No. 15-______

In The
Supreme Court of the United States

TODD ROCHOW and JOHN ROCHOW, Personal Representatives of the Estate of Daniel J. Rochow,

Petitioners,

v.

LIFE INSURANCE COMPANY OF NORTH AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

ERIC SCHNAPPER*
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

ERIK W. SCHARF
SCHARF APPELLATE GROUP
1395 Brickell Ave.
Suite 800
Miami, FL 33131
(305) 665-0475

JOHN J. COOPER
COOPER LAW FIRM, PLLC
1615 W. Big Beaver Rd.
Suite A6
Troy, MI 48084

Counsel for Petitioners

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

When a benefit plan, in violation of ERISA, wrongfully denies or delays payment of a benefit, the court may award relief because of the improper delay in the payment of that benefit. The question presented is:

Should the amount of a remedy based on the improper delay in the payment of a benefit be based on:

(1) only the amount needed to redress the loss that the beneficiary sustained as a result of the wrongful delay (the rule in the Sixth Circuit),

(2) either the amount needed to redress the loss that the beneficiary sustained as a result of the wrongful delay or the amount needed to disgorge any gain improperly realized by the plan as a result of that wrongful delay (the rule in the Second, Third, Seventh, Eighth and District of Columbia Circuits),

(3) the most analogous state *pre*judgment interest rate (the rule in the Fifth, Tenth and Eleventh Circuits), or

(4) the § 1961 *post*-judgment interest rate (the rule in the Ninth Circuit)?

PARTIES

The parties are set out in the caption.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	3
Factual Background	4
Proceedings Below	5
Reasons for Granting the Writ	13
I. There Is A Deeply Entrenched and Important Circuit Conflict Regarding The Grounds On Which and Rate At Which Redress May Be Awarded In An ERISA Case for The Delay Between The Occurrence and Correction of A Violation	15
A. The Sixth Circuit Limits Remedies To The Amount Needed To Make The Beneficiary Whole	16
B. Five Circuits Authorize Remedies Intended To Prevent Unjust Enrichment	18
C. Three Circuits Utilize State Prejudgment Interest Rates	26
D. The Ninth Circuit Utilizes The Post-Judgment Interest Rate In § 1961	30

TABLE OF CONTENTS – Continued

Page

E. The Circuit Conflict Is Well Recognized ... 32

II. The Question Presented Is of Exceptional Importance ... 34

Conclusion ... 38

APPENDIX

Opinion of the United States Court of Appeals (en banc), March 5, 2015 ... 1a

Order of the District Court for the Eastern District of Michigan, March 23, 2012 ... 74a

Order of the District Court for the Eastern District of Michigan, June 16, 2009 ... 100a

Opinion of the United States Court of Appeals, April 3, 2007 ... 120a

Fifth Circuit District Court Cases Applying State Prejudgment Rates ... 132a

Tenth Circuit District Court Cases Applying State Prejudgment Rates ... 134a

Eleventh Circuit District Court Cases Applying State Prejudgment Rates ... 136a

Ninth Circuit District Court Cases Applying Section 1961(a) Rate ... 137a

State Interest Statutes Utilized in ERISA Cases in the Fifth, Eighth and Eleventh Circuits ... 141a

TABLE OF AUTHORITIES

Page

CASES

Algie v. RCA Global Commc'ns, Inc., 891 F.Supp. 875 (S.D.N.Y. 1994) 25

Amara v. Cigna Corp., 559 F.Supp.2d 192 (D. Conn. 2008) 34

Anthuis v. Cold Industries Operating Corp., 971 F.2d 999 (3d Cir. 1992)......................................20

Biava v. Insurers Administrative Corp., 1995 WL 94461 (10th Cir. March 1, 1995)................28, 33

Blankenship v. Liberty Life Assurance Co. of Boston, 486 F.3d 620 (9th Cir. 2007) 31

Blanton v. Anzalone, 813 F.2d 1574 (9th Cir. 1987)...30

Brooking v. Hartford Life & Accident Ins. Co., 2007 WL 781333 (E.D. Ky. March 12, 2007)..........30

Christianson v. Poly-America, Inc. Medical Benefit Plan, 412 F.3d 935 (8th Cir. 2005)............24

CIGNA Corp. v. Amara, 131 S.Ct. 1866 (2011) ...13, 37

City of Milwaukee v. Cement Division, National Gypsum Co., 515 U.S. 189 (1995)...........................35

Clair v. Harris Trust and Savings Bank, 190 F.3d 495 (7th Cir. 1999) 21, 34

Dalal v. Alliant Techsystems, Inc., 72 F.3d 137, 1995 WL 747442 (10th Cir. 1995)...........................28

Day v. AT&T Disability Income, 2015 WL 1567857, ___ Fed.Appx. ___ (9th Cir. April 9, 2015)..31

TABLE OF AUTHORITIES – Continued

Page

DeGrado v. Jefferson Pilot Financial Ins. Co., 2009 WL 1198173 (D. Colo. May 1, 2009) 32

DeGrado v. Jefferson Pilot Financial Ins. Co., 367 F.Supp.2d 1315 (D. Colo. 2005) 32

Dunnigan v. Metro. Life Ins. Co., 277 F.3d 223 (2d Cir. 2002) 26, 33

Edmonds v. Hughes Aircraft Co., 1998 WL 782016 (E.D. Va. Nov. 6, 1998) 32

Florence Nightingale Nursing Service v. Blue Cross/Blue Shield of Alabama, 41 F.3d 1476 (11th Cir. 1995)..28

Ford v. Uniroyal Pension Plan, 154 F.3d 613 (6th Cir. 1998) 11, 29, 30

Fotta v. Trustees of United Mine Workers of America, 165 F.3d 209 (3d Cir. 1998) 19, 33

Garrett v. Principal Life Insurance Co., 557 Fed.Appx. 734 (10th Cir. 2014)...............................27

General Motors Corp. v. Devex Corp., 461 U.S. 648 (1983)...35

Grosz-Salomon v. Paul Revere Life Ins. Co., 237 F.3d 1154 (9th Cir. 2001)..31

Hansen v. Continental Ins. Co., 940 F.2d 971 (5th Cir. 1991) 27, 32

Hayes v. Arthur Young & Co., 1994 WL 463493 (9th Cir. Aug. 26, 1994)..31

Hizer v. General Motors Corp., Allison Gas Turbine Div., 888 F.Supp. 1453 (S.D. Ind. 1995) ...15, 33

TABLE OF AUTHORITIES – Continued

Page

Jones v. Unum Life Ins. Co. of America, 223 F.3d 130 (2d Cir. 2000) 15, 25

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990) 35

Kerr v. Charles F. Vatterott & Co., 184 F.3d 938 (8th Cir. 1999) 23, 25

Kinser v. Plans Administration Committee of Citigroup, Inc., 2008 WL 762200 (M.D. Ga. March 18, 2008) 29

Kramer v. Paul Revere Life Ins. Co., 2007 WL 1218715 (E.D. Mich. April 23, 2007) 29

Leigh v. Engle, 727 F.3d 113 (7th Cir. 1984) 23

Loeffler v. Frank, 486 U.S. 549 (1988) 35

Lorenzen v. Employees Retirement Plan of Sperry & Hutchinson Co., 896 F.2d 228 (7th Cir. 1990) 21

Loucks v. Liberty Life Assurance Co. of Boston, 2004 WL 3255332 (W.D. Mich. Nov. 22, 2004) 30

Lyons v. Georgia-Pacific Corp. Salaried Employees Retirement Plan, 196 F.Supp.2d 1260 (N.D. Ga. 2002) 29

Mansker v. TMG Life Ins. Co., 54 F.3d 1322 (8th Cir. 1995) 24

Masters v. Supplemental Executive Retirement Plan for Automated Packaging Systems, Inc., 2009 WL 1183377 (N.D. Ohio May 1, 2009) 29

Page

May Department Stores Co. v. Federal Insurance Co., 305 F.3d 597 (7th Cir. 2002)..............22, 34

Mertens v. Hewitt Associates, 508 U.S. 248 (1993)...36

Monessen Southwestern Rwy. Co. v. Morgan, 486 U.S. 330 (1988)...35

Moore v. CapitalCare Inc., 461 F.3d 1 (D.C. Cir. 2006)..26

National Security Systems, Inc. v. Iola, 700 F.3d 65 (3d Cir. 2012)...20

Nelson v. E G & G Energy Measurements Group, Inc., 37 F.3d 1384 (9th Cir. 1994)...............31

Nickel v. Bank of Am. Nat'l Trust & Sav. Ass'n, 290 F.3d 1134 (9th Cir. 2002)..................................13

Novella v. Westchester County, 661 F.3d 128 (2d Cir. 2011)..25

Parke v. First Reliance Standard Life Ins. Co., 368 F.3d 999 (8th Cir. 2004) 8, 24, 34

Perez v. Bruister, 54 F.Supp.3d 629 (S.D. Miss. 2014)..34

Rivera v. Benefit Trust Life Ins. Co., 921 F.2d 692 (7th Cir. 1991) 22, 23

Rochow v. Life Ins. Co. of North America, 737 F.3d 415 (6th Cir. 2013) 1, 9, 11

Roden v. Amerisourcebergen, 186 Cal.App. 4th 620 (4th App.Dist. 2010)...33

TABLE OF AUTHORITIES – Continued

Page

Rybarczyk v. TRW, Inc., 1997 WL 580609 (N.D. Ohio Sept. 5, 1997) 32

Rybarczyk v. TRW, Inc., 235 F.3d 975 (6th Cir. 2000) 17, 29, 30

Schumacher v. AK Steel Corp. Retirement Accumulation Pension Plan, 711 F.3d 675 (6th Cir. 2013) 18

Sereboff v. Mid Atlantic Medical Services, Inc., 547 U.S. 356 (2006) 36

Short v. Central States, Southeast & Southwest Areas Pension Fund, 729 F.2d 567 (8th Cir. 1984) 19, 23

Skredtvedt v. E.I. DuPont de Nemours, 372 F.3d 193 (3d Cir. 2004) 19

Smith v. American Int'l Life Assurance Co. of New York, 50 F.3d 956 (11th Cir. 1995) 28, 32

Stroh Container Co. v. Delphi Industries, Inc., 783 F.2d 743 (8th Cir. 1986) 20, 25

Transitional Learning Center at Galveston v. Metropolitan Life Ins. Co., 1996 WL 625412 (5th Cir. Oct. 19, 1996) 27

Trustmark Life Ins. Co. v. University of Chicago Hospital, 207 F.3d 876 (7th Cir. 2000) 21

United States ex rel. Canion v. Randall & Blake, 817 F.2d 1188 (5th Cir. 1987) 32

Varity Corp. v. Howe, 516 U.S. 489 (1996) 13

TABLE OF AUTHORITIES – Continued

Page

Weber v. GE Group Life Assurance Co., 541 F.3d 1002 (10th Cir. 2008) 27, 28

Western Pacific Fisheries, Inc. v. S.S. President Grant, 730 F.2d 1280 (9th Cir. 1984).......................31

Zumstein v. Great-West Life Assurance Co., 1992 WL 124424 (9th Cir. June 9, 1992)................31

STATUTES

28 U.S.C. § 1254(1)...2

28 U.S.C. § 1961 ....16, 30, 31, 32

28 U.S.C. § 1961(a)..*passim*

Employee Retirement Income Security Act

29 U.S.C. §§ 1001 *et seq.* ....*passim*

29 U.S.C. § 1132 ....11, 12

29 U.S.C. § 1132(a)......................................2, 3, 9, 20

29 U.S.C. § 1132(a)(1)(B) 11, 18

29 U.S.C. § 1132(a)(3) ....*passim*

29 U.S.C. § 1132(a)(3)(B) 8, 9, 11, 24

29 U.S.C. § 1132(a)(3)(B)(ii)...................................12

Mich. Comp. Law § 438.31 30

BRIEFS

Joint Merits Response Brief of Plaintiff-Appellee and Appellee, *Chao v. Consulting Fiduciaries, Inc.*, Nos. 08-1228 and 08-2254 (7th Cir.) 18

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Restatement (Third) of Trusts, § 95..........................13

Petitioners Todd Rochow and John Rochow, personal representatives of the Estate of Daniel J. Rochow, respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on March 5, 2015.

