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.***

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**On Appeal from the United States District Court for the Eastern District of Michigan (Judge Arthur J. Tarnow)**

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**EN BANC BRIEF OF AMICUS CURIAE**
**DRI — THE VOICE OF THE DEFENSE BAR**
**SUPPORTING DEFENDANT-APPELLANT AND REVERSAL**


Ariadna Alvarez
Holland & Knight LLP
515 East Las Olas Blvd., Suite 1200
Fort Lauderdale, FL 33301
954-468-7849

J. Michael Weston
President, DRI -- The Voice
of the Defense Bar
55 West Monroe, Suite 1105
Chicago, IL 60603
312-795-1101

Jerrold J. Ganzfried
John F. Stanton
Holland & Knight LLP
800 17th St., NW, Suite 1100
Washington, D.C. 20006
202-469-5151

*Counsel for Amicus Curiae DRI — The Voice of the Defense Bar*


March 28, 2014

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, non-party DRI — The Voice of the Defense Bar ("DRI") states that it has no parent corporation, does not issue shares of stock, and, therefore, no publicly-held corporation owns 10% or more of its stock.

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## INTEREST OF AMICUS CURIAE

DRI — The Voice of the Defense Bar ("DRI") is an international organization of approximately 22,000 attorneys engaged in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness and professionalism of defense attorneys. Accordingly, DRI seeks to address issues germane to defense attorneys, and to improve the civil justice system. To promote these objectives, DRI participates as amicus curiae in cases, such as this one, that raise issues of importance to its membership and to the judicial system. Based on the extensive practical experience of its members and their clients in administering and litigating ERISA claims, DRI is ideally suited to explain why the disgorgement of profit award in this case should be reversed.[1]

## ARGUMENT

### I. Awarding Recovery for Disgorgement of Profits Under ERISA's Catchall Provision in a Run-of-the-Mill Benefits Case is Inconsistent with ERISA

Awards of disgorged profits under ERISA's Catchall Provision will cause increased litigation, complex and costly changes in the way ERISA cases are litigated, uncertainty in plan administration, an overall increase in the risk associated with administering ERISA covered benefit plans and an increase in the

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[1] No party or party's counsel authored this brief in whole or in part, or contributed funding for the preparation of this brief. No person other than amicus DRI, its members or its counsel contributed funding for the the preparation of this brief. Counsel for all parties have consented to the filing of this brief. *See* FRAP 29(a), 29(c)(5).

cost of providing benefits to employees. These deleterious consequences will deter employers from offering benefits to their employees and deter insurers from offering products to ERISA-covered plans. Accordingly, the broad practical repercussions of allowing the windfall disgorgement remedy awarded in this case open a dangerous path that conflicts with ERISA's language and purpose.

### A. ERISA's Benefits Claim Process was Expressly Designed to Address All Aspects of Benefits Determinations and Does Not Contemplate Collateral Remedies.

The structured, deliberate and elaborate claims determination process for plans covered by ERISA is not accidental. As prescribed by statute, the process begins with an internal claims procedure that the plan administrator must follow. This procedure is required by ERISA §503 (which requires plans to provide a notice of denial stating the specific reasons for the denial of benefits, and to afford a reasonable opportunity for a full and fair review of the benefits denial by the appropriate named fiduciary) and is extensively regulated by U.S. Department of Labor ("DOL") Claims Procedure Regulations, 29 CFR Part 2560.

The Claims Procedure Regulations establish detailed provisions for processing disability claims. These regulations resulted from DOL's careful balance of the interests of the insurance industry and disability claimants. DOL considered testimony in public hearings as well as hundreds of comments from representatives of both claimants and insurers. In particular, DOL was alerted to

claimants' fears that insurers would delay payment of benefits. DOL addressed these concerns by designing a claims process with time limits and other controls to prevent undue delays.[2]

The Benefits Claims Provision of ERISA §502(a)(1)(B) – not the "catchall" provision – is the statutory mechanism designed for a claimant to challenge the plan administrator's final benefits determination. Allowing collateral remedies to a participant who has been denied benefits does not fit into ERISA's carefully crafted design that has been in place for decades. *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"). Nothing in the meticulously structured process for determining entitlement to benefits under ERISA and the DOL Claims

