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No. 12-2074

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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TODD ROCHOW and JOHN ROCHOW,
as personal representatives of the
ESTATE OF DANIEL J. ROCHOW,

Plaintiffs-Appellees,

v.

LIFE INSURANCE COMPANY OF NORTH AMERICA,

Defendant-Appellant.

On Appeal from the Judgment of District Judge Arthur J. Tarnow,
United States District Court for the Eastern District of Michigan

BRIEF *AMICUS CURIAE* OF UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations
And Financial Interest

Sixth Circuit
Case Number: 12-2074 Case Name: Rochow, et al. v. LINA

Name of Counsel: Mark D. DeBofsky

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I certify that on May 5, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ Mark D. DeBofsky

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INTEREST OF *AMICUS CURIAE*[1]

United Policyholders ("UP") is a non-profit 501(c)(3) organization founded in 1991 that serves as a voice and an information resource for insurance consumers in all 50 states. Advancing the interests of policyholders through participation as *amicus curiae* in insurance-related cases throughout the country is an important part of UP's efforts.[2] Donations, foundation grants and volunteer labor support the organization's work. UP does not accept funding from insurance companies.

As part of its mission, UP is concerned about the implementation and application of laws and rules under the Employee Retirement Income and Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, because a substantial percentage of the insurance market is governed by ERISA. We seek to assist the Court by addressing some of the arguments raised by Life Insurance Company of North America ("LINA") and its *amici*. This brief will explain why disgorgement of profits is not only an appropriate remedy under ERISA but also a necessary deterrent to insurer misconduct of the sort exhibited in this case.

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[1] Both parties have consented to the filing of this brief. No counsel for a party authored this brief, in whole or in part; and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

[2] UP's briefs have been received by the U.S. Court of Appeals for the Sixth Circuit in *Demolition Contrs., Inc. v. Westchester Surplus Lines Ins. Co.*, 381 Fed. Appx. 526 (6th Cir. 2010); *GenCorp Inc. v. AIU Ins. Co.*, 138 Fed. Appx. 732 (6th Cir. 2005); and *Advance Watch Co. v. Kemper Nat'l Ins. Co.*, 99 F.3d 795 (6th Cir. 1996).

SUMMARY OF ARGUMENT

The facts of this case are truly egregious and illustrate why, in exceptional circumstances, an award of benefits due under the plan, plus interest and attorney's fees, is insufficient to deter insurer misconduct – particularly where, as here, the insurer earned a substantial gain by investing the wrongfully denied benefits. In practice, disgorgement of profits under § 502(a)(3) (29 U.S.C. § 1132(a)(3)) will not dramatically alter ERISA benefits litigation and may even reduce litigation by removing the financial incentive plan administrators currently have to deny meritorious claims. Nothing in the language or legislative history of the ERISA statute, as interpreted by both the Supreme Court and this Circuit, precludes an award of disgorged profits under § 502(a)(3) in addition to benefits recovered under § 502(a)(1)(B) ((29 U.S.C. § 1132(a)(1)(B)). Indeed, the Seventh Circuit already awarded such relief in *Mondry v. Am. Family Mut. Ins. Co.*, 557 F.3d 781, 804 (7th Cir. 2009) (permitting ERISA benefits claimant to disgorge profits arising out of defendant's denial of speech therapy benefits). For the reasons set forth herein and in the panel-majority's well-reasoned opinion, the district court's award of $3.8 in disgorged profits to the Plaintiff-Appellees should be affirmed.

