On January 8, 2002, the Supreme Court decided *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). Since this decision, ERISA subrogation specialists and ERISA subrogation attorneys have been forced to actively participate in a nationwide legal battle over ERISA-covered health plans' subrogation and reimbursement rights under 29 U.S.C. § 1132(a)(3).

At the heart of this legal battle is *Knudson* and Justice Scalia’s interpretation of equitable relief under ERISA. The question is whether an ERISA-covered health plan can seek this relief available in federal court. Since *Knudson*, the Fourth,1 Fifth,2 Seventh,3 Eighth4 and Tenth Circuits5 have recognized health plans' rights, so long as the disputed settlement monies, over which the plan fiduciary seeks to impose a constructive trust, are identifiable and traceable. On the other side of the legal battle, the Sixth6 and Ninth Circuits7 hold that under *Knudson*, an ERISA-covered plan can never file a claim, as a plaintiff, in federal court to recover money under ERISA.8

The battle lines have been drawn and a true split exists between the circuits. In fact, as of November 28, 2005, the equitable relief issue is now again before the Supreme Court. Before making a ruling, the Supreme Court and Justice Scalia will examine each post-*Knudson* lower court case to determine the winning and losing interpretation of available equitable relief under *Knudson*. Below is a quick survey of each important post-*Knudson* case to get you up to speed and ready for combat!

**Fourth Circuit: Health Plan Prevails When Settlement Funds Traced To Investment Accounts**

Although the Fourth Circuit has issued two very favorable decisions regarding the right of recovery under ERISA after *Knudson*,9 the Fourth Circuit’s recent decision in *Mid Atl. Med. Servs., LLC v. Sereboff*,10 is of important note here because as of November 28, 2005, the Supreme Court decided that it intends to consider this case during the 2005 - 2006 term.

In *Sereboff*, Joel and Marlene Sereboff, both Maryland residents, were injured in an automobile accident in California. For their injuries, the Sereboffs received approximately $75,000 from an ERISA-covered plan, which was administered in Maryland. The Sereboffs filed suit in California and received a $750,000 settlement. Of the $750,000, the Sereboffs transferred an amount greater than the Plan’s lien to a joint investment account. The Plan contained a reimbursement provision that required covered persons to reimburse the Plan to the extent of benefits paid when a covered person recovers from another party. The Plan requested that the Sereboffs reimburse the Plan as required under the terms of the Plan, but they refused.

The Plan filed suit, and the Sereboffs stipulated to hold an amount equal to the lien in their investment account until the litigation could be resolved. The district court held that the Plan was entitled to equitable relief against the funds in the investment account pursuant to *Knudson*. The Sereboffs appealed and the appellate court affirmed. In affirming, the Fourth Circuit held that the funds could be traced even though they had been placed in an account holding the settlement funds as well as other unrelated funds of the Sereboffs. This distinction is important because unlike the case in several other post-*Knudson* decisions, the funds were not held in a court registry or an attorney’s trust account - the funds were actually disbursed to the member but preserved in investment accounts with other funds. The court also held that the funds belonged in good conscience to the Plan.

**Fifth Circuit: Health Plan Prevails When Settlement Funds Traced To Attorney’s Trust Account**
Like the Fourth Circuit, in *Bombardier*,\(^\text{11}\) the Fifth Circuit held that a Plan may pursue reimbursement in the form of a constructive trust if the Plan fiduciary sues the party with possession and control over the settlement funds. Unlike the case in the Fourth Circuit’s *Sereboff*, in *Bombardier*, the covered person’s attorney had possession of the settlement funds in his trust account.

Although the Fifth Circuit has held that equitable relief is available to health plans, suing the party with possession and control of the settlement funds is crucial. Otherwise a plan’s claim for reimbursement will fail. For example, in one Fifth Circuit case, *Banbaux USA, Inc. v. Copeland*,\(^\text{12}\) the Plan’s reimbursement claim was unsuccessful because the covered person did not have possession and control over the settlement funds. The settlement funds had been placed in the registry of the state court, which was not a defendant in the Plan’s lawsuit seeking reimbursement.