OPINIONS BELOW

The March 5, 2015 en banc opinion of the court of appeals, which is reported at 780 F.3d 364 (6th Cir. 2015) (en banc), is set out at pp. 1a-73a of the Appendix.[1] The March 23, 2012 order of the district court, which is reported at 851 F.Supp.2d 1090 (E.D.Mich. 2012), is set out at pp. 74a-99a of the Appendix. The June 16, 2009 order of the district court, which is not officially reported, is set out at pp. 100a-119a of the Appendix. The April 3, 2007 opinion of the court of appeals, which is reported at 482 F.3d 860 (6th Cir. 2007), is set out at pp. 120a-131a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on March 5, 2015. On May 14, 2015, Justice Kagan extended the deadline for filing the petition until

[1] An earlier panel decision, reported at 737 F.3d 415 (6th Cir. 2013), was withdrawn.

August 2, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 502(a) of the Employee Retirement Income Security Act, 29 U.S.C. § 1132(a) provides in pertinent part:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought –
>
> (1) by a participant or beneficiary –
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his 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;
>
> * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to

enforce any provisions of this subchapter
or the terms of the plan....

STATEMENT OF THE CASE

The Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, establishes detailed standards governing certain benefit plans established by employers for their employees. The covered benefit plans may provide such things as retirement income, medical coverage, and (in this case) disability benefits. Violations of ERISA take a variety of forms, including wrongful denials of a benefit, wrongful delays in the payment of a benefit, and improper actions that adversely affect the amount of funds available to pay benefits.[2] Section 502(a) authorizes courts to fashion appropriate remedies for such violations. 29 U.S.C. § 1132(a).

In fashioning such remedies, courts usually must decide what additional remedy to provide to address the consequences of the passage of time between when a violation first occurs (e.g., when a benefit is wrongfully denied) and when that violation is ultimately corrected (e.g., when the benefit is finally paid). Often, although not invariably, that type of redress is referred to as "prejudgment interest."

[2] The remedial issue presented in this case arises in a variety of contexts. For simplicity we refer to the most common context, the improper denial of a benefit.

There is a longstanding, multi-faceted conflict among the courts of appeals regarding the standard governing the amount of this type of remedy, and the rate at which it should be calculated. This issue arises in the vast majority of all successful ERISA cases, and it often has substantial financial significance; in the instant case millions of dollars in illicitly gained profits are at issue. This Court has repeatedly granted review to resolve issues about the availability or amount of prejudgment interest, and should do so here.

Factual Background

In mid-2001, the late Daniel J. Rochow was a high-level employee of Arthur J. Gallagher & Co., an insurance company. Rochow was covered by a disability policy issued by Life Insurance Company of North America ("LINA"). The policy provided for substantial disability benefits if an employee because of sickness became "unable to perform all material duties" of his regular occupation. The benefits were available only if the covered individual was still an employee when he or she became unable to perform those duties.

In 2001, Rochow began to experience increasing cognitive problems, particularly loss of short-term memory. In July of 2001, Rochow was demoted because of the effect of that then-unexplained illness. "[A]s a result of his inability to perform [even the] job [to which he had been demoted]," Gallagher in 2001 forced Rochow to resign, effective on January 2, 2002.

App. 123a. By February 2002, Rochow's medical condition required hospitalization, and he was diagnosed with HSV-Encephalitis, a rare and severely debilitating brain infection. In March 2002, Rochow was placed in an assisted living facility where he remained until his death in 2008. App. 124a.

In late 2002, Rochow's conservator filed a claim for long-term disability benefits with LINA. Rochow supplemented his application with a statement by a company vice-president who identified the material duties of Rochow's position with Gallagher, and stated that during 2001 – while he was still employed – Rochow "was not able to perform the material duties of his job due to a lack of memory." The vice-president stated "that Rochow was demoted, and ultimately terminated, because he could no longer perform the duties required of his position." App. 130a.

LINA denied Rochow's benefits and rejected a series of appeals. LINA maintained that because Rochow continued to be employed until January 2, 2002, he could not yet have been disabled. It reasoned that Rochow could only have become disabled after he had resigned, at a point in time when he was no longer covered by the disability insurance policy.

Proceedings Below

(1) In September 2004, Rochow sued LINA. His complaint stated claims under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et*

seq. ("ERISA"). Following cross-motions for summary judgment, the district judge in June 2005 concluded that LINA had acted arbitrarily and capriciously in finding that Rochow was not disabled while still employed.

That finding was upheld on appeal. App. 131a. "[T]he entire record ... confirm[s] the district court's ruling that LINA's denial of benefits was arbitrary and capricious and unsupported by substantial evidence." *Id.* Later in 2007, five years after Rochow had first applied for disability benefits, LINA finally began making partial monthly disability payments,[3] and it paid him a lump sum of approximately $300,000 in partial payment for the benefits that had improperly been withheld between 2002 and 2007. In 2009, after Rochow had died, LINA paid his estate an additional sum of approximately $420,000 of unlawfully withheld disability benefits. Subsequently LINA made a third payment of about $28,000, which, in combination with the earlier payments, rectified most of the principal underpayment.

On remand following the 2007 Sixth Circuit decision, Rochow sought additional relief because of the lengthy delay in the payment of the disability benefits. In June 2009, the district court held that Rochow's estate was entitled to that type of additional

[3] The district court later concluded that the payments that began in 2007 were lower than required by Rochow's policy. App. 108a-09a.

relief. The district court emphasized that LINA had breached its fiduciary duty to Rochow when it withheld for years the benefits to which he was entitled.[4] The court made extensive findings that LINA had acted in bad faith. It concluded that LINA had rejected Rochow's claims based on "[n]on-existent policy requirements,"[5] had asserted a "[k]nowingly false rationale for [denying Rochow's second application]," and had sandbagged Rochow by waiting until the administrative record had closed before asserting that he was required to submit certain medical records. App. 111a; see App. 42a, 59a-60a.

The district court concluded Rochow was entitled to additional relief calculated as a percentage of the amount that LINA owed Rochow, and that the rate used should be based on the return on equity that LINA earned during the relevant period.[6] The

---

[4] App. 101a ("defendant had ... custody over [the] money that it withheld from Rochow in breach of its fiduciary duty to him"), 105a ("[T]he court rejects LINA's argument that there has been no finding of a breach of fiduciary duty...."), 106a (defendant's actions were "a breach of the high standards that the law imposes on fiduciaries"); see App. 76a ("it has already been determined that Defendant owed Plaintiff a duty of loyalty and breached this duty").

[5] "LINA did not have serious arguments based in the policy language to support its position." App. 115a.

[6] For a regulated insurer such as LINA, the amount of insurance it can write depends on the amount of the company's own funds, referred to as its "surplus." The requirement is like the capitalization requirements that limit how much a bank can lend based on the amount of equity the bank has. LINA did not

(Continued on following page)

court held that this type of remedy was authorized because it is "a type of relief that was typically available in equity and therefore is appropriate under § 1132(a)(3)(B)," which provides that a court may order "appropriate equitable relief" for a wrongful denial of benefits. App. 104a (quoting *Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1008-09 (8th Cir. 2004)). The district court referred to the equitable remedies of avoiding unjust enrichment, disgorging improper profits, and equitable accounting. App. 104a. (For the purposes of this appeal any differences among those equitable remedies is not relevant.).

The district court calculated the total additional amount LINA owed by multiplying a rate based on the rate of return that LINA had enjoyed each year by the total amount owed as of each month. (LINA's annual rate of return on equity averaged about 26%,[7]

---

segregate the benefits claimed by Rochow in a separate account, but held them in a general account which was part of the firm's surplus. Thus, the total benefits unlawfully withheld from Rochow enabled LINA to sell significantly more insurance, and to reap the profits from those sales. LINA's Chief Accounting Officer acknowledged that the withheld benefits were held in a general account, the amount of which "formed a basis for LINA to write insurance coverage." App. 9a; Hearing Tr. 123-24.

[7] "LINA's intentional delay in paying Rochow's substantial disability benefits for more than seven years allowed LINA to earn millions of dollars in profits for its own gain.... [T]he district court found that LINA's average rate of return during the seven-year period was 26%." App. 42a.

but varied from year to year.). The calculations covered the period from 2002 (when Rochow's representatives first applied for benefits) until the entry of final judgment by the district court in 2012. The net effect of those interest calculations was that Rochow's estate was to receive about $2.8 million.[8]

(2) On appeal, a divided panel of the Sixth Circuit upheld the district court award. The majority reasoned that § 1132(a) provides two distinct bases for redress for a wrongful denial of or delay in paying benefits. First, under § 1132(a)(1)(B) a plaintiff may recover unlawfully withheld benefits themselves. Second, under § 1132(a)(3)(B) a plaintiff may also recover other relief, including additional monetary relief at the rate sufficient to result in disgorgement of profits unjustly obtained during the period when benefits were wrongfully withheld. *Rochow v. Life Ins. Co. of North America*, 737 F.3d 415, 423-26 (6th Cir. 2013). The panel also concluded that the district court's calculation of the amount of unjust enrichment was not an abuse of discretion. 737 F.3d at 427-31. A dissenting opinion argued that under ERISA a plaintiff cannot obtain disgorgement of profits under § 1132(a)(3). 737 F.3d at 431-35.

---

[8] For reasons related to tax law and certain Sixth Circuit precedents, the gross amount of the calculation was approximately $3.6 million, but tax adjustments will mean that the net to the estate, and the net cost to LINA, would be about $2.8 million.

