No. 16-1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONALD AND HARRIET VAN LOO,

Plaintiffs-Appellees,

v.

CAJUN OPERATING COMPANY d/b/a CHURCH'S CHICKEN,

Defendant-Appellant.

On Appeal From the United States District Court
for the Eastern District of Michigan
Eastern Division, No. 14-cv-10604

# Brief of the Amicus Curiae, Thomas E. Perez, Secretary of the United States Department of Labor, in support of Plaintiffs-Appellees, Requesting Affirmance

M. PATRICIA SMITH
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor for Plan Benefits Security

ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation
United States Department of Labor
200 Constitution Avenue NW, N-4611
Washington, DC 20210

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## QUESTION PRESENTED

As restated by the Secretary of Labor, as amicus curiae, the question presented is:

Whether beneficiaries of a deceased participant in an employer-sponsored life insurance plan may obtain monetary relief under section 502(a)(3) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(a)(3), in the amount of misrepresented plan coverage to redress a breach of fiduciary duty involving these misrepresentations where there was no direct evidence that the deceased plan participant detrimentally relied on the misrepresentations.

## STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

The Secretary of Labor has primary authority to interpret and enforce the provisions of Title I of ERISA to ensure fair and impartial plan administration and compliance with ERISA's requirements. See 29 U.S.C. §§ 1132, 1135; Donovan v. Cunningham, 716 F.2d 1455, 1462-63 (5th Cir. 1983). The Secretary has a substantial interest in ensuring that plan fiduciaries provide plan participants with accurate information so that plan participants can make informed decisions about their benefits. The Secretary likewise has a substantial interest, both in his own cases and in private litigation, in ensuring that remedies for fiduciary breaches are interpreted broadly to allow courts flexibility to grant make-whole financial relief to plan participants and their beneficiaries who have been harmed by fiduciary

breaches, even or perhaps especially where it is difficult or impossible to establish precisely what would have happened in the absence of a breach. Thus, particularly in cases involving misrepresentations to a plan participant who is now deceased, where it will often be hard to recreate what would have happened if the decedent had been given proper information while alive, the Secretary has a strong interest in rules that resolve doubts concerning the extent of harm against the breaching fiduciaries, and that do not require a showing of detrimental reliance in the strict sense. The Secretary files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

## STATEMENT OF THE CASE

1. Donna Van Loo was a participant in an ERISA-covered life insurance plan (the "Plan"), sponsored and administered by her employer, Defendant Church's. Corrected First Am. Compl. ("Am. Compl.") ¶¶ 14, 10. At the time she died, Van Loo had both basic and supplemental life insurance through policies issued by Reliance Standard Life Insurance Company under the Plan. Id. ¶ 14. She designated her parents, Plaintiffs Donald and Harriet Van Loo, as her beneficiaries. Id. ¶ 2.

Benefits under the Plan were calculated as multiples of the participant's salary. Basic life insurance was roughly equivalent to a participant's annual earnings, while participants could choose up to five times their salary in

supplemental life insurance with certain limitations. See Van Loo v. Cajun Operating Co., No. 14-CV-10604, 2016 WL 3137822, at *1 (E.D. Mich. June 6, 2016). The Plan provided that "'[a]mounts of insurance over $300,000 are subject to our approval of a person's proof of good health.'" Id. (quoting Plan at PageID 2022); see also Am. Compl. ¶ 58.

On November 11, 2007, Van Loo increased her supplemental life insurance by submitting an open enrollment change form for 2008. Am. Compl. ¶ 22. At the time, her salary was $100,000, and she selected supplemental coverage of three times her salary, and thus crossed the $300,000 threshold. Id. ¶¶ 18, 22. The open enrollment form stated: "If you wish to increase your supplemental life coverage, you may be required to submit an evidence of insurability form. If so, one will be mailed to you." Van Loo, 2016 WL 3137822, at *2. But no evidence of insurability form was mailed to her at that time, even though her premiums were accepted. Id.[1]

In 2011, Van Loo submitted another open enrollment change form, increasing her supplemental coverage to four times her salary. Am. Compl. ¶ 28.