**Seventh Circuit: Health Plan Prevails When Funds Are Secured In Joint Account Controlled By Plan Participant And Plan Participant’s Attorney**

In *Varco*,\(^\text{13}\) after seeking injunctive relief to preserve the status of the settlement funds, the health plan successfully obtained reimbursement under 29 U.S.C. § 1132(a)(3) and *Knudson*.

Regarding traceability issues under *Knudson*, a district court within the Seventh Circuit has published a helpful decision on whether settlement proceeds may be traced to tangible assets. In *Lumenite v. Jarvis*,\(^\text{14}\) an Illinois district court held that under *Knudson*, the disputed funds could be traced to equity in a home. This case may be used in cases where traceability is at issue - for example, when the Plan must file suit after the member’s attorney has disbursed the settlement proceeds to the client.

**Eighth Circuit: Health Plan Prevails In Overpayment Case**

In the Eighth Circuit, a recent decision in *Roth*,\(^\text{15}\) well illustrates the distinction drawn by Justice Scalia in *Knudson* that has been adopted by the Fourth, Fifth, Seventh and Tenth Circuits, but overlooked or ignored by the Sixth and Ninth Circuits. In *Roth*, North American overpaid retirement benefits to Roth who gave some or all of the monies to Schlaht. When Roth and Schlaht refused to relinquish the overpaid benefits, North American sued them under ERISA Section 502(a)(3), which ultimately required the Eighth Circuit to analyze, as a matter of first impression in that Circuit, the scope of monetary relief available under ERISA in light of *Roth*.

Proponents of the Sixth and Ninth Circuits’ interpretation of *Knudson* will argue that *Roth* is not applicable to the typical cause of action involving a Plan’s right to enforcement of its reimbursement/subrogation provision under ERISA’s 29 U.S.C. § 1132(a)(3) because the facts in *Roth* involved an overpayment made by the health plan. However, just recently, a district court in Florida held that *Roth* implements the same interpretation of *Knudson* as done by the Fourth, Fifth, Seventh and Tenth Circuits.\(^\text{16}\)

**Tenth Circuit: Health Plan Prevails When Settlement Funds Are Identifiable And Traceable**

The Tenth Circuit, like the Fourth, Fifth, Seventh and Eighth Circuits have held that equitable relief is available to Plans seeking reimbursement of identifiable funds that pursuant to the Plan terms, belong to the Plan. *Willard*\(^\text{17}\) is also an important decision standing for the proposition that without the assurance that health plans can recover benefits paid to plan participants and beneficiaries where those parties recover from third parties, the stability of many plans would be substantially compromised and could cause some companies to discontinue or greatly scale back the scope of the benefits provided.

**Ninth Circuit: Although Plan Participant Prevails And Health Plan Is Barred From Recovering Under ERISA, Health Plan May Still Have Chance For Success In Future Battles**
In *Westaff (U.S.A), Inc. v. Arce*, the first decision to interpret the scope of *Knudson*, the Ninth Circuit held that federal courts do not have subject matter jurisdiction over claims to enforce subrogation provisions in ERISA-covered plans under 29 U.S.C. § 1132(a)(3) whenever the substance of the remedy involves money. The *Westaff* panel reasoned that “*Westaff* is seeking to enforce a contractual obligation for the payment of money, a classic action at law and not an equitable claim.” The court found it immaterial that “the money at issue, a legitimate personal injury settlement to which the beneficiary [was] entitled, [had] been placed in an escrow account and [was] specifically identifiable.”

On the other hand, in *Honolulu Joint Apprenticeship and Training Committee v. Foster*, the second decision post-*Knudson* to interpret the scope of *Knudson* in the Ninth Circuit, the Ninth Circuit held that “equitable restitution is available where the specific res or funds can be identified and attached by equitable lien or constructive trust, but not where the plaintiff seeks to impose general personal liability as a remedy for the defendant’s monetary obligations.”

