It's Payback Time: The Sixth Circuit Acknowledges, Albeit Briefly, the Right of Benefit Claimants to Obtain Disgorgement of Profits Under § 502(a)(3)

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In *Rochow v. Life Insurance Company of North America*, 737 F.3d 415 (6th Cir. Dec. 6, 2013), the Sixth Circuit startled the ERISA community when it affirmed the right of a benefits claimant to disgorge $2.8 million in profits from the defendant, Life Insurance Company of North America ("LINA"), in addition to recovering $1 million in past-due long term disability benefits. The decision broke with over 15 years of Sixth Circuit precedent interpreting the Supreme Court's decision in *Varity Corp. v. Howe* as foreclosing the right of recovery under § 502(a)(3) where the plaintiff has a claim for wrongfully denied benefits under § 502(a)(1)(B).[1]

The *Rochow* decision caused an immediate stir within the ERISA community, drawing reactions ranging from elation to incredulity.[2] The decision apparently did not sit well with a majority of the Sixth Circuit, which granted LINA's petition for rehearing *en banc* on February 19, 2014. Although the fate of the *Rochow* decision is uncertain, that has not stopped plaintiff's attorneys across the country from amending their complaints to include disgorgement counts. As a result, practitioners and judges alike are wrestling with the questions: just what *is* disgorgement; when is it available; and how can it be reconciled with ERISA's remedial framework?

This article will briefly summarize the facts and procedural posture of the *Rochow* decision before discussing its holding. It will then argue that awarding disgorgement under § 502(a)(3) is not as controversial as it might sound, and indeed may provide a necessary deterrent for misconduct of the sort exhibited by LINA in *Rochow*.

***Rochow v. LINA*: Facts and Procedural Posture**

The plaintiff, Daniel J. Rochow, was an insurance executive who, in 2001, began to exhibit unexplained symptoms of short term memory loss, chills, sporadic sweating, and anxiety.[3] Rochow was demoted from his position as CEO to a less demanding sales position, yet he nevertheless continued to struggle at work and was ultimately fired in January 2002.[4] The following month, while visiting his son in Florida, Rochow was found wandering alone in a parking lot, unable to explain why he was there, and exhibiting slurred speech and amnesic symptoms.[5] He was transported to a local hospital, where he was diagnosed with HSV-Encephalitis, an extremely rare form of herpes that can cause brain trauma.[6]

In December 2002, Rochow applied for disability benefits under a group plan insured by LINA.[7] On his claim form, Rochow incorrectly stated that he was employed at the time of his February 2002 medical crisis.[8] LINA denied his claim, alleging that Rochow was not actively employed at the time his disability arose and therefore was not covered under the plan.[9] Rochow appealed that determination; but in April 2003 LINA affirmed its

decision to deny benefits, maintaining that although Rochow had exhibited symptoms of encephalitis in 2001, he was not disabled at that time because he continued to work.[10] In September 2003, Rochow appealed a second time, but LINA affirmed, citing a lack of medical evidence.[11] Rochow appealed a third time in June 2004, and LINA affirmed a final time the following month.[12]

In September 2004, Rochow sued LINA in the district court for the Eastern District of Michigan.[13] He stated two counts under § 502(a)(3), alleging that LINA violated the terms of the plan by failing to pay benefits, and that LINA's conduct violated ERISA's "exclusive benefit" rule (29 U.S.C. § 1104), requiring that a plan administrator discharge its duties solely in the interests of plan participants and beneficiaries.[14] In his prayer for relief, Rochow sought, among other things, a "full and accurate accounting" of the computations used by LINA to determine the amount of his disability benefits; an order compelling LINA to pay the full amount of benefits due to him, with interest; and disgorgement of any profits LINA obtained as a result of denying his benefits.[15]