[1] Although Church's does not appear to dispute that it did not send her an evidence of insurability form in 2008, in its decision denying her benefits claim against Reliance, the district court deferred to an assertion by Reliance, as claims administrator, that it sent such a form to Van Loo three years later in December 2010, which apparently was not connected with Van Loo submitting any open enrollment change form. Van Loo v. Cajun Operating Co., No. 14-CV-10604, 2015 WL 7889034, at *7 (E.D. Mich. Dec. 4, 2015).

Van Loo maintained this election for 2012 and 2013. Id. ¶¶ 30, 32. After Van Loo submitted her enrollment form for 2013, Church's computer system "generated a message congratulating her on 'completing [her] benefits enrollment for 2013.'" Id. ¶ 33 (revision in original). Throughout her employment, Van Loo submitted her enrollment forms directly to Church's, and Church's deducted Van Loo's premium payments directly from her paycheck. At the time of her death in 2013, Van Loo's premium payments were $179.74 bi-weekly, which included $97.02 for the supplemental insurance. Id. ¶ 34.

In December 2012, Van Loo became ill and went on disability leave. Am. Compl. ¶ 35. Church's subsequently sent Van Loo a letter stating that she would have to submit her life insurance premium payments directly to Church's, since she was no longer receiving regular paychecks. Id. ¶ 37. Van Loo remained on disability – and continued to pay her life insurance premiums directly to Church's – until she passed away on March 4, 2013. Id. ¶¶ 38, 36. Soon after Van Loo's death, plaintiffs submitted a proof of loss claim for $614,000, the full amount of the coverage Van Loo had selected. Id. ¶ 39.

At the time of her death, Van Loo was earning $122,200 per year. Am. Compl. ¶ 39. Her basic life insurance benefit under the Plan was $125,000, and her supplemental benefit was $489,000. Id. ¶ 46. She had not purchased other life insurance. Van Loo, 2016 WL 3137822, at *10.

Plaintiffs' claim for $614,000 was partially denied by Reliance on the basis that Van Loo had not submitted an evidence of insurability form and thus was not eligible for coverage above $300,000. Am. Compl. ¶¶ 40-41. Thus, Reliance denied plaintiffs $314,000 in coverage which their daughter had paid for with bi-weekly premiums and which she had been told she had. Plaintiffs contend that Van Loo never received an eligibility of insurance form and was never informed that she needed to submit a form to be eligible for life insurance benefits above $300,000. Id. ¶¶ 42-43.

2. On February 10, 2014, plaintiffs filed a complaint in the United States District Court for the Eastern District of Michigan alleging five claims against Reliance Standard Life Insurance Company, the life insurance provider and claims administrator, and Church's, the Plan sponsor and plan administrator. On December 1, 2014, the Court granted Reliance's motion to dismiss Counts II through V of the complaint and granted in part and denied in part Church's motion to dismiss. Van Loo v. Cajun Operating Co., 64 F. Supp. 3d 1007, 1033 (E.D. Mich. 2014). The remaining claims were a claim for denial of benefits under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), against Reliance (Count I), and a claim against Church's for equitable relief under ERISA section 502(a)(3), 29 U.S.C, § 1132(a)(3), to remedy fiduciary breaches in misleading Van Loo about her coverage.

On June 5, 2015, plaintiffs filed a corrected amended complaint. Soon after, the plaintiffs and Reliance filed cross-motions for judgment on the administrative record as to Count I. On December 4, 2015, the Court granted Reliance's motion and denied the plaintiffs' motion, concluding that plaintiffs were not entitled to benefits under the terms of the Plan. 2015 WL 7889034, at *11.