To add to the confusion of the law, the Ninth Circuit decided *Providence Health Plan v. McDowell*, the third post-*Knudson* decision in the Ninth Circuit. In that case, Providence brought a breach of contract claim in state court against McDowell, which McDowell removed to federal court and obtained an order of dismissal from the district court based upon ERISA preemption. Providence also filed its own action in federal court seeking specific performance under 29 U.S.C. § 1132(a)(3). The district court dismissed that action, holding, similar to *Westaff*, that a suit to obtain monetary relief could never constitute appropriate equitable relief under *Knudson*. The Ninth Circuit affirmed the district court’s decision with regard to the scope of relief available under *Knudson*, but reversed with regard to the breach of contract claim. The court held that a breach of contract claim by a Plan, against a participant, is not preempted by ERISA.

Due to the conflicting decisions in *Westaff*, *Foster* and *McDowell*, it can be argued that it is unclear whether a plan fiduciary will prevail on a reimbursement claim in federal court in the Ninth Circuit under 29 U.S.C. § 1132(a)(3). Under *McDowell*, however, it appears that a Plan will be able to sue a member for breach of contract.

**Sixth Circuit: Plan Participant Prevails**

The Sixth Circuit’s interpretation of *Knudson* in *QualChoice, Inc.* follows that of the Ninth Circuit’s in *Westaff*. In the Sixth Circuit, an ERISA-covered plan can never file a claim, as a plaintiff, in federal court to recover money under ERISA.

As the battle nears the end, the health plans have prevailed in five of the twelve circuits, while plan participants have held health plans abay in two of the twelve circuits. However, note there are some undecided circuits and battles yet to be fought. Listed below are important cases setting the stage for battle in the undecided circuits.

Of the twelve circuits, the First, Second, Third, Eleventh and the D.C. Circuits have not yet ruled on whether *Knudson* recognizes the right of an ERISA-covered plan to seek reimbursement/ subrogation against a member’s third party recoveries under 29 U.S.C. § 1132(a)(3); however, district courts within those Circuits have followed both the approach of the Sixth and Ninth Circuits, as well as the approach taken by the Fourth, Fifth, Seventh, Eighth and Tenth Circuits. Additionally, the issue is currently before the Eleventh Circuit.

**First Circuit: Health Plans Lead One To Zip**

The only court within the First Circuit, the District Court of Maine, that has had the opportunity to decide whether to follow Sixth or Ninth Circuits or the Fourth, Fifth, Seventh, Eighth and Tenth Circuits, has declined to follow the Sixth and Ninth Circuits’ interpretation of *Knudson*. 
Second Circuit: Health Plans Lead One To Zip

Scholastic Corp. involved facts similar to those in the foregoing circuit cases. The ERISA plan fiduciary sued a plan participant seeking imposition of a constructive trust under 29 U.S.C. § 1132(a)(1)(3) over settlement proceeds recovered by the plan participant from third parties responsible for injuries for which the plan paid medical benefits. Although a district court within the Second Circuit recognized a health plan’s right to reimbursement under 29 U.S.C. § 1132(a)(3) and Knudson, for the first time this court discussed a new approach when interpreting Justice Scalia’s language in Knudson. Instead of focusing just on the basis for the plaintiff’s claim as supposedly done by the Sixth and Ninth Circuits or focusing just on the nature of the remedies sought as supposedly done by the Fourth, Fifth, Seventh, Eighth and Tenth Circuits, the district court gave equal weight to both the basis of the plan fiduciary’s claim and the nature of relief requested. Rather than picking sides, the district court in Connecticut developed its own global interpretation of Knudson.

Eleventh Circuit: Health Plans Lead, Four To Two

The Eleventh Circuit, although undecided at this point, will not be undecided much longer. At this point, the Northern District of Georgia follows the Sixth and Ninth Circuit’s interpretation of Knudson, but the Middle District of Georgia, as well as the Middle District of Florida, follows the Fourth, Fifth, Seventh, Eighth and Tenth Circuits’ interpretation. Just recently, on November 15, 2005, the parties in Blue Cross Blue Shield of South Carolina v. Carillo and Popowski presented an oral argument to the Eleventh Circuit on this issue of whether, under 29 U.S.C. § 1132(a)(3), a health plan is entitled to seek equitable relief in the form of a constructive trust where funds are identifiable and traceable and belong, in good conscience, to the Plan.

