No. 12-2074

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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 AMICI CURIAE OF AARP AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES URGING 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: Mary Ellen Signorille

Pursuant to 6th Cir. R. 26.1, AARP makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:
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   No.

Name of Counsel: Julie Wilensky

Pursuant to 6th Cir. R. 26.1, NELA makes the following disclosure:

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   No.
2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:
   No.

CERTIFICATE OF SERVICE

I certify that on May 2, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/Mary Ellen Signorille
Mary Ellen Signorille

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INTERESTS OF AMICI CURIAE[1]

AARP is a nonprofit, nonpartisan organization, with a membership that helps people turn their goals and dreams into real possibilities, seeks to strengthen communities, and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits which countless members and older individuals receive or may be eligible to receive. One of AARP's main objectives is to ensure that participants receive those benefits to which they are entitled in a timely manner in accordance with ERISA's protections.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the workplace. NELA and its 69 circuit, state, and local affiliates have a

[1] Counsel states that 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. No person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

ERISA's protections and plan participants' opportunities to enforce those protections are of vital concern to workers of all ages and to retirees. With this amici curiae brief, AARP and NELA respond to several policy arguments of Appellant-Defendant Life Insurance Company of North America ("LINA") and its amici regarding the disgorgement remedy awarded below under ERISA § 502(a)(3). AARP and NELA respectfully submit this brief to facilitate a full consideration of the issues.

SUMMARY OF ARGUMENT

LINA and its amici urge this Court to overturn the district court's order and thus permit LINA to keep the millions of dollars it improperly gained from its breach of fiduciary duty in denying Mr. Rochow's claim for benefits. Affirming the district court's order will not result in the parade of horribles that LINA and its amici purport to predict. Disgorgement has a deterrent purpose, but it is not punitive, as it is tied to the amount of the wrongdoer's actual unjust enrichment.

Disgorging LINA's wrongful profits here will not lead to a flood of disgorgement awards in typical benefits cases, as not all wrongful benefit denials rise to the level of a breach of fiduciary duty, a necessary prerequisite to considering an equitable remedy under ERISA § 502(a)(3). By arguing that LINA should keep its millions of dollars in wrongful gains to prevent plan participants from "abuse," LINA's amici have the incentives reversed. The availability of disgorgement under ERISA § 502(a)(3) is necessary to deter insurers from breaching their fiduciary duties and wrongfully withholding benefits from plan participants, whom Title I of ERISA was designed to protect.

LINA and its amici present no evidence that affirmance will cause employers to cut benefits or refuse to offer plans. The Supreme Court has rejected similar hyperbolic, "sky is falling" arguments from insurers. This Court should give such speculative arguments no weight here.

ARGUMENT

I. THE AVAILABILITY OF DISGORGEMENT IS NECESSARY TO DETER INSURERS FROM BREACHING THEIR FIDUCIARY DUTIES AND WRONGFULLY WITHHOLDING BENEFITS.

A. The Purposes Of Disgorgement Are To Prevent Unjust Enrichment And Deter Breaches Of Fiduciary Duties.

The "standard current works" that courts consult to determine the contours of equitable relief under § 502(a)(3), *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217 (2002), make clear that disgorgement has two

purposes: preventing unjust enrichment and deterring the breach of fiduciary duties. First, disgorgement is a remedy in restitution to prevent a wrongdoer's unjust enrichment. *See, e.g.*, Restatement (Third) of Restitution & Unjust Enrichment §§ 51, 43 cmt. b (2011); 1 Dan B. Dobbs, *Dobbs Law of Remedies* (2d ed. 1993) §§ 4.1(1) at 551-52, 4.3(5) at 608. Second, where a breach of fiduciary duty has occurred, restitution also serves the "equally fundamental goal" of "enforce[cing] by prophylaxis the special duties of the fiduciary." Restatement (Third) of Restitution, § 43 cmt. b. It thus "offers a further safeguard, beyond the fiduciary's liability to make good any injury, protecting the reliance of the beneficiary on the fiduciary's disinterested conduct." *Id.*

