competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of these factors alone may, in some circumstances, be sufficient" (p 180).

In *Villareal*, the Eighth Circuit cited the lack of these three factors as reasons to support presumed competence. However, in relying on these factors, the court misunderstands the nature of disorders such as intellectual disability, which may cause incompetence to stand trial but not result in dramatic courtroom displays. In these cases, the ability to respond appropriately to yes/no questions is an insufficient indication of competence. Furthermore, attorneys may be unable to evaluate a defendant's mental state or to investigate his mental health history, as a defendant's limitations may prevent him from providing detailed information or directing the attorney to relevant records. Particularly if the defendant is from a lower socioeconomic background (where treatment may have been unavailable) or a culture in which families do not seek formal treatment, it may simply be impossible for an attorney to gather the documentation required by the *Villareal* decision (Reply Brief of Appellant, *United States v. Villareal*, No. 13–2367, No. 13–2586 (8th Cir. 2014)).

Ultimately, by way of their specialized training and experience, experts are better able to evaluate a defendant's mental state and mental health history than are defense attorneys. Therefore, it stands to reason that the courts should use a fairly low threshold for ordering an expert evaluation, particularly in relation to such fundamental matters as competency to stand trial. As the U.S. Supreme Court stated in *Cooper v. Oklahoma*, 517 U.S. 348 (1996), "[e]rroneous determination of competence threatens a 'fundamental component of our criminal justice system'—the basic fairness of the trial itself" (p 365). Mental health professionals should advocate on behalf of a lower standard for ordering competency evaluations, as this provides greater fairness for defendants whose mental illnesses or intellectual deficits render them unable to advocate for themselves. Psychiatrists should provide education about the nuances of mental illness, especially those conditions that present more subtly than the stereotype of florid psychosis. Without this enhanced understanding of mental illness, courts risk creating a standard for competency that disadvantages these vulnerable defendants.

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Another Victory for the Employee Retirement Income Security Act?

Gretchen N. Foley, MD
Fellow in Forensic Psychiatry

J. Richard Ciccone, MD
Professor of Psychiatry
Director, Psychiatry and Law Program

University of Rochester Medical Center
Rochester, NY

Under the Terms of the Employee Retirement Income Security Act (ERISA), 29 U.S.C.S. § 1001-1461 (1974), an ERISA Plan Cannot Be Overridden by Equitable Defenses; However, If a Plan Is Silent or Ambiguous With Respect to Apportionment of Settlements, Equitable Principles May Be Used

In *U.S. Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013), the U.S. Supreme Court overturned a Third Circuit decision that had rejected an ERISA plan's claim that it was entitled to a 100 percent reimbursement of medical expenses after third-party recovery. In *McCutchen*, the Court reaffirmed the terms of ERISA plans, at least where they are deemed unambiguous, are controlling, regardless of whether they seem fair or equitable.

Facts of the Case

James McCutchen worked as an airline mechanic for U.S. Airways. In January 2007, he was seriously injured when a young driver lost control of her car, crossed the median, and caused a deadly multiple car accident. Mr. McCutchen was a participant in a self-funded health benefits plan (the Plan) established under ERISA by his employer. Under the terms of the agreement, the Plan was obligated to pay the medical expenses of any participant injured by a third party, and the participant was required to reimburse the Plan if any money was later recovered from the third party. The Plan paid $66,866 to cover Mr. McCutchen's medical expenses.

Mr. McCutchen later hired an attorney and filed a lawsuit against the other driver. While his damages were estimated in excess of 1 million dollars, the total recovery was only $110,000 ($10,000 from the driver, who had only limited liability insurance and $100,000 in uninsured motorist coverage from his auto insurer). After deducting his attorney's 40 per-

cent contingency fee, Mr. McCutchen received only $66,000. On learning of this recovery, U.S. Airways brought action for reimbursement under § 502(a)(3), 29 U.S.C.S. § 1132(a)(3) of ERISA, which allows a fiduciary to seek "appropriate equitable relief" to enforce the terms of a benefit plan. U.S. Airways argued that the Plan had a first-priority right to recover the full $66,866 it had paid, even if it meant Mr. McCutchen had to pay back $866 more than his net recovery.