LINA sought rehearing en banc regarding whether ERISA authorizes a court to order relief at a rate calculated for the purpose of avoiding unjust enrichment.[9]

(3) The Sixth Circuit granted rehearing en banc and overturned the decision of the district court in a sharply fractured set of four opinions.

(a) The majority opinion concluded that ERISA does not authorize a court to use a rate intended to bring about disgorgement of the profits that a plan wrongfully earned during the period when it was illegally using funds that should have been paid to the beneficiary.

The en banc majority insisted that ERISA is concerned only with providing compensation to victims of unlawful behavior, and not with preventing wrongdoers from profiting from their own violations of the law. "The district court's use of equitable relief under § [1132](a)(3) as the vehicle for its disgorgement award misses the mark.... [T]he award reflects concern that LINA had wrongfully gained something, a consideration *beyond the ken* of ERISA...." App. 16a (emphasis added). The majority held that the purpose of ERISA remedies is limited to making whole the

---

[9] Petition for Rehearing En Banc of Defendant-Appellant. LINA also sought rehearing en banc regarding whether the district court had authority following the 2007 appeal to order any relief that had not been included in its original 2005 order directing that LINA pay the disputed benefits.

victim of the wrongful actions of the defendant. "ERISA remedies are concerned with the adequacy of relief to redress the claimant's injury, not the nature of the defendant's wrongdoing." App. 15a-16a.

The majority reasoned that this restriction is embedded in the structure of ERISA's remedial provision. 29 U.S.C. § 1132. The district court and panel had concluded that authority to use an unjust-enrichment-based rate is conferred by § 1132(a)(3)(B), which empowers courts, in addition to enjoining violations of the terms of a plan, to order "other appropriate equitable relief." App. 104a-08a; 737 F.3d at 426. The en banc court, however, held that relief is never available under § 1132(a)(3) if "adequate" relief is already provided by § 1132(a)(1)(B), and that an order under § 1132(a)(1)(B) directing the restoration of benefits is *inherently* "adequate" because it makes a beneficiary whole. App. 16a. "[A] claimant cannot pursue a ... claim under § [1132](a)(3) based solely on an arbitrary and capricious denial of benefits where the § [1132](a)(1)(B) remedies is adequate to make the claimant whole." App. 16a. Because "Rochow's loss remained exactly the same irrespective of the use made by LINA of the withheld benefits" (App. 21a), it reasoned, the court's authority was limited to compensating Rochow for that loss.

Prejudgment interest, the majority held, is permitted only at a rate no greater than that needed to "plac[e] the plaintiff in the position he or she would have occupied but for the defendant's wrongdoing." App. 26a (quoting *Ford v. Uniroyal Pension Plan*,

154 F.3d 613, 616 (6th Cir. 1998)). If, as the district court had concluded, the profit LINA made using Rochow's money was greater than the interest Rochow might have earned with that money, LINA was legally entitled to keep those ill-gotten gains.

(b) Judge White, concurring and dissenting, rejected the majority's "blanket rule" barring a remedy intended to prevent unjust enrichment. App. 32a-41a. She reasoned that under some circumstances a district court would have discretion to set a rate at a level intended to avoid unjust enrichment. Such a rate could be used, for example, if a plan had denied the benefits pursuant to "an organizational policy to delay paying valid claims for as long as possible...." App. 39a. Judge White would have remanded the case to permit the district court to apply that proposed standard. App. 41a.

(c) Judge Stranch, in an opinion joined in whole or in part by six other judges, would have upheld the district court decision. The dissenting opinion disagreed with the majority's interpretation of § 1132, and insisted that, in addition to make-whole relief, a court under § 1132(a)(3)(B)(ii) may award relief intended to prevent unjust enrichment.

"The [district] court below got it exactly right." App. 70a. "LINA's fiduciary wrongdoing and self-dealing warrant equitable remedies under § 1132(a)(3) – an accounting and disgorgement of the considerable profits LINA earned on the benefits it withheld from Rochow." App. 42a-43a. "The elementary rule

of restitution is that if you take my money and make money with it, your profit belongs to me." App. 70a (quoting *Nickel v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 290 F.3d 1134, 1138 (9th Cir. 2002)). "*Varity Corp.* [*v. Howe*, 516 U.S. 489 (1996)] ... fully support[s] ... disgorgement of LINA's profits under § 1132(a)(3)." App. 43a-44a. "[C]ourts sitting in equity 'possessed the power to provide relief ... to prevent the trustee's unjust enrichment.'" App. 52a (quoting *CIGNA Corp. v. Amara*, 131 S.Ct. 1866, 1880 (2011)) (citing Restatement (Third) of Trusts, § 95).

The dissenting opinion objected that the Sixth Circuit standard conflicted with the decisions of the Second, Third, Seventh and Eighth Circuits. "[T]he majority opinion stands at odds with governing law ... [:] Supreme Court opinions ... and cases from our sister circuits...." App. 45a. "[S]everal ... circuits ... authorize[ ] the remedy that the district court below awarded to Rochow." App. 68a.

REASONS FOR GRANTING THE WRIT

This case presents a recurring issue that affects a substantial majority of all successful ERISA cases. In virtually every case in which a plan wrongfully denies or delays a benefit, or in which a fiduciary engages in misconduct that adversely affects the amount of funds from which benefits can be paid, the court must determine what additional remedy should be provided in light of the delay between the initial

violation and the correction of that violation. The determination thus must be made in a large proportion of the cases in which the beneficiary (or plan) establishes a violation of ERISA.

In most cases there are two distinct types of consequences of a violation and the ensuing delay in its correction. First, the beneficiary (or the fund from which benefits will ultimately be paid) is deprived of the use of the funds for the period in question; for example, a beneficiary who has been denied a retirement or disability payment would be unable (for the period in question) to use that money for his or her own benefit. Second, the party that violated ERISA, such as a fund that wrongfully refused to pay a benefit, is ordinarily in a position to use for its own ends the funds that it should have paid to the beneficiary, and thus to profit from its own violation of the law. Courts disagree about which of these problems can be remedied under ERISA, and about what methodology should be used to determine the amount of the redress.

Often the remedy is characterized as "prejudgment interest." But that phrase does not denote any particular rationale for the amount to be paid or any specific rate. Rather, it merely designates a method of calculation: multiplying a rate (e.g., 5% a year) times a period of time (e.g., 2 years) times a dollar amount (e.g., $10,000).

I. THERE IS A DEEPLY ENTRENCHED AND IMPORTANT CIRCUIT CONFLICT REGARDING THE GROUNDS ON WHICH AND RATE AT WHICH REDRESS MAY BE AWARDED IN AN ERISA CASE FOR THE DELAY BETWEEN THE OCCURRENCE AND CORRECTION OF A VIOLATION

There are two distinct types of circuit conflicts regarding the appropriate type of redress addressing the delay between the occurrence and correction of an ERISA violation.

First, there is a conflict regarding what types of problems can be remedied by a court in fashioning the rate to be used in addressing that delay. Five circuits hold that relief to address that delay can be based on either (or both) of two distinct justifications: the extent to which the delay itself has injured the beneficiary, and the extent to which the plan has profited from the use of the unlawfully withheld funds. The Sixth Circuit, on the other hand, insists that only the first, make-whole factor can be considered. The appropriate rationale necessarily determines the rate at which additional relief (such as prejudgment interest) would be calculated.[10]

---

[10] *Hizer v. General Motors Corp., Allison Gas Turbine Div.*, 888 F.Supp. 1453, 1462 (S.D. Ind. 1995) ("Just as case law dealing with prejudgment interest provide[s] guidance as to whether interest on delayed payment is available at all, it also provides guidance in calculating that interest."); *Jones v. Unum Life Ins. Co. of America*, 223 F.3d 130, 139 (2d Cir. 2000) ("the same

(Continued on following page)

Second, another set of circuits has adopted per se rules, not based on a case-specific application of either factor, for setting that rate. Three circuits utilize the most analogous *pre*judgment interest rate of the state in which the claim arose. One circuit uses the *post*-judgment interest rate in 28 U.S.C. § 1961(a). Neither of these types of rates is tied to the level needed to provide make-whole relief for a particular beneficiary or to prevent unjust enrichment of a particular wrongdoer.

This conflict regularly and predictably leads to substantial and unjustifiable differences in the remedy provided when a plan has wrongfully refused to pay a required benefit. For example, as we explain below, in a case arising in Oklahoma, the federal courts (using the Oklahoma prejudgment rate) calculate additional redress at a rate of 15%, whereas federal courts in the Ninth Circuit (which utilizes § 1961) today routinely use a rate of 0.27%.

A. THE SIXTH CIRCUIT LIMITS REMEDIES TO THE AMOUNT NEEDED TO MAKE THE BENEFICIARY WHOLE

The en banc Sixth Circuit decision establishes a clear, and unprecedented, limitation on the authority of federal courts to provide remedies for violations of

considerations that inform the court's decision whether or not to award interest at all should inform the court's choice of interest rate.").

ERISA. As the decision below makes clear, courts in that circuit may not – in addition to ordering payment of improperly withheld benefits – adopt a remedy intended to prevent unjust enrichment on the part of a plan or fiduciary who violated federal law. The district court finding "that LINA had wrongfully gained something" – in the district court's calculation, over $2.8 million – was, in the words of the Sixth Circuit, "a consideration beyond the ken of ERISA." App. 16a.

The en banc court imposed this restriction in two distinct ways. First, it held that the award ordered by the district court was impermissible because its very purpose – the prevention of unjust enrichment – was outside the authority of the court. The remedial authority of the district court under ERISA ended, the Sixth Circuit held, once it had provided make-whole relief to Rochow. App. 11a-25a. A court is restricted to compensating the victim for his or her loss, and Rochow's "loss remained exactly the same irrespective of the use made by LINA of the withheld benefits." App. 21a.

Second, the Sixth Circuit held that the award of prejudgment interest must be limited to the amount necessary to compensate the beneficiary for his or her losses arising out of the delay in payment. "An award of interest should 'simply compensate a beneficiary for the lost interest value of money wrongfully withheld from him or her.'" App. 26a (quoting *Rybarczyk v. TRW, Inc.*, 235 F.3d 975, 985 (6th Cir. 2000)). "Awards of prejudgment interest are *compensatory*...."

App. 26a (emphasis in original). Prejudgment interest larger than that amount – such as interest based on a higher rate to avoid unjust enrichment – "would 'contravene ERISA's remedial goal of simply placing the plaintiff in the position he or she would have occupied but for the defendant's wrongdoing.'" App. 27a (quoting *Schumacher v. AK Steel Corp. Retirement Accumulation Pension Plan*, 711 F.3d 675, 686 (6th Cir. 2013)). The court remanded the case to permit the district court to decide only whether an "award of prejudgment interest is warranted under § [1132](a)(1)(B) to make Rochow whole." App. 28a.

