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,

vs.

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 OF THE AMERICAN COUNCIL OF LIFE INSURERS AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING *EN BANC* OF DEFENDANT-APPELLANT, LIFE INSURANCE COMPANY OF NORTH AMERICA

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* American Council of Life Insurers ("ACLI") discloses that it is a nonprofit corporation, has no parent corporation, and does not issue shares of stock. ACLI is a national organization representing member companies. Petitioner Life Insurance Company of North America is not an ACLI member company.*

* No party's counsel authored this brief, and no party, its counsel, or other person contributed money intended to fund the brief's preparation or submission other than ACLI and its members.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to a motion for leave under FRAP 29(b), this brief is being filed by the American Council of Life Insurers ("ACLI") as *amicus curiae* in support of the request of defendant-petitioner Life Insurance Company of North America ("LINA") for *en banc* review of the decision issued in *Rochow v. Life Ins. Co. of N. Am.*, 737 F.3d 415 (6th Cir. 2013) ("*Rochow II*").

ACLI is the largest life insurance trade association in the United States, representing the interests of more than 300 legal reserve life insurer and fraternal benefit member companies operating in the United States. ACLI member companies are leading providers of employee benefits, like those available under the disability policy at issue in *Rochow II*. In the United States, these member companies represent more than 90% of the assets, premiums, and considerations of the life insurance and annuity industry. Most products sold by ACLI members in the group employee benefits market are purchased to fund benefits under plans subject to the requirements of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et seq.* ("ERISA").

ACLI and its members have a substantial interest in the disposition of LINA's petition. The panel majority's decision in *Rochow II* is fundamentally flawed. After the Court, in a prior opinion, affirmed a compensatory award under ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) of $900,000 in benefits,

Rochow II affirmed an additional equitable award of over $3.7 million in disgorgement of "profits" pursuant to ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3) because LINA had purportedly breached ERISA fiduciary duties in denying Plaintiff's claim for benefits. If left standing, the decision would expose numerous ACLI member companies to a dramatic increase in litigation costs and potential "equitable" liability, and would interject huge inefficiencies into the current system of adjudicating employee benefit claims. Accordingly, ACLI has a significant interest in seeing *Rochow II* reviewed *en banc* and vacated.

ARGUMENT

There are many compelling reasons why the Court should grant LINA's petition for *en banc* review. These reasons are effectively stated in LINA's petition for *en banc* review and its *Rochow II* briefing, as well as in Judge McKeague's apt dissent, in which he rightly calls the decision "an unprecedented and extraordinary step to expand the scope of ERISA coverage." ACLI focuses this submission on the practical effect this expansion would have on the provision of employee benefits. The decision, if allowed to stand, would significantly increase the risk, cost, and uncertainty associated with offering such benefits, as well as the expense and burden associated with litigating denial of benefits cases. These effects inevitably would lead insurers to increase the cost of benefits and/or to limit their availability, which would be a "lose-lose" for all concerned.

I. *Rochow II*, If Allowed To Stand, Would Dramatically Increase The Risk, Expense, And Burden Associated With Providing ERISA Benefits.

Judge McKeague correctly recognized that the majority's affirmance would have serious "negative repercussions" to which the majority turned a "blind eye." *Rochow II,* 737 F.3d at 431, 435 (McKeague, J. dissenting). From ACLI's standpoint, the first sizeable "negative repercussion" would be to significantly increase the time and costs associated with litigating employee benefits cases.

The *Rochow* case itself is illustrative. Plaintiff Todd Rochow filed his complaint on September 17, 2004. Complaint, RE 1, Page ID ##1-9.[1] The district court granted summary judgment regarding Plaintiff's entitlement to benefits under Section 502(a)(1)(B) in less than a year, on June 24, 2005, based on a review of the administrative record. Order, RE 16, Page ID #105.[2] LINA appealed and this Court affirmed on April 3, 2007. Mandate, RE 31, Page ID ##164-65. Even with a judicial appeal, the entire process took just over two-and-a-half years. On remand, Rochow moved for an "equitable accounting" claiming that LINA had

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[1] ACLI understands that representatives of Mr. Rochow's estate have been substituted as the plaintiff in this case; the terms "Plaintiff" or "Rochow" are intended to cover substituted plaintiffs as well as Todd Rochow.

