.<sup>25</sup> Although originally intending only to regulate retirement plans, Congress eventually extended ERISA to include all employee benefit plans, including Medical Plans, Disability Plans, and Qualified Retirement Plans.<sup>26</sup> This article will limit its analysis to Medical Plans [hereinafter referred to as "plans"] that provide payments for medical costs that later become the subject of a third party recovery by an injured employee.

Three core policies motivated the enactment of ERISA:

- (1) to protect the rights of plan participants to the benefits promised to them under the terms of the plan (the "benefit protection policy");
- (2) to avoid imposing undue administrative burden on employers that would financially deter them from voluntarily sponsoring plans for their employees (the "cost

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22. Medill, *supra* note 17, at 834.

23. Employee Retirement Income Security Act of 1974 § 502(a)(3), 29 U.S.C. § 1132(a)(3) (2000).

24. Robert C. Sheres, Note, *Setting the Stage for Creative Lawyering in ERISA Reimbursement Actions*, 31 NOVA L. REV. 187, 190 (2006). See also *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 264 (1993).

25. Sheres, *supra* note 24, at 190–91.

26. *Id.* See also 29 U.S.C. § 1003(a) (stating that the Act "shall apply to any employee benefit plan").

minimization policy”); and (3) to preserve the right of the employer as the settlor of the plan to customize the design of the plan and the plan’s package of benefits to the employer’s workforce and budget (the “settlor function policy”).<sup>27</sup>

While the benefit protection policy is superior to the cost-minimization and settlor policies, the Supreme Court has noted the competing nature of these goals, stating that there is a “tension between the primary [ERISA] goal of benefiting employees and the subsidiary goal of containing . . . costs.”<sup>28</sup>

ERISA defines an “employee benefit plan” as “any plan, fund, or program . . . established . . . by an employer . . . for the purpose of providing . . . (A) medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment. . . .”<sup>29</sup> “Participants” in employee benefit plans are defined to include employees or former employees.<sup>30</sup> A “beneficiary” is a person designated by the terms of the plan or by the participant who is or may become entitled to a benefit under the plan.<sup>31</sup> A “fiduciary” is a person who has control over the plan or its assets.<sup>32</sup> Courts have interpreted the statutory concept of “fiduciary” broadly.<sup>33</sup> The key factors considered are discretion, authority, or control over the plan or its assets.<sup>34</sup> The fiduciary is required to diligently “discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries” for the exclusive purposes of: (1) providing benefits to participants and beneficiaries and (2) defraying reasonable expenses of the plan, all in accord with the plan documents.<sup>35</sup> Once an employer has a program that is an ERISA qualified “employee benefit plan,” the plan has access to the federal courts in most controversies and has an existence apart from the employer, constituting a separate legal entity that “may sue or be sued.”<sup>36</sup>

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27. Medill, *supra* note 17, at 919.

28. *Id.* at 920. *See also Mertens*, 508 U.S. at 262–63.

29. 29 U.S.C. § 1002(1).

30. § 1002(7).

31. § 1002(8).

32. § 1002(21).

33. *Chicago Bd. Options Exchange, Inc. v. Conn. General Life Ins. Co.*, 713 F.2d 254, 250 (7th Cir. 1983).

34. *Id.*

35. 29 U.S.C. § 1104(a)(1).

36. § 1132(d)(1).

Sections 514<sup>37</sup> and 502<sup>38</sup> of ERISA embody the goals of Congress. Section 514 outlines ERISA's preemptive effect on state laws.<sup>39</sup> Section 502 outlines ERISA's exclusive remedial scheme.<sup>40</sup> Section 514, sometimes called the "preemption clause," provides that ERISA "shall supersede any and all [s]tate laws insofar as they may now or hereafter relate to any employee benefit plan."<sup>41</sup> The statutory text of ERISA does not indicate how close a relationship is required to satisfy the "relate to" language for ERISA preemption; however, the Supreme Court has defined the phrase as having a "broad preemptive meaning."<sup>42</sup> Section 514 effectuates complete federal preemption, meaning that any action filed in state court may be removed to federal court, even if a federal law violation is not pled.<sup>43</sup> Section 502, the "civil enforcement" provision, enumerates the exclusive remedies available in ERISA actions by stating the following:

A civil action may be brought . . . by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violated any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.<sup>44</sup>

Appropriate equitable relief has been conclusively interpreted not to include claims for punitive, consequential, compensatory, or other state specific damages resulting from a breach of the benefits plan contract.<sup>45</sup> However, the types of remedies embraced under the guise of ERISA's appropriate equitable relief have evolved due to three Supreme Court

37. § 1144. Section 514 of ERISA is also printed in the United States Code under Section 1144 and the two provisions are used interchangeably. *See* ERISA: THE LAW AND THE CODE § 2-107 (Michael G. Kushner & Karen Hsu eds., 1999).

38. 29 U.S.C. § 1132. Section 502 of ERISA is also printed in the United States Code under Section 1132 and the provisions are used interchangeably. *See* ERISA: THE LAW AND THE CODE, *supra* note 37, § 2-107.

39. 29 U.S.C. § 1144 ("provisions of this . . . chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in . . . this title and not exempt under . . . this title").

40. 29 U.S.C. § 1132 (entitled "Civil enforcement").

41. § 1144.

42. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987) (stating that the broad common sense meaning of the phrase "relate to" means having "a connection with or reference to").

43. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 64-65 (1987). *See also* *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1488-90 (7th Cir. 1996).

44. 29 U.S.C. § 1132 (emphasis added).

45. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) (noting that Section 502(a)(3)'s provision for other appropriate equitable relief does not permit the recovery of consequential damages). *See also* *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985) (asserting that the language of ERISA does not support "a private right of action for compensatory or punitive relief").

decisions, discussed in Part IV.<sup>46</sup> Because of this varied judicial interpretation, the ability of ERISA plans to seek subrogation or reimbursement of medical benefits paid from third party recoveries has changed dramatically. Part III presents a background discussion of the purposes of subrogation and reimbursement in the context of ERISA.

### III. SUBROGATION AND REIMBURSEMENT

“Subrogation and reimbursement are related doctrines intended to prevent unjust enrichment and injustice.”<sup>47</sup> Subrogation “is a creature of equity; . . . enforced solely for the purpose of accomplishing the ends of substantial justice.”<sup>48</sup> Subrogation has been referred to as “a species of spontaneous agency.”<sup>49</sup> Subrogation allows the subrogee (the ERISA plan) to stand in the shoes of its subrogor (the insured participant) to recover benefits paid by the plan.<sup>50</sup> Subrogation transfers to the ERISA plan the participant’s right to recover benefits from a third party.<sup>51</sup>

A plan’s subrogation rights must arise out of its contractual provisions.<sup>52</sup> State judiciaries and legislatures disfavor enforcement of subrogation rights “because it seems to violate the public policies against assigning personal injury claims and the prohibition against splitting causes of action.”<sup>53</sup> “To avoid violating these public policies,” plans have “redesigned the language of their contracts to grant them the right of reimbursement” as well as the right of subrogation and have continually attempted to enforce these provisions.<sup>54</sup> Reimbursement is distinct from subrogation in that it is a contractual right contained in the plan allowing it to receive payment from a participant’s

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46. *See generally* *Sereboff v. Mid-Atlantic Med. Servs., Inc.*, 547 U.S. 356 (2006) (outlining forms equitable relief that would allow an ERISA plan to achieve reimbursement of a member’s tort recovery under the terms of its plan); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (drawing a sharp distinction between legal remedies and the equitable remedies available under § 502(a)(3)); *Mertens*, 508 U.S. 248 (defining equitable relief as “something less than *all* relief”).

47. *Sheres*, *supra* note 24, at 194.

48. *Memphis & Little Rock R.R. Co. v. Dow*, 120 U.S. 287, 301–02 (1887). *See also* *Standard Indus., Inc. v. Thompson*, 152 N.E.2d 500, 501–03 (Ill. App. Ct. 1958); *People ex. rel. Nelson v. Philip State Bank & Trust Co.*, 30 N.E.2d 771, 773 (Ill. App. Ct. 1940).

49. *St. Paul Fire & Marine Ins. Co. v. Petroleum Navigation Co.*, 35 F. Supp. 350, 351 (W.D. Wash. 1940) (quoting *Durante v. Eannaco*, 438, 72 N.Y.S. 1048, 1050 (N.Y. App. Div. 1901)).

50. *Unisys Med. Plan v. Timm*, 98 F.3d 971, 973 (7th Cir. 1996).

51. *Id.*

52. *See Walker v. Rose*, 22 F. Supp. 2d 343, 351 (D. N.J. 1998) (noting that ERISA “says nothing” about subrogation or reimbursement requiring such provisions to arise from the terms of the plan).