B. FIVE CIRCUITS AUTHORIZE REMEDIES INTENDED TO PREVENT UNJUST ENRICHMENT

Five circuits expressly apply the contrary rule, permitting a district court to consider the need to avoid unjust enrichment in framing a remedial order.[11] Indeed, those circuits expressly instruct district courts to consider the danger of unjust enrichment in framing such remedies. In the Third, Seventh and Eighth Circuits, the courts of appeals have upheld

[11] The Department of Labor takes the position that ERISA remedies may be framed to prevent unjust enrichment. Joint Merits Response Brief of Plaintiff-Appellee and Appellee, *Chao v. Consulting Fiduciaries, Inc.*, Nos. 08-1228 and 08-2254 (7th Cir.), available at 2008 WL 4212720 at *47 ("prejudgment interest is necessary not only to fully compensate the victim but also to prevent unjust enrichment.").

awards of prejudgment interest in cases in which it was not needed to make the beneficiary whole. In the Second, Third, Seventh, Eighth and District of Columbia Circuits, the remedy ordered in this case would have been upheld, and LINA would not have been permitted to retain the millions of dollars in profits at issue.

The Third Circuit has repeatedly made clear that courts may frame ERISA remedies for the purpose of avoiding unjust enrichment. *Skredtvedt v. E.I. DuPont de Nemours*, 372 F.3d 193 (3d Cir. 2004), in an opinion joined by then-Judge Alito, explained that the purposes of prejudgment interest itself are both "making the claimant whole and preventing unjust enrichment." 372 F.3d at 209.[12] *Fotta v. Trustees of United Mine Workers of America*, 165 F.3d 209, 211 (3d Cir. 1998), also held that where benefits have been wrongfully denied, prejudgment interest is awarded because "[t]o allow the Fund to retain the interest it earned on funds wrongfully withheld would be to approve of unjust enrichment. Further, the relief granted would fall short of making [the claimant] whole because he has been denied the use of money that was his." 165 F.3d at 212 (quoting *Short v. Central States, Southeast & Southwest Areas*

[12] "[M]aking the claimant whole and unjust enrichment are concerns equally present ... where benefits have been awarded pursuant to a judgment and where benefits have been withheld but are ultimately awarded without resort to a judgment." *Id.* at 209.

Pension Fund, 729 F.2d 567, 576 (8th Cir. 1984)).[13] *Anthuis v. Cold Industries Operating Corp.*, 971 F.2d 999, 1010 (3d Cir. 1992), held that "[a]warding prejudgment interest is intended to serve at least two purposes: to compensate prevailing parties for the true costs of money damages incurred, and ... to promote settlement and deter attempts to benefit from the inherent delays of litigation." (Quoting *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743, 750 (8th Cir. 1986)). *National Security Systems, Inc. v. Iola*, 700 F.3d 65 (3d Cir. 2012), upheld an award of prejudgment interest even though it was not needed or justifiable as a remedy to make the beneficiaries whole, the only permissible justification in the Sixth Circuit. The Third Circuit rejected the defendant's contention "that because the District Court found that prejudgment interest was not needed to make the plaintiffs whole, they should not have been awarded interest.... That argument neglects that prejudgment interest aims to make plaintiffs whole *and* to prevent unjust enrichment." 700 F.3d at 103 (emphasis in original).[14] That is precisely the interpretation of § 1132(a) rejected by the Sixth Circuit below.

---

[13] "[T]he concerns animating [the award of prejudgment interest are] ... making the claimant whole and preventing unjust enrichment." *Id.* at 213. "[T]he awarding of interest where benefits have been unjustifiably delayed not only ensures full compensation, but also serves to prevent unjust enrichment." *Id.*

[14] See 700 F.3d at 102 ("[p]rejudgment interest exists to make plaintiffs whole and to preclude defendants from garnering unjust enrichment.").

The Seventh Circuit agrees that prejudgment interest or other relief can be awarded for the purpose of avoiding unjust enrichment. "Prejudgment interest is designed not only to fully compensate the victim, but also to prevent unjust enrichment." *Trustmark Life Ins. Co. v. University of Chicago Hospital*, 207 F.3d 876, 885 (7th Cir. 2000).

> [Without prejudgment interest] there is incomplete compensation to victims of wrongdoing and there are added incentives to resist and delay the bringing of the wrongdoer to book.... The award of prejudgment interest is necessary for full compensation of the victims of wrongdoing.... Moreover, the award of prejudgment interest has an independent ground ... : the principle of unjust enrichment.... The retirement plan [in this case] held money that belonged to [the plaintiff] – held it on her account, as it were.... [T]he plan must return it to her together with the fruits that it has gleaned by holding on to it.

Lorenzen v. Employees Retirement Plan of Sperry & Hutchinson Co., 896 F.2d 228, 236-37 (7th Cir. 1990). The requirement that a wrongdoer return to its victim the fruits it gleaned by that violation is in other Seventh Circuit cases referred to as "restitution of wrongful gain" or a constructive trust. *Clair v. Harris Trust and Savings Bank*, 190 F.3d 495, 498

(7th Cir. 1999).[15] That remedy, however labeled, can be awarded even if the victim sustained no loss as a result of the wrongful delay in the payment of a benefit. In *Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 692 (7th Cir. 1991), for example, the Seventh Circuit rejected a contention that a plan that had wrongfully refused to pay medical bills should not pay prejudgment interest because the victim himself had not paid those bills, and thus had not lost the use of the funds needed to do so.

> The premise of defendants' argument is that the plaintiffs did not pay the medical bills at issue and therefore they did not forego the use of the money. However, ... prejudgment interest is designed not only to fully compensate the victim, but also to prevent unjust enrichment.... The ability of defendants to earn interest on funds which should have been expended to pay plaintiffs' medical benefits under the policy would result in the unjust enrichment of defendants. Relieving defendants from the payment of prejudgment interest would create an incentive for insurers to delay payments and would under compensate victims by forcing them to absorb expenses incurred as a result of the delay.

---

[15] See *May Department Stores Co. v. Federal Insurance Co.*, 305 F.3d 597, 603 (7th Cir. 2002) ("unjust enrichment is a basis, indeed the usual basis, for imposing a constructive trust on a sum of money.").

921 F.2d at 696-97; see *Leigh v. Engle*, 727 F.3d 113, 122 (7th Cir. 1984) ("ERISA clearly contemplates actions against fiduciaries who profit by using trust assets, even where the plan beneficiaries do not suffer direct financial loss.").

In the Eighth Circuit, avoidance of unjust enrichment is the primary purpose of prejudgment interest or other remedies that transfer to the victim profits illicitly earned by the wrongdoer. "A common thread throughout the prejudgment interest cases is unjust enrichment – the wrongdoer should not be allowed to use the withheld benefits or retain interest earned on the funds during the time of the dispute...." *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 946 (8th Cir. 1999); see *Short*, 729 F.3d at 576 ("To allow the Fund to retain the interest it earned on funds wrongfully withheld would be to approve of unjust enrichment. Further, the relief granted would fall short of making [the beneficiary] whole because he has been denied the use of money which was his."). Opinions in this circuit at times characterize these remedies as an accounting for profits or the imposition of a constructive trust.

> In the particular context of withheld benefits under ERISA, we conclude that interest is an appropriate measure of the profits made by a defendant who breaches its fiduciary duty to a defendant.... Interest is, in many respects, the only way to measure of the extent to which [a wrongdoer] was unjustly enriched. We emphasize that the purpose of this award

> is to prevent [the wrongdoer] from profiting by its breach of fiduciary duty and *not* to compensate [the victim] for the delay in payment.

Parke v. First Reliance Standard Life Ins. Co., 368 F.3d 999, 1007 (8th Cir. 2004) (emphasis added).[16] For this reason, in the Eighth Circuit prejudgment interest can be awarded even though the victim experienced no injury as a result of the delay in payment of a benefit.[17] The Eighth Circuit's interpretation of the

---

[16] See *id.* at 1007 ("interest is an appropriate remedy under § 1132(a)(3)(B) to avoid unjust enrichment of a plan provider who wrongfully delays the payment of benefits.").

[17] In *Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322, 1330-31 (8th Cir. 1995), "TMG argue[d] that there is no equitable basis for prejudgment interest in the present case because appellee has not yet paid the hospital bills and has not been charged interest. Thus, TMG contend[ed], prejudgment interest is not necessary to make appellee whole and would simply constitute a windfall." 54 F.3d at 1330. The court upheld the award of prejudgment interest to assure that the plan would not "benefit unfairly from ... [the] delays."

Christianson v. Poly-America, Inc. Medical Benefit Plan, 412 F.3d 935, 941 (8th Cir. 2005), involved a similar situation and holding:

> According to Poly-America, the award of prejudgment interest constitutes a windfall to Christianson ... because Christianson never spent any of Christianson's money to pay medical costs.
>
> We believe that Poly-America's argument misconstrues the purpose of prejudgment interest.... [W]hile one purpose of the remedy is to compensate the prevailing party for financial damages occurred, ... another important purpose is to "promote settlement and deter attempts to benefit unfairly from the inherent

(Continued on following page)

ERISA remedial scheme is thus essentially the opposite of the Sixth Circuit rule, which recognizes only compensation as a legitimate basis for an award of prejudgment interest.

The Second Circuit directs the lower courts to consider both compensation and the avoidance of unjust enrichment in fashioning a remedy for delay. Thus in *Novella v. Westchester County*, 661 F.3d 128, 150 (2d Cir. 2011), the court of appeals upheld the prejudgment rate imposed by the district court as "entirely consistent with the principle that plaintiffs should be 'made whole' and that defendants should 'not profit by their failure to comply with their ERISA obligations.'" (quoting *Algie v. RCA Global Commc'ns, Inc.*, 891 F.Supp. 875, 899 (S.D.N.Y. 1994)). Another Second Circuit opinion instructed the district court to "consider whether the plaintiff would have invested the money at some higher rate [than the Treasury bill rate] ... ; or it may take into account the rate of interest the defendant would have had to pay to borrow the money it withheld from the plaintiff...." *Jones v.*

---

delays of litigation." *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 752 (8th Cir. [ ] 1986). A common thread throughout the prejudgment interest cases is unjust enrichment – the wrongdoer should not be allowed to use the withheld benefits or retain interest earned on the funds during the time of the dispute. *Kerr*, 184 F.3d at 946. Regardless of whether Christianson spent his own money, Poly-America does not dispute that Poly-America retained the use of the funds during the dispute.

Unum Life Ins. Co. of America, 223 F.3d 130, 139 (2d Cir. 2000). *Dunnigan v. Metro. Life Ins. Co.*, 277 F.3d 223, 230 (2d Cir. 2002), warned that unless remedied "[an unjustified] delay enriches the fiduciary at the expense of the beneficiary."

The District of Columbia Circuit also recognizes that preventing unjust enrichment is a legitimate purpose of an award of prejudgment interest, and thus a basis for determining the amount of such an award.