In district court, Mr. McCutchen argued that, out of fairness, the Plan was not entitled to recover any money, because he was still far from being made whole, given the small amount of money awarded and that this settlement included monies for damages, lost wages, and pain and suffering. Further, he claimed that if he was required to reimburse the Plan, it should be reduced by taking into account the attorney's fees and other costs incurred in obtaining the settlement proceeds. The Western District of Pennsylvania granted summary judgment to U.S. Airways, citing the Summary Plan Description (or SPD) which read that the company is entitled to reimbursement from "any monies recovered." Mr. McCutchen appealed. The Court of Appeals for the Third Circuit issued a remarkable opinion and reversed (*U.S. Airways, Inc. v. McCutchen*, 663 F.3d 671 (3rd Cir. 2011)). The court determined that because the amount U.S. Airways wanted exceeded the net amount of Mr. McCutchen's third-party recovery, he was left without full coverage of his medical bills, and this undermined the very purpose of the Plan. The court described this as a "windfall" for U.S. Airways, which did not contribute to the cost of obtaining the third-party recovery. The Plan subsequently petitioned the Supreme Court for review and was granted *certiorari*.

In petitioning for reversal of the Third Circuit decision, U.S. Airways argued that the text of ERISA itself settles the question, citing that § 502(a)(3) provides for equitable relief to "enforce the terms of the plan." The company contended that allowing equitable defenses, that is, general principles of fairness, to negate the terms of the Plan would increase costs to beneficiaries, threaten the solvency of ERISA plans, and encourage participants to intentionally structure settlements so as to reduce a plan's reimbursement, thereby increasing litigation costs for ERISA plans.

Mr. McCutchen argued that the Third Circuit's opinion was sound and that equitable defenses should limit U.S. Airways' recovery. Mr. McCutchen contended that he should be permitted to keep any monies designated for damages, lost wages, and pain and suffering and that an insurer was required to contribute a proportional amount to the effort that produced the recovery (i.e., attorney's fees and court costs) if it desired reimbursement. Mr. McCutchen pointed out that if the legal costs were not taken into account, he would have been worse off than if he hadn't filed a lawsuit in the first place. He contended the full-reimbursement approach that U.S. Airways advocated would incentivize participants not to file or settle tort claims, resulting in less reimbursement to ERISA plans overall and increasing costs.

Ruling and Reasoning

In the ruling, Justice Kagan (joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor) delivered the opinion of the Court. The Court vacated the Third Circuit's decision and held that the express terms of an ERISA plan cannot be overridden by equitable defenses. "[E]nforcing the lien means holding the parties to their mutual promises . . . it means declining to apply rules—even if they would be 'equitable' in a contract's absence—at odds with the parties' expressed commitments" (*McCutchen*, p. 1541). They further determined that, whether or not an ERISA plan is silent or ambiguous with respect to the apportionment of settlement proceeds, equitable principles may be used to fill these gaps. The Court was clearly put off by U.S. Airways' attempt to avoid cost-sharing of the legal fees stating, "That would put McCutchen $866 in the hole; in effect, he would pay for the privilege of serving as U.S. Airways' collection agent" (*McCutchen*, p. 1550). The Court determined this Plan did not specifically address apportionment of settlement proceeds in regard to attorney's fees and court costs, therefore equitable defenses could be applied to interpret the agreement. The question of how much the Plan's reimbursement should be reduced after taking into account attorney's fees was remanded to district court.