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[2] As DOL observed, the insurance industry "argued that disability claims are often difficult to resolve inasmuch as they present complex issues requiring consideration of not only a claimant's medical condition, but also the claimant's continuing vocational capabilities [and] asserted that the proposed time frames were far too short to accommodate the individualized decisionmaking process involved in resolving most disability claims." 29 CFR Part 2560. Moreover, "Commenters representing claimants ... took an opposite position, arguing that disability providers frequently delay resolving these claims unnecessarily in order to avoid beginning to make payments. They emphasized the economic hardships disabled claimants experience as a result of any unnecessary delays in receiving the replacement income that disability benefits are intended to provide." *Id.* In arriving at its well-considered conclusion, DOL selected a framework that "will enable a plan to take sufficient time to make an informed decision on what may be a complex matter … By limiting the reasons for which decisions may be delayed, the regulation also requires prompt decisionmaking when appropriate." *Id.*

Procedure Regulations creates – or can reasonably be read to create – collateral remedies beyond those available under ERISA's Benefits Claim Provision.

This is a run-of-the-mill benefits denial case that appears to have been handled in accordance with the statutorily-prescribed claims process. Accordingly, there is no reason to augment the remedy designed to handle claims, which has already established Mr. Rochow's entitlement to benefits.

### B. Allowing collateral remedies for ordinary claims beyond those available under ERISA's Benefits Claim Provision is contrary to Supreme Court precedent and prior decisions of this Court.

The Supreme Court held in *Varity Corp. v. Howe,* 516 U.S. 489, 512 (1996), that ERISA's Catchall Provision in §502(a)(3) was intended as a safety net of last resort that applies when no other adequate remedy is available under ERISA. Accordingly, §502(a)(3) has no application to this case since Mr. Rochow was awarded the benefits due him.

Consistent with *Varity,* when the wrongful denial of a claim is adequately remedied by specific provisions in ERISA §502(a)(1)(B) (the Benefits Claim Provision), the Catchall Provision does not afford an additional remedy. *See* 516 U.S. at 515 ("[w]e should expect that courts, in fashioning 'appropriate' equitable relief, will keep in mind the 'special nature and purpose of employee benefit plans,' and will respect the 'policy choices reflected in the inclusion of certain remedies and the exclusion of others.' . . . Where Congress elsewhere provided

adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate'").

*Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609 (6th Cir. 1998), similarly bars Mr. Rochow's claims. *See also LaRocca v. Borden, Inc.*, 276 F.3d 22, 28-29 (1st Cir. 2002) (collecting cases holding that "if a plaintiff can pursue benefits under the plan pursuant to Section a(1), there is an adequate remedy under the plan which bars a further remedy under Section a(3)").

### C. **The Catchall Provision Does Not Provide a Remedy for Delays Caused by an Erroneous Benefits Denial.**

When a participant prevails in litigation under ERISA's Benefits Claim Provision, the plan must pay the benefits. To compensate for the participant's lack of access to the denied benefits during litigation, prejudgment interest may be awarded. *See Schumacher v. AK Steel Corp. Ret. Accumulation Pension Plan*, 711 F.3d 675, 685-87 (6th Cir. 2013). Accordingly, there is no need to resort to the Catchall Provision as a substitute remedy for delayed benefits. In short, the $3.8 million awarded in this case – above and beyond the plan benefits to which the court determined Mr. Rochow was entitled – is a windfall. To pile that $3.8 million award on top of the compensatory award of benefits is wholly punitive in nature. But punitive remedies are not available under ERISA. *Mertens v. Hewitt Assoc.*, 508 U.S. 255, 256-58 (1993).

### D. Disgorgement of Profits under the Catchall Provision Would Generate Gratuitous Litigation by Encouraging Participants to Re-Characterize Ordinary Claims for Benefits as Fiduciary Breaches.

