

# Sixth Circuit Revisits Controversial ERISA Decision

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The Sixth Circuit Court of Appeals voted to rehear an ERISA action that awarded an unprecedented remedy for the alleged denial of long term disability benefits. The order, granting en banc rehearing, vacates a controversial 2-1 panel decision that upheld a lower court decision in not only awarding the amount of the claimed disability benefits, but also ordering disgorgement of nearly \$4 million in profits allegedly resulting from the denial of benefits. The now-vacated decision, *Rochow v. Life Insurance Company of North America*, arose from the denial of long-term disability benefits to Daniel Rochow, the former president of Arthur J. Gallagher & Co. Rochow's troubles started in 2001 when he began experiencing short term memory loss, chills, sweating, and stress at work. Unable to perform his duties as president, Rochow was demoted and ultimately forced to resign effective January 2, 2002. In February 2002, he experienced bouts of amnesia and was hospitalized. During his hospitalization, he was diagnosed with HSV-Encephalitis, a rare and debilitating brain infection. As a Gallagher employee, Rochow was covered by a disability plan sponsored by his employer and administered by Life Insurance Company of North America (LINA). He filed for long-term disability benefits in late-December 2002. LINA denied his claim on the ground that his employment ended before his disability began and denied three appeals filed by Rochow on the same basis. Further, LINA found that Rochow failed to present any medical records demonstrating an inability to work prior to his resignation date. Rochow sued asserting that LINA wrongfully denied him benefits and breached its fiduciary duty under ERISA section 404 in doing so, claiming entitlement to relief under sections 502(a)(1)(B) and 502(a)(3). The district court, on summary judgment, held that Rochow was entitled benefits that were improperly denied, a decision affirmed by the Sixth Circuit in *Rochow I*. After remand, Rochow sought an equitable accounting and disgorgement of LINA's "profits" earned on the \$900,000 in withheld benefits as "appropriate equitable relief" under section 502(a)(3). Years of litigation ensued, which included written discovery into LINA's profits, expert reports and depositions, and a full evidentiary hearing after which the court awarded approximately \$3.8 million as disgorgement of profits. On LINA's second appeal to the Sixth Circuit (*Rochow II*), it argued that disgorgement was inappropriate because Rochow had an adequate remedy pursuant to section 502(a)(1)(B). The majority of the Sixth Circuit panel, however, agreed with the trial court and held that

where a plan administrator acts "arbitrarily and capriciously," the remedy of disgorgement of profits could be "appropriate equitable relief" under section 502(a)(3), in addition to the award of benefits under section 502(a)(1)(B) and also held that *Varity Corp. v. Howe* did not preclude the award of equitable relief because "Section 502(a)(1)(B) cannot provide the equitable redress" Rochow sought. The dissent characterized the majority's decision as an "unprecedented and extraordinary step to expand the scope of ERISA coverage" and decried the \$3.8 million disgorgement as a "windfall" to the plaintiff. LINA filed a Petition for en banc review in the Sixth Circuit on December 20, 2013. On February 13, 2014, the American Council of Life Insurers, represented by Carlton Fields, P.A., filed an amicus curiae brief in support of LINA, emphasizing the importance of the issue to the industry. Rehearing en banc was granted on February 19, 2014.

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