[2] Judicial review of denials of benefits claims are adjudicated solely on the administrative record. *See e.g. Buchanan v. Aetna Life Ins. Co.*, 179 Fed. App'x 304, 306 (6th Cir. 2006) ("the district court is limited to the evidence before the plan administrator at the time of its decision, and therefore, the court does not adjudicate an ERISA action as it would other federal civil litigation"). *Rochow II* would fundamentally alter this important time and cost saving procedure.

breached its fiduciary duties in denying his claim for benefits and that disgorgement was necessary to prevent LINA's unjust enrichment. Motion for Equitable Accounting, RE 46, Page ID ##626-48. Three years of discovery into LINA's "profits" ensued, which included extensive fact discovery, discovery motions, expert reports and depositions, *Daubert* motions, and a full evidentiary hearing. *See* LINA Principal Br., Doc. 006111534289 at 38-39. The district court transformed a streamlined adjudication regarding Plaintiff's entitlement to benefits into protracted and expensive litigation.

As Judge McKeague put it, "[f]orcibly marching district courts into such a mire is unwarranted, unwise, and contrary to law." *Rochow II* at 435 n.5. It is also contrary to the goal of making the administration of ERISA plans and benefit determinations efficient so as to encourage employers to offer employee benefits in the first instance. *See, e.g., Conkright v. Frommert,* 559 U.S. 506, 517 (2010) ("Congress sought 'to create a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ERISA plans in the first place.'"); *Perry v. Simplicity Eng'g,* 900 F.2d 963, 967 (6th Cir. 1990) ("A primary goal of ERISA was to provide a method for workers and beneficiaries to resolve disputes over benefits inexpensively and expeditiously.").

Another "negative repercussion" of *Rochow II* is that it unjustifiably expands the financial risk associated with offering employee benefits because it

makes a provider potentially liable for an undeterminable amount of "disgorgement" of "profits" if it is held to have breached fiduciary duties in denying benefits.[3] This unpredictability similarly discourages the provision of employee benefits. *See, e.g., Conkright,* 559 U.S. at 517 ("ERISA induces employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred.") (citing *Rush Prudential HMO, Inc. v. Moran,* 536 U.S. 355, 379 (2002)). Here, Plaintiff was awarded over $3.7 million in supposedly "equitable" disgorgement of "profits"--nearly quadruple the amount of his benefits award. Such an "equitable" award is clearly at odds with ERISA's remedial scheme, which is designed to make plaintiffs whole but not afford them a "windfall." *See Rochow II,* 737 F.3d at 431 (McKeague, J. dissenting) (citing *Ford v. Uniroyal Pension Plan,* 154 F.3d 613, 618 (6th Cir. 1998); *Henry v. Champlain Enters., Inc.,* 445 F.3d 610, 624 (2d Cir. 2006)).[4]

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[3] Although the issue is not briefed here, ACLI notes that there appear to be significant problems regarding the "ROE metric" used to calculate LINA's so-called "profits" purportedly derived from Plaintiff's denied benefits.

[4] The additional award is also clearly contrary to ERISA's "carefully reticulated" remedial scheme. *See Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 209 (2002) ("ERISA is a 'comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefits system."). As this Court has recognized, "[t]he Supreme Court clearly limited the applicability of § 1132(a)(3) to beneficiaries who may not avail themselves of (footnote continued on next page)

The litigation inefficiencies and unjustified increase in financial risk that *Rochow II* would create would inevitably lead to the "lose-lose" scenario where insurers would be forced to raise costs and/or restrict the availability of insurance products used to fund employee benefits. The decision is thus directly contrary to ERISA's desired aim of encouraging rather than discouraging the provision of benefits by allowing for an efficient system for adjudication of benefits claims and a predictable set of potential liabilities.[5]

1132's remedies." *Wilkins v. Baptist Healthcare Sys., Inc.,* 150 F.3d 609, 615 (6th Cir. 1998) (citing *Varity Corp. v. Howe,* 516 U.S. 489, 512 (1996) (describing Section 502(a)(3) as a "'catchall'" provision that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere remedy")).

