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Is Double Recovery Coming To An ERISA Suit Near You?

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Law360, New York (May 19, 2014, 5:55 PM ET) -- Since the early 1980s, the U.S. Supreme Court has repeatedly recognized that the Employee Retirement Income Security Act does not allow punitive or extracontractual damages. [1] Thus, the relief available under ERISA for an improper denial of benefits has been limited to recovery of the benefits at issue, interest and attorney fees. Now, however, in a first-of-its-kind opinion, a divided Sixth Circuit panel has held that disgorgement of profits earned on improperly denied benefits is available in addition to the benefits, interest and attorney fees.

In Rochow v. Life Insurance Company of America, a panel of judges for the Sixth Circuit awarded an ERISA disability benefits claimant's estate a disgorgement award under ERISA Section 502(a) (3), in addition to requiring the insurer to pay the amount of benefits that the participant was owed. [2]As the dissenting voice, Judge David W. McKeague stated, the Sixth Circuit panel took "an unprecedented and extraordinary step to expand the scope of ERISA coverage. The disgorgement of profits undermines ERISA's remedial scheme and grants the plaintiff an astonishing $3[.79 million] windfall under the catchall provision in [Section] 502 (a) (3)."[3]

Daniel Rochow was covered under a disability benefits program sponsored by his employer and insured by LINA. The policy allowed an employee to receive payment of disability benefits upon providing "satisfactory proof" that "solely because of [i]njury or [s]ickness [the employee is] unable to perform all the material duties of [his or her] [r]egular [o]ccupation or a [q]ualified [a]lternative[.]"[4]Rochow began to experience short-term memory loss, sporadic chills and sweating. He was demoted, but continued to have difficulties at work. As a result of his inability to perform his job, he was forced to resign, effective January 2002. In February 2002, he was diagnosed with a rare and severely debilitating brain infection. He filed a claim for long-term disability benefits in December 2002. LINA denied his claim, stating that his employment ended before his disability began. Three rounds of administrative appeal followed and LINA upheld its decision each time after finding that the plaintiff failed to present any medical records to support his inability to work prior to the date when he was terminated.

Rochow filed suit in the U.S. District Court for the Eastern District of Michigan. He put forth two claims under ERISA Section 502(a) (3): (1) to recover full benefits due from the failure to pay benefits in violation of the plan terms;and (2) to remedy the alleged breach of fiduciary duty under ERISA Section 404(a). The district court ultimately found that LINA acted arbitrarily and capriciously in finding that Rochow was not disabled while he was still employed by the plan sponsor. LINA appealed and a Sixth Circuit panel affirmed the lower court's decision. Rochow died in 2008, but the personal representatives of his estate, referred to hereafter as the "plaintiff," continued to pursue recovery on Rochow's behalf.

Following the Sixth Circuit appeal, the parties had numerous unresolved issues, including a dispute over whether the plaintiff was entitled to a disgorgement of profits. The plaintiff filed a motion with the district court, seeking an equitable accounting and a request for disgorgement, asserting that Rochow's estate was entitled to disgorgement of profits because LINA breached its fiduciary duties and that disgorgement was necessary to prevent LINA's unjust enrichment resulting from profits it earned on the wrongfully retained benefits.

The plaintiff provided an expert report, in which the expert determined that LINA used Rochow's benefits to earn between 11 percent and 39 percent return annually, making approximately $2.8 million. The plaintiff's expert used a return-on-equity metric to calculate LINA's profits.

LINA's expert opined that LINA realized profits of only $32,732 by withholding Rochow's benefits. LINA's expert arrived at that figure by treating the withheld benefits as though they were earning interest as part of LINA's investment assets. The district court went on to award disgorgement to the plaintiff, using the metric created by the plaintiff's expert and ordered LINA to pay disgorgement of $3.79 million.

