Setting the Stage for Creative Lawyering in ERISA Reimbursement Actions

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I. INTRODUCTION

Imagine a car accident involving two vehicles that is caused solely due to the negligence of one driver, whereby the other driver is injured. An ambulance quickly arrives at the accident scene and rushes the injured driver to a nearby hospital, where he receives extensive medical treatment. After he is discharged from the hospital, he is handed a bill totaling $80,000 of medical expenses. Fortunately, the injured driver’s medical expenses are covered by his employer-sponsored health plan, governed by the Employee Retirement Income Security Act (ERISA). However, as a result of the accident he also suffers an estimated $500,000 in non-economic damages, assuming a price can be placed on his pain and suffering. The injured driver hires an attorney and sues the party responsible for the accident. After months of negotiations, the injured driver finally recovers a settlement in the amount of $100,000. Although this will only compensate him for a fraction of his actual damages, he feels fortunate to recover anything at all. After $20,000 in attorney’s fees, his net recovery is $80,000.

The next day, he receives a letter from his ERISA insurer, demanding reimbursement of the $80,000 in medical expenses that the insurer paid on his behalf. Confused and bewildered, the employee pulls out a copy of his health plan, and finds, amidst the hundreds of pages, a subrogation clause. The clause reads something like this:

This subrogation provision applies when you are sick or injured as a result of the act or omission of another person or party. Subrogation means the company’s right to recover any payments made to you or your dependent by a third party . . . because of an injury or illness caused by a third party. Third party means another person or organization.

2. See id.
3. See id.
4. See id.
7. See id.
8. See id.
9. See id.
10. See id.
12. See id. at 697–98.
If you or your dependent receives benefits and have a right to recover damages from a third party, the company is subrogated to this right. All recoveries from a third party (whether by lawsuit, settlement, or otherwise) must be used to reimburse the company for benefits paid. Any remainder will be yours or your dependents. The company's share of the recovery will not be reduced because you or your dependent has not received the full damages claimed, unless the company agrees in writing to a reduction. The injured driver finds this provision unjust. He believes that because the insurer has been collecting the premium payments, the insurer should not be reimbursed until after he has been fully compensated for his injuries. The insurer, on the other hand, maintains that the enforcement of the provision is just because the injured driver agreed to these terms by signing the insurance policy. As such, the injured driver refuses to reimburse the insurer and the insurer files a lawsuit against him to enforce the provision under ERISA section 502(a)(3). Depending on how the settlement proceeds are allocated, the creativity of the injured employee's attorney, and how the insurer's attorney states a claim, a court may or may not require the injured employee to fully reimburse the insurer.

This Note discusses the issue of subrogation and reimbursement actions, brought by ERISA insurers, as they relate to situations such as the one presented in the hypothetical above. Part II presents a brief summary of ERISA and when it applies. This part also provides an overview of what reimbursement and subrogation actions are and when they arise under ERISA. Part III details federal circuit interpretations of the law established by the United States Supreme Court in the landmark case, Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 214 (2002) (refusing to reimburse the insurer for medical expenses paid because the settlement proceeds were allocated to a trust that was not in the beneficiary's possession and the insurer's attorney sought a legal remedy); but see Sereboff v. Mid Atl. Med. Servs., Inc. (Sereboff III), No. 05-260, slip op. at 5 (U.S. May 15, 2006) (requiring reimbursement for medical expenses because the settlement proceeds were placed in an account that was in the beneficiary's possession and the insurer's attorney sought an equitable remedy).

13. Id. (emphasis added).
14. See id. at 693.
15. See id.
17. Id. at 693.
19. See, e.g., Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 214 (2002) (refusing to reimburse the insurer for medical expenses paid because the settlement proceeds were allocated to a trust that was not in the beneficiary’s possession and the insurer’s attorney sought a legal remedy); but see Sereboff v. Mid Atl. Med. Servs., Inc. (Sereboff III), No. 05-260, slip op. at 5 (U.S. May 15, 2006) (requiring reimbursement for medical expenses because the settlement proceeds were placed in an account that was in the beneficiary’s possession and the insurer’s attorney sought an equitable remedy).
Part IV discusses *Sereboff v. Mid Atlantic Medical Services, Inc. (Sereboff III)*, the most recent United States Supreme Court decision on the issue of ERISA reimbursement, and compares the facts and holding of this case to those of *Knudson*. Part IV also explains how *Sereboff III* clarified the conflict among the circuits regarding this issue, which was created by the *Knudson* decision. Part V focuses on the likely effect that the *Sereboff III* ruling will have on future reimbursement and subrogation actions brought by ERISA insurers. Finally, Part VI suggests solutions to the problems that will likely result from the *Sereboff III* decision.

II. ERISA AND REIMBURSEMENT

In order to fully understand the issues analyzed in this note, a basic understanding of ERISA, subrogation, and reimbursement is necessary. Section A of this part provides an overview of ERISA, why this statute was enacted, and a description of the ERISA provisions that are applicable to insurers' reimbursement and subrogation actions. Section B defines and differentiates subrogation and reimbursement and explains when they apply in ERISA actions.

A. ERISA Generally

ERISA is a series of federal statutes that was enacted in 1974 in response to the mismanagement and failure of many employer-sponsored pension funds. This failure resulted in employees receiving only a small percentage of their promised benefits or none at all. Congress' primary purposes for enacting ERISA were to regulate these pension funds and protect employees. However, the courts expanded the scope of ERISA's coverage...
beyond pension fund regulation to all employer sponsored benefit plans. Since ERISA’s enactment, courts have concluded that Congress’ goals include developing a uniform federal common law, ensuring the solvency of employee benefit plans, and encouraging employers to provide fringe benefits to their employees. The two sections of ERISA that embody these purposes and goals are sections 514 and 502. Section 514 outlines ERISA’s preemptive effect on state laws, and section 502 outlines ERISA’s exclusive remedial scheme.

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.” ERISA describes an “employee benefit plan” as any plan “established or maintained (1) by any employer engaged in commerce or in any industry or activity affecting commerce; or (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or (3) by both.” The statutory text of ERISA does not indicate how close of a relationship is required to satisfy the “relate to” language for ERISA preemption; however, the United States Supreme Court has defined

1974 U.S.C.C.A.N. 4639, 4639. “The primary purpose of the bill is the protection of individual pension rights . . . .” Id.
27. 29 U.S.C. § 1003(a) (2000). This Act “shall apply to any employee benefit plan.” Id.

It is thus clear that ERISA’s pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.