The parties cross-moved for judgment; and, in June 2005, the district court ruled that LINA had acted arbitrarily and capriciously when it denied Rochow's claim for benefits.[16] LINA appealed and the Sixth Circuit affirmed, citing the Seventh Circuit's ruling in *Hawkins v. First Union Corp. Long-Term Disability Plan* for the rule that there is no "logical incompatibility between working full time and being disabled from working full time."[17] Shortly thereafter, Daniel Rochow died, and his estate was substituted as plaintiff.[18]

On remand, the estate moved for an equitable accounting of the profits LINA earned on the nearly $1 million in disability benefits it had wrongfully withheld.[19] The district court refused to entertain Rochow's claim for benefits under § 502(a)(3), instead treating it as a claim for benefits under § 502(a)(1)(B); but the court permitted the estate to obtain an equitable accounting under § 502(a)(3).[20] The parties spent the next three years embroiled in discovery over the proper method of calculating disgorgement.[21] The district court ultimately adopted the plaintiff's preferred method, which measured profits based on LINA's annual return on equity.[22] The district court entered judgment for the plaintiff in the amount of approximately $ 3.8 million, and LINA again appealed.[23]

The Majority Opinion

After dispensing with LINA's arguments about the timeliness of Rochow's motion for an equitable accounting, the court of appeals determined that § 502(a)(3) does indeed permit recovery of disgorged profits in a benefits claim under § 502(a)(1)(B).[24] The majority opinion, written by U.S. District Judge Michael H. Watson of the Southern District of Ohio (sitting by designation), acknowledged that although the Sixth Circuit ruled in *Wilkins v. Baptist Healthcare System, Inc.* that a plaintiff cannot repackage a claim for benefits as a breach of fiduciary duty under § 502(a)(3), the Sixth Circuit has since recognized several exceptions to that rule.[25] For instance, in *Hill v. Blue Cross and Blue Shield of Michigan*, the court of appeals permitted a class of benefit claimants to obtain a system-wide injunction against an unfair claims processing technique while also

maintaining a suit for benefits under § 502(a)(1)(B).[26] Moreover, in *Gore v. El Paso Energy Corp. Long Term Disability Plan*, the court ruled that a claimant in a disability benefits dispute with an insurer could maintain a separate claim against his employer for breach of fiduciary duty under § 502(a)(3) where the employer had misrepresented the extent of his disability benefit coverage.[27]

The majority determined that the district court's ruling in *Rochow* was "a logical extension" of the *Hill* exception to *Varity* and *Wilkins*, since § 502(a)(1)(B) could not provide Rochow with all the relief he sought.[28] Unlike the plaintiff in *Wilkins*, who sought compensatory damages, Rochow sought equitable redress for LINA's unjust enrichment – a different injury with an entirely different measure of relief.[29] The majority further observed that remedies under § 502(a)(3) need not be restorative in nature; rather, § 502(a)(3) permits equitable "redress" for violations of the ERISA statute or of the terms of the plan.[30] The court added that disgorgement is not punitive in nature, since "it leaves LINA no worse off than it would have been had it paid benefits to Rochow when they were due as the law required."[31] Additionally, the majority cited the Eighth Circuit's ruling in *Parke v. First Reliance Standard Life Ins. Co.* as authority for the rule that accounting of profits is a type of relief typically available in equity and therefore appropriate under § 502(a)(3).[32]

The court observed that although permitting disgorgement under § 502(a)(3) might impose an additional discovery burden, that concern was outweighed by the fact that, without disgorgement, "insurance companies would have the perverse incentive to deny benefits for as long as possible, risking only litigation costs in the process."[33] The majority added 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," since a plan administrator can act arbitrarily and capriciously without necessarily acting out of self-interest.[34]

Finally, the court approved the district court's use of LINA's return on equity metric as an appropriate measure of recovery, pointing out that LINA did not segregate Rochow's wrongfully withheld money into a separate investment account but rather comingled it with its general assets to be used for any business purpose.[35] The court noted that although the disgorgement award was large relative to Rochow's past-due benefits, the size of the award was immaterial, since the "basic concept" of equitable accounting is this: "[I]f you take my money and make money with it, your profit belongs to me."[36] Accordingly, the court of appeals affirmed the judgment for the plaintiff in the amount of $3,797,967.92.[37]