ARGUMENT

I. LINA'S MISTREATMENT OF ROCHOW ILLUSTRATES WHY DISGORGEMENT OF PROFITS IS A NEEDED DETERRENT IN ERISA BENEFIT DENIAL CASES

Amici for Life Insurance Company of North America ("LINA") seek to portray this as a "run-of-the-mill benefit case"[3] in order to make the $3.8 million disgorgement award for the Plaintiff-Appellees seem excessive. However, nothing about this case is run-of-the-mill: LINA's behavior toward Daniel Rochow ("Rochow")[4] was egregious, and the $3.8 million award to his estate, while portrayed by Appellant as jaw-dropping, was fair. In rendering its disability determination, LINA advanced inconsistent and shifting rationales for its denial of benefits and impermissibly relied on the fact that Rochow continued to work after his disability arose as evidence he was not disabled. *Rochow v. Life Ins. Co. of N. Am.*, 482 F.3d 860, 864 (6th Cir. 2007) ("*Rochow I*"). Moreover, Rochow was forced to litigate his entitlement to benefits until his untimely death. If this is a "run-of-the-mill" benefits case, then our present system is flawed.

LINA's mistreatment of Rochow illustrates why an award of past-due benefits, plus attorney's fees and interest, is insufficient to deter insurer misconduct – particularly where, as here, the insurance company receives extraordinary investment returns on the wrongfully withheld benefits. As the

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[3] *See* En Banc Brief of Amicus Curiae DRI – The Voice of the Defense Bar Supporting Defendant-Appellant and Reversal (hereafter "DRI Br.") at 1, 4; Docket No. 106.

[4] Daniel Rochow died on October 16, 2008 and his estate was substituted as plaintiff. For the sake of consistency, this brief will refer to the Plaintiff-Appellees simply as "Rochow."

panel-majority observed, "If no remedy beyond the award of benefits were allowed, insurance companies would have the perverse incentive to deny benefits for as long as possible, risking only litigation costs in the process." *Rochow v. Life Ins. Co. of N. Am.*, 737 F.3d 415, 417 (6th Cir. 2013) ("*Rochow II*"). Allowing insurers to profit from their own wrongdoing fosters abusive claims practices, as evidenced by the fact that both LINA and its competitor, Unum/Provident, have recently entered into regulatory settlement agreements with nearly every state under which they were forced to pay millions of dollars in fines, re-decide thousands of claims, and reform their claims procedures to adhere to market standards.[5]

States have long addressed this problem through insurance bad faith laws, but those laws are preempted by ERISA. *See Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41 (1987). However, ERISA ostensibly affords greater protection to plan participants than state law by imposing fiduciary duties on insurers. *See Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115 (2008) ("ERISA imposes higher-than-marketplace quality standards on insurers."); *Firestone Tire & Rubber Co. v.*

[5] *See* http://www.maine.gov/pfr/insurance/Admin_Enforcement_Actions/RSA_2013/CIGNA_RSA.pdf; https://maine.gov/pfr/insurance/unum/UNUM_Regulatory_Settlement_Agreement.htm; *see generally* John Langbein, "Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA," 101 Nw. U. L. Rev. 1315 (2007); *Radford Trust v. First UNUM Life Ins. Co. of Am.*, 321 F. Supp. 2d 226, 247 n.20 (D. Mass. 2004) (collecting cases involving misconduct by Unum).

Bruch, 489 U.S. 101, 114 (1989) (refusing to interpret the ERISA statute in a manner that "would afford employees and their beneficiaries less protection than they received under pre-ERISA cases"). As discussed *infra*, nothing in the plain language or legislative history of ERISA, as interpreted by the Supreme Court and this Circuit, precludes an award of benefits under § 502(a)(1)(B) and additional equitable relief under § 502(a)(3) in special circumstances.

Permitting disgorgement of profits under § 502(a)(3) in exceptional benefit denial cases will not dramatically alter ERISA litigation. First, whether to permit such an award is committed to the sound discretion of the district court. 1 D. Dobbs, *Law of Remedies*, § 2.4, at 90-92 (2d ed. 1993). Second, insurers can limit litigation expenses by segregating disputed benefits into a separate account, as LINA claimed to have done here. *Rochow II*, 737 F.3d at 429. Indeed, had LINA been forthright about not segregating Rochow's funds into a separate account, much of litigation expense of which it now complains could have been avoided. This Court has been reluctant to accept claims of burden and prejudice when the complaining party caused the situation.[6] Finally, in most cases the insurer's