The prospect of multi-million dollar windfalls will incentivize the assertion of ERISA §502(a)(3) claims in benefits denial cases. *See* Schmidtke, *Rochow v. LINA: Can it Really be True that ERISA Benefit Claimants Can Recover Millions of Dollars in Disgorged Profits?,* Martindale.com, (Dec. 11, 2013), http://www.martindale.com/employee-benefits-law/article_Ogletree-Deakins-Nash-Smoak-Stewart-PC_2039086.htm (panel opinion will cause lawyers to "attempt to amend existing complaints and expand such cases beyond what was intended by the statute"). Indeed, law firms for plan participants have announced not only that they will include a disgorgement theory in complaints, but they will also amend previous complaints to do so. *See, e.g.,* McKennon, *Rochow v. LINA: A Game-Changer in ERISA Disability Benefits Litigation*, McKennon Law Group-Cal. Ins. Litig. Blog (Dec. 13, 2013), http://www.californiainsurancelitigation. com/case-updates/rochow-v-lina-a-game-changer-in-erisa-disability-benefits-litigation/ (firm "will attempt to use this decision to assist our plan participant/beneficiary clients, including amending some of our existing complaints to expand the relief we are requesting to include disgorgement claims").

A disgorgement remedy would also serve as an incentive to participants not to cooperate with, or not to resolve their discrepancies with the plan during the

administrative process. Since the disgorgement remedy does not exist at the administrative level, participants could find it advantageous for the plan to deny benefits so that the stakes would be raised by seeking a windfall disgorgement remedy available only in post-denial litigation. That result is flatly contrary to the careful framework of ERISA §503 and the Claims Procedure Regulations.

2. Current rules encourage plan participants to supply all their evidence during the administrative review process, since judicial review of denials of benefits claims is generally confined to the administrative record. *See 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"). This process is designed to save the time and cost of presenting evidence in court, conducting discovery, engaging experts, etc., thereby facilitating judicial resolution through dispositive motions.

As this case illustrates, the disgorgement remedy under the Catchall Provision turns the streamlined statutory process into full-blown collateral litigation requiring extensive technical discovery, retention of experts, and analysis of the plan administrators' corporate financial information. Routine claims denial cases will turn into investigations to justify an alleged breach of fiduciary duty. This conflicts with ERISA's carefully crafted benefits claims process. *See 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").

3. Should plan administrators face the prospect of expensive complex litigation, as well as paying excessive disgorgement profits for an incorrect denial of benefits, the difficulty and cost of administering plans will necessarily escalate. And, if administrators err in favor of granting benefits in borderline cases (including claims not justified under the plan's terms), the cost of benefits will rise for all and premiums will become more expensive for the whole plan. Participant contributions will be higher across the board, a result that is detrimental to the plan and to all other participants.

In reality, the plan administrator's fiduciary duty is not just to the participant claiming individual benefits, but to all participants and to the plan. For a plan administrator, knowledge that an innocent mistake triggers multi-million dollar disgorgement liability could influence the award of benefits that are not due (or to which the participant's entitlement is unclear). That scenario would be an invitation to abuse by plan participants.

Disgorgement of profits will affect not only plans administered by insurance companies and funded through insurance policies, but also self-funded plans and

plans administered by employers. The judicial creation of a redundant disgorgement remedy will also affect plans providing other than disability benefits.

4. Plan administrators make benefits denial decisions on a regular basis. If each decision has the potential to expose the administrator to huge disgorgement "penalties," or if the cost of litigating becomes unmanageable, employers will be deterred from establishing benefit plans or continuing existing ones. *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").

Insurers may well decide not to offer products to ERISA plans because of the additional risks they may face. At the very least, the costs of such plans would skyrocket, providing a compelling disincentive for employers to offer plans at all or, conversely, an incentive for employers to pass cost increases on to employees.

The immediate widespread reaction to the panel's endorsement of a disgorgement remedy provides practical insight into the negative ramifications of affirming the district court judgment. As one commentator noted:

> When and how did disgorgement become an appropriate equitable remedy under 502(a)(3) rather than compensatory, and how is it that the court can provide a separate remedy on top of a benefit recovery? What happened to ERISA's boundaries that separate acting as an ERISA fiduciary from acting as a corporation, even when the same entity performs both roles? When did denying a claim necessarily mean a conflict of interest? What happened to the idea that a fiduciary has a fiduciary duty to all the participants to deny claims

> when it believes that is merited based on plan terms? Why are we even talking about LINA's ROE? I have no idea.