The Dissent

Judge David McKeague described the $3.8 million judgment for the plaintiff as an impermissible "windfall" that contravened Supreme Court and Sixth Circuit precedent.[38] He pointed out that in a wrongful denial of benefits case, "every time there is a denial, there will necessarily be a withholding of benefits," and argued that the withholding of benefits did not form a separate injury but rather was an ancillary effect of the denial.[39]

He added that an award of prejudgment interest would have been sufficient to make *Rochow* whole, while an award of disgorged profits amounted to an impermissible "double recovery," in violation of *Varity*.[40]

Judge McKeague observed that *Parke*, on which the majority had relied, involved an award of prejudgment interest, not disgorged profits, and therefore provided no support for the availability of disgorgement under § 502(a)(3).[41] He concluded that permitting disgorgement under the circumstances would "fundamentally alter" the nature of ERISA benefits litigation by increasing the costs and complexity associated with that litigation and by permitting discovery outside the administrative record.[42]

In Defense of Disgorgement

The majority in *Rochow* did itself a disservice by citing the Eighth Circuit's opinion in *Parke* as support for the rule that the remedy of equitable accounting, and the associated relief of disgorgement of profits, is available as a remedy under § 502(a)(3).[43] Although *Parke* spoke of disgorged profits, that decision actually involved an award of prejudgment interest, as Judge McKeague pointed out in his dissent.[44] Thus, *Parke* injects an unnecessary element of confusion into an already complex case.

The Sixth Circuit need not have entered into that briar patch. Supreme Court precedent provides more than adequate support for the rule that equitable accounting and disgorgement of profits are "appropriate equitable relief" within the meaning of § 502(a)(3). In *Mertens v. Hewitt Associates*, the Court acknowledged that "restitution of ill-gotten plan assets or profits" was available as a remedy under § 502(a)(5), the sister provision to § 502(a)(3).[45] Moreover, in *Harris Trust and Savings Bank v. Salomon Smith Barney Inc.*, the Court actually permitted plan fiduciaries to pursue a disgorgement claim against a non-fiduciary under § 502(a)(3).[46] Finally, in *Great-West Life & Annuity Ins. Co. v. Knudson*, the Court acknowledged in a footnote that equitable accounting is a traditional equitable remedy, even though tracing of profits is not required.[47]

Prejudgment interest confuses matters because, like restitution in general, prejudgment is a legal remedy when attached to a legal claim and an equitable remedy when attached to an equitable claim.[48] Where prejudgment interest attaches to an equitable claim, however, it is measured according to the defendant's unjust gain, not the plaintiff's expectation damages.[49] The Supreme Court acknowledged in *CIGNA v. Amara* that the relief afforded under § 502(a)(1)(B) is legal, not equitable, in nature[50] – although, ironically, plaintiffs continue to be denied jury trials under that provision.[51] Accepting as true that suits under § 502(a)(1)(B) are legal in nature, an award of prejudgment interest on benefits awarded under that provision should be measured according to the plaintiff's expectation damages (usually set by statute) and not by the defendant's profits.

But unlike parties to a contract, ERISA plan administrators are fiduciaries who owe a duty to plan participants and beneficiaries to act solely in their interest.[52] As *Varity* recognizes, a denial of benefits *can be* a breach of fiduciary duty where the plan

administrator has abused its discretion.[53] Not every breach of contract is a breach of fiduciary duty[54]; yet until *Rochow*, courts treated them as one and the same. That makes little sense, since a breach of fiduciary duty is a distinct and arguably more grave injury than a breach of contract.[55] Equitable accounting provides the necessary deterrent to breaches of fiduciary duty by forcing breaching trustees to disgorge their ill-gotten gains.[56]