Id.
30. See H.R. Rep. No. 93-533, pt. 1, at 4639–40. The bill was designed to promote the expansion of these plans and increase the number of employees receiving them. Id. at 4640.
33. Id. § 2-107.
34. Id. § 2-99.
the phrase "relate to" as having a "broad common sense meaning." In 1995, the Court clarified that although Congress intended this provision to be applied broadly, it did not intend for it to preempt state laws that have only an indirect economic effect on the subject matter of an ERISA plan. A clause in section 514 limits the scope of ERISA from being read too broadly, by carving out an exception for state laws that regulate insurance. It also clarifies that self-insured employee benefit plans do not constitute insurance companies that are exempt from ERISA. In other words, an employer that acts like an insurance company by providing a set of benefits to its employees, such as promising to pay medical expenses, is governed by ERISA. These types of benefit plans fit easily into the category which ERISA defines as an "employee welfare benefit plan." This is important because the vast majority of Americans receive their health coverage through some sort of employee welfare benefits plan governed by ERISA. Having the majority of Americans' health plans governed by the same federal statute, as opposed to many different and perhaps conflicting state and local statutes, furthers

38. 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").


40. 29 U.S.C. § 1144(b)(2)(A) (2000). Section 1144(b)(2)(A) states that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities." Id.

41. § 1144(b)(2)(B). Section 1144(b)(2)(B) states:

Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

Id.


43. See 29 U.S.C. § 1002(1) (2000). Section 1002(1) describes the term "employee welfare benefit plan" as follows:

[A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment.

Id.

44. Timothy S. Jost, Pegram v. Herdrich: The Supreme Court Confronts Managed Care, 1 YALE J. HEALTH POL'Y L. & ETHICS 187, 187 (2001) (estimating that eighty-eight percent of Americans with private health insurance have employment-based coverage).
Congress' goal of creating a uniform federal common law. Section 514 also has the effect of complete federal preemption, meaning that a defendant may remove any related lawsuit filed in state court to federal court, even if the plaintiff did not plead a federal law violation. Section 502, ERISA's "[c]ivil enforcement" provision, enumerates the exclusive remedies available in ERISA actions. This provision states the following:

A civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates 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.

The other appropriate equitable relief language, of subsection B of this provision, has been interpreted to not include claims for punitive, consequential, or other state specific damages resulting from a breach of the benefits plan contract. Limiting the available remedies and enabling defendants to remove ERISA actions to federal court help achieve Congress' intended goals of ensuring the solvency of employee benefit plans and encouraging employers to provide benefits to their employees.

46. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987). According to the "well-pleaded complaint rule," a defendant may not invoke federal subject matter jurisdiction if the plaintiff has not raised a federal law issue in the complaint. Id. However, the Court in Metropolitan. Life Insurance. Co. established that ERISA section 514(a) completely preempts state law claims, and according to the complete preemption doctrine, there is federal subject matter jurisdiction over these claims. Id. at 66. "Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of [section] 502(a) removable to federal court." Id.
48. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987) (stating that "ERISA's civil enforcement remedies were intended to be exclusive").
49. § 1132(a)(3) (emphasis added).
B. An Insurer’s Action for Reimbursement or Subrogation

Subrogation and reimbursement are related doctrines intended to prevent unearned enrichment and injustice. Subrogation is the principle whereby a fiduciary, who has indemnified a beneficiary, is substituted for that beneficiary in a suit against a third party for compensation of losses sustained by the fiduciary, caused by that third party. An insurer’s subrogation rights often arise out of a contractual provision in an insurance policy. Enforcement of these rights is disfavored by state judiciaries and legislatures, because it seems to violate the public policies against assigning personal injury claims and the prohibition against splitting causes of action. However, “over the past thirty years . . . insurers have continually sought” enforcement of these provisions. To avoid violating these public policies, the insurance industry redesigned the language of their contracts to grant them the right of reimbursement instead of subrogation. The effect of this redrafting was to “create the economic reality of subrogation . . . without

52. A fiduciary is “[a] person who . . . act[s] for the benefit of another person on all matters within the scope of their relationship.” BLACK’S LAW DICTIONARY 658 (8th ed. 2004).
53. To indemnify means “[t]o reimburse (another) for a loss suffered because of a third party’s or one’s own act or default.” BLACK’S LAW DICTIONARY 783-84 (8th ed. 2004).
55. Baron, Subrogation, supra note 54, at 238.
57. Baron, Subrogation, supra note 54, at 238-39.
59. See, e.g., In re Estate of Scott, 567 N.E.2d 605, 607 (Ill. App. Ct. 1991) (holding that “the language of the Plan’s subrogation provision does not call for the full assignment of the insured’s rights but, rather, mere reimbursement of amounts forwarded by the Plan”).
its language.\textsuperscript{60} This is a prime example of the creative lawyering that will be discussed later in this Note.

III. Knudson: The Law Established

In the landmark case \textit{Great-West Life & Annuity Insurance Co. v. Knudson},\textsuperscript{61} the United States Supreme Court established the law regarding ERISA subrogation and reimbursement actions brought by insurers to recover medical expenses paid on behalf of their beneficiaries.\textsuperscript{62} Section A of this part presents the facts and holding of \textit{Knudson}, while Section B discusses the federal circuits' conflicting interpretations of the law.

A. Great-West Life & Annuity Insurance Co. v. Knudson

ERISA’s text is silent as to whether it applies to a fiduciary’s action for reimbursement or subrogation.\textsuperscript{63} However, courts have consistently applied ERISA to such actions.\textsuperscript{64} The United States Supreme Court decided \textit{Knudson} in 2002.\textsuperscript{65} In \textit{Knudson}, an ERISA plan beneficiary was injured in a car accident.\textsuperscript{66} Her ERISA insurance plan contained a reimbursement provision that provided the insurer a right to recover for any expenses it had paid on behalf of its beneficiary, from any third party settlement awarded to the beneficiary.\textsuperscript{67} The insurer paid $411,157.11 of the beneficiary’s medical expenses.\textsuperscript{68} The following year, the beneficiary filed a tort action in a California state court against the third party responsible for the car accident, and

\textsuperscript{61} 534 U.S. 204 (2002).
\textsuperscript{62} \textit{See id.} at 221.
\textsuperscript{63} Member Servs. Life Ins. Co. v. Am. Nat'l Bank & Trust Co., 130 F.3d 950, 958 (10th Cir. 1997); \textit{see also} Roger M. Baron, \textit{Public Policy Considerations Warranting Denial of Reimbursement to ERISA Plans: It's Time to Recognize the Elephant in the Courtroom}, 55 \textit{MERCER L. REV.} 595, 617 (2004) (noting that “nothing in the ERISA scheme endorses reimbursement or suggests that reimbursement is permitted under ERISA”) [hereinafter Baron, \textit{Public Policy}].
\textsuperscript{65} \textit{Knudson}, 534 U.S. at 204.
\textsuperscript{66} \textit{Id.} at 207.
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{Id.}
subsequently recovered a $650,000 settlement. The settlement allocated approximately $250,000 to a Special Needs Trust, pursuant to California law, and the remaining sum was given to the beneficiary's attorney for fees and other expenses. Prior to the state court's approval of the settlement, the insurer filed an action in federal court under section 502(a)(3) to enforce the reimbursement provision, which would require the beneficiary to pay $411,157.11 to the insurer from the third party settlement proceeds. The district court granted summary judgment to the beneficiary on this claim, which was affirmed by the Ninth Circuit Court of Appeals. Thereafter, the United States Supreme Court granted certiorari and ultimately found that the insurer was seeking to impose personal liability on the beneficiary for a contractual obligation to pay money. Because "[a] claim for money due . . . under a contract is 'quintessentially an action at law,'" it is not recoverable under the other equitable relief terminology of section 502(a)(3). The Court dismissed the insurer's claim that its restitution action was equitable and clarified that "'restitution is a legal remedy when ordered in a case at law' . . . which depends on . . . the nature of the underlying remedies sought." However, Justice Scalia also stated the following:

[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. A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where "the property [sought to be recovered] or its proceeds have been dissipated so

69. Id.
70. Knudson, 534 U.S. at 207–08. The Court also allocated $13,828.70 to the insurer for past medical expenses but the insurer did not cash the check. Id. at 208.
71. Id. The insurer subsequently filed a complaint seeking a temporary restraining order against continuation of the state court proceedings for approval of the settlement, which was denied. Id.
72. Id.
73. Knudson, 534 U.S. at 209. The Ninth Circuit Court of Appeals affirmed on different grounds. Id.
74. Id. at 209–10.
75. Id. at 210 (quoting Admin. Comm. of the Wal-Mart Stores, Inc. v. Wells, 213 F.3d 398, 401 (7th Cir. 2000)).
76. See id. at 221.
77. Knudson, 534 U.S. at 213 (quoting Reich v. Cont'l Cas. Co., 33 F.3d 754, 756 (7th Cir. 1994)).
that no product remains, [the plaintiff's] claim is only that of a
general creditor," and the plaintiff "cannot enforce a constructive
trust of or equitable lien upon other property of the [defendant]."

B. Confusion Among the Circuits

Justice Scalia's statement that a plaintiff could possibly seek equitable
restitution by bringing an action for a constructive trust or equitable lien has
led to some confusion as to whether reimbursement and subrogation provi-
sions are enforceable under section 502(a)(3). Knudson seems to answer
this question in the negative. Following Knudson, the Sixth and Ninth Cir-
cuit Courts of Appeals refused to recognize insurers' claims for reimburse-
ment of medical expenses paid on behalf of their beneficiaries. However,
the Fourth, Fifth, Seventh, and Tenth Circuit Courts of Appeals permitted
reimbursement and subrogation actions by insurers if certain criteria were
met.

The courts that outright opposed an insurer's action for reimbursement
focused on the following portion of the Knudson opinion:

78. Id. at 213–14 (quoting RESTATEMENT (FIRST) OF RESTITUTION § 215, cmt. a (1937))
(citations omitted).

79. Compare Cmty. Health Plan of Ohio v. Mosser, 347 F.3d 619, 624 (6th Cir. 2003),
overruled by Primax Recoveries Inc. v. Gunter, 433 F.3d 515 (6th Cir. 2006), with Admin.
Comm. of the Wal-Mart Stores, Inc. v. Willard, 393 F.3d 1119, 1125 (10th Cir. 2004).

80. Knudson, 534 U.S. at 209, 221. The Court affirmed the judgment "that judicially
decreed reimbursement for payments made to a beneficiary of an insurance plan by a third
party is not equitable relief and is therefore not authorized by §502(a)(3) [of ERISA]." Id. at
209.

81. Qualchoice, Inc. v. Rowland, 367 F.3d 638, 649–50 (6th Cir. 2004), abrogated by
Sereboff v. Mid Atl. Med. Servs., Inc. (Sereboff III), No. 05-260, slip op. at 5, 11 (U.S. May
15, 2006) (refusing to recognize an insurer's subrogation claim and affirmed the lower court's
dismissal of it for lack of subject matter jurisdiction); Cmty. Health Plan of Ohio, 347 F.3d at
624; Westaff (USA), Inc. v. Arce, 298 F.3d 1164, 1166–67 (9th Cir. 2002), abrogated by
Sereboff III, No. 05-260, slip op. at 5 (refusing to recognize insurer's reimbursement cause of
action by affirming the lower court's dismissal of the action).

82. See Willard, 393 F.3d at 1125 (finding that insurers were entitled to restitution in the
form of an equitable lien because the criteria were satisfied); Primax Recoveries, Inc. v.
Young, No. 02-2115; slip op. at 3 (4th Cir. Dec. 18, 2003) (finding for the insurer because the
possession requirement was met), http://pacer.ca4.uscourts.gov/opinion.pdf/022115.U.pdf;
finding that the reimbursement action was equitable because the fund satisfied the identifi-
able requirement); see also Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer,
Poirot & Wansbrough, 354 F.3d 348, 357, 362 (5th Cir. 2003) (finding that the reimbursement
action was equitable because the possession requirement was met).
Here, petitioners seek, in essence, to impose personal liability on respondents for a contractual obligation to pay money—relief that was not typically available in equity. "A claim for money due and owing under a contract is 'quintessentially an action at law . . . . ' " Almost invariably . . . suits seeking . . . to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty."\(^8\)\(^3\)

The courts that opposed insurer reimbursement actions based their rationale on the underlying nature of the remedies sought, as opposed to the cause of action chosen by the plaintiff.\(^8\)\(^4\) Therefore, those courts held that even if an insurer sued based upon theories of constructive trusts or equitable liens, its claim was essentially a legal contract claim, and thus unenforceable under ERISA.\(^8\)\(^5\) Further, those courts emphasized that reimbursement claims are unenforceable "regardless of whether the plan participant or beneficiary recovered from another entity and possesses that recovery in an identifiable fund."\(^8\)\(^6\) This statement discounts the theory on which the opposing jurisdictions relied.

The courts that entertained the idea of enforcing reimbursement and subrogation provisions of ERISA plans focused more on the following language in *Knudson*:

Here, the funds to which the petitioners claim an entitlement under the Plan's reimbursement provision—the proceeds from the settlement of respondents' tort action—are not in respondents' possession . . . . The basis for the petitioners' claim is not that respondents hold particular funds that, in good conscience, belong to petitioners, but that petitioners are contractually entitled to some funds for benefits that they conferred.\(^8\)\(^7\)

The courts that allowed reimbursement insisted that the *Knudson* insurer could not recover only because the beneficiary did not possess the set-

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\(^8\)\(^4\). See Cmty. Health Plan of Ohio, 347 F.3d at 623.

\(^8\)\(^5\). See Qualchoice, Inc., 367 F.3d at 649; Cmty. Health Plan of Ohio, 347 F.3d at 623.

\(^8\)\(^6\). Qualchoice, Inc., 367 F.3d at 650.