The deterrent purpose of disgorgement is consistent with longstanding principles of trust law, under which breaching fiduciaries can be liable for unjust enrichment even without a loss to the trust beneficiary. *See* George G. Bogert and George T. Bogert, *The Law of Trusts & Trustees* (Rev. 2d ed. 1993) § 543 at 269 (noting that a trustee is "liable for any profit he has made for any breach of trust, even though the trust suffered no loss"); *id.* § 681 at 5 (noting the objective "to deter trustees from the commission of breaches of trust even though the trust itself has suffered no loss").

B. Disgorgement Is Not Punitive As The Amount of Disgorgement Is Tied To The Amount of the Unjust Enrichment.

Disgorging the actual profits of a wrongdoer – here, a breaching fiduciary – is not punitive.[2] As the Restatement of Restitution explains, "[d]isgorgement of wrongful gain is not a punitive remedy. While the remedy will be burdensome to the defendant in practice . . . the wrongdoer who is deprived of an illicit gain is ideally left in the position he would have occupied had there been no misconduct." Restatement (Third) of Restitution § 51 cmt. k.

In bemoaning the "gross disproportionality" of the district court's award, Br. of The American Council of Life Insurers et al. in Support of Defendant-Appellant at 11, *Rochow v. Life Ins. Co. of N. Am.*, No. 12-2074 (6th Cir. Feb. 19, 2014), ECF No. 94 ("ALCI Br."), LINA's amici ignore longstanding principles of restitution, which focus on of the breaching fiduciary's unjust gain, not the amount of the plaintiff's loss. *See, e.g.*, Dobbs, *supra*, §§ 3.1 at 280, 4.1(4) at 566. While LINA's profit was significant here, there is nothing inherent in the remedy of disgorgement that "punishes" a wrongdoer; rather, the wrongdoer is simply deprived of its actual, wrongfully obtained profits.

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[2] Because "[t]he rationale of punitive or exemplary damages is independent of the law of unjust enrichment," courts might order punitive damages in addition to an award of disgorgement under certain circumstances. Restatement (Third) of Restitution § 51 cmt. k. That is not the case here, as punitive damages are not available under § 502(a)(3). *Varity Corp. v. Howe*, 516 U.S. 489, 509-10 (1996).

LINA's amici are concerned about a "windfall" to the estate of Mr. Rochow, ACLI Br. 8; Br. of the DRI – The Voice of the Defense Bar Supporting Defendant-Appellant at 5, *Rochow v. Life Ins. Co. of N. Am.*, No. 12-2074 (6th Cir. Mar. 28, 2014), ECF No. 105 ("DRI Br.") , but LINA would receive a windfall if this Court overturns the district court's decision and permits LINA to keep millions of dollars gained from its breach of fiduciary duties. *See* Restatement (Third) of Restitution § 43 cmt. b ("Any such advantage must be given up to the beneficiary."). Indeed, in a case cited by LINA in the context of prejudgment interest, this Court rejected the defendant's argument that affirmance would be a "windfall recovery for plan participants," stating that "[i]f the award of prejudgment interest were lower than [the defendant's] actual rate of return, it is [the defendant] that would arguably receive a windfall."[3] *Rybarczyk v. TRW, Inc.*, 235 F.3d 975, 987 (6th Cir. 2000).

[3] LINA cites *Rybarczyk* and other cases on prejudgment interest to support its assertion that the district court's award was excessive. LINA Supp. Br. at 13-14 n.8, *Rochow v. Life Ins. Co. of N. Am.*, No. 12-2074 (6th Cir. Mar. 21, 2014), ECF No. 99. Although Mr. Rochow seeks the equitable remedy of disgorgement under § 502(a)(3), he has asserted that the same result could be achieved with prejudgment interest at a rate equal to LINA's rate of return. The cases LINA cites recognize both the importance of preventing unjust enrichment and the court's "discretion" to award prejudgment interest "in accordance with general equitable principles." *Rybarczyk*, 235 F.3d at 985; *see also Schumacher v. AK Steel Corp. Ret. Accumulation Pension Plan*, 711 F.3d 675, 686 (6th Cir. 2013) (noting that affirming the district court's low interest rate "would result in an unfair economic benefit" to the defendant plan) (citing *Rybzrczyk*, 235 F.3d at 986).