What makes an award of disgorgement awkward in the ERISA context is that the plaintiff's damages in an action under § 502(a)(1)(B) *are also* the defendant's unjust gains in an action under § 502(a)(3). Thus, a plaintiff in an ERISA benefits dispute must either seek a constructive trust over the wrongfully withheld benefits under § 502(a)(3), or bring separate claims for the wrongfully withheld benefits under § 502(a)(1)(B) and for an equitable accounting of profits under § 502(a)(3). Rochow attempted to do the former by pleading two counts for benefits and breach of fiduciary duty solely under § 502(a)(3); however, the district court refused to entertain his claim for benefits under that provision, treating it instead as a claim for wrongfully denied benefits under § 502(a)(1)(B).[57]

The latter approach runs into the Supreme Court's unhelpful dicta in *Varity* that § 502(a)(3) is a "catchall" provision designed to provide relief that § 502 does not elsewhere "adequately remedy."[58] Although the Court did not explicitly say so, its use of the term "adequate" to describe the relief available under § 502(a)(1)(B) is an invocation of the "adequacy doctrine," which provides that a plaintiff may not seek an equitable remedy for a legal right, unless the legal remedy is "inadequate," which requires a showing of irreparable harm.[59] However, Professor Dan Dobbs has observed that "the adequate legal remedy rule has no application where equitable intervention is substantive rather than remedial, as in the case of a constructive trust suit or a suit against a fiduciary."[60] Moreover, George Palmer, the leading authority on restitution, recognized that "equity jurisdiction over accounting by a trustee or other fiduciary usually has been continued even where an adequate remedy at law in quasi contract has become available."[61] Thus, the adequacy doctrine does not preclude a benefits claimant from pursuing benefits under § 502(a)(1)(B) and disgorgement of profits under § 502(a)(3).

The facts of *Rochow* illustrate why disgorgement of profits is needed in the ERISA context. Over the course of 10 years, LINA nearly tripled its returns on Mr. Rochow's wrongfully withheld benefits, proving that ERISA plan administrators have a financial incentive to deny claims even where those denials are later overturned by a court, since profits on the wrongfully denied benefits can far exceed the costs of litigation. Nor is there any reason to believe that *Rochow* is an isolated case. Just last year, LINA was faulted for engaging in unfair claims handling practices on a mass scale in targeted market conduct examinations conducted by the states of Maine, Massachusetts, and California. As a result, LINA entered into a regulatory settlement agreement with the insurance commissioners of nearly every state in which it agreed to re-evaluate all claims denied in 2009 and 2010.[62] Such brazen conduct falls far short of the "higher-than-marketplace" standards ERISA imposes on insurers, yet the ERISA statute as presently interpreted by the courts provides no disincentive to insurers from engaging in such

behavior.[63] Permitting disgorgement of profits under § 502(a)(3) would promote justice by forcing ERISA plan administrators to "internalize" the harmful consequences of their actions.[64]

Contrary to the concerns of the dissent in *Rochow*, permitting disgorgement of profits under § 502(a)(3) will not dramatically expand the scope of ERISA coverage, since – as the majority acknowledged – not every plan administrator who acts arbitrarily and capriciously by denying benefits will have engaged in impermissible self-dealing under § 1104.[65] The Supreme Court has recognized that conflict of interest is but one "factor" that must be weighed in determining whether there has been an abuse of discretion[66]; and there is a well-developed body of jurisprudence addressing when a plan administrator's conflict of interest is entitled to greater weight.[67] Nor would disgorgement necessarily result in burdensome discovery, since basic internet research reveals the return on equity for publicly traded insurers.[68] As the majority in *Rochow* recognized, return on equity is an appropriate metric for measuring profits where the disputed benefits are kept in the plan administrator's general assets.[69] Plan administrators may further minimize discovery costs by segregating disputed benefits into a separate account, which LINA failed to do in *Rochow*.[70]