\(^8\)\(^7\). *Knudson*, 534 U.S. at 214 (emphasis omitted).
tlement funds. Because of this lack of possession, it was determined that the insurer’s action is a legal contract claim, not an equitable claim. From this conclusion, along with Justice Scalia’s previous statement regarding constructive trusts and equitable liens, arose a three-part test to determine whether a claimant is seeking “[other] appropriate equitable relief under [section] 502(a)(3).” The three-part test, also referred to as the possession theory, requires that the insurer “seek to recover funds (1) that are specifically identifiable, (2) that belong in good conscience to the [insurer], and (3) that are within the possession and control of the defendant beneficiary.”

IV. Sereboff III: The Law Clarified

In 2006, the issue of ERISA reimbursement was once again in front of the United States Supreme Court in the case of Sereboff v. Mid Atlantic Medical Services, Inc. (Sereboff III). In Sereboff III, the Court established that it may be possible for an ERISA insurer to recover medical expenses paid on a beneficiary’s behalf if certain criteria are met. Section A of this part presents the Sereboff III case. Section B compares the facts and holding of Sereboff III with those of Knudson. Finally, section C breaks down and analyzes the three-part test that must be satisfied in order for an insurer to enforce an ERISA subrogation or reimbursement provision.

88. See, e.g., Admin. Comm. of Wal-Mart Stores, Inc. v. Willard, 393 F.3d 1119, 1124 (10th Cir. 2004) (stating that in Knudson, “the Court ultimately determined that equitable restitution was not an available remedy because the funds claimed by the fiduciary were not in the plan beneficiary’s possession”). See also Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough, 354 F.3d 348, 356 (5th Cir. 2003); Admin. Comm. of the Wal-Mart Stores, Inc. v. Varco, 338 F.3d 680, 687 (7th Cir. 2003).

89. See, e.g., Primax Recoveries, Inc. v. Sevilla, 324 F.3d 544, 548 (7th Cir. 2003) (concluding that the action sought legal relief because the plan participant possessed only an un-cashed check; therefore, the participant did not possess an identifiable fund); Varco, 338 F.3d at 687–88 (concluding that the action sought equitable relief because the plan participant possessed identifiable funds); Bauhaus USA, Inc. v. Copeland, 292 F.3d 439, 445 (5th Cir. 2002) (concluding that the action sought legal relief because, like Knudson, the settlement funds were not in the beneficiary’s possession).

90. See Knudson, 534 U.S. at 213–14.

91. Bombardier, 354 F.3d at 355 (emphasis added).

92. Wellmark, Inc. v. Deguara, 257 F. Supp. 2d 1209, 1216 (S.D. Iowa 2003). “This Court finds the possession theory is the correct read of [Knudson].” Id.

93. Bombardier, 354 F.3d at 356.


95. See id. at 3–6.
A. Sereboff v. Mid Atlantic Medical Services, Inc. (Sereboff III)

As a result of Knudson, the various jurisdictions treated ERISA reimbursement provisions differently.96 Some outright refused to enforce them, while others applied the possession theory.97 This resulted in inconsistent decisions which were contrary to the ERISA goal of developing a uniform common law.98 The United States Supreme Court attempted to clear up the confusion on May 15, 2006, when it decided the case of Sereboff III in which the beneficiaries of an employer-sponsored health insurance plan, covered by ERISA, were involved in a car accident and suffered injuries.99 The insurer paid the beneficiaries' medical expenses, which amounted to $74,869.37.100 The beneficiaries filed a state tort action against third parties, seeking damages for their injuries.101 After the suit was commenced, the ERISA insurer asserted a lien on the anticipated proceeds from that suit for compensation of the medical expenses it had paid on the beneficiaries' behalf.102 Subsequently, the beneficiaries settled with the third parties for $750,000 which was then distributed.103 Because the funds had been distributed, the insurer sought a temporary restraining order and preliminary injunction to require the beneficiaries to set aside, from the settlement proceeds, an amount sufficient to fully reimburse it for the medical expenses.104 The beneficiaries agreed to set aside $74,869.37 from the proceeds in an investment account “until the [d]istrict [c]ourt rule[d] on the merits of [the] case and all appeals, if any, [were] exhausted.”105

The district court found in favor of the insurer and ordered the beneficiaries to pay the insurer $74,869.37 from the investment account.106 On appeal, the Fourth Circuit Court of Appeals affirmed in relevant part, and then

96. See supra notes 74–93 and accompanying text.
97. Compare Westaff (USA), Inc. v. Arce, 298 F.3d 1164, 1166-67 (9th Cir. 2002), abrogated by Sereboff III, No. 05-260, slip op. at 11 (refusing to recognize an insurer's reimbursement action), with Bombardier, 354 F.3d at 356-57 (recognizing an insurer's reimbursement action and applying the possession theory).
98. N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 657 (1995) (citing Senator William's statement that ERISA was intended to "eliminate the threat of conflicting or inconsistent [s]tate and local regulation of employee benefit plans" 120 CONG. REC. 29,197, 29,933 (1974)).
100. Id.
101. Id.
102. Id.
103. Id.
104. Sereboff III, No. 05-260, slip op. at 2.
105. Id. at 2-3.
106. Id. at 3.
the United States Supreme Court granted certiorari. The Court found that the insurer’s action was for *other appropriate equitable relief* under section 502(a)(3), because the insurer sought payment by means of “constructive trust or equitable lien on a specifically identified fund” that was in the beneficiaries’ possession. As such, the Court affirmed the Fourth Circuit’s judgment. This resolved the issue of whether an insurer could recover upon a reimbursement or subrogation provision in an ERISA plan. However, another question arises: Why did the United States Supreme Court come to such a different conclusion in *Sereboff III* than it did in *Knudson* when the facts of the cases were so similar? This would not be an issue if the Court had overturned or abrogated *Knudson* after ruling on *Sereboff II*, but it did not, it merely distinguished the cases based on a fact that seems arbitrary.

**B. Sereboff III Compared to Knudson**

The United States Supreme Court notes the similarities between the facts of *Knudson* and those of *Sereboff III*. In both cases, the beneficiaries of ERISA plans were injured in car accidents. Additionally, both plans contained reimbursement or subrogation provisions entitling the insurer to be reimbursed from third party settlements recovered by the beneficiary. Further, both insurers sought to collect for the medical expenses they had paid on the beneficiaries’ behalves. Even though these two cases arose from almost identical facts, the Court permitted one insurer to collect and not the other.

The Court explains that in *Knudson*, the *other appropriate equitable relief* requirement was not met because “the funds to which petitioners...
claim[ed] an entitlement’ were not in [the beneficiary’s] possession, but had instead been placed in a ‘Special Needs Trust’ under California law.”  

However, the requirement was met in Sereboff II because the funds “were ‘within the possession and control of the [beneficiaries, since the funds were]’ . . . set aside and ‘preserved in the [beneficiaries’] investment accounts.’”  
The Court notes that this distinction is the difference between seeking a constructive trust or equitable lien, which are equitable remedies, and imposing personal liability on a defendant, which is legal.  