53. *Sheres*, *supra* note 24, at 194.

54. *Id.*



recovery against a third party.<sup>55</sup> “The effect of this redrafting was to create the economic reality of subrogation . . . without its language.”<sup>56</sup> A plan may include either or both rights, and plan provisions often use the terms interchangeably.<sup>57</sup>

ERISA does not require specific authority for a particular plan provision due to the broad discretion given trustees.<sup>58</sup> “ERISA says nothing about subrogation/reimbursement provisions.”<sup>59</sup> Therefore, the Act does not preclude an ERISA plan from enforcing a subrogation or reimbursement provision contained in the plan against a participant. However, because ERISA is silent on the matter of subrogation of benefits, federal common law governs the enforcement of a welfare benefit plan’s subrogation rights.<sup>60</sup> Courts typically give full effect to the reimbursement language in a plan, holding participants responsible for paying back a benefit plan pursuant to the reimbursement provisions.<sup>61</sup> Reimbursement is only required, however, to the extent required by the terms of the plan. An ambiguous provision purporting to create a right of reimbursement is construed against the drafter and in accordance with the reasonable expectations of the participant.<sup>62</sup> Accordingly, whatever rights a plan has to recovery are governed by the plan’s written provisions.

The ability of ERISA plans to enforce subrogation and reimbursement rights have hinged on the interpretation and application of Section 502, the “civil enforcement” provision of ERISA.<sup>63</sup> Section 502 enumerates that the exclusive remedy available in ERISA actions to enforce terms of the plan are actions for “appropriate equitable relief.”<sup>64</sup> The ability of ERISA plans to bring actions claiming reimbursement or subrogation for medical benefits paid

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55. *Timm*, 98 F.3d at 973.

56. Sheres, *supra* note 24, at 194–95 (quoting *Lee v. State Farm Mut. Auto. Ins. Co.*, 129 Cal. Rptr. 271, 278 (Cal. Ct. App. 1976)).

57. *See Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293, 1297–99 (7th Cir. 1993).

58. *See Chicago Bd. Options Exchange, Inc. v. Conn. General Life Ins. Co.*, 713 F.2d 254, 250 (7th Cir. 1983). *See also* Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104(a)(1) (2000).

59. *Walker v. Rose*, 22 F. Supp. 2d 343, 351 (D. N.J. 1998).

60. *See Cutting*, 993 F.2d at 1296–97 (stating “[t]here is no doubt about the authority of the federal courts to create common law for use in ERISA cases”).

61. *Serembus ex rel. UIU Health & Welfare Fund v. Mathwig*, 817 F. Supp. 1414, 1423 (E.D. Wis. 1992).

62. *Bailey v. Blue Cross & Blue Shield of Virginia*, 67 F.3d. 53, 57 (4th Cir. 1995); *Germany v. Operating Eng’rs Trust Fund of Washington, D.C.*, 789 F. Supp. 1165, 1169–70 (D. D.C. 1992).

63. *See generally* *Sereboff v. Mid-Atlantic Med. Servs., Inc.*, 547 U.S. 356 (2006); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 264 (1993).

64. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a)(3) (2000).

against a third party recovery by one of its members has dramatically changed over the past thirty years in response to interpretation of Section 502 by the United States Supreme Court.

#### IV. THE SUPREME COURT'S EVOLVING INTERPRETATION OF "APPROPRIATE EQUITABLE RELIEF"

The Supreme Court has taken three opportunities to interpret the meaning of "appropriate equitable relief" as used in Section 502(a)(3) of ERISA. First, in *Mertens v. Hewitt Associates*, the Court addressed for the first time the question of the types of remedies available under Section 502(a)(3), noting that equitable relief designated by the statute is something less than all relief.<sup>65</sup> Next, in *Great-West Life & Annuity Insurance Company v. Knudson*, the Court drew a sharp distinction between legal remedies and the equitable remedies available under Section 502(a)(3), finding that if the action was one for recovery of money, it was legal and could not be brought under ERISA's exclusive provision of equitable relief.<sup>66</sup> Finally, in *Sereboff v. Mid Atlantic Medical Services, Inc.*, while the Court preserved the historical distinction between legal and equitable remedies, the Court outlined equitable remedies available that would allow a plan to achieve reimbursement and subrogation.<sup>67</sup>

##### A. *Mertens v. Hewitt Associates*

In *Mertens*, the petitioners represented a class of former employees who participated in the Kaiser Steel Retirement Plan, a pension plan that qualified under ERISA.<sup>68</sup> A class of former employees sued the plan's actuary, Hewitt Associates, under Section 502(a)(3).<sup>69</sup> When the plan's sponsor, Kaiser, began to phase out its steelmaking operations—prompting a large number of plan participants to opt for early retirement—Hewitt Associates did not change the plan's actuarial assumptions to reflect the additional costs of the increased retirements.<sup>70</sup> Plan assets eventually became insufficient to cover the benefit obligations, and the plan participants sued for breach of fiduciary duty.<sup>71</sup> The Supreme Court granted certiorari only on the question of "whether ERISA authorizes suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty."<sup>72</sup>

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65. *Mertens*, 508 U.S. at 258 n.8.

66. *Knudson*, 534 U.S. at 216, 218.

67. *Sereboff*, 547 U.S. at 361–63.

68. *Mertens*, 508 U.S. at 250.

69. *Id.* at 250–53.

70. *Id.* at 250.

71. *Id.*

72. *Id.* at 251.

The plan participants maintained that the suit sought “appropriate *equitable* relief” under Section 502(a)(3).<sup>73</sup> The Supreme Court held that ERISA did not authorize suits for money damages in such cases.<sup>74</sup> The Court noted that the plan participants were seeking money damages, amounting to nothing more than compensatory damages.<sup>75</sup> According to the Court, these compensatory damages were a classic form of legal relief and not a form of equitable relief.<sup>76</sup> Although the Court had not previously interpreted the phrase “appropriate equitable relief,” the Court had construed similar language in Title VII to preclude “awards for compensatory or punitive damages.”<sup>77</sup> By looking to Title VII for guidance in the ERISA context, the Court eschewed ERISA’s roots in the common law of trusts.<sup>78</sup> The Court acknowledged that equitable relief could mean two things: (1) whatever relief a court of equity is empowered to provide in the particular case at issue, or (2) those categories of relief that were historically available in equity such as injunction, mandamus, and restitution, but not compensatory damages.<sup>79</sup> The Court chose the latter more restrictive definition.<sup>80</sup>

According to the Court, reading equitable relief to mean “all remedies available from a common law court of equity” would in no way limit the relief available and would render an important modifier in the statute superfluous.<sup>81</sup> The Court reasoned that “[e]quitable’ relief” as used in Section 502(a)(3) “must mean *something* less than *all* relief.”<sup>82</sup> The Court’s decision was based on a strict textual reading of the statute, but was also policy driven. According to Justice Scalia: “ERISA . . . defines ‘fiduciary’ not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan . . . thus expanding the universe of persons subject to fiduciary duties—and to damages—under § 409(a).”<sup>83</sup> Thus, “[a]ll that ERISA has eliminated . . . is the common law’s joint and several liability, for *all* direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did.”<sup>84</sup> According to Justice Scalia, exposure to this type of liability would raise insurance costs for persons who regularly deal with

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73. *Mertens*, 508 U.S. at 255 (emphasis in original).

74. *Id.* at 263.

75. *Id.* at 255.

76. *Id.*

77. *Id.* at 255 (citing *United States v. Burke*, 504 U.S. 229, 238 (1992)).

78. *Mertens*, 508 U.S. at 255, 257 (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110–11 (1989)).

79. *Id.* at 255–56.

80. *Id.* at 257–58.

81. *Id.* at 258.

82. *Id.* at 258 n.8 (emphasis in original).

83. *Mertens*, 508 U.S. at 262 (emphasis in original).