Finally, the dissent suggests that permitting disgorgement of profits in benefits disputes would contravene ERISA's "remedial" purpose.[71] However, the ERISA statute has multiple, competing purposes.[72] Attempting to distill a single, overriding purpose of the ERISA statute is, therefore, a circular and futile endeavor. The Supreme Court in *Mertens* interpreted Congress's silence on the availability of "extracontractual damages" under ERISA to mean that remedies under § 502(a)(3) are limited to "those categories of relief that were *typically* available in equity."[73] As the Court affirmed in *Amara*, that includes all manners of equitable relief, even monetary relief.[74] And as the *Rochow* court correctly concluded, it encompasses equitable accounting and disgorgement of profits as well.

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[1] 516 U.S. 489, 512 (1996) ("Thus, we should expect that 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' [within the meaning of § 502(a)(3).]"); *see Wilkins v. Baptist Healthcare System, Inc.*, 150 F. 3d 609, 616 (1998) (interpreting *Varity* to foreclose recovery under § 502(a)(3) where the plaintiff has a claim for benefits under § 502(a)(1)(B)).

[2] *See, e.g.*, Mark E. Schmidtke, Rochow v. LINA*: Can it Really be True that ERISA Benefit Claimants Can Recover Millions of Dollars in Disgorged Profits?*, http://blog.ogletreedeakins.com/rochow-v-lina-can-it-really-be-true-that-erisa-benefit-claimants-can-recover-millions-of-dollars-in-disgorged-profits/#sthash.m6MIiM2s.dpuf (Dec. 9, 2013).

[3] *Rochow v. Life Ins. Co. of N. Am.*, 737 F.3d 415, 417 (6th Cir. 2013) (hereafter "Rochow II").

[4] *Id.*

[5] *Rochow v. Life Ins. Co. of N. Am.*, 482 F.3d 860, 863 (6th Cir. 2007) (hereafter "Rochow I").

[6] *Id.*

[7] *Id.*

[8] *Id.* at 864.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*; Rochow II at 418.

[14] Rochow II at 418.

[15] Complaint at 6, *Rochow v. Life Ins. Co. of N. Am.*, No. 04-cv-73628 (E.D. Mich. filed Sept. 17, 2004).

[16] Rochow II at 418.

[17] Rochow I, 482 F.3d at 865 (citing *Hawkins v. First Union Corp. Long-Term Disability Plan*, 326 F.3d 914, 918 (7th Cir. 2003)).

[18] Rochow II, 737 F.3d at 419 n.1.

[19] *Id.* at 419.

[20] *Rochow v. Life Ins. Co. of N. Am.*, No. 04-cv-73628, slip op. at 1-5 (E.D. Mich. June 16, 2009).

[21] Rochow II, 737 F.3d at 419.

[22] *Rochow v. Life Ins. Co. of N. Am.*, 851 F. Supp. 2d 1090, 1097, 1102 (E.D. Mich. 2012).

[23] Rochow II, 737 F.3d at 420.

[24] *Id.* at 420-27.

[25] *Id.* at 424-25 (citing *Wilkins*, 150 F. 3d at 616).

[26] *Id.* at 424 (citing *Hill v. Blue Cross and Blue Shield of Michigan*, 409 F.3d 710, 718 (6th Cir. 2005)).

[27] *Id.* at 424 (citing *Gore v. El Paso Energy Corp. Long Term Disability Plan* 477 F.3d 833, 840-41 (6th Cir. 2007)).

[28] *Id.* at 425.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at 426 (citing *Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1008 (8th Cir. 2004) (permitting an award of prejudgment interest pursuant to § 502(a)(3)).

[33] *Id.* at 426.

[34] *Id.* at 426-27.

[35] *Id.* at 428-31.

[36] *Id.* at 430 (quoting *Nickel v. Bank of Am.*, 290 F.3d 1134, 1138 (9th Cir. 2002) (citing RESTATEMENT OF RESTITUTION § 1 (1937)).