Based on this rationale, it appears as though a beneficiary is able to avoid enforcement of an ERISA reimbursement provision by simply allocating third party settlement funds so that the insurer could not satisfy the possession theory requirements.

C. A Deeper Understanding of the Possession Theory

As indicated above, all three requirements of the possession theory must be satisfied for an insurer to enforce a reimbursement provision. Subsection 1 presents the first possession theory requirement—that the funds sought be specifically identifiable—and illustrates how this requirement is satisfied. Subsection 2 analyzes the second requirement—that the funds belong in good conscience to the insurer—and how this requirement is met. Subsection 3 discusses the last requirement—that a beneficiary must possess the funds—and identifies which funds are and are not in a beneficiary’s possession.

1. The Specifically Identifiable Requirement

The first requirement for an insurer to exercise its reimbursement or subrogation rights is that the funds which the insurer seeks to assert a constructive trust or equitable lien on be specifically identifiable. This stems from the requirement that a constructive trust and equitable lien can only be

118. Sereboff III, No. 05-260, slip op. at 4–5.
119. Id. at 5 (quoting Mid Atl. Med. Servs., Inc. v. Sereboff (Sereboff II), 407 F.3d 212, 218 (4th Cir. 2005)).
120. Id.
122. Bombardier, 354 F.3d at 356. The Plan must “seek to recover funds . . . that are specifically identifiable.” Id.
invoked on a specific res, either the funds belonging to the insurer or property that has been exchanged for those funds. However, where one can show only that another has received funds, but cannot demonstrate that those specific funds are still in the other’s possession, there is no identifiable fund on which to assert a trust or lien. As such, the only remedy available would be a general debt that may be pursued only at law. In theory, if a beneficiary cashed a third-party settlement check and buried the money, there would be no identifiable fund on which the insurer could seek a trust or lien. However, the check would have to have been cashed and not merely deposited in a bank account, because a bank account is specifically identifiable and therefore subject to a constructive trust or equitable lien. In addition to the obvious ethical restraints, cashing and hiding funds in this manner will likely prove unsuccessful. Before a settlement agreement is even made and a check disbursed, it is likely that the insurer will place a lien on the anticipated proceeds. This lien is one that a court will likely enforce. Even if the insurer did not have such foresight, it may just as easily seek a temporary restraining order or preliminary injunction requiring a sufficient portion of the settlement proceeds to be set aside before or after distributing the funds. Because of these options, which the insurance companies’ attorneys prudently exercise, the specifically identifiable requirement is generally satisfied.

123. A res is a fund. Primax Recoveries, Inc. v. Sevilla, 324 F.3d 544, 548 (7th Cir. 2003).
125. Id.
126. Id.
127. See id.
128. See id.
129. See DBBS, supra note 124, § 4.3(2).
131. See Sereboff III, No. 05-260, slip op. at 11 (enforcing the equitable lien on the settlement proceeds).
132. Id. at 2; see e.g., Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough, 354 F.3d 348, 350 (5th Cir. 2003).
133. See Sereboff III, No. 05-260, slip op. at 5; Bombardier, 354 F.3d at 355; Bauhaus USA, Inc. v. Copeland, 292 F.3d 439, 451 (5th Cir. 2002) (stating that the insurer was “contesting title to a specific and identifiable quantum of funds”).
2. The Belonging in Good Conscience Requirement

The second requirement an insurer must meet in order to enforce a reimbursement or subrogation provision is that the identifiable funds which it seeks to assert a trust or lien on belong to the insurer in good conscience.134 There has been little debate on this topic mainly because these suits generally arise from a clear and unambiguous reimbursement provision of an ERISA plan, which the employee has signed.135 However, one might argue that the settlement funds do not belong in good conscience to the insurer. As stated previously, a constructive trust or an equitable lien can only be asserted on a res that is traceable to the insurer.136 Usually, either the actual funds that belong to the insurer or property exchanged for those funds will suffice.137 In ERISA reimbursement actions, the funds belonging to the insurer—the funds actually disbursed to the beneficiary pursuant to the ERISA policy—are generally used for their intended purpose of payment for the beneficiary’s medical expenses.138 Therefore, the only res belonging to the insurer would be the hospital beds, medication, or services purchased with those funds.139

An insurer might argue that the settlement funds received are repayment for the medical treatment provided to the beneficiary. Since the insurer has reimbursement rights, the funds belong to it in good conscience and the insurer should be fully reimbursed before the beneficiary collects anything. Generally, however, the majority of these types of settlement funds are categorized as compensation for the beneficiary’s injuries and suffering, not medical expenses.140 So, perhaps the funds do not belong in good conscience to the insurers.

Further, given that the insurers have been collecting premiums and ERISA’s purpose was to protect employees, one may argue that beneficiaries

134. Bombardier, 354 F.3d at 356. Bombardier Aerospace Employee Welfare Benefits Plan (The Plan) must seek funds “that ‘belong in good conscience’ to the plan.” Id.
135. See id. In several cases, the policy “terms contained an express, unambiguous reimbursement provision which made the disputed funds ‘belong in good conscience’ to the [insurer.]” Id. This ignores the fact that the terms of a beneficiary’s ERISA plan policy are generally negotiated by his or her employer, who may or may not be acting in the beneficiary’s best interest. Kathy L. Cerminara, Contextualizing ADR in Managed Care: A Proposal Aimed at Easing Tensions and Resolving Conflict, 33 Loy. U. Chi. L.J. 547, 570 (2002).
136. DOBBS, supra note 124, § 6.1(3).
137. Id. n.1.
138. See Bombardier, 354 F.3d at 350; Bauhaus USA, Inc., 292 F.3d at 440.
139. See DOBBS, supra note 124, § 6.1(3) (stating that only the property regarded as the source of the debt or the property substituted for it can be the subject of a constructive trust).
140. See, e.g., Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 207–08 (2002). Only $13,828.70 of the $650,000 settlement was allocated to medical expenses, even though the medical expenses actually amounted to over $400,000. Id.
should be fully or at least partially reimbursed before insurers. 141 This concept is embodied in the make-whole doctrine. 142 At least three federal circuits have adopted this doctrine. 143 These circuits agree that the make-whole doctrine is the default rule in ERISA reimbursement actions, yet not applicable when the ERISA policy clearly and specifically gives the insurer "priority to the funds recovered and [the] right to any full or partial recovery." 144 Other circuits have refused to adopt the make-whole doctrine. 145 The United States Supreme Court did not address this particular doctrine in Sereboff III or in Knudson. 146 Further, neither decision conflicts with either side of the circuit split. 147 Therefore, one can only speculate as to how the Court would decide on the matter.