84. *Id.*

ERISA plans and, therefore, for ERISA plans themselves.<sup>85</sup> Furthermore, “[t]here is . . . a ‘tension between the primary [ERISA] goal of benefiting employees and the subsidiary goal of containing pension costs.’”<sup>86</sup> The Court, in Justice Scalia’s words, would not attempt to adjust the balance that Congress has struck between these competing goals.<sup>87</sup>

*B. Great-West Life & Annuity Insurance Company v. Knudson*

In a second attempt, *Great-West Life & Annuity Insurance Company v. Knudson*, the Supreme Court addressed the equitable remedy question in the context of an ERISA reimbursement provision.<sup>88</sup> Janette Knudson was rendered quadriplegic as a result of a 1992 car accident. Janette was covered by an ERISA plan.<sup>89</sup> The plan covered \$411,157.11 of Janette’s medical expenses.<sup>90</sup> The plan included a reimbursement provision, which provided that the plan “shall have the right to recover from the [beneficiary] any payment for benefits paid by the Plan that the beneficiary is entitled to recover from a third party.”<sup>91</sup> If a beneficiary recovered from a third party and failed to reimburse the plan, the beneficiary was personally liable to the plan.<sup>92</sup>

The Knudsons eventually filed a tort action in state court, in which they sought to recover from the manufacturer of the vehicle they were riding in at the time of the accident, along with other tortfeasors.<sup>93</sup> The parties negotiated a \$650,000 settlement and notice was sent to the plan.<sup>94</sup> After judicial allocation of the settlement,<sup>95</sup> Janette only recovered \$256,745.30 for her debilitating injuries,<sup>96</sup> which was allocated to a Special Needs Trust under California law to provide for Janette’s medical care.<sup>97</sup>

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85. *Id.*

86. *Id.* at 262–263 (quoting *Alessi v. Rabestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981)).

87. *Id.* at 263.

88. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002).

89. *Id.* at 207.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Knudson*, 534 U.S. at 207.

94. *Id.*

95. *Id.* at 207–08. The judicial allocation of the settlement proceeds was as follows: \$373,426 to attorney’s fees and costs; \$5,000 to reimburse the California Medicaid program; and \$13,828.70 to satisfy Great-West’s claim under the reimbursement provision of the Plan. Great-West did not cash the check.

96. *Id.*

97. A special needs trust is designed to protect the government benefits of disabled people who inherit property, settle claims, or win judgments. “In California, the term ‘special needs trust’ generally refers to an irrevocable trust that gives the trustee discretion to supplement, but not supplant, whatever is provided by government programs to the trust’s beneficiary.” Terry M.

The state court approved the settlement and directed the defendants to pay the settlement amount directly to the Special Needs Trust and the remaining amount to the Knudsons' attorney.<sup>98</sup> The attorney then tendered a check in the amount of \$13,828.70 to the plan for reimbursement.<sup>99</sup> The plan never cashed the check and instead filed suit in federal court seeking injunctive and declaratory relief under ERISA Section 502(a)(3).<sup>100</sup> The plan sought to enforce the reimbursement provision requiring the Knudsons to pay the plan \$411,157.11 out of the proceeds recovered from the third parties.<sup>101</sup>

The district court granted summary judgment to the Knudsons, holding that the plan only required reimbursement in the amount of \$13,828.70, covering past medical treatment.<sup>102</sup> The Ninth Circuit affirmed the district court and held that the judicially decreed reimbursement for payments made to a beneficiary by a third party is not equitable relief and is thus not available under Section 502(a)(3).<sup>103</sup> The Supreme Court granted certiorari on the issue of whether Section 502(a)(3) authorized the plan to take "this action" to enforce a reimbursement provision of an ERISA plan.<sup>104</sup> The Court held that ERISA did not authorize the plan to seek restitution to obtain reimbursement from Janette.<sup>105</sup>

The Supreme Court relied on the reasoning in *Mertens* "that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."<sup>106</sup> The Court also reinforced the point that "equitable relief must mean *something* less than *all* relief."<sup>107</sup> In the Court's opinion, suits seeking to compel the defendant to pay a sum of money to the plaintiff, whether by judgment or injunction, almost invariably are suits for "money damages" or legal relief.<sup>108</sup> The Court stated that "not all relief falling under the rubric of restitution is available in equity."<sup>109</sup> Although restitution was typically available in equity, it was also available in certain cases at law.<sup>110</sup> According

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Magady, *Something Special*, L.A. LAW., Feb. 2002, at 26. The goal of a special needs trust is to enable a disabled beneficiary to benefit from both the trust and the government programs. *Id.*

98. *Knudson*, 534 U.S. at 207–08.

99. *Id.* at 208.

100. *Id.*

101. *Id.*

102. *Id.* at 208–09.

103. *Knudson*, 534 U.S. at 209.

104. *Id.* at 206.

105. *Id.* at 221.

106. *Id.* at 209 (emphasis in original) (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254, 258 (1993)). The Court reiterated that the term equitable relief in Section 502(a)(3) must refer to those categories of relief that were typically available in equity. *Id.*

107. *Id.* at 209 (emphasis in original).

108. *Knudson*, 534 U.S. at 210.

109. *Id.* at 212.

110. *Id.* at 206 (citing 1 DAN D. DOBBS, LAW OF REMEDIES § 1.2, at 11 (2d ed. 1993)).

to the majority opinion, whether or not restitution is equitable or legal depends on the basis of the plaintiff's claim and the nature of the remedies sought.<sup>111</sup>

In cases in which the plaintiff "could not assert title or right to possession of particular property, but in which . . . he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him," the plaintiff had a right to restitution, not in equity, but at law.<sup>112</sup> In contrast, a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession.<sup>113</sup> "Thus, for an action to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession."<sup>114</sup>

In the *Knudson* case, the plan sought the proceeds from the Knudsons' tort action, which were never in the possession of the Knudsons.<sup>115</sup> The basis for the claim was not that the Knudsons held particular funds that, in good conscience, belonged to the plan, but that the plan was contractually entitled to some funds for benefits that they conferred: "[t]he kind of restitution that [the plan sought], therefore, is not equitable—the imposition of a constructive trust or equitable lien on particular property—but legal—the imposition of personal liability for the benefits that they conferred upon [the Knudsons]."<sup>116</sup> Even though the Court admitted that it had never "previously drawn this fine distinction" of law and equity, the Court strictly construed the plain statutory language.<sup>117</sup> Thus, the plan was not entitled to this type of remedy under ERISA.<sup>118</sup>

After *Knudson*, the circuits split over whether a fiduciary could enforce a subrogation provision under Section 502(a)(3). The Fourth, Fifth, Seventh, Eighth and Tenth Circuits decided that if a plaintiff's request for reimbursement under ERISA Section 502(a)(3) did not seek to impose personal liability but instead sought relief (such as a constructive trust or equitable lien) against identifiable funds in the actual or constructive possession of the insured, the relief was equitable in nature and, therefore,

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111. *Id.* at 213.

112. *Id.* at 214.

113. *Knudson*, 534 U.S. at 215 (quoting *Reich v. Cont'l Cas. Co.*, 33 F.3d 754, 756 (7th Cir. 1994)).

114. *Id.* at 214.

115. *Id.*

116. *Id.*

117. *Id.* at 214.

118. *Knudson*, 534 U.S. at 217–18.

permitted under Section 502(a)(3).<sup>119</sup> The Sixth and Ninth Circuits, by contrast, found that any attempt by an insurer to enforce a subrogation or reimbursement clause was a request that constituted legal relief and was not available under ERISA.<sup>120</sup>

### C. *Sereboff v. Mid Atlantic Medical Services*

In its final interpretation of the equitable relief available under ERISA, the Supreme Court affirmed the Fourth Circuit in *Sereboff v. Mid Atlantic Medical Services, Inc.*<sup>121</sup> The Sereboffs received nearly \$75,000 medical benefits from MAMSI, an ERISA plan, following an automobile accident.<sup>122</sup> They subsequently recovered \$750,000 in a personal injury verdict in state court against the third party tortfeasors.<sup>123</sup> MAMSI requested payment from the Sereboffs and their attorney under the terms of the plan.<sup>124</sup> The Sereboffs and their attorney rejected MAMSI's position and refused to reimburse the plan.<sup>125</sup> Instead, the Sereboffs' attorney "disbursed the funds to the Sereboffs and his law firm, pursuant to their representation agreement in the California litigation."<sup>126</sup> "The Sereboffs then placed the funds into their investment accounts."<sup>127</sup> "When the Sereboffs failed to reimburse MAMSI for the medical benefits it had paid, MAMSI sued, asserting that, as plan beneficiaries,

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119. See *Mid Atlantic Med. Servs., Inc. v. Sereboff*, 407 F.3d 212, 217–21 (4th Cir. 2005) ("We agree with the district court that, in this dispute, MAMSI's action seeks equitable restitution, as that term is used in *Knudson*, because MAMSI seeks to recover funds that are specifically identifiable, belong in good conscience to MAMSI, and are within the possession and control of the Sereboffs."), *aff'd*, 547 U.S. 356 (2006); *N. Am. Coal Corp. v. Roth*, 395 F.3d 916, 917 (8th Cir. 2005) (Plaintiff stated claims under Section 1132(a)(3) and the district court properly imposed a constructive trust on overpaid benefits, permanently enjoined defendants from disposing of or transferring funds in their possession and required tracing of funds no longer in defendants' possession.); *Admin. Comm. of the Wal-Mart Assocs. Health & Welfare Plan v. Willard*, 393 F.3d 1119, 1120, 1125 (10th Cir. 2004) (Action seeking injunction, declaration of rights, constructive trust and equitable restitution was equitable in nature as in *Knudson*, even though defendant never had disputed funds in his possession.); *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348, 358 (5th Cir. 2003); *Admin. Comm. of the Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan v. Varco*, 338 F.3d 680, 687–88 (7th Cir. 2003); *Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439, 445 (5th Cir. 2002).