[5] The panel majority, echoing the concerns of *amicus curiae* AARP, stated that without the availability of Section 502(a)(3) relief, insurers "would have the perverse incentive to deny benefits for as long as possible" because, "[a]s the U.S. Supreme Court and this court have recognized, ERISA fiduciaries that pay benefits already operate under an inherent conflict of interest." *Rochow II,* 737 F.3d at 426 (citing *Metro. Life Ins. Co. v. Glenn,* 554 U.S. 105, 112-115 (2008)). The *Glenn* Court held that the existence of this conflict, which is present in the "lion's share" of benefits cases, should be considered as "a factor" in deciding whether a conflicted administrator abused its discretion in denying benefits. *Glenn,* 554 U.S. at 115-17. The majority's decision seeks to catapult what the Supreme Court held to be a single factor in determining whether benefits were improperly denied under Section 502(a)(1)(B) into a virtually wholesale revision of the carefully crafted remedial scheme under which appropriate relief for benefit denials is determined. Moreover, as the *Glenn* Court recognized, insurers are governed by market forces and regulators in the first instance, and ERISA "supplements marketplace and regulatory controls with judicial review of individual claims denials [under] § 1132(a)(1)(B)." *Id.* at 114-15.

II. *Rochow II* Is Potentially Applicable To Any Case In Which Benefits Are Denied By A Plan Administrator With Discretionary Authority To Interpret Plan Terms—Truly Opening The Floodgates To Ancillary Benefits Litigation.

The panel majority posited that "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. As the dissent points out, however, the district court equated these findings. *See id.* at 433 n.3 (citing RE 67 Order at 5, Page ID # 936) ("Surely, arbitrary or capricious action by a fiduciary is a breach of the high standards that the law imposes on fiduciaries.").[6] In fact, there is nothing in the majority's opinion that would limit a plaintiff whose benefits are denied from coupling a 502(a)(3) claim for additional "appropriate equitable relief" with a 502(a)(1)(B) claim for benefits.[7] To be sure, few plaintiffs' lawyers aware of *Rochow II* would not add such a claim where his

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[6] Plaintiff, in its response to LINA's petition for rehearing, goes so far as to claim that there is no need to determine that there has been a breach of fiduciary duty before a plaintiff seeking benefits is entitled to disgorgement under Section 502(a)(3). *See* Appellees' Response to Petition for Rehearing *En Banc*, Doc. No. 006111958155 ("Response"), at 4 n.2 ("the Catchall does not require a breach of fiduciary duty to trigger its application"--arbitrary and capricious denial of benefits "can count as a violation that would trigger liability under the catchall provision").

[7] Plaintiff asserts the *ipse dixit* that a litigant who "***prevails*** on a benefit claim" would "have no reason to repackage a winning claim. To the contrary, any further remedy would constitute ***additional relief*** to address an ***additional and distinct injury***." Response at 6 (emphasis in original). Plaintiff, however, did not and cannot identify any "additional and distinct injury" he allegedly suffered that would satisfy his own standard for obtaining "additional relief."

or her client stands to quadruple his or her recovery. The result, from an insurer's perspective, is that it risks being subject to an anomalous and costly "disgorgement" award any time it denies benefits. To account for this disproportionate risk, and the attendant pressure to grant claims for benefits that may not be valid, insurers that have the wherewithal to stay in the market will have no choice but to consider changing their pricing structure or limiting the level of insurance benefits they currently provide. Because of these palpable industry-wide repercussions, ACLI and its member companies have a strong interest in having the full Court thoroughly review the panel majority decision.

Dated: February 13, 2014

Respectfully submitted,

/s/ Waldemar J. Pflepsen, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of February, 2014, I tendered a PDF copy of the foregoing Brief of the American Council of Life Insurers as *Amicus Curiae* in Support of Petition for Re-Hearing *En Banc* of Defendant-Appellant, Life Insurance Company of North America to the Clerk of the U.S. Court of Appeals for the Sixth Circuit for filing using the Court's electronic filing and docketing system (CM/ECF).

/s/ Waldemar J. Pflepsen, Jr.
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