

Ninth Circuit Allows Application of Equitable Defenses to Reduce ERISA Reimbursement Claims – *CGI v. Rose*

By Donald M. de Camara

On June 20, 2012, the Ninth Circuit held in a published decision that equitable defenses were available to ERISA plan participants to reduce reimbursement claims made by their plans against their personal injury recoveries. See *CGI Solutions and Technologies, Inc. v. Rose*, et al., No. 11-25127, 2012 WL 2334230 (9th Cir.). In so doing, the Ninth Circuit followed the lead of the Third Circuit in *U.S. Airways v. McCutchen*, et al., 663 F.3d 671 (3d Cir. 2011). Notably, *U.S. Airways* had been the very first opinion anywhere in the country allowing equitable defenses to stand against such claims despite being waived by the plan's subrogation provision. (See previous article re *U.S. Airways* case in *CAOC Forum*, Jan/Feb 2012.)

On June 25, 2012, the Supreme Court granted certiorari in *U.S. Airways* and is therefore likely to do the same in *CGI*. Despite the likelihood of certiorari being granted in *CGI*, practitioners should raise all available equitable defenses against

every ERISA reimbursement claim to preserve the issues.

FACTS IN *CGI V. ROSE*

Rhonda Rose had her health coverage through CGI's self-funded ERISA plan when she was "seriously injured" in an automobile accident. Ms. Rose recovered a total of approximately \$377,000 from the other driver and her own UIM coverage, which was only 21.44% of her total damages. CGI's health benefit plan had paid about \$32,000 to Ms. Rose's medical providers and demanded full reimbursement. CGI's reimbursement provision waived both the make-whole and common fund rules. Rose, through her attorney, declined to reimburse the plan, but the attorney placed the full amount of the plan's claim in trust. CGI sued Ms. Rose and her attorneys for the full amount of its reimbursement claim. The district court rejected Rose's equitable arguments and granted summary judgment in favor of the plan, but reduced the plan's recovery for the common fund doctrine.

fashioning equitable remedies such as an equitable lien or a constructive trust, even where contract terms attempted to limit their application. (*Id.*, *6.)

Importantly, as a further example of this principle, the *CGI* court quoted from 4 Palmer, *The Law of Restitution*, §32.18(d) at 472-74 stating that:

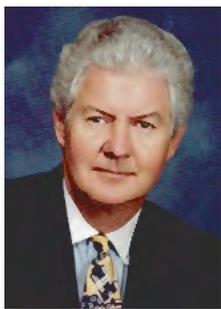
The principle of unjust enrichment ... should serve to limit the effectiveness of contract provisions which in terms provide for reimbursement out of the insured's tort recovery *without regard to whether or the extent to which, that recovery includes medical expense.* (*Ibid.*,² emphasis added.)

The *CGI* court repeatedly referred to the recent U.S. Supreme Court decision in *CIGNA v. Amara*, 131 U.S. 1866 (2011) for the proposition that an ERISA plan's terms must yield to equitable principles and were subject to modification as equity required. The *CGI* court noted that the majority of federal circuits had ruled in favor of the primacy of the plan's language over principles of equity, but held that it agreed with the minority position of the Third Circuit in *U.S. Airways* that:

Under 502(a)(3), the district court, in granting "appropriate equitable relief," may consider traditional equitable defenses, notwithstanding express terms disclaiming their application. (*Id.*, *8, emphasis in original.)

Notably, *CGI* held that, "we will not read out of the statute the limitation that equitable relief be appropriate." (*Ibid.*) At the conclusion of its opinion, the *CGI* court summarized its holding as follows:

We do not see good reason in interpreting §502(a)(3) to recede from the traditional broad powers of a court in equity. We therefore hold that the



Donald M. de Camara has offices in Carlsbad and specializes in lien litigation and resolution. He can be reached at decamara-law@sbcglobal.net.

Author's Note: A debt of gratitude is owed to Public Justice and its attorneys Matthew

Wessler and Leslie Brueckner, who briefed and argued both the *U.S. Airways* and *CGI* cases discussed in this article. These cases have clearly advanced the interests of personal injury victims in limiting ERISA reimbursement claims to an equitable share of their recoveries.

HOLDING IN *CGI V. ROSE*

A. Application of Equitable Defenses

In *CGI*, the court had to determine the meaning of the limitation placed on ERISA plans by 29 U.S.C. §1132(a)(3)¹ to "appropriate equitable relief" in actions against participants. The *CGI* court emphasized the very broad nature of a court's equity jurisdiction in fashioning relief, noting:

Traditionally, at equity, it was within the province of the court to consider concerns of unjust enrichment when

parties may not by contract deprive the district court of its power to act as a court in equity in a 502(a)(3) action. Contract terms should be considered by the court in assessing what is the proper scope of equitable relief. But notwithstanding the express terms of the Plan disclaiming the application of the make whole doctrine and the common fund doctrine, it is within the district court's broad equitable powers under §502(a)(3) not to give those provisions a controlling weight in fashioning "appropriate equitable relief." (*Id.*, *9.)

