No. 13-4084

In The United States Court of Appeals
for the Sixth Circuit

KAREN RUSSELL,

Plaintiff-Appellant,

v.

CATHOLIC HEALTHCARE PARTNERS EMPLOYEE LONG TERM DISABILITY PLAN; UNUM LIFE INSURANCE COMPANY OF AMERICA,

Defendants-Appellees.

On Appeal from the Judgment of District Judge Herman J. Weber, United States District Court for the Southern District of Ohio, Western Division
Case No. 1:11–cv–188

BRIEF *AMICUS CURIAE* OF UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING *EN BANC*

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations
And Financial Interest

Sixth Circuit
Case Number: 13-4084

Case Name: Russell v. Catholic Healthcare Partners Employee Long Term Disability Plan; Unum Life Insurance Company of America

Name of Counsel: Michelle L. Roberts

Pursuant to 6th Cir. R. 26.1, United Policyholders makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

   No.

CERTIFICATE OF SERVICE

I certify that on September 3, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ Michelle L. Roberts
Michelle L. Roberts

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INTEREST OF *AMICUS CURIAE*

As described more fully in the accompanying motion for leave, United Policyholders ("UP") is a non-profit 501(c)(3) organization founded in 1991 that serves as a voice and an information resource for insurance consumers in all 50 states. Advancing the interests of policyholders through participation as *amicus curiae* in insurance-related cases throughout the country is an important part of UP's efforts. UP does not accept funding from insurance companies. No counsel for a party authored this brief, in whole or in part; and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

Given that a substantial portion of in-force long-term disability insurance products are subject to the Employee Retirement Security Act of 1974 ("ERISA"), UP has a corresponding interest in this case. This brief will explain why the panel's decision conflicts with Sixth Circuit precedent and the decisions of other Circuit Courts of Appeals and the practical negative impact of permitting accrual of a contractual statute of limitations when there is no justiciable controversy.

SUMMARY OF ARGUMENT

Pursuant to FRAP 34(b), the panel decision in this case, *Russell v. Catholic Healthcare Partners Employee Long Term Disability Plan*, 13-4084, 2014 WL 3953722 (6th Cir. Aug. 14, 2014), should be reviewed *en banc* because the panel decision conflicts with a decision of this Court in *Moyer v. Metro. Life Ins. Co.*,

13-1396, __ F. 3d ___, 2014 WL 3866073 (6th Cir. Aug. 7, 2014) ("*Moyer*") issued on August 7, 2014 and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decision. In addition, *Russell* raises a question of exceptional importance because it conflicts with *Mogck v. Unum Life Ins. Co. of Am.*, 292 F.3d 1025 (9th Cir. 2002) and *Burke v. PriceWaterHouseCoopers LLP Long Term Disability Plan*, 572 F.3d 76 (2d Cir. 2009) and will result in significantly hampering ERISA plan participants' access to judicial review for denied benefits claims.

REASONS TO GRANT THE PETITION

I. THE COURT'S DECISION IN *MOYER* IS BINDING AND DISPOSITIVE OF THIS MATTER.

In this Circuit, published panel opinions are binding on later panels and a panel of this Court cannot overrule the decision of another panel. *Salmi v. Sec'y of Health & Human Servs*., 774 F.2d 685, 689 (6th Cir.1985); *see also* 6 Cir. R. 32.1 (stating that published panel opinions are binding on later panels). In *Moyer*, this Court held that an ERISA plan administrator breached its obligations under ERISA by failing to include in its benefit revocation letter the time limit for seeking judicial review, and thus, the contractual limitations period could not be enforced against the participant. *Moyer*, 2014 WL 3866073 at *4. In this matter, the ERISA plan administrator also failed to include in its benefit revocation letter the time limit for seeking judicial review. Petition for Rehearing, p. 2. The Appellant

argued that Unum's denial letter did not comply with 29 C.F.R. § 2560.503-1(g)(1)(iv). *Id*. Notification of the time limit for judicial review is required by 29 C.F.R. § 2560.503-1(g)(1)(iv) and (j)(4):

> (**g) Manner and content of notification of benefit determination…**the plan administrator shall provide a claimant with written or electronic notification of any adverse benefit determination.… **The notification shall set forth, in a manner calculated to be understood by the claimant** –
>
> …(iv) A description of the plan's **review procedures** and **the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action** under section 502(a) of the Act following an adverse benefit determination on review[.]
> * * *
> **(j) Manner and content of notification of benefit determination on review.** The plan administrator shall provide a claimant with written or electronic notification of a plan's benefit determination on review.… the notification shall set forth, in a manner calculated to be understood by the claimant –
> … (4) . . . **a statement of the claimant's right to bring an action** under section 502(a) of the Act[.]