142. Moore v. Capital Care, Inc. (Moore II), Nos. 04-7121 & 7122, slip op. at 12–13 (U.S. D.C. Cir. Aug. 29, 2006). The court defines the make-whole doctrine as:

"In the absence of contrary statutory law or valid contractual obligations to the contrary, the general rule under the doctrine of equitable subrogation is that where an insured is entitled to receive recovery for the same loss from more than one source, e.g., the insurer and the tortfeasor, it is only after the insured has been fully compensated for all of the loss that the insurer acquires a right to subrogation, or is entitled to enforce its subrogation rights. The rule applies as well to instances in which the insured has recovered from the third party and the insurer attempts to exercise its subrogation right by way of reimbursement against the insured's recovery.

Id. Make-whole provisions prevent insurers from being reimbursed until after the beneficiary has been fully compensated for losses suffered. See BLACK'S LAW DICTIONARY 975 (8th ed. 2004).


144. Copeland Oaks, 209 F.3d at 813 (italics omitted).


147. See id. The Knudson decision does not conflict with either side because the insurer could not recover based solely on the beneficiary's lack of possession. Knudson, 534 U.S. at 214. The Sereboff III decision does not conflict with either side because there was clear and specific language in the policy giving the insurer the right to fully recover from the settlement funds. Sereboff III, No. 05-260, slip op. at 2.
3. The Possession Requirement

The third requirement—that the beneficiary possess the funds which the insurer is seeking a trust or lien on—has been the turning point for the majority of these cases. In Knudson, the insurer could not recover because the Special Needs Trust was not in the beneficiary’s possession. In Sereboff III, the insurer was able to recover because the investment account was in the beneficiaries’ possession. Therefore, if a beneficiary could allocate funds so that they were not in his or her own possession, an ERISA insurer could not be reimbursed from those funds.

Possession is having “[t]he right under which one may exercise control over something to the exclusion of all others.” One may have actual or constructive possession over property. Actual possession is having “[p]hysical occupancy or control over property.” Constructive possession means having “[c]ontrol or dominion over [] property without actual . . . custody of it.” Both of these types of possession satisfy the possession requirement under the possession theory. The next step in establishing whether an insurer will be able to satisfy the possession requirement is determining what types of funds one does or does not possess. An analysis of common law may aid in this determination.

a. Possessory Funds

In Sereboff III, the Court established that placing funds in an investment account that the beneficiary has control over satisfies the possession requirement. In Administrative Committee of the Wal-Mart Stores, Inc. v.

148. Knudson, 534 U.S. at 213. The Plan must seek funds within the control and possession of the beneficiary. Id.
149. Id. at 214.
150. Sereboff III, No. 05-260, slip op. at 5.
152. Id. at 1201–02.
153. Id. at 1201.
154. Id.
155. See Admin. Comm. of the Wal-Mart Stores, Inc. v. Varco, 338 F.3d 680, 691 (7th Cir. 2003). Since the funds were in the beneficiary’s own account he had sole possession over them and satisfied the possession requirement. Id. See also Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot, & Wamsbrough, 354 F.3d 348, 356 (5th Cir. 2003). Since the funds were being held by the beneficiary’s agent, the beneficiary had ultimate control over them giving him constructive possession. Id.
Varco, the beneficiary’s attorney held the settlement funds in a reserve account for the beneficiary which also satisfied the possession requirement. In Administrative Committee of the Wal-Mart Stores, Inc. v. Willard, the beneficiary agreed to have the settlement funds placed in the court registry. The Tenth Circuit Court of Appeals found this agreement to establish that the beneficiary exercised control over the funds and deemed him to have constructive possession of the funds. In Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot, & Wamsbrough, the settlement funds were being held in a bank account in the beneficiary’s attorneys’ names. Since the attorneys were indisputably the beneficiary’s agents, the beneficiary had ultimate control over the funds which satisfied constructive possession. These cases exemplify the courts’ eagerness to enforce reimbursement provisions, furthering Congress’ ultimate goals of creating a uniform common law and encouraging employers to provide benefit plans.

b. Non-possessory Funds

Despite insurers’ best efforts, beneficiaries have on occasion been able to avoid the enforcement of reimbursement provisions of ERISA plans. One example is a Special Needs Trust. In Knudson, the United States Supreme Court determined that if settlement funds are placed in a Special Needs Trust, then those funds are not considered to be in the beneficiary’s possession. A Special Needs Trust, also referred to as a Supplemental Needs Trust, is defined as: “A trust established to provide supplemental income for a disabled beneficiary who is receiving or may be eligible to re-

157. 338 F.3d 680 (7th Cir. 2003).
158. Id. at 684, 688.
159. 393 F. 3d 1119 (10th Cir. 2004).
160. Id. at 1121.
161. Id. at 1125.
162. 354 F.3d 348 (5th Cir. 2003).
163. Id. at 356.
167. Id. at 214.
168. Id.
receive government benefits." 170 Another example is an un-cashed check. 171 In Primax Recoveries, Inc. v. Sevilla, 172 the Seventh Circuit Court of Appeals established that an un-cashed check does not give a beneficiary possession of funds even if he has the ability to cash it. 173 A third example is funds held in a court registry. 174 In Bauhaus USA, Inc. v. Copeland, 175 the Fifth Circuit Court of Appeals found that funds placed in the Mississippi Chancery Court's registry were also not in the beneficiary's possession, contrary to the finding in Willard. 176 These examples illustrate possible scenarios in which beneficiaries may avoid the possession requirement.

V. THE LIKELY EFFECT OF SEREBOFF III AND THE POSSESSION THEORY ON FUTURE REIMBURSEMENT AND SUBROGATION CLAIMS BY INSURERS

"[An attorney's] task is to convert the requirements of the client into legal solutions . . ." 177 The combination of specific rules and an emphasis on legal form and literalism can be used artificially, in a manipulative way to circumvent or undermine the purpose of regulation," in order to serve a client's needs. 178 Now that it has been established by the United States Supreme Court in Knudson and Sereboff III, that the standard for reimbursement actions in ERISA cases is the possession theory, attorneys on both sides will likely shape their legal solutions to conform to this standard.

Section A of this part will analyze how a beneficiary's attorney may try to avoid enforcement of a subrogation or reimbursement provision of an ERISA plan through the application or manipulation of case law and the law of trusts. This section will also present the legal and ethical restraints on an attorney's success. Section B identifies the steps an insurer's attorney must take in order to satisfy the possession theory requirements and enforce a subrogation or reimbursement provision.