The concurring opinion by Judge Schroeder concentrates on the unfairness of a plan provision purporting to waive both the make-whole rule and common fund doctrine against a plan participant who was "vastly undercompensated" by her tort recovery and also suggested that "appropriate equitable relief" would include "reducing the Plan's recovery to an amount equivalent to the proportion of the beneficiary's actual damages that she recovered." (*Id.*, *10, emphasis added.)

B. Liability of Attorneys for Client's ERISA Lien

Section A contains the good news. Unfortunately, the *CGI* court also engaged in a lengthy discussion of the propriety of the ERISA plan suing the plan participant's attorneys. It upheld the district court's dismissal of the plan's action against the attorneys, but only because the attorneys had agreed to hold the entire amount of the lien in trust. The court clearly indicated that an attorney who pays himself a fee resulting in less than the full amount of the plan's claim being available has misappropriated funds in an "unlawful way." Footnote 2 summarizes the court's position quite concisely:

By contrast, an attorney who before adjudication pays himself out of the disputed funds, effectively reducing the available amount to less than the plan's claim, would be an appropriate defendant under *Harris Trust*. (*Id.*, *3 fn. 2.)

In the course of its discussion, *CGI* held that the Ninth Circuit's previous decision in *Hotel Employees & Rest. Employees Int'l.*

Union Welfare Fund v. Gentner, 50 F.3d 719 (9th Cir. 1995) was no longer good law as a result of the subsequent Supreme Court decision in *Harris Trust & Savings Bank v. Salomon Smith Barney*, 530 U.S. 238 (2000). *Gentner* had stood for the proposition that a plan participant's personal injury attorney was not liable to an ERISA plan for its lien against his client unless the attorney had agreed to protect said lien. A key reason for the *Gentner* court's decision was that it would be improper for the federal courts to impose a conflict of interest on attorneys that would purport to force them to violate states' codes of professional responsibility prohibiting such conflicts of interest. Clearly, the Tenth Amendment should be implicated in this discussion but there is no mention of it in the *CGI* opinion.

Ironically, the Ninth Circuit had recently affirmed the viability of the *Gentner* ruling in holding that an attorney was not liable to an ERISA plan for not honoring its lien in *A.C. Houston v. Berg*, 407 Fed. Appx. 208 (9th Cir. 2010). There, the 9th Circuit held:

Hotel Employees & Rest. Employees Int'l. Union Welfare Fund v. Gentner, 50 F.3d 719 (9th Cir. 1995), controls. *Gentner* held that an ERISA plan's lien cannot be enforced against an attorney who did not sign the reimbursement agreement or expressly agree to honor the plan's lien. (*Id.*, at 209.)

In *A.C. Houston*, the Ninth Circuit reversed the district court's holding that the attorney was liable for his client's ERISA lien. Like *CGI*, *A.C. Houston* was a 2-1 decision. However, *A.C. Houston* was not published and therefore does not serve as binding precedent, although it is properly citable pursuant to Fed.R.App.P. 32.1.

Obviously, it was a simple issue for the attorneys in *CGI* to agree to hold \$32,000 in trust out of a \$377,000 recovery but this would be far more problematic if there had been a minimal policy limit available. It would appear that this portion of the *CGI* holding renders the attorney the guarantor of the ERISA lien if he or she does not hold it in trust pending resolution. On the bright side, it should be easier to negotiate the ERISA liens in such cases with the benefit of the equitable defenses authorized by the balance of the *CGI* holding. ■

¹ ERISA §502(a)(3).

² Notably, the *U.S. Airways* court relied upon this same section of *Palmer*.

DISABILITY INSURANCE CLAIM ADVICE

ART FRIES

TOLL FREE 800-567-1911

web: www.afries.com email: friesart@hotmail.com

Representing attorneys, physicians, dentists and other professionals on THEIR personal disability claims. Since 1995:

- Over 70 articles written related to disability claims.
- Over 100 testimonial letters received.
- Over 700 disability claimants represented in a consult capacity.

Prior experience related to sale of disability insurance for many years to attorneys in the L.A./Beverly Hills area of Southern California with endorsement by numerous Bar associations.

Uccelli & Associates Court Reporters

1243 Mission Road, South San Francisco, CA 94080

T: 650.952.0774 F: 650.952.8666

Silicon Valley Office:

111 W. St. John Street, Suite 1010, San Jose, CA 95113

T: 408-275-1122

Complimentary 24/7 Online Document Repository

Teleconferencing Video Conferencing

Audiotape/Videotape/CD/DVD Transcription

Comp. Conf. Rms: So. San Francisco, San Francisco, Burlingame, San Mateo, Redwood City, San Jose, Santa Clara

www.uccellireporting.com reporters@uccellireporting.com