120. See *Qualchoice, Inc. v. Rowland*, 367 F.3d 638, 650 (6th Cir. 2004); *Westaff (USA) Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002).

121. *Sereboff v. Mid Atlantic Med. Servs., Inc.*, 547 U.S. 356, 369 (2006).

122. *Mid Atlantic Med. Servs., LLC v. Sereboff*, 407 F.3d 212, 214 (4th Cir. 2005).

123. *Sereboff*, 547 U.S. at 360.

124. *Sereboff*, 407 F.3d at 214–15.

125. *Id.*

126. *Id.* at 216.

127. *Id.*

[the Sereboffs] had failed to comply with their subrogation obligations to reimburse it for benefits paid on their behalf.”<sup>128</sup>

MAMSI sued under Section 502(a)(3) of ERISA.<sup>129</sup> The district court granted summary judgment, holding that MAMSI was “entitled to recover the disputed proceeds under the terms of the Plan” and that MAMSI was indeed seeking “equitable relief” under Section 502(a)(3).<sup>130</sup> The Fourth Circuit affirmed, holding that MAMSI’s action sought equitable restitution as the term was used in *Knudson* because MAMSI sought to “recover funds that are specifically identifiable, belong in good conscience to MAMSI, and are within possession and control of the Sereboffs.”<sup>131</sup> In essence, the Fourth Circuit adopted the majority position stated above and specifically rejected the minority position held by the Sixth and Ninth Circuits.<sup>132</sup>

The Supreme Court affirmed the Fourth Circuit.<sup>133</sup> It first considered whether the type of relief MAMSI sought was equitable or legal.<sup>134</sup> The Court determined that MAMSI sought an “equitable lien” which could be properly characterized as equitable because the funds were specifically identifiable and remained in the possession and control of the Sereboffs.<sup>135</sup> The Court next analyzed whether the basis for MAMSI’s claim was equitable, applying “the familiar rul[e] of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing.”<sup>136</sup> The Court drew a parallel between MAMSI’s claim and that of an equitable lien claim “of the sort epitomized by our decision in *Barnes*.”<sup>137</sup>

*Barnes v. Alexander* was a case decided by the Supreme Court in 1914.<sup>138</sup> Barnes, an attorney, promised two other attorneys one-third of the contingency fee he expected in a case.<sup>139</sup> The Court found Barnes’ undertaking created a lien upon the fee due to him from the client that “as soon as it was identified, [the other attorneys] could follow it into the hands [of Barnes].”<sup>140</sup> The Court based its decision on “one of the familiar rules of equity that a contract to

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128. *Id.* at 214.

129. *Sereboff*, 407 F.3d at 214.

130. *Id.*

131. *Id.* at 218.

132. *See supra* Part VI.B.

133. *Sereboff*, 547 U.S. at 369.

134. *Id.* at 362.

135. *Id.* at 362–63.

136. *Id.* at 363–64 (quoting *Barnes v. Alexander*, 232 U.S. 117, 121 (1914)).

137. *Id.* at 368.

138. *Barnes*, 232 U.S. at 117.

139. *Id.* at 119.

140. *Id.* at 123.



convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing.”<sup>141</sup>

The Court reasoned that MAMSI’s plan provisions, like Barnes’ promise, specifically identified a particular fund distinct from the Sereboffs’ general assets and the particular share to which the plan was entitled. Thus, the plan could rely on the familiar rule of equity to collect for the medical bills it had paid by following a portion of the recovery into the Sereboffs’ hands as soon as the settlement fund was identified and imposing on that portion of a constructive trust or equitable lien.<sup>142</sup> The Court found:

the “Acts of Third Parties” provision in the Sereboffs’ plan specifically identified a particular fund, distinct from the Sereboffs’ general assets— “[a]ll recoveries from a third party (whether by lawsuit, settlement, or otherwise)” — and a particular share of that fund to which [MAMSI] was entitled— “that portion of the total recovery which is due [MAMSI] for benefits paid.”<sup>143</sup>

MAMSI therefore “could rely on a ‘familiar rul[e] of equity’ to collect for the medical bills it had paid on the Sereboffs’ behalf”<sup>144</sup> by following a portion of the recovery into the hands of the Sereboffs as soon as the settlement fund was identified and by imposing an equitable lien on that amount.<sup>145</sup> The Court held that the “strict tracing rules” that may have accompanied an action for equitable restitution at common law do not apply to equitable liens imposed by agreement or assignment.<sup>146</sup> The Court effectively acknowledged that money is fungible, so no “tracing” of money is needed.<sup>147</sup>

The Supreme Court clarified its holding in *Knudson*, noting that “[t]here was no need in *Knudson* to catalog all the circumstances in which equitable liens were available in equity; Great-West claimed a right to recover in restitution, and the Court concluded only that equitable *restitution* was unavailable because the funds sought were not in Knudson’s possession.”<sup>148</sup> In summary, the Supreme Court restricted any strict tracing requirement to claims for equitable restitution and allowed MAMSI to seek an equitable lien on the facts before the Court.<sup>149</sup>

After *Sereboff*, it is clear that a plan’s claim for reimbursement or subrogation must be equitable and based on a claim for unjust enrichment designed to enforce plan terms against identifiable property.<sup>150</sup> The plan’s

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141. *Id.* at 121.

142. *Sereboff*, 547 U.S. at 364.

143. *Id.*

144. *Id.* (citing *Barnes*, 232 U.S. at 121).

145. *Id.* at 364.

146. *Id.* at 365.

147. *Sereboff*, 547 U.S. at 365.

148. *Id.* (emphasis added).

149. *Id.*

150. *See id.* at 356.

action to enforce payment was the same as equitable lien enforcement.<sup>151</sup> The plan could “follow a portion of the recovery” into *Sereboff*’s hands.<sup>152</sup> *Sereboff* leaves some questions unanswered. While *Sereboff* preserved *Knudson*’s historical vision of the dichotomy of law and equity, it is yet unclear whether equitable defenses can be litigated.<sup>153</sup> The Court commented that, while equitable defenses to an equitable subrogation claim were unavailable when a lien was created by agreement of the parties, the Court did not completely foreclose the possibility of bringing equitable defenses or conducting an inquiry to determine whether equitable relief is “appropriate.”<sup>154</sup> If equitable defenses can be alleged, the most resounding call for such defenses would be within the context of a capped recovery.

#### V. THE CONFLICT OF “APPROPRIATE EQUITABLE RELIEF” AND STATUTORILY LIMITED OR CAPPED RECOVERY

While hidden behind the evolving reasoning of the Supreme Court as to the meaning of appropriate equitable relief, one distinction remains clear when examining the difference in the outcomes of *Knudson* and *Sereboff*. In *Knudson*, a participant was rendered a quadriplegic and received only \$256,745.30 for her debilitating injuries, which was allocated to a Special Needs Trust under California law to provide for future medical care.<sup>155</sup> In *Sereboff*, the recovery was much greater and the injured parties were able to invest funds recovered from the tortfeasor.<sup>156</sup> While one distinction in the cases seem to be based on whether the injured parties actually received the funds from the settlement, clearly the sympathies of the Court could have been an important factor in the distinctions between these two decisions.

The dilemma in interpreting appropriate equitable relief develops when there are not enough potential assets in the recovery to satisfy all obligations. Subrogation and reimbursement of benefits advanced by a plan would be fairly straightforward if participants suffering injuries at the hands of third parties always recovered the amount of their actual medical expenses from the tortfeasor in addition to compensation for lost wages, disability, future medical care, pain and suffering, attorneys’ fees, and costs of litigation. The tort system has been said to have two primary goals: “(1) to compensate persons who are injured through the negligence of others; and (2) to deter future negligent behavior,” both in the specific defendant and in others through the

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151. *Id.* at 363.

152. *Sereboff*, 547 U.S. at 364.

153. *Id.* at 368.

154. *Id.* at 361.

155. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 207–08 (2000).

156. *Mid Atlantic Med. Servs., LLC v. Sereboff*, 407 F.3d 212, 216 (4th Cir. 2005).

precedent created.<sup>157</sup> However, today's climate of capped damages in many areas of recovery result in compromise settlements and verdicts that fail to cover all damages.