LINA again appealed to the Sixth Circuit, arguing that disgorgement was inappropriate because equitable relief under ERISA Section 502(a) (3) is available only where
ERISA Section 502(a) does not otherwise provide an adequate remedy. The majority of the Sixth Circuit panel held "that disgorgement is an appropriate equitable remedy under [Section] 502(a) (3) and can provide a separate remedy on top of a benefit recovery." The majority found that ERISA Section 502(a) (1) (B) could not provide Rochow with the relief he sought because "Section 502(a) (1)(B) cannot provide the equitable redress of preventing LINA's unjust enrichment because it only allows a participant to 'recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.'"[5]The panel also opined that "disgorgement does not result in double compensation, nor does it represent punishment. An award of both actual damages and disgorgement does not offend the doctrine against double recovery."[6]

In a vehement dissent, Judge McKeague noted that, "At its core, ERISA is a remedial statute. It does not seek to punish violators, but rather, attempts to place 'the plaintiff in
the position he or she would have occupied but for the defendant's wrongdoing.'"[7]Judge McKeague also opined that the 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."[8]He found that "[a]llowing Rochow to recover disgorged profits, in addition to denied benefits, results in an improper repackaging of the benefits claims. Put differently, it results in a second recovery for the same injury. Such overcompensation contravenes ERISA's basic purpose."[9]

Rochow v. LINA has been set for rehearing en banc, and in the interim, the panel's decision was vacated. As articulated in Judge McKeague's dissent, the panel's decision to award disgorgement is a sharp departure from the remedial purpose of ERISA's civil enforcement provisions. Although the Supreme Court did reference equitable remedies under ERISA in Cigna Corp. v. Amara, the panel decision in Rochow took the unprecedented step of allowing a participant to recover not only the benefits that he was denied but to also recover a sizable "disgorgement" award.

In fact, Judge Ronald A. Guzman of the U.S. District Court for the Northern District of Illinois recently invoked Judge McKeague's dissent in rejecting a plaintiff's bid to assert a claim for benefits under ERISA Section 502(a)(1)(B) and an additional claim for equitable relief under ERISA Section 502(a)(3).[10]Judge Guzman also noted that Amara did not change the legal landscape to open the door to double recovery under ERISA Section 502 (a)(1)(B) and ERISA Section 502(a)(3). Thus, the original panel decision in Rochow is not receiving a groundswell of support from other courts while the rehearing en banc is pending.

If allowed to stand, Rochow would represent a major sea change in ERISA benefits litigation. Since 1996, it has been generally understood that equitable relief under ERISA Section 502(a) (3) is not appropriate if ERISA otherwise provides a specific remedy. [11]Thus, a Section 502(a) (3) claim is not available at all in a garden variety benefits claim, because Section 502(a) (2) (B) already provides an express remedy.

Under the Rochow approach, however, every single benefits claim, no matter how routine, would come with an additional claim for disgorgement. Furthermore, applying the Rochow majority's disgorgement calculation methodology could result in multimillion dollar awards to many, if not most claimants, who can establish that benefits were improperly withheld.

Oral argument for the Rochow rehearing en banc will occur on June 18, 2014, making Rochow a must-watch case for this summer in ERISA litigation.

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[1]See Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 138 (1985);Mertens v. HewittAssocs., 508 U.S. 248, 255, 256-58, & n.8 (1993).
[2]Rochow v. Life Ins. Co. of Am., 737 F.3d 415 (6th Cir. 2013).
[3]Rochow, 737 F.3d at 431 (McKeague, J. dissenting).
[4]Rochow, 737 F.3d at 417.
[5]Id. at 425 (quoting 29 U.S.C. §1132(a)(1)(B)).
[6]Id. (citation omitted).
[7]Id. at 431 (McKeague, J., dissenting) (quoting Ford v. Uniroyal Pension Plan, 154 F.3d 613, 618 (6th Cir. 1998)).
[8]Id.
[9]Id.
[10]Sexton v. Standard Ins. Co., No. 13 C 7761, 2014 WL 1745420, at *1 (N.D. Ill. Apr.30, 2014).
[11]See Varity Corp. v. Howe, 516 U.S. 489, 514 (1996).