The D.C. Circuit: Health Plans Lead, One To Zip

The D.C. Circuit has not addressed the scope of equitable relief after Knudson. However, the district court within the D.C. Circuit held that a Plan may pursue reimbursement in the form of a constructive trust if the plan fiduciary sues the party with possession and control over the settlement funds. See Primax Recoveries v. Lee. Although there are few battlegrounds left in this war on health plans’ rights to equitable relief under ERISA, with the biggest battle currently before the Supreme Court, it is imperative to stay abreast of recent decisions on this issue. Expect to see a monumental decision from the Supreme Court sometime next summer.

ENDNOTES

1 The Fourth Circuit consists of Maryland, West Virginia, North Carolina, and South Carolina.
2 The Fifth Circuit consists of Texas, Louisiana, and Mississippi.
3 The Seventh Circuit consists of Illinois, Indiana, and Wisconsin.
4 The Eighth Circuit consists of Missouri, Arkansas, Iowa, Minnesota, North Dakota, South Dakota, and Nebraska.
5 The Tenth Circuit consists of Wyoming, Utah, Colorado, Kansas, New Mexico, and Oklahoma.
6 The Sixth Circuit consists of Tennessee, Michigan, Kentucky, and Ohio.
8 See QualChoice, Inc. v. Rowland, 367 F.3d 638 (6th Cir. 2004) and Westaff (USA) Inc. v. Arve, 298 F.3d 1164 (9th Cir. 2002).


Banhaus USA, Inc. v. Copeland, 292 F.3d 439 (5th Cir. 2002).

Administrative Committee v. Varco, 338 F.3d 680 (7th Cir. 2003).


North American Coal Ret. Savings Plan v. Roth, 395 F.3d 916 (8th Cir. 2005).


Wal-Mart v. Willard, 393 F.3d 1119 (10th Cir. 2004).

Westaff (USA), Inc. v. Area, 298 F.3d 1164 (9th Cir. 2002).

Westaff (USA) Inc., 298 F.3d at *1166.

Id. at *1167.

Honolulu Joint Apprenticeship and Training Committee v. Foster, 332 F.3d 1234 (9th Cir. 2003).

Honolulu Joint Apprenticeship and Training Comm., 332 F.3d at *1238.

Providence Health Plan v. McDowell, 361 F.3d 1243 (9th Cir. 2004).

QualChoice, Inc. v. Rowland, 367 F.3d 638, 650 (6th Cir. 2004).

The First Circuit consists of Maine, New Hampshire, Massachusetts, and Rhode Island.

The Second Circuit consists of Vermont, New York, and Connecticut.

The Third Circuit consists of Pennsylvania, New Jersey, and Delaware.

The Eleventh Circuit consists of Florida, Georgia, and Alabama.


B.P. Amoco Corp. v. Connell, 320 F. Supp. 2d 1368, 1371-72 (M.D. Ga. 2004) (“This language from Knudson indicates that plan fiduciaries may obtain restitution where the actual proceeds from a settlement remain intact, even if they may not obtain legal remedies by imposing a personal liability upon the plan beneficiary.”); Great West Life & Annuity Ins. Co. v. Brown, 192 F. Supp. 2d 1376, 1381 (M.D. Ga. 2002) (“Here, Defendant has placed the amount in controversy, which came directly from the settlement, in a non-interest-bearing trust account. Therefore, the funds are identified and clearly traceable to the award from third parties. Accordingly, Plaintiff may seek restitution in equity.”); see HCA v. Clemmons, 162 F. Supp. 2d 1374, 1379 (M.D. Ga. 2001) (“Plaintiff’s claim seeking partial reimbursement for proceeds paid pursuant to an ERISA-covered plan is a proper cause of action under these statutes.”); and Space Gateway Support v. Prieth, 371 F. Supp. 2d 1364 (M.D. Fla. 2005).