C. The Availability Of Disgorgement As A Discretionary Remedy For Breaches Of Fiduciary Duty In Handling Benefit Claims Will Not Transform Innocent Mistakes Into Multi-Million Dollar Liability.

Affirming the district court's order will not transform a plan administrator's "innocent mistake" into "multi-million dollar disgorgement liability." DRI Br. 8. DRI is facetious by ignoring both the history of this case and the well-settled law on remedies for breaches of fiduciary duty. Here, the Sixth Circuit affirmed the determination that LINA breached its fiduciary duties: LINA did not act "'solely in the interest of the participants and beneficiaries and for the exclusive purposes of providing benefits to participants and their beneficiaries' as required by ERISA. *Rochow v. Life Ins. Co. of N. Am. (Rochow I)*, 482 F.3d 860, 866 (6th Cir. 2007) (quoting 29 U.S.C. § 1104(a)(1)). The conclusion – which LINA does not challenge – that it violated ERISA's fiduciary standards is a necessary prerequisite to even consider an award of equitable remedies under § 502(a)(3). *See, e.g.*, *CIGNA Corp. v. Amara*, __ U.S. __, 131 S. Ct. 1866, 1878 (2011) (noting that § 502(a)(3) allows a participant "'to obtain other appropriate equitable relief' to redress violations of (here relevant) parts of ERISA . . . .") (quoting 29 U.S.C. § 1132(a)(3)).

The district court's discretionary *remedy* will not turn all wrongful benefit denials into an "automatic" breach of fiduciary duty, *cf.* DRI Br. 10 n.3, because the threshold issue of whether a breach has occurred is a separate question from

what, if any, equitable remedy is "appropriate" for a particular breach.[4] *See Amara*, 131 S. Ct. at 1878.

Not all wrongful benefit denials rise to the level of a breach of fiduciary duty. Courts are well-equipped to make the fact-intensive, case-by-case determination as to whether there has been a breach of fiduciary duty in a particular case. This Court need not decide what specific conduct amounts to a breach of fiduciary duty in the context of a benefits denial, as it already affirmed the district court's conclusion that LINA breached its fiduciary duties here. *Rochow I*, 482 F.3d at 864.

D. Amicus's Speculation That Affirming The District Court's Discretionary Equitable Remedy Would Invite Abuse From Plan Participants Is Unfounded.

LINA's amicus DRI contends that affirming the district court's discretionary remedy of disgorgement to Mr. Rochow's estate would provide an "invitation to abuse by plan participants" and an "incentive to participants not to cooperate in the

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[4] Additionally, breach of fiduciary duty claims under §502(a)(3) will not lie where the injury is "elsewhere adequately remed[ied]" by another subsection of ERISA § 502. *See Varity*, 516 U.S. at 512. As AARP has previously explained, this Court has consistently held that when Section 502(a)(1)(B) cannot "provide an adequate remedy for the alleged injury to the plaintiffs caused by the breach of fiduciary duties," § 502(a)(1)(B) and § 502(a)(3) claims can be brought together. *See* Br. Amicus Curiae of AARP, *Rochow v. Life Ins. Co. of N. Am.* at 4 & n.3, No. 12-2074 (6th Cir. Mar. 11, 2013), ECF No. 41 (citing *Gore v. El Paso Energy Corp. Long Term Disability Plan*, 477 F.3d 833, 840 (6th Cir. 2007); *accord Thornton v. Graphic Commc'ns Conf. of Int'l Bhd. of Teamsters Supp. Ret. & Disability Fund*, 566 F.3d 597, 616-17 (6th Cir. 2009)).