Plaintiffs then filed a motion for summary judgment on the remaining claim for equitable relief (Count II) against Church's, and Church's filed a cross-motion for summary judgment. On June 6, 2016, the Court granted the plaintiffs' motion for summary judgment and denied the motion filed by Church's. Van Loo v. Cajun Operating Co., No. 14-CV-10604, 2016 WL 3137822 (E.D. Mich. June 6, 2016).

In its June 6, 2016 decision, the district court concluded that Church's acted as the Plan Administrator for purposes of issuing evidence of insurability forms to Plan participants. 2016 WL 3137822, at *6. It also concluded that no such form was mailed to Van Loo in 2008. Id. at *2. It then held that "Church's communications with Van Loo throughout her employment constituted material misrepresentations regarding her level of effective coverage." Id. at *7. These communications included accepting Van Loo's enrollment forms each year, sending a computer-generated message in 2012 congratulating Van Loo on having completed her benefits enrollment, stating on some of the enrollment forms that an evidence of insurability form would be mailed to Van Loo if one was needed,

deducting premium payments – which increased as Van Loo increased her coverage – from Van Loo's paycheck, and directing Van Loo to send her premium payments to Church's and acknowledging that they had been received when she was out on disability leave. Id. The district court held that these misrepresentations of coverage constituted a fiduciary breach under ERISA section 404, 29 U.S.C. § 1104, id. at *9, and found Church's liable to plaintiffs under ERISA section 502(a)(3), 29 U.S.C, § 1132(a)(3), in the amount of $314,000, the amount of the additional life insurance proceeds to which they, as beneficiaries, would have been entitled but for Church's fiduciary breaches. Id. at *11.

## SUMMARY OF ARGUMENT

Under the Supreme Court's decision in CIGNA Corp. v. Amara, 563 U.S. 421 (2011), plaintiffs, beneficiaries under their deceased daughter's life insurance plan, were not required to establish detrimental reliance for the court to surcharge Church's in the amount of the insurance coverage that it misled the decedent into thinking she had obtained. Instead, in order to obtain this remedy under the flexible approach applied by courts of equity, the Van Loos were merely required to establish that they had been harmed by the fiduciary breaches committed by Church's, breaches which Church's does not challenge on appeal.

Such harm need not be shown through direct evidence of what would have happened in the absence of a breach, evidence that would often be difficult if not

impossible to obtain, particularly where the plan participant is deceased. Instead, circumstantial evidence of harm may suffice. And, as here, where the beneficiaries of a deceased plan participant have established fiduciary breaches based on misrepresentations to the decedent about life insurance coverage, a showing that the decedent elected the challenged coverage under the plan, paid premiums and did not seek alternative coverage, suffices to establish harm under Amara. Thus, the district court quite rightly rejected Church's argument that it was entitled to summary judgment because it offered proof that Reliance would have rejected her for supplemental coverage above $300,000 given her medical conditions or because Reliance evidently sent her an eligibility form two years later. As the district court found, the uncontested evidence established that Church's fiduciary breaches in misrepresenting her life insurance coverage caused her to lose, irrevocably, the ability to make alternate arrangements for her parents upon her death at the time that she passed the $300,000 threshold.

Because a strict showing of detrimental reliance is not required to obtain a surcharge remedy against a breaching fiduciary of the sort sought here, the plaintiffs were not required to show that their daughter's reliance on Church's was reasonable. And, in any event, the district court properly rejected Church's argument that Van Loo's reliance was unreasonable given the language in the governing policy requiring her to submit an evidence of insurability form because

there was no evidence the policy had been made available to her, and the materials that were available merely stated that a form would be provided to her if necessary.

Finally, even if some showing of detrimental reliance were required, this Court has recently made clear that the detriment need not be economic, but may be a loss of an opportunity to improve (or protect) one's position. And while it is certainly possible that Van Loo might have had to pay more for alternative coverage had she been turned down by Reliance, the district court quite correctly resolved any doubts about this against Church's. Resolving doubts about the extent of the harm against the breaching fiduciary is consistent with longstanding decisions of this Circuit and most others.