Many states have enacted various forms of tort reform that limit recovery for all torts or a limited number of specified torts, including medical negligence cases, dramshop cases, nursing home negligence cases, and products liability cases.<sup>158</sup> All states have enacted state workers' compensation schemes that limit the potential for tort recovery by injured workers.<sup>159</sup> When ERISA collides with state statutory schemes that limit or cap the recovery of injured persons, the result is truly not appropriate or equitable. To support this conclusion, the examples of dramshop statutes and workers' compensation systems will be analyzed.

*Dramshop.* Dramshop liability has the primary goal of compensating innocent third parties for the injuries they suffer when they are injured by intoxicated tortfeasors.<sup>160</sup> Dramshop statutes attempt to reallocate some of the social cost of drinking from the drinkers themselves to the businesses that profit from the sale of alcoholic beverages.<sup>161</sup> Illinois<sup>162</sup> has adopted a statute that essentially amounts to strict liability when injuries are caused by the intoxication of the dramshop's patron, no matter what the circumstances of the sale.<sup>163</sup> Illinois, however, has limited the damages available in dramshop actions.<sup>164</sup> In 2007, Illinois placed absolute caps on the damages that dramshops may be forced to pay at \$56,302.45.<sup>165</sup> Damage caps benefit dramshops because they lessen the possibility that a single lawsuit will put the dramshop out of business and make it easier for the dramshop to purchase insurance to protect itself.<sup>166</sup>

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157. Adam G. Winters, *Where There's Smoke, Is There Fire? An Empirical Analysis of the Tort "Crisis" in Illinois*, 56 DEPAUL L. REV. 1347, 1349 (2007).

158. Robert S. Peck & Ned Miltenberg, *Challenging the Constitutionality of Tort 'Reform'*, in 3 LITIGATING TORT CASES § 29.20 (2007).

159. Gwen Forté, *Rethinking America's Approach to Workplace Safety: A Model for Advancing Safety Issues in the Chemical Industry*, 53 CLEV. ST. L. REV. 513, 519-23 (2006).

160. Richard Smith, *A Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation*, 25 J. CORP. L. 553, 557 (2000).

161. *Id.* at 554.

162. The author chose the state of Illinois because it is the jurisdiction where the case referenced in the introduction, *Trustees of the Carpenters' Health and Welfare Trust Fund of St. Louis v. Brunkhorst*, No. 05-382-DRH, 2006 U.S. Dist. LEXIS 38107 at \*1 (S.D. Ill. 2006), was pending.

163. 235 ILL. COMP. STAT. 5/6-21 (2006); Smith, *supra* note 160, at 557.

164. § 5/6-21.

165. See DRAM SHOP LIABILITY LIMITS, *supra* note 5.

166. Smith, *supra* note 160, at 573.

However, damage caps lie in stark contrast to the primary goal of tort law, to compensate victims who suffer harm due to the tortious conduct of others.<sup>167</sup>

When compensatory damages are limited, it severely undercuts the rationale of the entire tort system, especially when the medical expenses arising from the tortious conduct of a single drunk driver can easily exceed the damages cap, the cap can render a dramshop action almost meaningless in the event of a serious accident.<sup>168</sup>

Recoveries are further reduced by the typical one-third contingency fees charged by attorneys who prosecute these suits.<sup>169</sup> It has been argued that “having made the policy decision that dramshops may be liable in tort to third parties for the improper service of alcohol, legislatures should not then remove any chance for meaningful recovery by the most seriously injured victims of an intoxicated customer.”<sup>170</sup> What state legislatures, such as Illinois, probably never considered in their decisions to cap dramshop damages was the impact of ERISA as likely reducing—or completely obliterating—compensation of those injured by intoxicated persons.

*Workers’ Compensation.* Employers who provide workers’ compensation benefits enjoy immunity from suit by their employees for injuries arising out of employment.<sup>171</sup> Most state workers’ compensation statutes create a no-fault compensation system.<sup>172</sup> Negligence is irrelevant to the determination of whether an employee is entitled to workers’ compensation benefits.<sup>173</sup> Employees have a right to workers’ compensation benefits for work-related injuries, regardless of fault.<sup>174</sup>

“The right to benefits and amount of benefits are based largely on a social theory of providing support and preventing destitution, rather than settling accounts between two individuals according to their personal deserts [sic] or blame.”<sup>175</sup> Employees sacrifice their rights to an action in tort and their ability to collect damages for pain and suffering in exchange for prompt compensation every time they sustain an injury during work.<sup>176</sup> Unlike tort recovery, a worker’s compensation system does not seek to return to the employee what he

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167. *Id.*

168. *Id.*

169. See GILLERS, *supra* note 4, at 143–45.

170. Smith, *supra* note 160, at 573–74.

171. Forté, *supra* note 159, at 519–23. See also Illinois Workers’ Compensation Act, 820 ILL. COMP. STAT. 305/5-11 (1994).

172. § 305/2; ILLINOIS LAW AND PRACTICE, WORKERS’ COMPENSATION, 37 I.L.P. WORKERS’ COMPENSATION § 2, at 216 (2007).

173. ARTHUR LARSON, THE LAW OF WORKMEN’S COMPENSATION § 2.10 (1989).

174. *Id.*

175. *Id.* at 1–2.

176. See generally *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 356–59 (Ill. 1978).

has lost, but it enables the employee to live without burdening others.<sup>177</sup> The amount of compensation is often regarded as being not much higher than necessary to keep the employee from destitution.<sup>178</sup>

For example, the Illinois Workers' Compensation Act [IWCA] prohibits liens on recovery by providing that no workers' compensation "payment, claim, award or decision shall be subject to any lien."<sup>179</sup> However, courts have held that ERISA preempts this state law.<sup>180</sup> As a result, an injured worker's limited compensation can be claimed by an ERISA plan through a reimbursement or subrogation provision, thereby frustrating the entire purpose of the legislature in enacting the workers' compensation scheme.

*Policy Considerations.* Cases of statutorily capped or limited recovery by state legislatures make clear the need for equitable relief to protect the recoveries of an injured person. It is unlikely that state legislatures take into consideration the preemptive effect of ERISA when enacting damage caps or statutorily limiting recovery through systems such as workers' compensation.<sup>181</sup> The policies of ERISA to protect the rights of plan participants to the health and welfare benefits promised to them by the terms of the plan received through their employment<sup>182</sup> are also consistent with the policies of state legislatures that attempt to ensure that, while an employee is compensated for injury by intoxicated persons<sup>183</sup> or while at work,<sup>184</sup> business owners' economic interests are protected. Each legislative policy seeks a compromise to benefit both the business and the injured party by seeking to ensure business is economically feasible without denying compensation to injured persons. However, when statutorily capped or limited recoveries intersect with the doctrine of the complete preemption of ERISA requiring an employee to reimburse the plan the entire amount of the limited or capped recovery, these policies are entirely at odds.

The problem for plans and their participants becomes universal in that overpayments increase plan costs and reduce funds unnecessarily. Injuries caused by third parties often involve large amounts of money and put plan assets at stake. While the settling participant may not have much incentive to preserve the plan's assets, other participants lose when the plan makes an

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177. LARSON, *supra* note 173, at § 2.05. See also ILLINOIS LAW AND PRACTICE, *supra* note 172.

178. LARSON, *supra* note 173, at § 2.05.

179. Illinois Workers' Compensation Act, 820 ILL. COMP. STAT. 305/2-1 (1994).

180. Health Cost Controls v. Manetas, No. 94 C 00419, 1995 WL 66383 (N.D. Ill. 1995).

181. See, e.g., 820 ILL. COMP. STAT. 305/2-1. The Illinois state legislature attempted to prevent any liens from affecting workers' compensation coverage, indicating that ERISA preemption was not intended nor was likely considered. *Id.*

182. Medill, *supra* note 17, at 919.

183. Smith, *supra* note 160, at 557.

184. LARSON, *supra* note 173, at § 2.05.

overpayment.<sup>185</sup> The plan's claims against participants to enforce the terms of the plan implicate all three core ERISA policies. All of the participants are subject to the terms of the plan. The plan terms dictate the benefits that each individual participant in the plan is entitled to receive. If an individual participant receives a greater benefit amount than is permitted under the terms of the plan, the administrator must have the ability to enforce the plan's terms and recoup the excess benefit amount. If the plan is unable to effectively enforce its terms, ultimately the plan's ability to pay the benefits promised to the other participants may be financially compromised. Lack of effective enforcement of the plan's terms undermines the employer's ability to accurately estimate the costs of the plan's benefits and design a benefit structure that is affordable to the employer.<sup>186</sup>

For a plan to receive reimbursement, action must be taken to establish liability against the tortfeasor. In the absence of action by the injured participant, the plan would be required to exercise its subrogation rights by filing a lawsuit against the tortfeasor on behalf of the injured participant.<sup>187</sup> Such action would involve coordinating the cooperation of the participant, hiring counsel to prosecute the lawsuit, paying the costs of litigation, and bearing the risks associated with the litigation.<sup>188</sup> Failure of the plan to act on its own behalf would result in the plan remaining responsible for payment of the participants' medical costs associated with the injury without reimbursement. While it is unclear how often an ERISA plan exercises its subrogation rights to file suit on behalf of injured members against third parties, it appears unlikely that it would do so in light of the risk involved. As long as the plan documents are strictly enforced without any consideration for the appropriateness of the equitable relief, it would not be logical for the plan to choose to pursue litigation at its own cost when it can successfully contract those costs away to its injured members.<sup>189</sup>

When the injured member independently employs an attorney to achieve recovery against the tortfeasor and allocate responsibility, such action furthers the goals of society to deter future negligent behavior in the tortfeasor and others and to compensate injured persons.<sup>190</sup> While the action of the injured participant to hold the tortfeasor responsible benefits himself, the community, and the plan, the current conflict between the federal law of ERISA and state statutory schemes capping or limiting damages dampens any motive to take

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185. Medill, *supra* note 17, at 923–24.