[6] *Brennan & Co. v. Dowagiac Mfg. Co.*, 162 F. 472, 476 (6th Cir. 1908) ("When did a court of justice, whether administered according to the rules of equity or law, ever listen to a wrongdoer's argument to stay the arm of justice grounded on the steps he himself had successfully taken to prevent his iniquity from being traced?"); *see also R.H. Stearns Co. v. United States,* 291 U.S. 54, 61-62 (1934) (Cardozo, J.) ("'He who prevents a thing from being done may not avail himself of the non-performance which he has himself occasioned, for the law says to him in

disgorged profits will resemble pre-judgment interest. Only where the insurer unnecessarily prolongs litigation while actively managing the disputed funds will the disgorgement award approach the amounts at issue in this case. In those instances, equity dictates that the profit belongs to the claimant. *See Nickel v. Bank of Am.*, 290 F.3d 1134, 1138 (9th Cir. 2002) ("The elementary rule of restitution is that if you take my money and make money with it, your profit belongs to me."). Otherwise, insurers would be perversely rewarded for their bad behavior, a result that is inconsistent with ERISA's stated purpose of protecting plan participants and beneficiaries. *See* 29 U.S.C. § 1001(b).

LINA and its *amici* argue that federal dockets are already clogged with disability cases[7] and that permitting disgorgement of profits in ERISA benefit denial cases will only contribute to litigation costs, thus driving up premiums and forcing employers to stop offering these benefits. However, LINA and its *amici* cite no empirical evidence in support of that tired argument. Arguably, the availability of disgorgement will have the opposite effect, curbing the flood of

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effect "this is your own act, and therefore you are not damnified....' "); *United States v. Cohen,* 145 F.2d 82 (2d Cir. 1944) (L. Hand, J.) ("It is particularly unreasonable for the accused . . . to complain of that confusion of which they were the authors."); *United States v. Goodwin*, 449 F.3d 766, 772 (7th Cir. 2006) (Posner, J.) ("He was therefore the co-author of the prolongation that is the fulcrum of his Fourth Amendment claim . . . It is in that sense that he is the author of the delay of which he complains.").

[7] Br. of the Am. Council of Life Insurers et al. at 5 n. 1; Docket No. 103.

litigation by removing the financial incentive insurers presently have to deny meritorious claims and further delay payment through protracted litigation. LINA's *amici* further argue that the $3.8 million disgorgement award represents an impermissible "windfall" to Rochow,[8] but the same can be said of LINA if it is permitted to keep the $3.8 million it earned on Rochow's wrongfully withheld benefits. Accordingly, the decision of the district court should be affirmed.

II. THE DISTRICT COURT'S DECISION IS CONSISTENT WITH SUPREME COURT AND SIXTH CIRCUIT PRECEDENT

A. The Supreme Court Made Clear in *CIGNA Corp. v. Amara* that Monetary Relief Is Available in a Suit Against a Fiduciary Under § 502(a)(3).

The Supreme Court recently acknowledged in *CIGNA Corp. v. Amara* that although § 502(a)(3) does not permit suits for money damages against a non-fiduciary, plan participants who sue a fiduciary under § 502(a)(3) have a spectrum of equitable remedies at their disposal, including "monetary 'compensation' . . . to prevent the trustee's unjust enrichment." 131 S. Ct. 1866, 1880 (2011). In so ruling, the Court overturned a considerable body of circuit court precedent interpreting § 502(a)(3) as precluding monetary relief. *See Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869, 880 (7th Cir. 2013) (acknowledging that "the relief available for a breach of fiduciary duty under section 1132(a)(3) is broader than we

[8] DRI Br. at 6; Docket No. 106.

have previously held"); *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 450 (5th Cir. 2013) (same); *McCravy v. Metro. Life Ins. Co.*, 690 F.3d 176, 181 (4th Cir. 2012) (same).