170. BLACK'S LAW DICTIONARY 1552 (8th ed. 2004).
171. See Primax Recoveries, Inc. v. Sevilla, 324 F.3d 544, 546 (7th Cir. 2003).
172. Id. at 544.
173. Id. at 548.
174. See Bauhaus USA, Inc. v. Copeland, 292 F.3d 439, 441 (5th Cir. 2002).
175. Id. at 439.
176. Id. at 445; see Admin. Comm. of the Wal-Mart Stores, Inc. v. Willard, 393 F.3d 1119, 1124–25 (10th Cir. 2004) (holding that the beneficiary had constructive possession of the funds placed in the court registry satisfied the possession requirement).
A. Lawyering on the Part of Beneficiaries

Despite the insurer’s success in Sereboff III, the United States Supreme Court’s ruling in Knudson and the appellate courts’ rulings in Sevilla and Bauhaus USA, Inc. still remain good law. In all three of these cases, the beneficiaries were successful, because the insurers were unable to meet all the requirements of the possession theory. The success of these beneficiaries may give future beneficiaries and their attorneys hope that they too can succeed in avoiding the enforcement of ERISA reimbursement provisions. For instance, an attorney may attempt to have a beneficiary’s third party settlement proceeds placed in a Special Needs Trust since this act enabled the Knudson beneficiary to succeed. However, this may not be as easy or successful as one might think, since not every injured beneficiary is eligible for a Special Needs Trust. Further, even if a beneficiary is eligible and successful in placing those funds in the Special Needs Trust, there is no guarantee that the funds will be unattainable by the insurer.

When the law does not support a client’s case and an attorney is under pressure to find a legal solution to the client’s problem, that attorney may be enticed to manipulate or circumvent the law, so that it appears to favor a particular client’s case. For example, combining the ruling in Sevilla with the specifically identifiable res requirement of the possession theory pre-
sents a possible loophole. Since the un-cashed check in *Sevilla* was not sub-
ject to equitable remedies,\(^{187}\) and cashing a check makes funds not specifi-
cally identifiable,\(^{188}\) an inexperienced attorney may instruct his client to hold
onto the un-cashed check until after the insurer’s suit is dismissed, then cash
it quickly, and hide the funds. Although at first glance this solution seems
feasible, such unscrupulous legal advice would likely subject an attorney to
professional sanctions, a malpractice suit, and possibly criminal charges.\(^{189}\)
Further, it will also likely prove unsuccessful for a couple of reasons. First,
the facts surrounding the *Sevilla* case were unique, since the beneficiary’s
purpose for not cashing the check was to prevent another case from becom-
ing moot, not to avoid an obligation.\(^{190}\) Second, a court may issue a prelimi-
nary injunction or temporary restraining order preventing the beneficiary
from cashing the check.\(^{191}\)

An attorney may also attempt to avoid the possession requirement by
having settlement proceeds placed in a court registry.\(^{192}\) However, this will
also likely fail its intended purpose.\(^{193}\) In *Bauhaus USA, Inc.*, the beneficiary
was successful only because the funds were placed in the registry in anticipa-
tion of an interpleader action\(^ {194}\) that never developed, not in an attempt to
evade a reimbursement provision.\(^ {195}\) Because these solutions will likely fail,
a beneficiary’s attorney may look to the law of trusts for further assistance.

1. Basic Trusts

A trust arises when one person holds title to property “subject to an eq-
uitable obligation to keep or use the property for the benefit of another.”\(^ {196}\)
A trust may be created *inter vivos*\(^ {197}\) or by testament.\(^ {198}\) A trust may ex-

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188. *See Bombardier*, 354 F.3d at 356.
189. MODEL CODE OF PROF’L RESPONSIBILITY & CODE OF JUD. CONDUCT DR 7-102(A)(7)
      (1980); 16 AM. JUR. PROOF OF FACTS 2D Legal Malpractice—Inadequate Case Investigation § 2
      (1978).
190. *Sevilla*, 324 F.3d at 548 (noting the reason the check was not cashed was to avoid
      mooting a collateral case).
191. DOBBS, *supra* note 124, § 2.11(1).
192. *See, e.g.*, Bauhaus USA, Inc. v. Copeland, 292 F.3d 439, 445 (5th Cir. 2002).
193. *Id.*
194. *Id.* at 441. In an interpleader action, property is held by an uninterested third party
      until the ownership rights of that property are determined. BLACK’S LAW DICTIONARY 837
      (8th ed. 2004).
195. *Bauhaus USA, Inc.*, 292 F.3d at 441.
197. 1 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 3.1 (5th ed.
      2006). A trust created inter vivos is created during one’s lifetime. *Id.*
pressed or implied. Express trusts are those created through a written document called a trust instrument, which details the powers, rights, duties, and terms of the trust. Implied trusts are those created by courts because the facts of a particular case warrant their creation. Furthermore, trusts can be either revocable or irrevocable, depending on the terms of the trust.

"[V]irtually all trust law is default law." This means that a settlor can make any provisions, with respect to the trust, which the trustee must implement, as long as the provisions do not offend important rules and policies of the law of trusts.

2. The Possession Requirement

Due to a settlor's ability to design the terms of the trust to his or her liking, the ERISA beneficiary may be able to set up an inter vivos express trust in such a way as to avoid the possession requirement. One possibility is the creation of a trust that mirrors a Special Needs Trust, except without the eligibility requirements. This type of trust is a possible solution, since placing funds in a Special Needs Trust enabled the beneficiary in *Knudson* to avoid an ERISA reimbursement provision.

Another possibility includes the creation of an Offshore Purpose Trust for the settlement proceeds. For example, a settlor may create this type of

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198. A trust created by testament is created upon one's death. *Id.*
200. *Id.*
201. *Id.* § 1.
202. *Id.* § 8.
203. 2 Restatement (Third) of Trusts § 63 (2003).
205. A settlor is a person who creates a trust. *Bogert,* supra note 196, § 1.
206. The trustee is the person who holds the title of the trust property, in trust, for the beneficiary of the trust. *Id.*
208. See, e.g., Holdeen v. Ratterree, 270 F.2d 701, 706 (2d Cir. 1959) (finding that due to the "complete absence of control in the instrument itself... the settlor did not possess such control as to be considered substantially the owner of [the trust] property"). See 1 Scott et al., * supra* note 197, § 2.2.4, 3.1.
trust to finance a child's education or to take care of a pet. If the settlor
would likely have paid for these expenses, then he or she would essentially
be receiving the benefits of the trust. Before sending money overseas, a
settlor should first consult with a knowledgeable attorney and consider
whether such activity is financially worthwhile. Additional considerations
include: "[T]he purpose and term of the trust;" the laws and political stabil-
ity of the foreign jurisdiction; and the settlor's travel preferences.

A third possibility includes placing the settlement funds in an irrevoca-
ble trust created for the benefit of the settlor's family members. Because
an irrevocable trust is not within the control of the settlor, the possession
requirement cannot be met. As such, it may be possible for the settlor's
family members to enjoy the benefits of the settlement funds, something the
settlor would likely prefer over having the insurance company receive the
funds.

In all of these cases, the funds would not be in the ERISA beneficiary’s
possession. Therefore, the insurer would be unable to satisfy this require-
ment of the possession theory. As a result, an ERISA beneficiary’s attorney
might encourage the creation of one of these trusts.