186. *Id.*

187. *See, e.g.*, Trs. of the Carpenters' Health and Welfare Trust Fund of St. Louis v. Brunkhorst, No. 05-382-DRH, 2006 U.S. Dist. LEXIS 38107, at \*13–\*15 (S.D. Ill. 2006).

188. *Id.*

189. *Id.*

190. Winters, *supra* note 157, at 1349.

such action. When recovery is limited or insufficient, the current interpretation of appropriate equitable relief under ERISA allows the plan to retain the entire benefit, without even relieving the participant of the costs of litigation or his attorneys' fees.<sup>191</sup> In such a state, most injured participants would conclude that it is not feasible to take any action against the tortfeasor, because the net result is only the injured member's ultimate responsibility for the attorneys' fees and costs of pursuing the action or termination of health benefits in order for the ERISA plan to recover these costs.<sup>192</sup>

In the case presented in the beginning of the article, the injured party and his attorney took a risky cause of action and attempted to establish liability against a drinking establishment that allowed a person to become intoxicated, creating a hazardous and violent situation for its patrons. Because liability was capped and the lawsuit was difficult to prove, only a limited recovery was available. However, the attorney and the injured participant appealed to the state court where the action was pending to allocate the settlement fund to the proper parties.<sup>193</sup> Neither the attorney nor injured participant was seeking a windfall or to avoid the obligations of the plan. Under the allocation by the state court, no party recovered completely, but each party received compensation.<sup>194</sup> However, instead of accepting partial reimbursement, the plan proceeded to sue the injured participant and threatened to withhold his family's health insurance benefits.<sup>195</sup> Although the plan was willing to spend its assets to litigate against the injured participant, it was not willing to share in the participant's attorneys' fees that resulted in the availability of the funds.<sup>196</sup> The court incorrectly deemed that this result was "appropriate."<sup>197</sup>

Currently, ERISA harshly enforces the terms of a plan without any balancing of the appropriate equities. In the absence of a clear, contractual provision to the contrary, an insured must be made whole before a plan can enforce its right to subrogation. However, many ERISA plans require that the plan reimburse all expenses without regard for the make-whole doctrine, even renouncing litigation costs and attorneys' fees for the recovery of the fund.<sup>198</sup> When subrogation and reimbursement provisions are clear, the federal common law holds that a court's ability to fashion remedies is limited, and it is inappropriate for a court to fashion a common law remedy that contravenes the unambiguous subrogation provisions of a plan.<sup>199</sup> When the plan's provision

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191. See, e.g., *Brunkhorst*, 2006 U.S. Dist. LEXIS 38107, at \*13-\*15.

192. *Id.*

193. *Id.* at \*6-\*7.

194. *Id.* at \*7.

195. *Id.*

196. *Brunkhorst*, 2006 U.S. Dist. LEXIS 38107, at \*7.

197. *Id.* at \*24-\*26.

198. *Marshall v. Employer's Health Ins. Co.*, 927 F. Supp. 1068, 1074-75 (M.D. Tenn. 1996).

199. *Ryan v. Fed. Express Corp.*, 78 F.3d 123, 126-28 (3d Cir. 1996).

requires complete reimbursement, even over attorney's fees and costs of litigation, the common law holds that it would be improper to allow an obligated participant to deduct a proportionate share of the participant's attorney's fees from reimbursement owed to the plan on the basis that the plan would be "unjustly enriched" if it did not share in the participant's recovery expenses.<sup>200</sup> The claim that ERISA's core policies require the plan to be responsible for a pro rata reduction of its reimbursement to offset the costs of litigation has been rejected by some courts.<sup>201</sup> If such blind enforcement of plan provisions that require complete subrogation and reimbursement in cases of limited or capped recovery continues, injured participants and their attorneys will fail to bring actions against tortfeasors, dramshops, employers, and others that cause harm to members of ERISA plans. Subsequently, ERISA plans will stifle the social and economic benefits of the tort system by failing to provide equitable provisions in plans. Courts should step in and award appropriate equitable relief.

#### VI. PRINCIPLES OF EQUITY—CAN THEY SOLVE THE CONFLICT?

Equity is the "body of principles constituting what is fair and right."<sup>202</sup> "Equity is a way of looking at the administration of justice; it is a set of effective and flexible remedies admirably adapted to the needs of a complex society; it is a body of substantive rules."<sup>203</sup>

In *Sereboff*, the participants argued that enforcement of the plan provision would be inappropriate "without imposing various limitations" that would apply to "truly equitable relief grounded in principles of subrogation."<sup>204</sup> The Court focused on the Sereboffs' claim that they would be allowed to bring certain equitable defenses in an equitable *subrogation* action that would be available regardless of the plan's provisions.<sup>205</sup> The Court held that the plan's claim was not "considered equitable because it is a subrogation claim"<sup>206</sup> and explained that the enforcement of the plan's provisions qualified as an "equitable remedy because it is indistinguishable from an action to enforce an equitable lien established by agreement, of the sort epitomized by the Supreme Court's decision in *Barnes*."<sup>207</sup> The Court held that the equitable remedies claimed by the Sereboffs, such as the make-whole doctrine, did not accompany

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200. *Id.*

201. *Id.* See also *Bollman Hat Co. v. Root*, 112 F.3d 113, 116–17 (3d Cir. 1997).

202. BLACK'S LAW DICTIONARY 247 (8th ed. 2004).

203. Zecharia Chafee, *Foreword*, to SELECTED ESSAYS ON EQUITY, iii (Edward Donenic, Re, ed., 1955).

204. *Sereboff v. Mid Atlantic Med. Servs., Inc.*, 547 U.S. 356, 368 (2006) (quoting Reply Brief for Petitioners at 5, No. 05-260).

205. *Id.*

206. *Id.*

207. *Id.*



the plan's action and were "beside the point."<sup>208</sup> The Sereboffs also claimed that if the plan's action was equitable under Section 502(a)(3), it was not "appropriate."<sup>209</sup> The Supreme Court refused to hear this argument because it was not considered by the court below.<sup>210</sup>

There are several important considerations embodied in this reasoning from *Sereboff*. First, it is clear that the Supreme Court did not consider whether, how, or if the modifier "appropriate" in the statute would change its decision in the context of an argument based in equity.<sup>211</sup> Because this issue has not been addressed, it remains an important consideration and a promising possibility to adjust subrogation or reimbursement recoveries by ERISA plans in cases where there is a statutorily limited or capped recovery. Second, it characterized the plan's claim as one for an equitable lien "of the sort epitomized by our decision in *Barnes*."<sup>212</sup> Distinguishing *Barnes* assists in the understanding of what potential equitable defenses may arise against the enforcement of an ERISA reimbursement or subrogation provision.

The Supreme Court's analogy between *Barnes* and the Sereboffs leaves much food for thought. Initially, it must be noted that that the Court was attempting to enforce an equitable trust or lien by agreement. In *Barnes*, that agreement existed between attorneys who were equitably dividing the work and risk of handling a case on a contingency fee.<sup>213</sup> This lien by agreement occurred at arm's length between sophisticated parties who were fully informed of the terms of the agreement.<sup>214</sup> This type of agreement is distinct from the typical agreement between an ERISA plan and its participants, where ERISA plans are drafted by sophisticated parties and handed to employees who simply accept the health coverage offered by their employers as a benefit of employment.<sup>215</sup>

Additionally, the agreement in *Barnes* was supported by the principles of equity. In *Barnes*, the Court noted that each party performed the obligations required under the contract and were entitled to the benefits negotiated by the contract.<sup>216</sup> By contrast, an ERISA reimbursement provision requiring full

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208. *Id.*

209. *Sereboff*, 547 U.S. at 368 n.2.