> The presumption in favor of prejudgment interest has three recognized bases. First, to permit the fiduciary to retain the interest earned on wrongfully withheld benefits would amount to unjust enrichment – a fiduciary would benefit from failing to pay ERISA benefits.... Second, prejudgment interest ensures that a beneficiary is fully compensated, including for the loss of the use of money that is his.... Finally, prejudgment interest promotes settlement and deters any attempt to benefit unfairly from inevitable litigation delay.

Moore v. CapitalCare Inc., 461 F.3d 1, 13 (D.C. Cir. 2006).

C. THREE CIRCUITS UTILIZE STATE PREJUDGMENT INTEREST RATES

In three circuits, federal courts presumptively apply state prejudgment interest statutes in determining the rate for prejudgment interest in ERISA

cases, an approach that does not consider either the rate needed to make the beneficiary whole or the rate needed to prevent unjust enrichment. The Sixth Circuit disapproves of this practice.

The Fifth Circuit has repeatedly advised district courts to look to state law in determining the prejudgment interest rate for ERISA claims. *Transitional Learning Center at Galveston v. Metropolitan Life Ins. Co.*, 1996 WL 625412 at *3 (5th Cir. Oct. 19, 1996) (courts "consult [state law] for guidance in assessing prejudgment interest in ERISA claims...."); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 984-85 (5th Cir. 1991) ("state law ... provides guidance [in fixing the prejudgment interest rate in ERISA claims]"). District courts in the Fifth Circuit regularly apply state-law prejudgment interest rates in ERISA cases; we set out a list of such cases in the Appendix. App. 132a-33a.

In the Tenth Circuit "[c]ourts commonly look to state statutory prejudgment interest provisions as guidelines for a reasonable rate." *Weber v. GE Group Life Assurance Co.*, 541 F.3d 1002, 1016 (10th Cir. 2008). *Garrett v. Principal Life Insurance Co.*, 557 Fed.Appx. 734, 738 (10th Cir. 2014), upheld the use in ERISA cases of the 15% prejudgment interest rate established by Oklahoma statute. "[W]e have approved of the use of the relevant state's statutory prejudgment interest rate, including Oklahoma's, as appropriate in ERISA cases as long as 'nothing in the record suggests that the award ... is punitive.'" (Quoting *Weber*). *Weber* explained that a state rate is

nonpunitive so long as it is a rate of general applicability and is not limited to cases in which a defendant acted in bad faith. 541 F.3d at 1017; see *Biava v. Insurers Administrative Corp.*, 1995 WL 94461 (10th Cir. March 1, 1995) ("State law governs prejudgment interest."). The Tenth Circuit imposes prejudgment interest on the proportion of an award that will be used to pay taxes, clearly not a make-whole remedy because it was the Internal Revenue Service, not the plaintiff, that would have benefitted from an earlier payment. See *Dalal v. Alliant Techsystems, Inc.*, 72 F.3d 137, 1995 WL 747442 at *6 (10th Cir. 1995) ("prejudgment interest should be awarded on the entire back pay award in employment discrimination cases because it is better to confer a windfall upon a claimant than the defendant in order to discourage future discrimination."). District courts in the Tenth Circuit regularly apply state-law prejudgment interest rates in ERISA cases; we set out a list of such cases in the Appendix. App. 134a-35a.

The Eleventh Circuit also suggests that district courts "look to state interest rates to fill a gap in ERISA law." *Smith v. American Int'l Life Assurance Co. of New York*, 50 F.3d 956, 958 (11th Cir. 1995); *Florence Nightingale Nursing Service v. Blue Cross/ Blue Shield of Alabama*, 41 F.3d 1476, 1484 (11th Cir. 1995), approved the district court decision to use an Alabama prejudgment interest statute, which provides an interest rate of over 18% a year, to "fill a gap in ERISA law." The district courts in the Eleventh Circuit understand the court of appeals to have

"endorsed the practice of looking to analogous state law provisions" in setting prejudgment interest rates in ERISA cases. *Kinser v. Plans Administration Committee of Citigroup, Inc.*, 2008 WL 762200 at *1 (M.D. Ga. March 18, 2008); *Lyons v. Georgia-Pacific Corp. Salaried Employees Retirement Plan*, 196 F.Supp.2d 1260, 1271 (N.D. Ga. 2002). District courts in the Eleventh Circuit regularly apply state-law prejudgment interest rates in ERISA cases; we set out a list of such cases in the Appendix. App. 136a.

The Sixth Circuit, on the other hand, expressly rejects this mechanical adoption of state law rates. "Among the constraints on a district court's discretion to shape an award of prejudgment interest in an ERISA case is the fact that we look with disfavor on simply adopting state law interest rates." *Rybarczyk v. TRW, Inc.*, 235 F.3d 975, 985 (6th Cir. 2000). "Incorporation of state standards in the calculation of prejudgment interest could frustrate ERISA's remedial scheme." *Ford v. Uniroyal Pension Plan*, 154 F.3d 613, 617 (6th Cir. 1998). "[T]he calculation of prejudgment interest is not an area 'primarily of state concern' for which there does not exist a substantial body of federal law." *Id.* District courts in the Sixth Circuit understand *Rybarczyk* and *Ford* to bar utilization of state interest rates.[18] A state prejudgment

---

[18] *Masters v. Supplemental Executive Retirement Plan for Automated Packaging Systems, Inc.*, 2009 WL 1183377 at *2 (N.D. Ohio May 1, 2009) (declining to apply Ohio prejudgment interest rates of 5% to 8% in light of *Rybarczyk*); *Kramer v. Paul*

(Continued on following page)

interest rate could be used in the Sixth Circuit only if that rate happened to coincide with the particular rate that a court concluded was needed to make the beneficiary whole.

D. THE NINTH CIRCUIT UTILIZES THE POST-JUDGMENT INTEREST RATE IN § 1961

The Ninth Circuit has repeatedly admonished district courts to calculate prejudgment interest using the *post*-judgment rate in § 1961(a). 28 U.S.C. § 1961(a). That rate is the weekly average yield on one-year Treasury bills. The most recent rate was 0.27% for July 2015.[19]

"[T]his circuit has a strong policy in favor of the Treasury bill rate...." *Blanton v. Anzalone*, 813 F.2d 1574, 1576 (9th Cir. 1987). "We have held that the interest rate prescribed for post-judgment interest

---

Revere Life Ins. Co., 2007 WL 1218715 at *1-*2 (E.D. Mich. April 23, 2007) (declining to apply Michigan prejudgment interest rate in light of *Ford* and *Rybarczyk*); *Brooking v. Hartford Life & Accident Ins. Co.*, 2007 WL 781333 at *2 (E.D. Ky. March 12, 2007) (declining to apply Kentucky prejudgment interest rate of 12% in light of *Ford* and *Rybarczyk*); *Loucks v. Liberty Life Assurance Co. of Boston*, 2004 WL 3255332 at *1 (W.D. Mich. Nov. 22, 2004) (declining to apply Michigan prejudgment interest rate under Mich. Comp. Law § 438.31 (5%) in light of *Ford*; "[*Ford*] favored the application of the post-judgment rate specified under 28 U.S.C. § 1961 rather than a state interest rate").

[19] http://www.utd.uscourts.gov/documents/judgpage.html.

under 28 U.S.C. § 1961 is appropriate for fixing the rate of pre-judgment interest ‘unless the trial judge finds, on substantial evidence, that the equities of that particular case required a different rate.’” *Nelson v. E G & G Energy Measurements Group, Inc.*, 37 F.3d 1384, 1391 (9th Cir. 1994) (quoting *Western Pacific Fisheries, Inc. v. S.S. President Grant*, 730 F.2d 1280, 1289 (9th Cir. 1984)). “The district court may depart from the Treasury bill rate, but only if substantial evidence supports the decision to do so and only if the departure is accompanied by a reasoned justification.” *Hayes v. Arthur Young & Co.*, 1994 WL 463493 at *17 (9th Cir. Aug. 26, 1994); see *Day v. AT&T Disability Income*, 2015 WL 1567857 (9th Cir. April 9, 2015); *Blankenship v. Liberty Life Assurance Co. of Boston*, 486 F.3d 620, 628 (9th Cir. 2007); *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1164 (9th Cir. 2001).

District courts in the Ninth Circuit regularly apply § 1961(a) in ERISA cases; we set out a list of such cases in the Appendix. App. 137a-40a.

Unlike the limitation established by the Sixth Circuit in this case, the Ninth Circuit awards pre-judgment interest even in cases in which doing so is not necessary to make the plaintiff whole. *Zumstein v. Great-West Life Assurance Co.*, 1992 WL 124424 at *2 (9th Cir. June 9, 1992) (approving prejudgment interest for failure to pay medical benefits despite the fact that the beneficiary had not paid the bills in question and was not being charged interest by the medical provider.).

E. THE CIRCUIT CONFLICT IS WELL RECOGNIZED

The multi-faceted conflict is widely recognized. Courts have repeatedly noted the circuit conflict regarding whether to use state rates rather than the § 1961 rate[20] and regarding whether to use the § 1961

[20] *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 984-85 (5th Cir. 1991) ("Continental would apply the rate set down in the postjudgment interest statute to awards of prejudgment interest. This court, however, has already rejected that position.") (citing *United States ex rel. Canion v. Randall & Blake*, 817 F.2d 1188, 1193 (5th Cir. 1987)); *Rybarczyk v. TRW, Inc.*, 1997 WL 580609 at *2 (N.D. Ohio Sept. 5, 1997).

("[T]here is considerable support for using the § 1961 rate to calculate prejudgment interest.... [T]he Ninth Circuit has held that the § 1961 rate should be applied unless the trial court finds that the equities of a particular case justify use of a different rate.... On the other hand, many courts have held that a federal court may look to state law for guidance in determining the rate of prejudgment interest."); *DeGrado v. Jefferson Pilot Financial Ins. Co.*, 2009 WL 1198173 at *2 (D. Colo. May 1, 2009) (contrasting Tenth Circuit rule relying on state law with practice in "other circuit courts" applying § 1961); *DeGrado v. Jefferson Pilot Financial Ins. Co.*, 367 F.Supp.2d 1315, 1328 (D. Colo. 2005) (contrasting Tenth Circuit standard and that in "many circuits" applying state law with use of § 1961 in "several courts"); *Edmonds v. Hughes Aircraft Co.*, 1998 WL 782016 at *2 (E.D. Va. Nov. 6, 1998) ("several circuits have approved the use of the post-judgment interest rate in 28 U.S.C. § 1961(a) to compute pre-judgment interest on ERISA damage awards.... Nonetheless, several decisions have used state law interest rates in setting the rate of pre-judgment interest on ERISA damages awards."); *Smith v. American Int'l Life Assurance Co. of New York*, 50 F.3d 956, 958 (11th Cir. 1995) ("We recognize that some circuit courts have approved the use of the section 1961(a) post-judgment rate to compute pre-judgment interest.... Because

(Continued on following page)

rate rather than make an individualized determination of the appropriate rate.[21]

The dissenting opinion in the court below, citing a number of the cases described above, correctly noted that the standard adopted by the en banc majority conflicted with the standard applied in the Second, Third, Seventh and Eighth Circuits, all of which permit or require the use of a rate based in whole or in part on the need to prevent unjust enrichment. App. 63a-68a. The dissenters, citing many of the same decisions from those circuits described above, noted that "a litany of [cases] from four of our sister circuits undermine the majority's premise that no legal basis exists to conclude that ... a breach of LINA's fiduciary duties [is] remediable under § 1132(a)(3)." App. 69a.[22] "[T]he relief for the wrongful

---

district courts have discretion in determining pre-judgment interest rates, we hold that district courts are not required to use section 1961(a) in computing such interest.").