administrative process." DRI Br. 8, 6-7. This argument is absurd. The participants whom DRI speculates will subject plans to such abuse are people whose disability prevents them from working and who depend on disability benefits as income replacement. There is no basis to imagine that participants will deliberately delay receiving their disability benefits. Nor is there any basis to speculate that they will refuse to "cooperate in the administrative process," given that judicial review of eligibility for benefits is generally limited to the administrative record.[5] *See, e.g.*, *Schwalm v. Guardian Life Ins. Co. of Am.*, 626 F.3d 299, 308 (6th Cir. 2010).

In addition, a plan participant who seeks the equitable remedy of disgorgement under § 502(a)(3) for profits earned on wrongfully withheld benefits must successfully prove far more than her entitlement to the underlying benefits. Among other things, she must show: (1) that the insurer breached its fiduciary duties; (2) that the insurer profited from wrongfully withholding the benefits; (3) that the discretionary equitable remedy of disgorgement is "appropriate" in her particular case, *Amara*, 131 S. Ct. at 1878 (and that § 502(a)(1)(B) is an inadequate to remedy, *see supra* n.4); and (4) the profits on the withheld benefits, which

[5] LINA has not asserted that Mr. Rochow did not "cooperate" in the administrative process. If anyone failed to "cooperate," it was LINA, which denied Mr. Rochow's claim four times in the administrative process. *See Rochow I*, 482 F.3d at 864. Mr. Rochow did not get a final determination that he was *eligible* for disability benefits until 2007, long after his initial claim in 2002. *Id.* at 866. Mr. Rochow died in 2008, years before the district court ultimately awarded his estate the disgorgement remedy. *Rochow v. Life Ins. Co. of N. Am. (Rochow II)*, 737 F.3d 415, 419 n.1, 420 (6th Cir. 2013), *reh'g en banc granted, opinion vacated* (Feb. 19, 2014).

entails significant discovery. That Mr. Rochow chose to pursue this remedy in litigation – after LINA had already delayed his claim by denying it four times in the administrative process – does not mean many others will do so.

In any event, even if increasing numbers of plan participants pursue disgorgement remedies, seeking to redress a breaching fiduciary's unjust enrichment is not "abuse." It makes no sense to argue that breaching fiduciaries must be allowed to keep their ill-gotten gains on wrongfully withheld benefits – here, literally *millions* of dollars – to deter plan participants, for whom Title I of ERISA was designed to protect, from bringing equitable claims.[6]

II. LINA AND ITS AMICI PRESENT NO EVIDENCE THAT AFFIRMANCE WILL CAUSE EMPLOYERS TO CUT BENEFITS OR REFUSE TO OFFER PLANS, AND THE SUPREME COURT HAS REJECTED SIMILAR HYPERBOLIC ARGUMENTS.

It has become a tradition for insurers and plans, as well as their amici, to argue in the Supreme Court and elsewhere that "the sky will fall." They describe in exquisite detail the purported domino effect that any decision in favor of plan participants will have on employee benefit plans. For example, the Supreme Court has heard ERISA insurers or plans contend the following: if the plan provisions as interpreted by plan fiduciaries do not control in all cases, plans will lack necessary

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[6] *See, e.g.*, *Shields v. Reader's Digest Ass'n, Inc.*, 331 F.3d 536, 542 (6th Cir. 2003) ("The principal object of ERISA is 'to protect plan participants and beneficiaries.'") (quoting *Boggs v. Boggs*, 520 U.S. 833, 845 (1997) (citation omitted)).

predictability; if the decisions of plan administrators are subject to challenge, plans will become more expensive due to increased litigation costs; and that if plan participants are permitted to recover attorneys' fees for a remand of claims for benefits, substantial secondary litigation will result. The purported result if these occur will be that employers will cut benefits or refuse to offer plans altogether.[7]