210. *Id.*

211. *Id.* at 358.

212. *Id.*

213. *Barnes v. Alexander*, 232 U.S. 117, 119–20 (1914).

214. *Id.*

215. *See, e.g., Germany v. Operating Eng'rs Trust Fund of Washington, D.C.*, 789 F. Supp. 1165, 1169 (D. D.C. 1992) ("Insurance policies are almost always drafted by specialists employed by the insurer. In light of the drafters' expertise and experience, the insurer should be expected to set forth any limitations on its liability clearly enough for a common layperson to understand.").

216. *Barnes*, 232 U.S. at 121.

reimbursement in a case where there is limited recovery and portions of the recovery are for damages other than medical expenses, it is not clear that such an agreement is equitable. Finally, the *Barnes* Court allowed the attorneys to collect from the portion Barnes received as soon as the settlement fund was identified and in his hands.<sup>217</sup> The question in ERISA actions is: what is the portion that is received by a participant that is identifiable and in his hands? In the case discussed in the introduction, the injured member only collected \$21,000 for his knife wounds.<sup>218</sup> Because this amount did not come close to covering his lost wages, medical expenses, attorney's fees and costs of litigation, the money was deposited with the state court in which the action was pending to adjudicate all claims and equitably allocate the money between interested parties.<sup>219</sup> Can it properly be said that the entire recovery could be followed into the participant's hands and be identified? Or is such a case more similar to the case of Jeanette Knudson, whose recovery was deposited in a Special Needs Trust and, thus, was not in her hands for the purposes of an equitable remedy?<sup>220</sup>

*Equitable considerations surrounding the ERISA agreement.* Typically, a party can defend against a contract that is unconscionable, oppressive, or iniquitous. A contract may be treated as unconscionable when it is improvident, oppressive, or totally one-sided.<sup>221</sup> Even where there is no actual fraud, courts of equity will relieve against hard and unconscionable contracts which have been procured by taking advantage of the condition, circumstances, or necessity of the other parties.<sup>222</sup> Factors relevant to finding a contract unconscionable include gross disparity in the values exchanged or gross inequality of the bargaining positions of parties, together with terms unreasonably favorable to the stronger party.<sup>223</sup> Courts will also look to such factors as the age and education of the contracting parties, their commercial experience, and whether the aggrieved party had a meaningful choice when faced with unreasonably unfavorable terms.<sup>224</sup>

In ERISA actions, courts should consider the equitable defense of unconscionability. When a third party is not held liable for a member's

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217. *Id.* at 123.

218. *Trs. of the Carpenters' Health and Welfare Trust Fund of St. Louis v. Brunkhorst*, No. 05-382-DRH, 2006 U.S. Dist. LEXIS 38107, at \*5-\*7 (S.D. Ill. 2006).

219. *Id.* at \*6-\*7.

220. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 207-08 (1993).

221. 8 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 18:10 (4th ed. 2008).

222. *Id.*

223. *See* RESTATEMENT (SECOND) OF CONTRACTS, § 208, cmts. c, d (1981).

224. V. Woerner, Annotation, "*Unconscionability*" as Ground for Refusing Enforcement of Contract for Sale of Goods or Agreement Collateral Thereto, 18 A.L.R.3d 1305, 1313-16 (1968). *See generally* J. Fort, *Understanding Unconscionability: Defining the Principle*, 9 LOY. U. CHI. L.J. 765 (1978).

injuries, the ERISA insurer would be required to cover all of the member's medical costs under the terms of the health benefit plan. If a member decided not to attempt recovery against a third party for causing the injuries, the ERISA plan's only recourse would be to assert its subrogation rights and file the claim on behalf of the member at its own expense and risk. In both cases, the ERISA plan would receive less than the full portion of the recovery. However, when a member does take steps to financially recover for injuries caused by a third party, any contract requiring an ERISA plan to retain all of the benefit of the action by claiming reimbursement of the full recovery, with no responsibility for the costs of procuring the recovery, is unconscionable. Clearly, no member would agree in advance to take such measures on behalf of the ERISA plan. Imagine if the injured member was given the following options: (1) do nothing and your medical expenses are covered fully; (2) do nothing, allow the ERISA plan sue on your behalf and bear its own litigation costs, and your medical expenses will remain covered fully; or (3) spend time and expend effort, hire your own attorney, collect a statutorily capped recovery to reimburse the ERISA plan, and the result will be that you owe all of the litigation fees and costs or will have your health insurance benefits cut off. Members do not realize that these are their options.

In today's climate of rising health care costs and difficulty procuring health insurance, membership in an ERISA plan—probably the only option for medical care coverage offered by the employer—is likely an employee's only choice for affordable health coverage. Because of the gross inequality of the bargaining positions of the parties, together with terms unreasonably favorable to the stronger party, no court awarding appropriate equitable relief should find such a result conscionable, appropriate, or in line with public policy.

*Equitable considerations surrounding the unjust enrichment of the plan in cases of limited recovery.* Unjust enrichment is the receipt of an economic benefit under circumstances such that its retention without payment would result in the unjust enrichment of one party at the expense of the other.<sup>225</sup> An argument exists that there has been unjust enrichment by both parties to an ERISA plan. The plan can certainly make the argument that the participant who retains any portion of a limited or insufficient tort recovery after the plan has advanced medical benefits pursuant to a valid subrogation or reimbursement provision has been unjustly enriched at the expense of the plan. However, a participant who has independently hired an attorney at his own expense and received an insufficient settlement allocated to cover a portion of his damages can certainly make the argument that allowing the plan to receive all of those funds without consideration for appropriate allocation of the expenses and fees incurred in obtaining the funds has unjustly enriched itself at

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225. RESTATEMENT (THIRD) OF RESTITUTION § 1 (2000).

the expense of the participant. Courts should attempt to resolve this issue by allowing for partial reimbursement to ERISA plans in the case of a members' capped or limited recovery.

*Equitable considerations surrounding the imposition of a constructive trust or lien on a fund that is in the participant's hands.* A constructive trust is a restitutionary remedy used by a court of equity to compensate a party who unfairly holds a property interest to convey that interest to another whom it justly belongs.<sup>226</sup> It is not a remedy for recovery or compensation under any theory of contract law or tort but rather a restitutionary remedy that arises by operation of law and is imposed by a court on equitable and public policy grounds when a person holding money or property would profit by a wrong or be unjustly enriched at the expense of another if he were permitted to retain it.<sup>227</sup> If a constructive trust or lien becomes available when an injured party comes into possession of a fund for recovery, it is important to note that the fund is usually held in the possession of his attorneys who also have a lien imposed on the fund for an amount equal to their attorney's fees and costs.<sup>228</sup> Usually, an injured party only receives that portion of the fund that has already been reduced by attorney's fees and costs. Because the participant only ever sees that portion, it is inequitable to allow the plan to claim reimbursement of the entire amount according to the plan provisions. This seems at odds even with the familiar rule of equity espoused by the Supreme Court in *Sereboff*.

Because Section 502(a)(3) prescribes that the civil enforcement of ERISA plan terms by a fiduciary must be for "appropriate equitable relief," it is only logical that the judiciary allow participants to bring equitable defenses to plan terms, acknowledging fully the import of the words of the statute and employing all historical principles of equity, fairness, and justice.

## VII. A CALL FOR A CHANGED JUDICIAL INTERPRETATION OF "APPROPRIATE EQUITABLE RELIEF"

The judiciary needs to strike the appropriate balance between ERISA core policy objectives and the objectives of states in enacting statutory caps on recovery by applying Section 502(a)(3) as written, giving full meaning to the words "*appropriate equitable relief*."<sup>229</sup> As the introductory case illustrates,

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226. *Id.*

227. *Id.*

228. *Bishop v. Burgard*, 764 N.E.2d 24, 30–34 (Ill. 2002).

229. In this article, the analysis has operated under the assumption that the injured party would pay some portion the recovery to reimburse the plan, as occurred the introductory case. *See Trs. of the Carpenters' Health and Welfare Trust Fund of St. Louis v. Brunkhorst*, No. 05-382-DRH, 2006 U.S. Dist. LEXIS 38107, at \*7 (S.D. Ill. 2006) (The plan was paid \$6,282.90, which represented one third of the net recovery, minus the plan's pro rata share of attorneys' fees and costs.). However, it is important whether the member has clean hands. In *Sereboff*, this issue seemed important because both the *Sereboffs* and the attorney ignored the plan's attempts to

each party can benefit when a capped recovery is allocated appropriately and equitably among the interested parties. In that case, because there were not enough funds recovered to satisfy obligations, the state court adjudicated the matter and held that the injured party should receive approximately one-third of the recovery for losses such as pain and suffering, lost wages, disability, and out-of-pocket medical expenses, including co-pays and prescription payments, also considering remaining outstanding medical bills that were not paid by the ERISA plan.<sup>230</sup> The attorney was found to be entitled to full payment of his fees and the costs of litigation, split on a pro rata basis between the member and the plan and paid by the two parties receiving a benefit from the fund he successfully created.<sup>231</sup> Finally, the plan received the remaining one-third of the settlement fund with its contribution for attorneys' fees and costs of litigation.<sup>232</sup> Such an outcome is both appropriate and equitable and should have been enforced by the federal court.