## ARGUMENT

### THE DISTRICT COURT IMPOSED A PROPER REMEDY UNDER ERISA SECTION 502(a)(3) FOR THE FIDUCIARY BREACHES COMMITTED BY CHURCH'S IN MISLEADING DECEDENT DONNA VAN LOO CONCERNING THE EXTENT OF HER LIFE INSURANCE COVERAGE BY REQUIRING CHURCH'S TO PAY HER BENEFICIARIES THE AMOUNT OF THE MISREPRESENTED COVERAGE

In its brief on appeal, Church's does not challenge the district court's conclusion that it was acting in a fiduciary capacity in its communications with the decedent; nor does it challenge that its actions were misleading, and thus constituted breaches of its fiduciary duties. Appellant's Br. 17. This is not surprising given the case law in this Circuit. Drennan v. Gen. Motors Corp., 977

F.2d 246, 251 (6th Cir. 1992) ("[m]isleading communications to plan participants 'regarding plan administration (for example, eligibility under a plan, the extent of benefits under a plan) will support a claim for a breach of fiduciary duty'") (quoting Berlin v. Mich. Bell Tel. Co., 858 F.2d 1154, 1163 (6th Cir. 1988)). Instead, the sole contention made by Church's on appeal is that "Plaintiffs are not entitled to relief" under ERISA section 502(a)(3), "because, even assuming Church's was acting in a fiduciary capacity, there is no evidence that Ms. Van Loo detrimentally relied on misrepresentations regarding her level of coverage." Appellant's Br. 15. In this regard, they argue that "[t]here is . . . no evidence that Ms. Van Loo was discouraged from obtaining other supplemental life insurance benefits, or, more importantly, that she could have had she tried." Id.

The district court correctly rejected Church's argument, however, based on uncontested, albeit circumstantial, evidence, rather than direct evidence. Quoting the Sixth Circuit's decision in James v. Pirelli Armstrong Tire Corp., 305 F.3d 439, 449 (6th Cir. 2002), the district court concluded that Van Loo "relied on [Church's] misrepresentations to [her] detriment." 2016 WL 3137822, at *10 (noting that the plaintiffs in James "testified that the representations that their health benefits would remain the same for the rest of their lives had encouraged them to take early retirement"). The district court also relied on another district court in the Sixth Circuit that held that a plaintiff "'reasonably relied to her detriment upon the

misrepresentations of [a plan fiduciary] by paying premiums and by foregoing alternative coverage.'" Id. (quoting Rainey v. Sun Life Assur. Co. of Canada, No. 3-13-0612, 2014 WL 4979335, at *2 (M.D. Tenn. Oct. 6, 2014)). Unlike in James, however, which did not involve life insurance, the district court noted that Van Loo could not testify or be deposed in the litigation because she was deceased. 2016 WL 3137822, at *10. Nevertheless, the court reasoned that "[t]he fact that Van Loo continued to enroll in – and increase the amount of – her supplemental life insurance shows that she expected those increases to be effective." Id. And noting that nothing in the record suggested that Van Loo sought alternative coverage, the court further reasoned that "it is obvious that a plan participant, operating under the belief that her elected coverage was effective, would not seek coverage elsewhere." Id.

The uncontested facts upon which the district court relied – that the decedent paid premiums and did not get alternative coverage – suffice to establish a circumstantial case of harm and causation. This is because, under the Supreme Court's decision in CIGNA Corp. v. Amara, 563 U.S. 421 (2011), there is no strict requirement that plaintiffs establish detrimental reliance to show that they have been harmed by a fiduciary breach in misleading them about coverage in order to obtain a remedy. In Amara, the Court held that where a plaintiff is seeking the remedy of surcharge against a breaching fiduciary, courts should apply "a flexible

approach" to determining whether, under a preponderance of the evidence standard, a participant or beneficiary has been harmed by a fiduciary breach, an approach which "belies a strict requirement of 'detrimental reliance.'" Id. at 444 (quoting G. Bogert & G. Bogert, Trusts and Trustees § 861, at 4, that "equity courts 'would mold the relief to protect the rights of the beneficiary according to the situation involved'").