Although *Amara* did not explicitly address the remedy of equitable accounting, the Supreme Court has previously acknowledged that equitable accounting, and the associated relief of disgorgement of profits, are appropriate equitable remedies under § 502(a)(3). *See Harris Trust & Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000) (permitting plan fiduciaries to pursue disgorgement claim against a non-fiduciary under § 502(a)(3)); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 214 n.2 (2002) (acknowledging that equitable accounting is a traditional equitable remedy, even though tracing of profits is not required). Thus, equitable accounting and the associated relief of disgorgement of profits are appropriate equitable relief under § 502(a)(3).

B. *Russell*, *Varity*, and *Wilkins* Do Not Preclude Concurrent Claims for Benefits Under § 502(a)(1)(B) and Equitable Accounting Under § 502(a)(3).

LINA argues that had Congress intended for a potential disgorgement remedy to be available in benefit denial cases, it would have expressly provided for such a remedy in the statute. LINA's Br. At 10-11; Docket No. 99. In support, LINA cites *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985), where the Supreme Court ruled that § 502(a)(2) does not provide "extracontractual

damages" arising out of the defendant's improper or untimely processing of benefit claims. However, *Russell* reserved judgment as to whether § 502(a)(3) authorizes such relief, since the plaintiff in that case expressly disclaimed reliance on § 502(a)(3). *Id.* at 139 n.5. As *Amara* recently made clear, although compensatory and punitive damages (i.e., legal relief) are not available under § 502(a)(3), equitable restitution is plainly available, even where it results in a monetary award to the plaintiff. 131 S. Ct. at 1880.

LINA points out that ERISA expressly provides for disgorgement of profits under § 502(a)(2) (which gives effect to § 409 (29 U.S.C. § 1109)) and argues that Congress would not have "tucked away" a disgorgement remedy under § 502(a)(3) that is potentially available in every benefits denial case. LINA's Br. At 10-11; Docket No. 99. However, the Supreme Court dispensed with that argument in *Varity Corp. v. Howe*, observing that "one can read § 409 as reflecting a special congressional concern about plan asset management without also finding that Congress intended that section to contain the exclusive set of remedies for every kind of fiduciary breach." 516 U.S. 489, 511 (1996). ERISA is silent on many important matters, including prejudgment interest, yet no one doubts the availability of prejudgment interest in suits brought under ERISA, whether that relief is implied under § 502(a)(1)(B) or under § 502(a)(3).

LINA relies on *Varity* for the proposition that § 502(a)(1)(B) "specifically

provides a remedy for breaches of fiduciary duty with respect to the interpretation of plan documents and the payment of claims" and argues that where relief is available under § 502(a)(1)(B), it would not be "appropriate" to award additional equitable relief under § 502(a)(3). LINA's Br. at 12; Docket No 99 (citing *Varity*, 516 U.S. at 512, 515). However, *Varity* was merely responding to concerns by *amici* that lawyers would "complicate ordinary benefit claims by dressing them up in 'fiduciary duty' clothing." 516 U.S. at 514. That is precisely what occurred in *Wilkins v. Baptist Healthcare System, Inc.*, where the plaintiff sought to recover compensatory damages under § 502(a)(3) arising out of the defendant's denial of benefits. 150 F. 3d 609 (1998). This Court halted that attempt, observing that "[t]o rule in Wilkins's favor would allow him and other ERISA claimants to simply characterize a denial of benefits as a breach of fiduciary duty, a result which the Supreme Court expressly rejected." *Id.* at 616.

The present case does not run afoul of either *Varity* or *Wilkins* because, as the panel-majority observed, "§ 502(a)(1)(B) cannot provide all the relief Rochow seeks," since only benefits due under the plan are recoverable under § 502(a)(1)(B). *Rochow II*, 737 F.3d at 425. Furthermore, whereas the plaintiff in *Wilkins* sought to recover compensatory damages (i.e., legal relief) under § 502(a)(3), *see* 150 F. 3d at 616, Rochow sought an equitable accounting, a uniquely equitable form of relief. Finally, the plaintiff in *Wilkins* failed to establish

his entitlement to benefits under § 502(a)(1)(B); thus, the *Wilkins* court did not have occasion to consider whether additional equitable relief might be appropriate under § 502(a)(3). Therefore, *Russell*, *Varity*, and *Wilkins* are inapposite.