Caresani, *Sixth Circuit 502(a)(3) Windfall in Rochow v. Life Insurance Company of North America -- ERISA's Delicate Balance Goes So Far Off Kilter That I Am Queasy*, Porter Wright - Employee Benefits L. Rep. (Dec. 9, 2013), http://www.employeebenefitslawreport.com/2013/12/sixth-circuit-502a3-windfall-in-rochow-v-life-insurance-company-of-north-america-erisas-delicate-balance-goes-so-far-off-kilter-that-i-am-queasy/.[3] The panel's now-vacated opinion opened a Pandora's box that – consistent with the statutory language, the statutory purpose, and the practical realities of administering benefits plans and litigating denials of benefits – should remain shut.

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[3] *See also* Schmidtke, *supra* at 6 (similar criticism); Sidley Austin LLP, *The Sixth Circuit Dramatically Expands the Scope of Relief Available for Denial-of-Benefits Claims Under ERISA*, ERISA Litig. & Employee Benefits Update (Dec. 12, 2013) http://www.sidley.com/ERISA/EmployeeBenefitsUpdate12/12/13/ ("This decision represents a dramatic departure from existing precedent, which has generally held that such a dual award constitutes a double-recovery. A dissenting opinion made exactly this point, noting that the majority opinion represents an unprecedented and extraordinary step to expand the scope of ERISA coverage…. If the decision stands and is followed by other courts, it will place plan sponsors in a difficult position when making decisions to deny benefits. If a sponsor errs when denying benefits, it will risk not only potential litigation, but also the possibility of disgorgement of profits. As the dissent noted, the majority decision turns every wrongful denial-of-benefit decision into an automatic breach of fiduciary duty. And the majority's decision is hard to square with existing precedent, which holds that 502(a)(3) relief is generally unavailable for denial-of-benefit decisions") (internal citations omitted).

## II. The District Court's Award of Additional Remedies Violates the Mandate Rule and is Contrary to the Jurisdictional Imperative of the Final Judgment Rule.

Aside from the substantive error in the district court's disgorgement ruling, the stated jurisdictional basis for awarding new and expanded remedies following affirmance of a final judgment is incorrect. A litigant cannot obtain additional remedies after an appeal unless permitted by the appellate mandate. *See, e.g., In re Sanford Fork & Tool Co.,* 160 U.S. 247, 255-56 (1895) (following appellate remand, a district court "is bound by the decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; *or give any other or further relief*")(emphasis added).[4] A favorable disposition from this Court is not a license to assert additional remedies on remand. *See, e.g., Guzowski v. Hartman,* 849 F.2d 252, 255-56 (6th Cir. 1988) (appellant could not pursue additional remedies on remand following reversal when remedies were not asserted in earlier appeal).[5]

[4] Although, as the panel noted (Op. 10), the Supreme Court has not expressly ruled whether the mandate rule is jurisdictional, this Court and numerous other circuits have so held. *See Tapco Prods. Co. v. Van Mark Prods. Corp.,* 466 F.2d 109, 110 (6th Cir. 1972); *Nyyssonen v. Bendix Corp*., 356 F.2d 193, 194 (1st Cir. 1966); *Eutectic Corp. v. Metco, Inc.*, 597 F.2d 32, 34 (2d Cir. 1979); *Seese v. Volkswagenwerk, A.G.,* 679 F.2d 336, 337 (3d Cir. 1982); *U.S. v. Cotes,* 51 F.3d 178, 181 (9th Cir. 1995); *U.S. v. Pimentel*, 34 F.3d 799, 800 (11th Cir. 1994).

[5] *See also Frank Music Corp. v. MGM,* 886 F.2d 1545, 1556 (9th Cir. 1989) (additional damages were foreclosed by appellate court's earlier opinion affirming judgment); *Elias v. Ford Motor Co.,* 734 F.2d 463, 465 (1st Cir.1984) ("we agree

Moreover, the final judgment rule serves many salutary purposes, such as preventing wasteful and expensive piecemeal appeals and promoting judicial efficiency. *See, e.g., Cunningham v. Hamilton Co., Ohio*, 527 U.S. 198, 203-04 (1999); *Radio Station WOW v. Johnson,* 326 U.S. 120, 124 (1945).[6] The jurisdictional ruling of the district court (which the panel opinion approved) undermines those salutary purposes. Neither the district court nor the panel set forth a valid jurisdictional basis for imposing additional remedies following appellate affirmance of a final judgment (from which the prevailing party did not cross-appeal to argue for or preserve remedies not awarded in the original final judgment). In these circumstances, it is essential that the losing party – indeed, all parties and the court – know the matter has been concluded. There should be no specter of potential future exposure to additional remedies (particularly punitive remedies) following affirmance of a final judgment.