[21] *Hizer v. General Motors Corp., Allison Gas Turbine Div.*, 888 F.Supp. 1453, 1463 (S.D. Ind. 1995), noted that the Fifth Circuit in *Hansen* and the Tenth Circuit in *Biava* had borrowed the state statutory rate. "But the Seventh Circuit has followed a different course.... [T]he Seventh Circuit has ... held that the appropriate rate is the market rate.... A simple (and acceptable) approximation of the market rate is the prime rate...." *Roden v. Amerisourcebergen*, 186 Cal.App. 4th 620, 656-57 (4th App.Dist. 2010), "recognized that not all circuits agree with the Ninth Circuit in terms of the particular rate of interest to be applied.... The First and Fourth Circuits ... leave it to the full discretion of the trial court to set the interest rate."

[22] The dissenting opinion cited, inter alia, the Second Circuit decision in *Dunnigan*, and Third Circuit decision in *Fotta*,
(Continued on following page)

gain falls squarely within ERISA's equitable remedies, as recognized by the Supreme Court, ... and other circuits." "[By] affirm[ing] the district court's decision to require LINA to disgorge the profit it earned by breaching its fiduciary duties to Rochow, ... we [would] simply join the mainstream view of our sister circuits acknowledging the trust law principles that undergird ERISA's equity jurisprudence." App. 71a.

II. THE QUESTION PRESENTED IS OF EXCEPTIONAL IMPORTANCE

The question presented in this case affects a far larger number of ERISA cases than any of the ERISA issues on which this Court has granted review in the past. In virtually every case in which a beneficiary establishes that a plan wrongfully denied, or delayed, benefits, the court will be called upon to determine whether to award prejudgment interest or some other delay-related remedy, and to determine the appropriate rate. This issue was litigated in the district court decision in *Amara*.[23] The question also has been litigated in cases in which the Department of Labor seeks benefits on behalf of a beneficiary.[24]

---

the Seventh Circuit decisions in *Clair* and *May*, and the Eighth Circuit decision in *Parke*. App. 63a-68a.

[23] *Amara v. Cigna Corp.*, 559 F.Supp.2d 192, 220-21 (D. Conn. 2008).

[24] E.g., *Perez v. Bruister*, 54 F.Supp.3d 629, 680 (S.D. Miss. 2014).

Benefit disputes constitute the largest portion of the more than 7,000 ERISA cases filed each year in federal court.

This Court has repeatedly granted certiorari to resolve issues regarding prejudgment interest.[25] The practical importance of the issue in this case is particularly great.

The consequences of the en banc decision in this case are not limited to litigated cases; by stripping courts in the Sixth Circuit of the power to require ERISA violators to disgorge their ill-gotten gains, the decision below seriously weakens the incentive to comply with ERISA itself. "Allowing LINA to retain its profit creates an incentive for claims administrators to delay paying much-needed benefits to participants and beneficiaries while investing that money for their own gain.... LINA gains from delaying the claims process as long as possible. Permitting LINA to keep its profit also encourages fiduciaries to commingle plan assets with company funds." App. 72a.

That consequence is particularly serious with regard to the insurance companies that generally provide ERISA-regulated health, life and disability

[25] E.g., *City of Milwaukee v. Cement Division, National Gypsum Co.*, 515 U.S. 189 (1995); *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990); *Loeffler v. Frank*, 486 U.S. 549 (1988); *Monessen Southwestern Rwy. Co. v. Morgan*, 486 U.S. 330 (1988); *General Motors Corp. v. Devex Corp.*, 461 U.S. 648 (1983).

insurance. As this case illustrates, the total amount of insurance that these companies can write, and thus their profits, are generally proportional to the assets (or "surplus") of the company itself. Each dollar of wrongfully unpaid benefits may permit the insurance company to write (and profit from) more insurance. This "surplus" functions like capitalization; the amount of additional insurance a company can write is typically a significant multiple of the amount of its surplus. Insurance firms cannot, however, treat borrowed money as part of their surplus.

Congress enacted ERISA because it well understood that plans and fiduciaries are often in a position to profit from the types of wrongdoing forbidden by the statute. Violations of ERISA can be quite profitable, whether on a plan-wide scale or – as here – in individual cases. The decision of the Sixth Circuit, guaranteeing that wrongdoers will be able to pocket those ill-gotten gains in the right circumstances, is an intolerable invitation for plans and fiduciaries to engage in dubious or even palpably unlawful practices.

The decision of the Sixth Circuit is clearly wrong. The essential premise of the decision below, that ERISA remedies are limited to providing compensation, is inconsistent with the decisions of this Court. This Court has repeatedly emphasized that the "appropriate equitable relief" authorized by § 502(a)(3) encompasses those categories of relief that "were typically available in equity." *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356, 361 (2006); *Mertens v. Hewitt Associates*, 508 U.S. 248,

256 (1993). *CIGNA Corp. v. Amara*, 131 S.Ct. 1866 (2011), made clear that "[e]quity courts possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty, *or to prevent the trustee's unjust enrichment*." 131 S.Ct. at 1880 (emphasis added). This Court should grant review to restore the equitable power of federal courts to prevent such unjust enrichment.

This case is an excellent vehicle for resolving the question presented. The Sixth Circuit decided this case on a single ground, that under ERISA the remedy for the wrongful delay in paying a benefit is limited to the amount needed to make whole the beneficiary, and cannot be framed to prevent unjust enrichment. The court of appeals decision did not turn on the particular facts of this case, and did not address the particular rates and amounts involved. If this Court holds that such remedies are limited to making whole the beneficiary, the case would then be an ideal vehicle for determining whether the rate to be used should be based on state law, on § 1961(a), or on the particular circumstances of each case.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

ERIC SCHNAPPER*
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

ERIK W. SCHARF
SCHARF APPELLATE GROUP
1395 Brickell Ave.
Suite 800
Miami, FL 33131
(305) 665-0475

JOHN J. COOPER
COOPER LAW FIRM, PLLC
1615 W. Big Beaver Rd.
Suite A6
Troy, MI 48084

Counsel for Petitioners

**Counsel of Record*

780 F.3d 364
United States Court of Appeals,
Sixth Circuit.

Todd R. ROCHOW and John Rochow,
personal representatives of the
Estate of Daniel J. Rochow, Plaintiffs-Appellees,
v.
LIFE INSURANCE COMPANY OF
NORTH AMERICA, Defendant-Appellant.

No. 12-2074. | Argued: June 18, 2014. |
Decided and Filed: March 5, 2015.

Attorneys and Law Firms

ARGUED: Jeremy P. Blumenfeld, Morgan, Lewis, Bockius LLP, Philadelphia, Pennsylvania, for Appellant. Erik W. Scharf, Scharf Appellate Group, Miami, Florida, for Appellees. **ON BRIEF:** Jeremy P. Blumenfeld, Morgan, Lewis, Bockius LLP, Philadelphia, Pennsylvania, Brian T. Quinn, Honigman Miller Schwartz & Cohn, LLP, Lansing, Michigan, for Appellant. Erik W. Scharf, Scharf Appellate Group, Miami, Florida, John J. Cooper, Cooper Law Firm, PLLC, Troy, Michigan, for Appellees. Waldemar J. Pflepsen, Jr., Carlton Fields Jorden Burt, P.A., Washington, D.C., Jerrold J. Ganzfried, Holland & Knight LLP, Washington, D.C., Julie Wilensky, Lewis, Feinberg, Lee, Renaker & Jackson, P.C., Oakland, California, Mary Ellen Signorille, AARP, Washington, D.C., Mark D. DeBofsky, Debofsky & Associates, P.C., Chicago, Illinois, for Amici Curiae.

BEFORE: COLE, Chief Judge; KEITH, BOGGS, BATCHELDER, MOORE, CLAY, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, GRIFFIN, KETHLEDGE, WHITE, STRANCH, and DONALD, Circuit Judges.

McKEAGUE, J., delivered the opinion of the court in which BOGGS, BATCHELDER, GIBBONS, ROGERS, SUTTON, COOK, GRIFFIN, and KETHLEDGE, JJ., joined, and WHITE, J., joined in part. GIBBONS, J. (pp. 376-78), delivered a separate concurring opinion in which BATCHELDER and COOK, JJ., joined. WHITE, J. (pp. 378-82), delivered a separate opinion concurring in part and dissenting in part. STRANCH, J. (pp. 382-95), delivered a separate dissenting opinion in which COLE, C.J., KEITH, MOORE, CLAY, and DONALD, JJ., joined, and WHITE, J., joined in part.

OPINION

McKEAGUE, Circuit Judge.

This is the second time this case has been before the Sixth Circuit. The first time, we affirmed the district court's determination that defendant Life Insurance Company of North America ("LINA") acted arbitrarily and capriciously when it denied Daniel Rochow's claim for long-term disability benefits under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"). *Rochow v. LINA*, 482 F.3d 860 (6th Cir.2007) ("*Rochow I*"). Our second review comes after the district court ordered that

LINA disgorge profits flowing from its wrongful denial of benefits. A divided three-judge panel affirmed the district court's order. *Rochow v. LINA*, 737 F.3d 415 (6th Cir.2013) ("*Rochow II*"). We granted rehearing en banc, thereby vacating *Rochow II*, in order to reconsider as a full court whether the disgorgement award was proper. For the reasons that follow, we vacate the disgorgement award and remand the case to the district court to determine whether prejudgment interest is appropriate.