The plaintiffs in this case specifically sought, among other remedies, to surcharge Church's for the loss of the insurance coverage. In fact, in an earlier opinion on defendants' motion to dismiss, the district court expressly noted that plaintiffs could not proceed on an equitable estoppel claim, which requires detrimental reliance, but rather could proceed instead on their claim for equitable remedies under section 502(a)(3). Van Loo v. Cajun Operating Co., 64 F. Supp. 3d 1007, 1028 (E.D. Mich. 2014) (dismissing equitable estoppel claim based on circuit precedents – Sprague v. Gen. Motors Corp., 133 F.3d 388, 403 (6th Cir. 1998), and Marks v. Newcourt Credit Grp., Inc., 342 F. 3d 444, 456 (6th Cir. 2003) – that do not allow equitable estoppel to vary the terms of unambiguous plan documents, even if a plaintiff has not seen them). And, while the district court cited James, a pre-Amara case from the Sixth Circuit requiring detrimental reliance for claims based on fiduciary misrepresentation, and held that the plaintiffs met that standard, its flexible approach in making this finding is certainly consistent

with a broader surcharge remedy as envisioned in Amara and can therefore be affirmed on that basis. See Jennings v. Stephens, -- U.S. --, 135 S. Ct. 793, 796 (2015) (the "prevailing party" may "seek[ ] to enforce a district court's judgment," without relying on "its reasoning").

It is true that this Court has cited James in at least one post-Amara case as requiring detrimental reliance in a misrepresentation case. See Deschamps v. Bridgestone Americas, Inc. Salaried Emps. Ret. Plan, 840 F.3d 267, 273 (6th Cir. 2016). But the plaintiffs in that case were asking for an equitable estoppel remedy, and it is not clear whether they additionally asked for surcharge, as the plaintiffs did in this case. Id. Certainly there was no discussion of surcharge or of the Supreme Court's discussion of surcharge in Amara in that decision, and for that reason, we think this discussion in Deschamps is best read as limited to the estoppel context, and not as a rejection of the Supreme Court's conclusion in Amara that a showing of detrimental reliance is not required for a surcharge remedy.

In fact, in two recent decisions, the Sixth Circuit has taken a flexible approach to harm in similar contexts and has recognized that detrimental reliance is not necessary to obtain a surcharge remedy. In Stiso v. International Steel Group., 604 F. App'x 494, 496 (6th Cir. 2015) (unpublished), the plaintiff only sought equitable estoppel for the defendants' disloyal interpretation of the plan

documents, but the court acknowledged that "[t]he Supreme Court in Amara held that the relevant substantive provisions of ERISA do not set forth any particular standard for determining harm." Id. at 500. On this basis the Sixth Circuit held that the plaintiff could seek "surcharge" for fiduciary misconduct without establishing detrimental reliance. Id. Similarly, in Brown v. United of Omaha Life Ins. Co., No. 15-4293, 2016 WL 4887516, at *7 (6th Cir. Sept. 14, 2016) (unpublished), the Sixth Circuit agreed with two sister circuits in recognizing the "broad availability of equitable remedies where a plan fiduciary accepts premiums and then denies paid-for benefits pursuant to the terms of the plan." In Brown, the insurance company defendant accepted premiums for supplemental life insurance but then ultimately denied the plaintiff coverage because he failed to submit "evidence of insurability." Id. at *1. The court recognized that equitable remedies, such as surcharge, reformation of the contract, or estoppel, might be appropriate. Id. at *6.