C. The Seventh Circuit in *Mondry* Permitted Disgorgement in the Context of an ERISA Benefit Denial Case.

The Sixth Circuit is not the first court of appeal to permit disgorgement of profits in the context of an ERISA benefit denial case. In addition to the cases cited in the initial panel decision, in *Mondry v. American Family Mutual Insurance Company*, the Seventh Circuit allowed the plaintiff to obtain equitable restitution under § 502(a)(3) for the "lost time value of [the] money" she was forced to expend on speech therapy for her son as a result of the defendant's failure to timely produce plan documents. 557 F.3d at 804. *Mondry* observed that the defendant "had the interest-free use of money that should have been paid to Mondry much sooner than it was. Restitution would thus force American Family to disgorge the gain it enjoyed from the delay that its breach of trust helped to bring about." *Id.* at 806-07; *see also Clair v. Harris Trust and Savings Bank,* 190 F.3d 495, 498 (7th Cir. 1999) (acknowledging the availability under § 502(a)(3) for the lost time value of wrongfully withheld benefits); *Parke v. First Reliance Std. Life Ins. Co.*, 368 F.3d 999, 1007-09 (8th Cir. 2004) (same).

Both *Mondry* and *Clair* recognized that the deprivation of the use of one's benefits is, in itself, an injury that is separate and distinct from the denial of

benefits and not remediable under § 502(a)(1)(B). Whether that deprivation results from the denial of benefits or their delayed payment is immaterial, since the harm to the plaintiff is the same. Although *Mondry* involved a breach of the duty to timely produce plan documents under § 104(b)(4) (29 U.S.C. § 1024(b)) and not a breach of the duty of loyalty under § 404 (29 U.S.C. § 1104), *Mondry* is nevertheless on point. Indeed, the *Mondry* court permitted the plaintiff to obtain equitable restitution under § 502(a)(3) notwithstanding the fact that she had already been awarded statutory penalties under § 502(c)(1) (29 U.S.C. § 1132(c)(1)), observing that "the purpose of those penalties is to induce the plan administrator to comply with the statutory mandate rather than to compensate the plan participant for any injury she suffered as a result of non-compliance." 557 F.3d at 806. Similarly here, an award of the benefits due under the plan cannot compensate Rochow for the injury he sustained as a result of LINA's breach of its duty of loyalty under § 404.

Importantly, as the panel-majority observed, "not every court will find that a plan administrator who acted arbitrarily and capriciously in denying benefits also breached its fiduciary duty under § 404." *Rochow II*, 737 F.3d at 426. However, where such a finding occurs, as it did here, there is no logical reason why the remedy should be the same as would be the case in the absence of a finding of a breach of the duty of loyalty. Such a result is contrary to the maxim of equity that

"'[e]quity suffers not a right to be without a remedy.'" *See Amara*, 131 S. Ct. at 1879 (quoting R. Francis, Maxims of Equity 29 (1st Am. ed. 1823)). Accordingly, the decision of the district court should be affirmed.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Dated: May 5, 2014

Respectfully submitted,

/s/ Mark D. DeBofsky

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the Court's February 19, 2014 Order directing supplemental briefs not to exceed 25 pages because the brief is 12 1/2 pages long, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 14-point font size in Times New Roman.

/s/ Mark D. DeBofsky

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2014, the foregoing Brief *Amicus Curiae* of United Policyholders in Support of Plaintiffs-Appellees and Affirmance was filed with the Court via electronic mail to beverly_harris@ca6.uscourts.gov, and a copy of the brief will be served on all counsel of record by the office of the clerk.

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