I

The facts of this case are adequately summarized in *Rochow II* and are reproduced here:

> In mid-2000, the late Daniel J. Rochow ("Rochow"), a principal of Universico Insurance Company ("Universico"), sold his interest in Universico to Arthur J. Gallagher & Co. ("Gallagher") and became President of Gallagher. As an employee of Gallagher, Rochow was covered under Life Insurance Company of North America ("LINA") policy number LK 30214. LINA's policy provided for disability benefits if an employee gave "satisfactory proof" that "solely because of Injury or Sickness [the employee is] unable to perform all material duties of [his or her] Regular Occupation or a Qualified Alternative[.]" *See Rochow v. LINA* ("*Rochow I*"), 482 F.3d 860, 863-64 (6th Cir.2007).
>
> In 2001, Rochow began to experience short term memory loss, occasional chills, sporadic

sweating, and stress at work. *Id.* In July 2001, Gallagher demoted Rochow from President to Sales Executive-Account Manager because Rochow could no longer perform his duties as President. *Id.* Rochow continued to have difficulties, and as a result of his inability to perform his job, Gallagher forced Rochow to resign effective January 2, 2002. *Id.* In February 2002, Rochow experienced periods of amnesia and was hospitalized. *Id.* During his February 2002 hospital stay, Rochow was diagnosed with HSV-Encephalitis, a rare and severely debilitating brain infection. *Id.*

On or about December 31, 2002, Rochow filed a claim for long term disability benefits. LINA denied Rochow benefits stating that Rochow's employment ended before his disability began. *Rochow I*, 482 F.3d at 864.

Rochow appealed LINA's denial and included medical records from 2001 that stated Rochow was suffering short-term memory loss during 2001. In denying Rochow's appeal, LINA noted that Rochow experienced the effects of encephalitis during 2001 but denied coverage because Rochow continued to work and was not disabled until February 2002. *Rochow I*, 482 F.3d at 864.

Rochow again appealed and included a report from Jack Tellerico, an area vice president for Gallagher, which identified the material duties of Rochow's position with Gallagher and stated that during 2001,

Rochow was not able to perform all the material duties of those jobs due to his lack of memory. LINA again denied Rochow's claims stating, "[s]ince, Mr. Rochow's long-term disability claim was not filed until after his termination date; his claim was denied because of, 'not considered actively working at time of disability.' It appears no additional documentation was provided which would support that Mr. Rochow was actively working when he became disabled.'" (Page ID 4056) (Joint App'x) (sic).

Rochow appealed the denial a third time. LINA denied his claim for the final time stating Rochow had not presented any medical records to support his inability to work prior to the date he was terminated.

On September 17, 2004, Rochow filed a complaint against Cigna Group Insurance, LINA's parent company, in the United States District Court for the Eastern District of Michigan. Compl., ECF No. 1. The complaint states two claims under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3): one to recover full benefits due to the failure to pay benefits in violation of the terms of the plan and one to remedy the alleged breach of fiduciary duty in ERISA Section 404(a), 29 U.S.C. § 1104(a).

Defendant moved for judgment on the record and Plaintiff moved for summary judgment. On June 24, 2005, Judge Tarnow of the United States District Court for the Eastern District of Michigan heard oral arguments on

the parties' motions. At the conclusion of oral argument, Judge Tarnow stated on the record that LINA acted arbitrarily and capriciously in finding Rochow was not disabled while still employed and that Rochow had prevailed. In a one page order which incorporated the reasoning stated on the record, the Court granted Rochow's motion and denied LINA's motion. The same day, the district court clerk filed a judgment which purported to dismiss the case and was signed by the district court clerk and Judge Tarnow.

LINA appealed the June 24, 2005 Order denying Defendant's motion and granting Plaintiff's motion. Rochow moved to enforce judgment or require Defendant to post a supersedeas bond pursuant to Federal Rule of Civil Procedure 62(d). Eventually this motion was withdrawn and Defendant deposited a supersedeas bond in the amount of $250,000.

On April 3, 2007, a panel of this Court affirmed Judge Tarnow's Order. *Rochow I*, 482 F.3d at 866. The *Rochow I* panel held the record supported the district court's decision that LINA's denial of Rochow's claims was arbitrary and capricious, was not the result of a deliberate, principled reasoning process, and did not appear to have been made " 'solely in the interest of the participants and beneficiaries and [ ] for the exclusive purpose of [ ] providing benefits to participants and their beneficiaries' as required by ERISA. 29 U.S.C. § 1104(A)(1)." *Id.* The opinion noted, "there is no 'logical incompatibility between

working full time and being disabled from working full time'" and that the policy required only "satisfactory proof of disability, not medical evidence." *Id.* (internal citations omitted). On the same day, the clerk for this Court entered judgment stating "the order of the district court is AFFIRMED." The clerk of this Court issued the mandate on April 26, 2007, and it was filed May 3, 2007.

On May 10, 2007, the parties filed a stipulation "to toll the time for all parties and counsel to bring any post remand motions," and the district court entered an Order tolling the filing deadlines for post-remand motions until further order of the court. On April 3, 2008, the district court referred the remaining issues in dispute to United States Magistrate Judge Whalen. Over the next few months, Judge Whalen held several status conferences.

On November 10, 2008, LINA filed a statement of resolved and unresolved issues and Plaintiff[1] filed motions for attorneys' fees and costs and equitable accounting. LINA's statement of issues represented that the parties still disputed several issues, including

---

[1] Rochow died on October 16, 2008, and the representative of his estate, Patrick Rochow, was substituted as plaintiff in this action. Later, Todd R. Rochow and John D. Rochow were substituted as administrators of Daniel Rochow's estate and as plaintiffs in this case. For consistency, this opinion refers to all litigation actions taken on behalf of Rochow's estate as actions by [Rochow].

whether Plaintiff was entitled to a disgorgement of profits.

Plaintiff also filed a motion seeking an equitable accounting and a request for disgorgement. In that motion, Plaintiff argued Rochow's estate was entitled to disgorgement of profits because LINA breached its fiduciary duties, and disgorgement was necessary to prevent LINA's unjust enrichment resulting from profits it earned on the wrongfully retained benefits. Plaintiff supported the motion with the report of his expert, Dr. David C. Crosen [sic]. In calculating LINA's "Return on (Average) Equity" ("ROE"), Dr. Crosen [sic] determined LINA used Rochow's benefits to earn between 11 percent and 39 percent annually and, therefore, made approximately $2.8 million by retaining Rochow's benefits.

> In June 2009, the district court granted Plaintiff's motion for an equitable accounting of profits and disgorgement of the same. LINA then moved to strike Croson's report and to preclude him from testifying as an expert on the ground that his principles and methods were unreliable under Federal Rule of Civil Procedure 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 [113 S.Ct. 2786, 125 L.Ed.2d 469] (1993). The motion was referred to the magistrate judge, who issued a report recommending that the motion be denied, noting that the matter was being tried to the court rather than a jury and

finding that many of LINA's objections went to the weight of Croson's opinions, not their admissibility. The district court adopted the magistrate judge's recommendation over LINA's objections.

After the parties briefed the issue, the district court conducted an evidentiary hearing in November 2011 on the issue of calculation of profits for disgorgement. At the hearing, LINA offered the testimony of its expert, Timothy Holzli, who served as the Chief Accounting Officer for the group insurance division of Cigna. Holzli opined Rochow's withheld benefits earned LINA profits of $32,732. He arrived at that figure by treating the withheld benefits as though they were earning interest as part of LINA's investment assets. On cross examination, Holzli acknowledged, however, that the account was not a separate or segregated account. He also conceded that LINA payed [sic] its operating expenses and benefits from the account, and the money in the account formed a basis for LINA to write insurance coverage.

Following additional briefing and oral argument, the district court issued its decision on calculation of profits for disgorgement in March 2012.[2] The district court adopted

[2] The district court's decision is reported at *Rochow v. LINA*, 851 F.Supp.2d 1090 (E.D.Mich.2012).

Croson's ROE metric as the basis for determining the profits LINA gained from the wrongfully withheld funds, and it rejected Holzli's retained investment margin metric. It did so, in part, based upon its factual finding that the subject money was not placed in a separate investment account, but rather was available for LINA to use for any business purpose. In the last paragraph of its decision, the district court stated:

Plaintiff will, within two weeks from this order, submit a final amount to be disgorged by Defendant based upon the Court's rulings, above. Defendant may then submit a memorandum in response within seven days. This memorandum is limited only to any objections regarding the accuracy of Plaintiff's calculations based on this order, and is not an invitation to relitigate issues already decided by this Court.

(Page ID 3576).

On May 4, 2012, in its response brief to Plaintiff's final calculation of disgorgement, LINA argued for the first time that permitting disgorgement was outside the scope of the mandate in the first appeal. Nonetheless, on July 24, 2012, the district court ordered disgorgement of $3,797,867.92. The court noted, "Defendant has, in response to a proposed order submitted by Plaintiff, raised objections. To the extent that these objections do not simply repeat arguments

> already rejected by the Court, and raise new issues in Defendant's argument concerning the 'mandate rule,' they are untimely and will not be considered." (Page ID 3907). LINA timely appealed.

Rochow II, 737 F.3d at 417-20 (alteration in original).

On December 6, 2013, a panel of this court affirmed the disgorgement award, holding that disgorgement was properly ordered under ERISA § 502(a)(3) for LINA's breach of fiduciary duty and that Rochow's claim for such relief was not an impermissible repackaging of a claim for wrongful denial of benefits under § 502(a)(1)(B). *Id.* at 423. The *Rochow II* panel stated that the successful result obtained by Rochow on his claim for wrongful denial of benefits in *Rochow I* did not preclude additional relief on Rochow's breach-of-fiduciary-duty claim. *Id.* at 422-23. LINA's petition for en banc rehearing was granted on February 19, 2014, vacating the panel's decision in *Rochow II*.

II

There is essentially one issue before us: Is Rochow entitled to recover under both ERISA § 502(a)(1)(B) and § 502(a)(3) for LINA's arbitrary and capricious denial of long-term disability benefits? As a result of our ruling in *Rochow I*, Rochow recovered all benefits that he had been wrongfully denied under § 502(a)(1)(B). We now decide whether Rochow may also recover under § 502(a)(3), which makes "appropriate equitable

relief" available to redress such violations as a breach of fiduciary duty.[3] The district court held that Rochow

---

[3] We assume, for present purposes, that the district court made a finding that LINA breached a fiduciary duty owed to Rochow. However, the district court's various orders are devoid of any such express finding. When the case was before the district court on the issue of whether the plan administrator arbitrarily and capriciously denied benefits, the court ruled from the bench in granting summary judgment for Rochow. The transcript of the hearing reveals no express finding of a breach of fiduciary duty. R. 19, Hearing Tr. at 24, Page ID 4095. Further, the one-page order that memorialized the district court's ruling includes the finding simply that "the denial of Plaintiff's claim was arbitrary and capricious." R. 16, Order at 1, Page ID 105. There is no mention of a breach of fiduciary duty. The judgment order that issued the same day, apart from granting Rochow's claim for benefits wrongfully denied, "dismissed" the case. That is, the district court appeared to have dismissed the breach-of-fiduciary-duty claim as a claim pled in the alternative and rendered moot by Rochow's success on the principal claim. R. 17, Judgment, Page ID 106.

In *Rochow I*, similarly, we did not address any claim for breach of fiduciary duty, or even use the terms "fiduciary," "duty," or "breach" in the opinion. Admittedly, one could infer from *Rochow I* that LINA's fiduciary duty was alluded to in the observation that LINA's decision did not appear to have been made "'solely in the interest of the participants and beneficiaries and [ ] for the exclusive purpose of [ ] providing benefits to participants and their beneficiaries' as required by ERISA. 29 U.S.C. § 1104(a)(1)." *See Rochow I*, 482 F.3d at 866. However, no ruling on a breach-of-fiduciary-duty claim was before the court and the opinion contains no analysis of the point.