The district court properly concluded that, by electing additional coverage through her ERISA plan, paying the premiums for that coverage and foregoing alternative coverage, Van Loo relied on and was thus harmed by Church's breaches in misleading her about her coverage. Indeed, it is apparent that Church's actual complaint is that it was held liable for the amount of misstated coverage even though the Van Loos did not (and could not) offer any direct proof of reliance,

such as affidavits or deposition testimony from their daughter about what she would have done if the breach had not taken place, or indeed make any assertions about exactly what would have happened had their daughter been given the evidence of insurability form in 2008. But, particularly in a case such as this one concerning life insurance benefits, where the covered party is of course deceased and cannot offer direct proof in the form of testimony, plan beneficiaries will often be hard pressed to offer anything other than indirect proof of harm caused by the fiduciary breaches in misleading a participant about coverage. In this context, the uncontested fact that the decedent sought and paid for supplemental coverage and did not seek coverage elsewhere ought to be sufficient to establish a circumstantial case of harm, as the district court held.

Despite the offer of proof from Church's that Reliance would not have allowed Van Loo to obtain the supplemental benefits given her health conditions, it is indisputable, as the district court recognized, that she lost the opportunity to obtain alternative coverage or to otherwise provide for her parents upon her death, as she evidently wanted to do. 2016 WL 3137822, at *11 (noting that, if denied coverage under her plan, "she would have been in a position to make informed decisions about how to ensure that her beneficiaries would receive the amount of money she wanted them to receive upon her death"). Thus, based on the Supreme Court's suggestion in Amara, the actual harm necessary to obtain a surcharge

remedy from a breaching fiduciary may consist of the loss by a plan participant of her rights "protected by ERISA or its trust-law antecedents," 563 U.S. at 444, in this case, the right to be given the truthful information necessary to protect her interests in providing for her parents upon her death. It is hard to imagine that "Congress would have wanted to bar [such an] employee[] from relief." Id.

Although Church's insists that any reliance on its collection and acceptance of premiums and its letter congratulating Van Loo on her coverage was not reasonable given that the policy required her to submit an evidence of insurability form, Appellant's Br. 28-29, reasonable reliance is a requirement to obtain equitable estoppel, but is not a requirement for surcharging a fiduciary for the consequences of its breaches. Compare Amara, 563 U.S. 443-44, with Sprague, 133 F.3d at 404 ("estoppel requires reasonable or justifiable reliance . . . [and such] reliance can seldom, if ever, be reasonable or justifiable if it is inconsistent with the clear and unambiguous terms of plan documents available to or furnished to the party").

Because promissory estoppel is, in effect, an alternative way to get a plan to pay benefits, there is some sense to imposing a requirement that the plaintiff show ambiguity in the plan terms in order to establish that any reliance on the misrepresentation was reasonable. This is because, where a participant or beneficiary obtains benefits under a promissory estoppel theory, these benefits are

paid by the plan, and if the plan is funded by a trust, this presumably unexpected drain on the assets of the trust could affect the other plan participants. Conversely, a more flexible approach to establishing harm in the surcharge context makes sense. Where a plan participant or beneficiary seeks to surcharge a breaching fiduciary for the consequences of its breach, the plan and other participants will not be directed affected in any way, and the terms of the plan and the bargain struck by the parties also are not directly implicated.

In any event, the district court determined that Church's offered no evidence that the policy was posted on the company's intranet or that it was otherwise made available to Van Loo. 2016 WL 3137822, at *11. And "[t]he materials that were available merely repeated the statement Church's made on its open enrollment forms – that if an EIF [evidence of insurability form] were needed, one would be provided." Id. While Church's contends on appeal that undisputed testimony that the district court accepted during an earlier ruling in the case established that Reliance mailed an EIF in 2010, the district court logically reasoned in its summary judgment decision that, "even accepting that Van Loo received the EIF that Reliance mailed in 2010, this was too late: Van Loo was entitled to apply for coverage based on her health at the time she crossed the $300,000 guaranteed issue threshold, which was 2008." Id. (citing Silva v. Metro. Life Ins. Co., 762 F.3d 711, 718 (8th Cir. 2014), for the proposition that insurance companies are unlikely

to allow someone who is very ill to take out a large life insurance policy "shortly before death").