(Emphasis added.) Because the Appellant sufficiently raised the issue of improper notification but the panel did not address it, and because *Moyer* was decided before the panel's decision in this case and is dispositive of this issue, a rehearing *en banc* is necessary to ensure uniformity.

II. THE PANEL'S DECISION CONFLICTS WITH THE NINTH AND SECOND CIRCUIT COURTS OF APPEALS.

The *Russell* panel determined that the contractual 3-year statute of limitations barred Appellant's suit by using an accrual date of February 8, 2008, the date proof of claim was first required. *Russell*, 2014 WL 3953722, at *4. The

panel erred by determining that Unum's written requests for proof of continuing disability pertained to a single continuous claim and did not reset the three-year clock. *Id.* Unum did not mention review of her claim under the new standard of disability until November 14, 2008, at the earliest. AR958. Under the panel's reasoning, if Unum terminated her claim on or after February 8, 2011, any claim for judicial review would be time-barred. The panel's decision conflicts with the Ninth and Second Circuit decisions in *Mogck v. Unum Life Ins. Co. of Am.*, 292 F.3d 1025 (9th Cir. 2002) and *Burke v. PriceWaterHouseCoopers LLP Long Term Disability Plan*, 572 F.3d 76 (2d Cir. 2009). Following *Mogck* and *Burke*, the earliest date that the contractual limitations period could accrue was July 27, 2009, the date that Unum subsequently required "proof of claim" several months in advance of when the definition of disability under the Plan would change. *See* Petitioner's Brief, p. 13; AR 1135. Applying an accrual date of July 27, 2009, the Appellant's lawsuit would have been timely. *Russell*, 2014 WL 3953722, at *4.

In *Mogck*, the relevant portion of the contractual limitations period is identical to that in the present case. *Mogck*, 292 F.3d at 1028 (The policy provides that a legal action cannot be started … 'more than three years after the time proof of claim is required'"). Mogck, like Russell, sought continuing disability benefits, not initial disability benefits. *Id.*; *Russell*, 2014 WL 3953722, at *1. The Ninth Circuit determined that the contractual limitation period begins as of the date when

Unum asked Mogck for a "request for the proof," or a "proof of claim." *Mogck*, 292 F.3d at 1028. "When an insurer drafts particular policy terms and procedures relating to the insured's right to commence a legal action, the insurer must utilize those basic terms and procedures in order for the policy provision to be triggered." *Id*. at 1029.

In *Burke*, the long-term disability claimant applied for and was approved for LTD benefits which commenced on October 20, 2002. *Burke*, 572 F.3d at 78. On March 28, 2003, Hartford, the Plan administrator, requested Proof of Loss, including an evaluation to be completed by her doctor. *Id*. The Plan required Proof of Loss be provided within thirty days of the request, or April 27, 2003. *Id*. The Second Circuit determined that under the terms of the Plan, Burke's claim was required to be filed by April 27, 2006—three years from the date Proof of Loss was due because of Hartford's request, not when it was initially due. *Id*. at 81.

In *Russell*, Unum was paying Russell's benefits when it requested "proof of claim" for the upcoming change in disability on July 27, 2009. AR 1135. The contractual limitations period cannot accrue before that date. Holding so would put the Sixth Circuit in direct conflict with two other Circuit Courts of Appeals.