[37] *Id.* at 431.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 431-32.

[41] *Id.* at 434 (citing Parke, 368 F.3d at 1008-09).

[42] *Id.* at 435.

[43] *See id.* at 426 (citing Parke, 368 F.3d at 1008).

[44] *Id.* at 434 (citing Parke, 368 F.3d at 1008-09).

[45] 508 U.S. 248, 260 (1993).

[46] 530 U.S. 238, 250 (2000). The Court justified the disgorgement of profits under § 502(a)(3) by observing:

> As petitioners and *amicus curiae* the United States observe, it has long been settled that when a trustee in breach of his fiduciary duty to the beneficiaries transfers trust property to a third person, the third person takes the property subject to the trust, unless he has purchased the property for value and without notice of the fiduciary's breach of duty. The trustee or beneficiaries may then maintain an action for restitution of the property (if not already disposed of) or disgorgement of proceeds (if already disposed of), and disgorgement of the third person's profits derived therefrom. See, *e.g., Restatement (Second) of Trusts* §§ 284, 291, 294, 295, 297 (1959); 4 A. Scott & W. Fratcher, Law of Trusts § 284, § 291.1, pp. 77-78, § 294.2, p. 101, § 297 (4th ed. 1989) (hereinafter Law of Trusts); 5 *id.* , § 470, p. 363; 1 D. Dobbs, Law of Remedies § 4.7(1), pp. 660-661 (2d ed. 1993); G. Bogert, Law of Trusts and Trustees § 866, pp. 95-96 (rev. 2d ed. 1995).

[47] 534 U.S. 204, 214 n.2 (2002). The Court remarked:

> There is a limited exception [to the equitable requirement of tracing] for an accounting for profits, a form of equitable restitution that is not at issue in this case. If, for example, a plaintiff is entitled to a constructive trust on particular property held by the defendant, he may also recover profits produced by the defendant's use of that property, even if he cannot identify a particular res containing the profits sought to be recovered. See 1 Dobbs § 4.3(1), at 588; *id.*, § 4.3(5), at 608.

[48] *May Dep't Stores Co. v. Fed. Ins. Co.*, 305 F.3d 597, 602 (7th Cir. 2002) (Posner, J.) (citing *SEC v. Lipson*, 278 F.3d 656, 663 (7th Cir. 2002) (Posner, J.)); *see generally Reich v. Continental Casualty Co.*, *33 F.3d 754*, 755-56 (7th Cir. 1994) (Posner, J.) ("Restitution is a remedy historically and today dispensed in law and equity proceedings alike. Whether it is equitable depends merely on whether it is being sought in an equity suit.").

[49] *See May*, 305 F.3d at 602; *Lipson*, 278 F.3d at 663.

[50] 131 S. Ct. 1866, 1879 (2011) (citing RESTATEMENT (SECOND) OF TRUSTS §§ 198(1)-(2) (1957); 4 A. SCOTT, W. FRATCHER, & M. ASCHER, TRUSTS § 24.2.1 (5th ed. 2007)); *see also May*, 305 F.3d at 602 (characterizing suits under § 502(a)(1)(B) as legal suits); *see generally* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 629 (1995).

[51] *See, e.g., Smith v. State Farm Group Long Term Disability Plan,* No. 12 C 9210, 2013 U.S. Dist. LEXIS 121572 (N.D. Ill. Aug. 27, 2013) (denying plaintiff's request for a jury trial in a § 502(a)(1)(B) claim despite *Amara*'s pronouncement that such claims provide legal, not equitable, relief); *see also Zuckerman v. United of Omaha Life Ins. Co.,* No. 09-CV-4819, 2011 U.S. Dist. LEXIS 57875 (N.D. Ill. May 31, 2011) (striking plaintiff's jury demand despite the Supreme Court's acknowledgement in *Knudson* that a claim for

money damages is a legal, as opposed to equitable, suit); *see generally Wardle v. Central States, Southeast and Southwest Areas Pension Fund,* 627 F.2d 820 (7th Cir. 1980) ("Congress' silence on the jury right issue reflects an intention that suits for pension benefits by disappointed applicants are equitable.").