Discussion

ERISA was originally designed to protect employee pensions from companies that would use the money for other purposes. Given widespread abuses of pension monies in the decades following World

War II, the Chairman of the Senate Labor and Public Welfare Committee, Harrison Williams, introduced a bill in 1972 that was intended to address problems with the current laws regulating pension assets. ERISA was to accomplish this by establishing uniform national standards for funding and payment and would do so by pre-empting all state laws on these matters. The House Committee later widened ERISA's scope to cover all employee benefit plans, including health plans. As a result, the pre-emption clauses in ERISA affect health care torts, including malpractice and civil litigation for damages. (Ciccone JR: ERISA, health care and the courts, in Principles and Practice of Forensic Psychiatry (ed 2). Edited by Rosner R. London, Arnold, 2003, pp 756–60).

Over the years, ERISA has withstood many attempts to curtail its power over health care benefits. Several lawsuits against ERISA plans have failed when they asserted that the plans' decisions to either deny benefits or limit care have directly harmed plaintiffs (*Corcoran v. United Healthcare, Inc.,* 965 F.2d 1321 (5th Cir. 1992), *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350 (3rd Cir. 1995), and *Pegram v. Herdrich*, 530 U.S. 211 (2000)). Later suits have focused on whether ERISA plans may obtain recovery of medical costs from beneficiaries who have been reimbursed by a third party. *Sereboff v. Mid Atlantic Medical Services, Inc.,* 547 U.S. 356 (2006), determined that, given the presence of certain plan terms, ERISA plans could seek at least some reimbursement from employees who obtain compensation from third parties. In *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011), the Court determined that the actual terms of an ERISA Plan Document govern, not the Summary Plan Description (SPD).

The Third Circuit's decision to side against ERISA in this case was seen as a potential game changer. With its decision in *U.S. Airways, Inc. v. McCutchen*, the U.S. Supreme Court reaffirmed that the terms of ERISA plans still rule the day. The Court did communicate some displeasure at U.S. Airways' attempt to make Mr. McCutchen pay the costs associated with the reimbursement. This case highlights the importance of drafting plan documents with clear provisions regarding how third-party settlements and costs associated in obtaining them will be shared between the plan and its participants. If courts perceive ambiguity in the terms of an ERISA plan, decisions could result in a finding that favors the employee participant.

Mr. McCutchen's case remains in litigation. Upon being remanded to the district court, he filed a counterclaim in which he alleged that while the U.S. Airways SPD includes a provision for reimbursement, the Plan Document itself does not. He argued that U.S. Airways had breached its fiduciary duty to him, as it failed to provide a copy of the Plan earlier during litigation. He asserted that the Plan itself does not require repayment from his settlement. The district court granted his motion for leave to amend his counterclaim stating:

> Under normal circumstances, this Court would be loath to allow amendment of the pleadings and a reopening of discovery nearly six (6) years after the commencement of the case . . . however, the Court is troubled by U.S. Airways' untimely production of the Plan documents and its disingenuous contention that Defendants failed to request the Plan document . . . .The Court finds U.S. Airways' reasons for its failure to produce the Plan to be woefully inadequate" [Memorandum order, *U.S. Airways, Inc. v. McCutchen*, No. 2:08-cv-01593 (W.D. Pa. (March 17, 2014))].

It will be interesting to follow the further development of this case.

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The Impact of Individualized Education Programs on Free Appropriate Public Education

Iustinian Rusu, MD
Fellow in Forensic Psychiatry

Robert Weisman, DO
Associate Professor of Psychiatry
Co-director, Forensic Psychiatry Fellowship

University of Rochester Medical Center
Rochester, NY

Reliance on "Retrospective Testimony" in Defending the Appropriateness of an Individualized Education Program Constitutes Denial of a Free and Appropriate Public Education, as Defined by the Individuals with Disabilities Education Act

In *Reyes v. New York City Department of Education*, 760 F.3d 211 (2nd Cir. 2014), the United States Court of Appeals for the Second Circuit reviewed the case of the plaintiff, Dominga Reyes, who enrolled