III. THE PANEL'S DECISION FRUSTRATES THE PURPOSES OF ERISA'S CIVIL ENFORCEMENT SCHEME.

One of ERISA's goals is to provide participants with ready access to the courts. 29 U.S.C. § 1001(b). Many, if not most, denial of disability benefit claims

involve claims that were approved for some period of time and then later terminated. As noted by one court, over a two-year period, "a combined total of more than 1.1 million claims were submitted to MetLife . . . Of the more than 1.1 million claims, approximately 80% (or more than 914,000) were approved and paid for some period of time." *Dilley v. Metro. Life Ins. Co.*, 256 F.R.D. 643, 645 (N.D. Cal. 2009). The panel's decision permits a contractual statute of limitations to accrue for many LTD claims during a period of time when proof of claim is not required and while there is no justiciable controversy because a benefit is in pay status. Such a result is contrary to the terms of the Plan that starts accrual 30 days after proof of claim is required. Further, it permits running the clock on the statute of limitations during a period of time a plan participant has no reason to believe there is a dispute or reason to seek legal counsel.[1]

[1] Indeed, it is difficult for participants to find an attorney knowledgeable about ERISA claims. The ERISA bar representing individuals is extremely small. For example, in 2010, there were 852 attorney members of the Employee Benefit Committee of the Section of Labor and Employment Law of the American Bar Association; of those, only 101 classified themselves as representing Employee-Plaintiffs, or approximately less than twelve percent (12%) of the total membership. Brief of AARP and National Employment Lawyers Association, as *Amici Curiae*, in Support of Petitioner, *Hardt v. Reliance Standard Life Ins. Co.*, 2010 WL 768489 (U.S.)(Appellate Brief). It may take several weeks or months for a participant battling a serious medical condition to get her life in order before having the wherewithal to seek out the small community of ERISA attorneys who may be willing to take her case. *See e.g., Steffy v. Liberty Life Assur. Co. of Boston*, No. 09–538, 2009 WL 3255219 (W.D. Penn. Oct. 7, 2009) (due, in part, to cognitive difficulties stemming from dementia, participant missed deadline to file a claim).

This is significant because courts generally discourage attorneys from participating in the claims process. *See Rego v. Westvaco Corp.*, 319 F.3d 140 (4th Cir. 2003). The congressional purpose of ERISA, which emphasized promotion of "the soundness and stability of plans with respect to adequate funds to pay promised benefits," (29 U.S.C. § 1001(a)) encourages participants to resolve their claims on their own without legal counsel. The Sixth Circuit recognized this purpose of ERISA in declining to award attorneys' fees for work done during the claims and appeal process because "some claimants and some plans may use informal internal review procedures, accomplished by nonlawyers . . . a nonliteral reading of the statute which exposed the loser to the prevailing party's attorneys' fees might undermine such a process." *Anderson v. Procter & Gamble Co.*, 220 F.3d 449 (6th Cir. 2000), quoting *Cann v. Carpenters' Pension Trust Fund for N. California*, 989 F.2d 313, 317 (9th Cir. 1993).

Because an administrator need not inform a participant of the time limit for judicial review until there is a denial, *Moyer*, 2014 WL 3866073 at *2, participants will be completely unaware that the clock on their right to file suit is ticking while they receive disability payments. Where situations like the one in this case cause a participant's claim to be time-barred, "courts are well equipped to apply traditional doctrines that may nevertheless allow participants to proceed. If the administrator's conduct causes a participant to miss the deadline for judicial

review, waiver or estoppel may prevent the administrator from invoking the limitations provision as a defense." *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604, 615, 187 L. Ed. 2d 529 (2013). In this case, Unum requested proof of claim in July 27, 2009, which would reasonably lead any participant to believe that accrual would not start earlier than that date where a Plan runs a contractual limitations period from 30 days after Proof of Claim is requested.

CONCLUSION

For the foregoing reasons, UP requests that the Court grant Plaintiff-Appellant's request for rehearing *en banc*.

Dated: September 3, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29 & 35 because this brief is 7 ½ pages long, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 14-point font size in Times New Roman.

/s/ Michelle L. Roberts
Michelle L. Roberts

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2014, the foregoing Brief *Amicus Curiae* of United Policyholders in Support of Plaintiff-Appellant's Petition for Rehearing *En Banc* and Affirmance was filed with the Court via electronic mail to beverly_harris@ca6.uscourts.gov, and a copy of the brief will be served on all counsel of record by the office of the clerk.

/s/ Michelle L. Roberts
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