## CONCLUSION

The judgment of the district court should be reversed.

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with the district court that it no longer had power to amend its judgment once we affirmed the judgment on appeal").

[6] The only basis for this Court's jurisdiction in *Rochow I* was 28 U.S.C. § 1291 (final judgment). By "necessary implication," *Rochow I* determined all rights of the parties. *See Coal Resources, Inc. v. Gulf & W. Indus., Inc.*, 865 F.2d 761, 766-67 (6th Cir. 1989).

Respectfully submitted.

/s/ Jerrold J. Ganzfried
Jerrold J. Ganzfried
John F. Stanton
Holland & Knight LLP
800 17th St., NW, Suite 1100
Washington, D.C. 20006
202-469-5151
jerry.ganzfried@hklaw.com
john.stanton@hklaw.com

Ariadna Alvarez
Holland & Knight LLP
515 East Las Olas Blvd., Suite 1200
Fort Lauderdale, FL 33301
954-468-7849
ariadna.alvarez@hklaw.com

J. Michael Weston
President, DRI — The Voice
of the Defense Bar
55 West Monroe, Suite 1105
Chicago, IL 60603
312-795-1101
mweston@lwclawyers.com

Attorneys for Amicus Curiae DRI — The Voice of the Defense Bar

## CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C)(i) and 6th Cir. R. 32, I hereby certify that this brief complies with the type volume limitation of FRAP 29(d) because this brief is no longer than half the pages allotted to the parties by this Court in its February 19, 2014 Order, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii) and 6th Cir. R 32(b)(1).

/s/ John F. Stanton
John F. Stanton

## CERTIFICATE OF SERVICE

I, Jerrold J. Ganzfried hereby certify that, on this 28th day of March 2014, I filed a PDF file of the foregoing EN BANC BRIEF OF AMICUS CURIAE DRI — THE VOICE OF THE DEFENSE BAR SUPPORTING DEFENDANT-APPELLANT AND REVERSAL with the Clerk of the U.S. Court of Appeals for the Sixth Circuit using the Court's electronic filing and docketing system (CM/ECF), which electronically served the following registered attorneys by transmitting a Notice of Docket Activity:

Jeremy P. Blumenfeld
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103
(215) 963-5000
jblumenfeld@morganlewis.com

John D. Pirich
Brian T. Quinn
Honigman Miller Schwartz & Cohn, LLP
222 N. Washington Square, Suite 400
Lansing, MI 48933
(517) 484-8282
jpirich@honigman.com
bquinn@honigman.com

*Counsel for Defendant-Appellant*

John J. Cooper
Cooper Law Firm, PLLC
1615 W. Big Beaver Road, Suite A6
Troy, Michigan 48084
Tel: (248) 822-2212
johnjcooper@sbcglobal.net

Erik W. Scharf
Scharf Appellate Group
1395 Brickell Avenue, Suite 800
Miami, Florida 33131
Tel: (305) 665-0475
escharf@ewscharfpa.com

*Counsel for Plaintiffs-Appellees*

Mary Ellen Signorille
AARP Foundation Litigation
601 E Street, NW
Washington, D.C. 20049
Tel: (202) 434-2060
msignorille@aarp.org

*Counsel for Amicus Curiae AARP*

Waldemar Jacob Pflepsen, Jr.
Jorden Burt
1025 Thomas Jefferson Street, N.W., Suite 400 E.
Washington, DC 20007
Tel: (202) 965-8100
wjp@jordenusa.com

*Counsel for Amicus Curiae American Council of Life Insurers*

/s/ Jerrold J. Ganzfried
Jerrold J. Ganzfried