Nevertheless, in *Hardt*, *Glenn*, *LaRue*, and *Varity*, the Supreme Court reached decisions contrary to those urged by plans, insurers, and their amici. In fact, in some of these cases, the Court specifically rejected those arguments either

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[7] *See*, *e.g.*, Resp. Br., *Hardt v. Reliance Std. Life Ins. Co.*, 560 U.S. 242 (2010), 2010 WL 1220085, at *50-51 (Mar. 24, 2010) (noting that "a decision by this Court that awarding benefits upon 'remand' triggers attorneys' fees . . . . would make plans more costly to administer, thus discouraging the creation of generous plans and increasing the costs of plans to plan participants"); Pet. Br., *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008), 2008 WL 512780, at *28 (Feb. 25, 2008) ("Increasing the litigation burdens on ERISA plans will drain their limited financial resources and discourage employers from establishing benefit plans – to the substantial detriment of existing and prospective plan participants and beneficiaries."); Br. of America's Health Ins. Plans et al., *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 2008 WL 596063, at *19 (Mar. 3, 2008) ("Employers might respond to those costs in various ways – by reducing the available coverage, paying increased premiums, or discontinuing the plan entirely – but none of them would redound to the benefit of plan participants in the long run."); Br. of The ERISA Industry Cmte., *LaRue v. DeWolff, Boberg & Assoc. Inc.*, 552 U.S. 248 (2008), 2007 WL 2679382, at *8 (Sept. 11, 2007) ("Plans will suffer financially under the burden of mounting litigation costs necessitating reductions in benefits, increases in required employee contributions, or both, and employer interest in sponsoring employee benefit plans will decline."); Br. for Chamber of Commerce, *Varity Corp. v. Howe*, 516 U.S. 489 (1996), 1995 U.S. S. Ct. Briefs LEXIS 347, at *6 (June 23, 1995) (contending that plans "would be forced to defend and pay recoveries under these additional claims, thereby increasing the overall cost of benefit plan administration and offsetting private sector efforts to manage health care spending").

because they had no support, *see Glenn*, 554 U.S. 105, 113 (2008) (rejecting MetLife's argument because "we have no reason, empirical or otherwise, to believe that our decision will seriously discourage the creation of benefit plans"), or because they were a strained reading of the statute and ignored the balance that Congress attempted to achieve. *See Varity*, 516 U.S. at 513-515. Here, LINA and its amici have presented no evidence that the sky has fallen as a result of the Supreme Court's decisions in these cases.

Nor have LINA and its amici presented any evidence that if this Court affirms the district court's order, employers will be discouraged "from offering benefits to their employees in the first place."[8] LINA Supp. Br. 17; *see* DRI Br. 9; ACLI Br. 7-8. Rather, DRI cites a handful of overblown statements from commentators, for example, an attorney stating she feels "queasy" about disgorgement being an "appropriate equitable remedy under 502(a)(3)." DRI Br. 9-10. There is simply no evidence the sky will fall if the district court is affirmed.

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[8] DRI asserted similar arguments in *Hardt*. *See* Br. of DRI – The Voice of the Defense Bar, *Hardt v. Reliance Std. Life Ins. Co.*, 560 U.S. 242, 2010 WL 1320774, at *5 (Mar. 31, 2010) ("In the context of litigation disputes, while broad damages remedies may favor participants who happen to be plaintiffs in lawsuits, the availability of such damages would harm the large class of participants who seek to be covered under such plans because added litigation costs would discourage employers from offering benefit programs in the first place."). The Supreme Court ultimately ruled 9-0 against the insurer and did not address the policy arguments of the insurer and its amici. *Hardt*, 560 U.S. 242.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's decision and order that judgment be entered for Plaintiffs-Appellees.

Dated: May 2, 2014

Respectfully submitted,

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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 1/4 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/Mary Ellen Signorille
Mary Ellen Signorille

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2014, the foregoing Brief Amici Curiae of AARP and National Employment Lawyers Association in Support of Plaintiffs-Appellees Urging 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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