When a court adjudicates the allocation of a partial or capped recovery in an equitable and appropriate manner, it advances the interests of all parties involved as well as the interests of society. First, with regard to the interests of the ERISA plan, the three core objectives of ERISA would be met.<sup>233</sup> The benefit protection policy would be served by providing an incentive for injured members and their attorneys to seek even a risky partial or capped recovery from the third parties that caused the injuries by ensuring the receipt of an equitable portion of the recovery. The cost minimization policy would be met because an appropriate equitable remedy would reduce litigation fees incurred by the plan by distributing the litigation costs against third parties between it and the member, thus creating an incentive for the member to take action and the attorney to assume the risk of pursuing the cause of action by taking the case for a contingency fee. Additionally, ERISA plans would find that such an equitable distribution would result in it receiving a portion of the recovery

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obtain any reimbursement according to the plan provisions in an action where there were clearly enough funds and no applicable damage caps or statutory limitations. *Mid Atlantic Med. Servs., Inc. v. Sereboff*, 407 F.3d 212, 214–15 (4th Cir. 2005) (The Sereboffs refused to pay any portion of their \$750,000 tort recovery to reimburse the plan for the medical expenses paid by MAMSI on their behalf in the amount of \$75,000.).

Although not directly addressed in *Sereboff*, at least one court has held that it is not a violation of ERISA for a plan to withhold health benefits to a plan participant after the participant has refused to sign an early agreement to reimburse the fund. *Alves v. Silverado Foods, Inc.*, 6 Fed. Appx. 694, 705 (10th Cir. 2001).

230. See *Brunkhorst*, 2006 U.S. Dist. LEXIS 38107, at \*7 (The injured member was paid \$5,365.79, which approximately represented one-third of the net recovery, minus his pro rata share of attorneys' fees and costs.).

231. *Id.* (The attorney was paid \$9,151.31, representing "fees and expenses.").

232. *Id.* (The plan was paid \$6,282.90, which represented one-third of the net recovery, minus the plan's pro rata share of attorneys' fees and costs.).

233. *Medill*, *supra* note 17, at 919.

without having to litigate against its members to protect the fund's reimbursement rights. Finally, the settlor function policy would be served in that, while the employer would still retain the benefits of customizing the plan's package of benefits to the employer's workforce and budget, it would preclude workers being subject to unconscionable plan provisions that result in unjust enrichment and ultimately lead to unsatisfied, financially-disadvantaged employees.

Second, attorneys who litigate against tortfeasors would benefit from a court adjudication that allocates a partial or capped recovery in an equitable and appropriate manner. Most attorneys agree to represent injured parties on a contingency basis.<sup>234</sup> This is beneficial to both attorneys and injured parties who seek to redress injuries because it ensures that, when there is a recovery, both the client and the attorney recover an appropriate percentage, making the venture economically feasible.<sup>235</sup> The attorney assumes the risk of the claim only when there is a likelihood of reward. In cases of capped recovery, there is less incentive for attorneys to take the cases on a contingency basis because there is a statutory ceiling on the outcome of the case. The attorney's incentive is reduced further in cases where liability is difficult to prove because the likelihood of a recovery profiting both attorney and client is even less probable.<sup>236</sup> Finally, if an ERISA plan seeks reimbursement of the entire recovery, leaving the attorney to recover his contingency fee from a disgruntled client who has received no portion of the funds, the attorney's incentive to assume the risk in this type of litigation is seriously diminished.

In the introductory case, while the attorney received payment from the initial settlement recovery, he was left with a client owing his entire recovery back to the ERISA plan and having his health insurance terminated so that the ERISA plan could recover the fee the client had already paid to the attorney.<sup>237</sup> In such a case, personal injury attorneys would be wise not to pursue any claim where there is a statutorily capped recovery and medical expenses have been paid by an ERISA plan that requires full reimbursement without any appropriate, equitable allocation. However, if a judicial allocation split the recovery between the ERISA plan and the injured member, requiring each party to pay their pro rata share of attorney's fees, the attorney can assure his client of modest recovery and ensure the ERISA plan that it will receive an equitable portion of the recovery at greatly reduced costs. Should the judiciary interpret its enforcement of ERISA plans in this equitable manner, it will lead to negotiations of equitable distributions of capped recoveries between injured

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234. See, e.g., GILLERS, *supra* note 4, at 143–45. See also Illinois Workers' Compensation Act, 820 ILL. COMP. STAT. 305/16a (1994).

235. GILLERS, *supra* note 4, at 143–45.

236. *Id.*

237. See *Brunkhorst*, 2006 U.S. Dist. LEXIS 38107, at \*24–26.

workers, their attorneys, and the ERISA plan that will benefit all parties involved.

While it is true that the ERISA plan might be able to obtain for itself the entire recovery, less attorneys' fees and costs, by subrogating its members' interest in their legal claims, the coordination and costs of such lawsuits would only result in meager financial benefit to the plan. Initially, the plan would likely be required to coordinate with counsel in a variety of different jurisdictions on a significant number of diverse lawsuits, which would result in increased administration costs. The ERISA plan would further be required to coordinate litigation between its retained counsel and the member. Although the client is likely contractually bound by the plan terms to assist the pursuit of the claim, the client's lack of interest in the outcome may result in less vigorous advocating of his claims. Once the claim was resolved, the plan would still be required to pay its own attorneys' fees and costs, plus the additional administrative costs of coordination of the litigation efforts, likely leaving it with less than the full reimbursement the plan requires of its members. Therefore, while attorneys may be interested in pursuing such claims on behalf of ERISA plans asserting subrogation interests, an appropriate equitable allocation of capped recoveries creates more incentive for vigorous representation in an efficient manner by fostering an attorney-client relationship between the parties with the most incentive, leading to reduced costs of litigation and increased efficiency.

Third, injured members would be benefited by court adjudication that allocated a partial or capped recovery in an equitable and appropriate manner. When members are injured by a tortfeasor, they have the most powerful interest in seeking justice for the harm caused to them. By seeking out a local attorney who specializes in prosecuting their specific type of claim and attempting to maximize the recovery, the member serves the two primary goals of the tort system by seeking compensation for injuries and deterring future negligent behavior in both the defendant and others.<sup>238</sup> Society has approved of injured persons hiring attorneys on a contingency fee basis to encourage the pursuit of personal injury lawsuits when it might not otherwise be financially feasible.<sup>239</sup> To that end, it is important that injured members of society maintain an incentive to seek compensation and redress harms. If this incentive is removed by ERISA plans that threaten members with no recovery and ultimately responsibility for attorneys' fees and costs, in addition to the possible termination of their health benefits, it will discourage the pursuit of legitimate injury claims. Such an outcome is not in the interests of the injured members of ERISA plans or society as a whole.

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238. Winters, *supra* note 157, at 1349.

239. See GILLERS, *supra* note 4, at 143-45.

In conclusion, a call for judicial action is clear when ERISA plans requiring full reimbursement of an entire recovery intersect with injury recoveries that are limited or capped under state law. In such a case, the judiciary should follow the plain language of Section 502(a)(3) and award appropriate equitable relief. By considering equitable defenses to unconscionable and unjust provisions in ERISA plans and giving full meaning to the modifier “appropriate” within the statute, the judiciary can meet the needs of society and each interested party to a capped or limited recovery. It is recommended that the judiciary follow the pattern of the state court in the introductory case by allocating an appropriate portion of the recovery between the injured member, the attorney, and the ERISA plan, in line with the principles of equity. The application of such an allocation would benefit all interested parties and society as a whole. Should the judiciary fail to allow equitable defenses to strict application of ERISA plan terms and fail to apply the modifier “appropriate” to the equitable relief allowed in Section 502(a)(3), there will be a breakdown of the purposes of ERISA and the policies of the tort system, leaving injured workers who are members of an ERISA plan in debt for attorneys’ fees and costs or without health insurance. The responsibility rests with the judiciary not to blindly follow the terms of the ERISA plan in the case of statutorily limited or capped recoveries, as illustrated in the introductory case, but to allow equitable defenses and give full meaning to the phrase “*appropriate* equitable relief.”

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