3. Restrictions on the Use of Trusts

Even if an ERISA beneficiary is able to create one of these trusts and
have the third party agree to allocate the settlement funds to the trust, a court
may still have to approve the settlement. Courts addressing related issues
have concluded that "[a]ny ERISA plan participant [cannot] unilaterally allo-
cate settlement proceeds to something other than medical expenses in order
to evade subrogation." Additionally, in \textit{Knudson}, the settlement proceeds were placed in a Special Needs Trust pursuant to California Law, not by the parties' discretion. Thus, if the state in which the action arises does not require settlement funds to be placed in a Special Needs Trust, it may be even more difficult for a beneficiary to utilize this reimbursement evasion tactic.

Other restrictions may prevent a beneficiary from utilizing trusts to avoid reimbursement or subrogation, such as the requirement "that the trust have a purpose that is lawful [and] not contrary to public policy." If a court determines that the settlor created a trust for an illegal or contrary to public policy purpose, the trust will fail. Further, "[a]n intended trust or a particular provision in the terms of the trust [instrument] may fail for illegality where . . . the purpose of the settlor in creating the trust is to defraud creditors or other third persons." Although, the settlor will likely attempt to convince a court that the purpose of the trust was not to defraud the insurer, but rather to ensure the education of a child or the well-being of his or her family or pet, it will be an uphill battle.

Regardless of whether the beneficiary is successful in creating one of these trusts, encouraging such activity may subject the attorney to sanctions. The \textit{Model Code of Professional Responsibility} states that an attorney "shall not . . . counsel or assist his client in conduct that the [attorney] knows to be illegal or fraudulent."

\section*{B. Lawyering on the Part of Insurers}

As a result of \textit{Sereboff III}, insurers now have United States Supreme Court precedent in support of their actions to enforce ERISA reimbursement

\begin{itemize}
\item 219. Moore v. Blue Cross & Blue Shield of the Nat'l Capital Area (\textit{Moore I}), 70 F. Supp. 2d 9, 39 (D.C. Cir. 1999). The beneficiary claimed entitlement to all of the settlement proceeds because she had not yet been made whole for her injuries. \textit{Id.} at 38. \textit{See} Chitkin v. Lincoln Nat'l Ins. Co., 879 F. Supp. 841, 862 (S.D. Cal. 1995) (finding that the reimbursement provision permitted repayment from any settlement funds—except from strict liability—regardless of how the settlement funds were allocated).
\item 220. \textit{Knudson}, 534 U.S. at 207–08.
\item 222. \textit{Austen Wakeman Scott et al., Scott and Ascher on Trusts}, § 9.6 (5th ed. 2006).
\item 223. 1 \textit{Restatement (Second) of Trusts} § 60 (1959); \textit{see also} 2 \textit{Restatement (Third) of Trusts} § 29 (2003).
\item 225. \textit{Id.}
\end{itemize}
provisions. This will likely add to the increasing trend towards insurers seeking enforcement of such provisions. Although less creativity is required on the part of the insurers' attorneys than those of beneficiaries, they must still follow the proper procedures in order to be successful. First, the insurers must make sure that the reimbursement provision in the ERISA plan is signed by and enforceable against the beneficiary. This will likely satisfy the belonging in good conscience requirement of the possession theory. Second, the insurers' attorneys must act promptly in anticipation of, or as a result of, the beneficiary receiving a third party settlement by seeking a preliminary injunction and temporary restraining order. These orders should require the beneficiary to set aside sufficient funds from the settlement proceeds to fully reimburse the insurer. However, it is important that the funds be set aside in an account that is subject to a constructive trust or equitable lien, such as the beneficiary's investment account, a court registry, or the beneficiary's attorney's bank account, so that the possession requirement is met. With these three possession theory requirements satisfied, the insurers have a good chance at success.

VI. CONCLUSION AND RECOMMENDATIONS

The Sereboff III insurer's success confirmed that pursuant to the civil enforcement provision, section 502(a)(3) of ERISA, an insurer may succeed in a reimbursement or subrogation action against a beneficiary for medical expenses paid on the beneficiary's behalf. The United States Supreme Court also clearly identified the requirements for enforcement of such provi-

228. See Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough, 345 F.3d 348, 356 (5th Cir. 2003) (noting that the belonging in good conscience requirement is satisfied when the beneficiary has signed an "express, unambiguous reimbursement provision").
229. See id.
230. See e.g., Sereboff III, No. 05-260, slip op. at 2. The insurer's attorney sought a preliminary injunction and temporary restraining order to require the beneficiary to set aside sufficient funds to reimburse it. Id.
231. Id.
232. Id. at 5. See also Admin. Comm. of the Wal-Mart Stores, Inc. v. Willard, 393 F.3d 1119, 1124–25 (10th Cir. 2004); see Admin. Comm. of the Wal-Mart Stores, Inc. v. Varco, 338 F.3d 680, 691 (7th Cir. 2003).
233. Sereboff III, No. 05-260, slip op. at 4–5 (indicating that if these three requirements are met, then the insurer will succeed).
234. Id. at 11.
However, because there are cases which indicate that a beneficiary may still be able to avoid reimbursing the insurer, Congress' goal of establishing a uniform common law may still be frustrated. Since a beneficiary's attorneys may seek to exploit possible loopholes in the possession theory, there is the potential for ethical and professional conduct violations. Because of the increasing trend towards insurers seeking enforcement of reimbursement provisions, and the fact that the majority of Americans are insured under ERISA, a more efficient solution than the three-pronged analysis is necessary.

The clearest solution to this problem is to amend ERISA, specifically indicating whether or not Congress intended for ERISA reimbursement provisions to be enforceable. If the answer is "yes," the solution may be as simple as adding the word "legal" to section 502(a)(3) of ERISA, which would enable insurers to enforce reimbursement provisions on contract theories. If the answer is "sometimes," which is more probable, perhaps a detailed outline of the situations in which enforcement is appropriate should be provided. If Congress is concerned that explicitly requiring the enforcement of these provisions will pose an undue burden on beneficiaries, it should include a make-whole doctrine provision in its revision of the statute. This provision would provide that an insurer may only be reimbursed after the beneficiary has been fully compensated for losses suffered. This would require the tortfeasor to fulfill his or her obligation to the injured party to his or her ability. It will also require the insurer to pay for the expenses covered by the premium which it has already received. Until this is done, courts will continue to exercise their discretion and attorneys on both sides will continue to exercise their own.

235. Id. at 4–5.
237. See supra notes 185–200 and accompanying text.
238. Baron, Subrogation, supra note 54, at 238–39.
240. This solution is based on the fact that ERISA is silent on the issue of reimbursement and subrogation. Member Servs. Life Ins. Co. v. Am. Nat'l Bank & Trust Co., 130 F.3d 950, 958 (10th Cir. 1997); see also Baron, Public Policy, supra note 63, at 617.
241. See BLACK'S LAW DICTIONARY at 975 (8th ed. 2004).
242. Kono, supra note 141, at 449.
243. Id.