[52] *See* 29 U.S.C. § 1104(a).

[53] *See* 516 U.S. at 514 ("[C]haracterizing a denial of benefits as a breach of fiduciary duty does not necessarily change the standard a court would apply when reviewing the administrator's decision to deny benefits.").

[54] *See Killian v. Concert Health Plan*, 742 F.3d 651, __, 2013 U.S. App. LEXIS 22657, *59 (7th Cir. 2013) (Posner, J., concurring) ("There is no evidence of abuse of discretion in this case and thus of a violation of a fiduciary obligation. There was a breach of contract, but not every such breach is a violation of a fiduciary obligation.").

[55] *See* 1 D. DOBBS, LAW OF REMEDIES, § 6.12, at 253 (2d ed. 1993) (hereafter "DOBBS") ("With the advent of ERISA, the federal statute governing employee retirement benefits, the state-law bad faith cause of action is preempted so far as it deals with employee benefits. The exclusive relief when preemption occurs must then be under ERISA itself, which in some respects may go beyond the requirement of good faith by imposing fiduciary duties.").

[56] For a general overview of the remedy of equitable accounting, *see* 1 DOBBS § 4.3(5), at 608-10 (2d ed. 1993); American Law Institute, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, § 51 (2011); Joel Eichengrun, *Remedying the Remedy of Accounting*, 60 IND. L.J. 463, 463-67 (1985) (discussing the historical origins of the remedy of equitable accounting). *See also SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. N.Y. 1997) (collecting cases) (recognizing that "[t]he primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains").

[57] *Rochow*, No. 04-cv-73628, slip op. at 4 (E.D. Mich. June 16, 2009).

[58] 516 U.S. at 512.

[59] 1 DOBBS § 2.1(1), at 58 (2d ed. 1993); *id.* at § 2.5, at 123; *see May*, 305 F.3d at 602 ("[E]quitable relief is available only when legal relief is not, a condition not satisfied when a plaintiff can obtain all he wants in a suit for benefits.").

[60] 1 DOBBS § 2.5(2), at 129.

[61] 1 George E. Palmer, THE LAW OF RESTITUTION § 1.6, at 35 (1978).

[62] *See,* http://www.maine.gov/pfr/insurance/Admin_Enforcement_Actions/RSA_2013/CIGNA_RSA.pdf.

[63] *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115 (2008).

[64] *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967) (arguing that property rights evolve to force parties to a transaction to "internalize" the external effects, both good and bad, of their actions).

[65] Rochow II, 737 F.3d at 426-27, 431.

[66] *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

[67] *See, e.g., Glenn*, 554 U.S. at 112-15, 118 (2008) (suggesting that an ERISA fiduciary's conflict of interest should be given greater weight when it takes a position financially advantageous to the plan, for instance by disregarding a favorable Social Security award).

[68] *See, e.g.,* http://csimarket.com/stocks/CI-Annual-Return-on-Equity-ROE.html.

[69] Rochow II, 737 F.3d at 429-30; *see also Knudson*, 534 U.S. at 214 n.2. (acknowledging that tracing is not required in an action for an equitable accounting).

[70] *Id.* at 430-31.

[71] *Id.* at 431.

[72] *See Mertens*, 508 U.S. at 251, 262-63 ("There is, in other words, a 'tension between the primary [ERISA] goal of benefiting employees and the subsidiary goal of containing pension costs.'") (citing *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 515, (1981); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148, n.17 (1985).

[73] *Knudson*, 534 U.S. at 210 (quoting *Mertens*, 508 U.S. at 256).

[74] 131 S. Ct. at 1880.