PUBLICATION

Sixth Circuit Issues Shocking Opinion Against ERISA Insurer, Dramatically Changes The ERISA Landscape

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In what can only be described as a shocking opinion, the Sixth Circuit Court of Appeals issued a 2-1 decision affirming a lower court's award of $3.8 million dollars in disgorged profits to a former president of Arthur J. Gallagher & Co., after finding that Life Insurance Company of North America (LINA) arbitrarily and capriciously denied him disability benefits. *Rochow v. Life Ins. Co. of N. Am.*, No. 12-2074 (6th Cir. Dec. 6, 2013). What makes this opinion so dramatic is that traditionally an award for wrongful denial of benefits has been limited to payment of disability benefits and attorneys' fees under § 502(a)(1)(B). In this case, however, the majority awarded the plaintiff disability benefits, attorneys' fees ***and*** disgorgement of profits it earned on the wrongfully retained benefits under an equitable theory of unjust enrichment. Judge David W. McKeague, dissenting, described it as "an unprecedented and extraordinary step to expand the scope of ERISA coverage."

The plaintiff initially sued LINA for recovery of benefits and alleged breach of fiduciary duty after LINA denied him benefits. LINA argued that the plaintiff's employment ended before his disability began because he filed for benefits after he resigned. The district court concluded that LINA's denial was arbitrary and capricious, and the Sixth Circuit Court of Appeals affirmed.

On remand, the plaintiff filed a motion seeking an equitable accounting and disgorgement of LINA's profits that it earned on the retained benefits. The plaintiff argued that he[1] was entitled to disgorgement because it was necessary to prevent LINA from being unjustly enriched by retaining the profits it earned on his benefits. The plaintiff's expert calculated that his benefits earned LINA between 11-39% annually and, therefore, made LINA approximately $2.8 million by retaining his benefits. The district court adopted the plaintiff's reasoning and granted his motion for an equitable accounting of profits and disgorgement.

After significant briefing, LINA appealed the disgorgement issue to the Sixth Circuit Court of Appeals. On appeal, the plaintiff argued that he was entitled to disgorgement of profits because LINA breached its fiduciary duties under § 502(a)(3), and disgorgement was necessary as stated to the lower court. In addition to making numerous procedural arguments, LINA asserted that disgorgement was inappropriate because equitable relief under § 502(a)(3) is only available where § 502(a) does not otherwise provide an adequate remedy, and the award of benefits under § 502(a)(1)(B) is the appropriate remedy. Permitting the additional award would violate the holdings in *Varity Corp. v. Howe*, 516 U.S. 489 (1996) and *Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609 (1998), which both either held or suggested that a claimant cannot seek to recover under both claims for denial of benefits and breach of fiduciary duty.

The Court noted that "[a]lthough courts initially interpreted *Wilkins* as a complete bar to simultaneous claims for benefits under § 502(a)(1)(B) and breaches of fiduciary duty under § 502 (a)(3), several exceptions have emerged." Upholding the district court's decision, the Sixth Circuit found that this case was a logical extension of the prior exceptions because "§ 502(a)(1)(B) cannot provide all the relief Rochow seeks." Specifically, § 502 (a)(1)(B) could not provide "the equitable redress of preventing LINA's unjust enrichment" because it only allows plaintiff to recover benefits to him. The court further noted that "[n]othing in ERISA itself or *Varity* limits this Court to allowing remedies under § 503 (a)(3) that focus on the plaintiff's injuries" and "disgorgement does not result in double compensation," nor "offend the doctrine against double recovery." Accordingly, the Court

held that "disgorgement is an appropriate equitable remedy under § 502(a)(3) and can provide a separate remedy on top of a benefit recovery."

The Court also addressed LINA's argument that this extension will require significant discovery beyond the administrative record. While the Court acknowledged LINA's concerns about discovery slowing down litigation of benefits, it weighed more heavily "the risk of liability and extensive discovery regarding profits or interest will act as an incentive to ensure plan administration acts in the interest of the plan participants throughout the claims process." The Court also noted that not every plan administrator who acted arbitrarily and capriciously will have also breached its fiduciary duty.

Judge David W. McKeague, dissenting, argued that "disgorgement of profits undermines ERISA's remedial scheme and grants the plaintiff an astonishing $3,797,867.92 windfall under the catchall provision in § 502(a)(3)." Judge McKeague noted that "[a]t its core, ERISA is a remedial statute" that does not seek to punish violators. Rather, it attempts to put the claimant in a position he or she would have been in had the insurance company not wrongfully denied them benefits. He found that "Plaintiff was made whole when he was paid his disability benefits and attorney's fees. If not, an award of prejudgment interest certainly would have made him whole." Recovery for disgorged profits allowed the plaintiff to have a second recovery for the same injury, which the Supreme Court and the Sixth Circuit have interpreted ERISA to prevent. Plaintiffs have never been permitted to recover under both theories.

After distinguishing the exceptions the majority found to filing simultaneous claims for benefits under § 502(a)(1)(B) and breaches of fiduciary duty under § 502 (a)(3), Judge McKeague stated that "the majority's approach is an end run around the limitations placed on the use of § 502(a)(3) and is willfully blind to the negative repercussions that undoubtedly will ensure. As § 502(a)(1)(B) provided an adequate remedy, compensation under § 502(a)(3) was unnecessary."

So, what does *Rochow* mean for ERISA insurers or employers with ERISA plans? Money. ERISA insurers and employers should expect to see a sudden increase in lawsuits asserting breach of fiduciary claims and seeking disgorgement of profits. These new cases will slow litigation, increase discovery and litigation costs, and drive up settlement values. ERISA insurers and employers may want to reassess reserves and litigation budgets because this case has dramatically changed the ERISA landscape. They should also prepare their *amicus curiae* briefs because this case will be litigated up to the Supreme Court of the United States. Stay tuned to see what happens.

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[1] The plaintiff died in October 2008. Thereafter, the representative for his estate was substituted as the plaintiff in this action. To simplify, plaintiff is referred to as "he."