Finally, although Church's made and continues to make much of the fact that Van Loo had Hepatitis C (and other health issues) when she applied for supplemental coverage above the threshold in 2008, and insists and offered some proof that Reliance would have denied coverage on that basis, Appellant's Br. 17-19, the district court, as we have discussed, was not convinced that she could not have obtained alternative life insurance coverage in the amount she desired. The court quite correctly noted that "the point is that Van Loo was entitled to be evaluated in 2008, not that she was entitled to a particular outcome in terms of coverage." 2016 WL 3137822, at *11. And, as the court pointed out, had she been denied coverage at that time, "she would have been in a position to make informed decisions about how to ensure that her beneficiaries would receive the amount of money she wanted them to receive upon her death," including by seeking "additional coverage from another provider." Id. But because "Church's took this choice away from Van Loo when it failed to send her an EIF in 2008 and yet still led her to believe that her supplemental coverage election became effective," the court quite rightly concluded that her beneficiaries made the requisite showing of harm to be entitled to the amount of coverage that Van Loo elected. Id.

Even if some showing of "detrimental reliance" were required here, this Court has ruled recently that "[t]he prejudice, or detriment, suffered must be 'actual and substantial,' but may be proved by loss of opportunity to improve one's position.'" Deschamps 2016 WL 6093183, at *5 (citation omitted). Moreover, the harm does not need to be "economic" at all; instead, a lost opportunity to explore other options may suffice. Id. at *6. In this case, although it is certainly possible that Van Loo would have had to pay more for any insurance coverage in light of her health problems if she had been denied by Reliance as Church's contends, Appellant's Br. 19, Church's did not present evidence establishing this, and any doubts in this regard go to the extent of the remedy and should be resolved in the plaintiffs' favor. E.g., Sec'y of U.S. Dep't of Labor v. Gilley, 290 F.3d 827, 830 (6th Cir. 2002); Donovan v. Bierwirth, 754 F.2d 1049, 1056 (2d Cir. 1985); Leigh v. Engle, 727 F.2d 113, 138-39 (7th Cir. 1984); Roth v. Sawyer-Cleator Lumber Co., 61 F.3d 599, 602 (8th Cir. 1995); Kim v. Fujikawa, 871 F.2d 1427, 1430-31 (9th Cir. 1989); see also Deschamps, 840 F.3d at 276 (affirming summary judgment on "detrimental reliance" theory to plaintiff because the defendant did not establish plaintiff would be worse off if he had the opportunity to explore other options).

## CONCLUSION

For the reasons stated above, the Secretary respectfully requests that the Court affirm the decision of the district court.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor for
Plan Benefits Security

/s Elizabeth Hopkins
ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation
United States Department of Labor
Plan Benefits Security Division
200 Constitution Ave., N.W., N-4611
Washington, D.C. 20210
(213) 894-3283

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 32(a)(7), I certify that this amicus brief contains 4688 words.

Dated: November 30, 2016

/s Elizabeth Hopkins
ELIZABETH HOPKINS
United States Department of Labor
Plan Benefits Security Division
200 Constitution Ave., N.W., N-4611
Washington, D.C. 20210
Telephone: (213) 894-3283
Email: hopkins.elizabeth@dol.gov

## CERTIFICATE OF SERVICE

I hereby certify that on this day, November 30, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s Elizabeth Hopkins
ELIZABETH HOPKINS
United States Department of Labor
Plan Benefits Security Division
200 Constitution Ave., N.W., N-4611
Washington, D.C. 20210
Telephone: (213) 894-3283
Email: hopkins.elizabeth@dol.gov