After the district court's initial decision was affirmed and the district court took up the motion for equitable accounting, however, the court rejected LINA's argument that it had not made the requisite finding of a

(Continued on following page)

could recover under both provisions because Rochow pleaded claims for two distinct kinds of relief, namely one claim to recover benefits arbitrarily and capriciously

---

breach of fiduciary duty to trigger the availability of equitable relief. Citing *Varity*, the court stated, "an arbitrary or capricious denial of benefits can count as a breach of fiduciary duty." R. 67, Order at 4, Page ID 935. Further, when the district court set the method of accounting for the disgorgement award, it stated "it has already been determined that Defendant owed Plaintiff a duty of loyalty and breached this duty through its arbitrary and capricious denial of disability benefits to Plaintiff." R. 113, Order at 2, Page ID 3562. The district court thus treated its finding of an arbitrary and capricious denial of benefits, in and of itself, as a breach of fiduciary duty. The district court never identified any other grounds for finding a breach of a fiduciary duty. In the district court's ruling, it was one and the same injury that made out two distinct ERISA violations and justified both remedies.

Though we are aware of no persuasive authority for the proposition that a wrongful denial of benefits in and of itself constitutes a breach of fiduciary duty remediable under both § 502(a)(1)(B) and § 502(a)(3), we assume, without deciding, that the district court permissibly found a breach of fiduciary duty based on the administrator's arbitrary and capricious denial of benefits. The dissenting opinion suggests other ways in which LINA might be deemed to have breached a fiduciary duty, but the district court's judgment now under review clearly includes no such ruling. Careful review of the district court rulings cited in the dissent discloses that the asserted findings of other instances of misconduct by LINA were not identified by the district court as grounds for holding that LINA breached its fiduciary duty.

denied by LINA, and one claim for disgorgement of profits realized by LINA as a result of its breach of fiduciary duty consisting of the arbitrary and capricious denial of benefits. Contrary to Rochow's arguments, Rochow is made whole under § 502(a)(1)(B) through recovery of his disability benefits and attorney's fees, and potential recovery of prejudgment interest, discussed below. Allowing Rochow to recover disgorged profits under § 502(a)(3), in addition to his recovery under § 502(a)(1)(B), based on the claim that the wrongful denial of benefits also constituted a breach of fiduciary duty, would – absent a showing that the § 502(a)(1)(B) remedy is inadequate – result in an impermissible duplicative recovery, contrary to clear Supreme Court and Sixth Circuit precedent.

ERISA has six remedial provisions. The remedial provisions relevant to this action are § 502(a)(1)(B) and § 502(a)(3), which state:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought –
>
> (1) by a participant or beneficiary –
>
> . . .
>
> (B) to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights under the terms of the plan;
>
> . . .

> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a).

Unfortunately for Rochow, Supreme Court precedent construing the interplay of these provisions dictates a result contrary to that reached by the district court. In *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), the Supreme Court allowed a group of plaintiffs, who were unable to bring a claim under § 502(a)(1)(B), to bring suit for breach of fiduciary duty under § 502(a)(3). As the Court explained, § 502(a)(3) "functions as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." *Id.* at 513, 116 S.Ct. 1065. Importantly, however, the *Varity* Court limited this expansion of ERISA coverage by noting 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.*" *Id.* at 515, 116 S.Ct. 1065 (emphasis added) (internal quotation marks omitted).

The *Varity* Court thus emphasized that ERISA remedies are concerned with the adequacy of relief to redress the claimant's injury, not the nature of the

defendant's wrongdoing. The district court's use of equitable relief under § 502(a)(3) as the vehicle for its disgorgement award misses the mark. Instead of focusing on the relief available to make Rochow whole, the award reflects concern that LINA had wrongfully gained something, a consideration beyond the ken of ERISA make-whole remedies. *Varity* indicates that equitable relief is not ordinarily appropriate where Congress has elsewhere provided adequate means of redress for a claimant's injury. In other words, a claimant cannot pursue a breach-of-fiduciary-duty claim under § 502(a)(3) based solely on an arbitrary and capricious denial of benefits where the § 502(a)(1)(B) remedy is adequate to make the claimant whole. Here, there is no showing that the benefits recovered by Rochow, plus the attorney's fees awarded, plus the prejudgment interest that *may* be awarded on remand, are inadequate to make Rochow whole. Absent such a showing, there is no trigger for "further equitable relief" under *Varity*.

If an arbitrary and capricious denial of benefits implicated a breach of fiduciary duty entitling the claimant to disgorgement of the defendant's profits in addition to recovery of benefits, then equitable relief would be potentially available whenever a benefits denial is held to be arbitrary or capricious. This would be plainly beyond and inconsistent with ERISA's purpose to make claimants whole. Tellingly, the appellate briefing contains citation to no case that allowed disgorgement of profits under § 502(a)(3)

after the claimant recovered for wrongful denial of benefits under § 502(a)(1)(B).

Here in the Sixth Circuit we have had occasion to apply *Varity*'s teaching on the relationship between § 502(a)(1)(B) and § 502(a)(3) in *Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609 (6th Cir.1998). In *Wilkins*, Wilkins applied for long-term disability benefits and, after the plan administrator denied his claim, sued for benefits under § 502(a)(1)(B) and for equitable relief under § 502(a)(3) based on breach of fiduciary duty. We denied relief under § 502(a)(3) stating:

> Because [§ 502(a)(1)(B)] provides a remedy for Wilkins's alleged injury that allows him to bring a lawsuit to challenge the Plan Administrator's denial of benefits to which he believes he is entitled, he does not have a right to a cause of action for breach of fiduciary duty pursuant to [§ 502(a)(3)].

Id. at 615. Just like the plaintiff in *Wilkins*, Rochow is not entitled to relief under the catchall provision: such relief is unnecessary and unavailable because he has an adequate remedy under § 502(a)(1)(B).

LINA thus contends the district court's disgorgement award contravenes *Wilkins* and allows a claimant to improperly repackage a claim for benefits wrongfully denied as a cause of action for breach of fiduciary duty. Rochow insists that *Wilkins* provided a way to ensure only that claimants do not attempt an "end run" around ERISA's limitations by repackaging

an *unsuccessful claim for benefits* as a claim for "appropriate relief" based on an alleged breach of fiduciary duty. Rochow claims that *Wilkins* bars relief sought under § 502(a)(3) *only if* that same type of relief could have been obtained under § 502(a)(1)(B). Because he purportedly seeks a type of relief under § 502(a)(3) (i.e., disgorgement of LINA's profits) different from and in addition to what is available to him under § 502(a)(1)(B), Rochow contends that *Wilkins* does not preclude his claim for this additional remedy to obtain complete relief.

Rochow mischaracterizes *Wilkins*. A claimant can pursue a breach-of-fiduciary-duty claim under § 502(a)(3), irrespective of the degree of success obtained on a claim for recovery of benefits under § 502(a)(1)(B), only where the breach of fiduciary duty claim is based on an *injury* separate and distinct from the denial of benefits or where the remedy afforded by Congress under § 502(a)(1)(B) is otherwise shown to be inadequate. *See Gore v. El Paso Energy Corp. Long Term Disability Plan*, 477 F.3d 833, 840-42 (6th Cir.2007). *Wilkins* simply affords no support for the argument that § 502(a)(3) equitable relief may be appropriate to further redress a wrongful denial of benefits adequately remediable under § 502(a)(1)(B). Rather, *Wilkins* makes clear that the availability of relief under § 502(a)(3) is contingent on a showing that the claimant could not avail himself or herself of an adequate remedy pursuant to § 502(a)(1)(B). *Wilkins*, 150 F.3d at 615.

Rochow contends there is no legitimate concern about impermissible claim "repackaging" when a benefits-claimant prevails and seeks "*other* appropriate equitable relief." We disagree. Impermissible repackaging is implicated whenever, in addition to the particular adequate remedy provided by Congress, a duplicative or redundant remedy is pursued to redress the same injury. Because Rochow was able to avail himself of an adequate remedy for LINA's wrongful denial of benefits pursuant to § 502(a)(1)(B), he cannot obtain additional relief for that same injury under § 502(a)(3).

In *Hill v. Blue Cross and Blue Shield of Michigan*, 409 F.3d 710 (6th Cir.2005), we further clarified the interplay of § 502(a)(1)(B) and § 502(a)(3). In *Hill*, the plaintiffs brought a class-action lawsuit seeking individual relief for wrongfully denied benefits under § 502(a)(1)(B) and for plan-wide injunctive relief under § 502(a)(3) based upon the defendant's alleged breach of its fiduciary duty. The district court dismissed the § 502(a)(3) claim, finding that "these claims were merely repackaged claims for individual benefits and did not constitute actual fiduciary-duty claims." *Id.* at 717. We reversed. Whereas *Wilkins* involved the rejection of fiduciary-duty claims on the basis that they were actually disguised individual-benefits claims, in *Hill* the need for relief under the catchall provision arose out of a defect in *plan-wide* claim handling procedures, implicating a different injury. "The award of benefits to a particular [plaintiff] based on an improperly denied claim for

emergency-medical-treatment expenses will not change the fact that [defendant] is using an allegedly improper methodology for handling . . . claims." *Id.* at 718. To remedy *this* separate and distinct injury, we permitted injunctive relief under § 502(a)(3), not an additional award of monetary damages for the same denial of benefits. Thus, *Hill* recognized an exception to *Varity* and *Wilkins* where "[o]nly *injunctive relief* of the type available under [§ 502(a)(3) would] provide the complete relief sought by Plaintiffs by requiring [Defendant] to alter the manner in which it administers all the Program's claims. . . ." *Id.* at 718 (emphasis added). In *Hill*, as in *Varity*, the primary purpose of ERISA was given effect – ensuring availability of an adequate remedy to make the plaintiffs whole.

The present case does not fall within the *Hill* exception to *Varity* and *Wilkins*. *Hill* distinguished between the denial of individual claims and plan-wide mishandling of claims as two distinct injuries. Section 502(a)(1)(B) provided relief for the denial of the *Hill* plaintiffs' individual benefits, and § 502(a)(3) remedied the systemic plan-wide problems that posed a potential for future injury. Contrast *Hill* with the present case, where the only asserted injury to Rochow is the denial of benefits and withholding of the same benefits. These are not distinct injuries; they are one and the same injury. Because Rochow has an adequate and effective remedy for this injury under § 502(a)(1)(B), he is not also entitled to relief under § 502(a)(3).

Rochow continues to claim that the disgorgement award ("equitable accounting") remedies an injury entirely distinct from the injury remedied by recovery of his benefits, and that he has therefore suffered two distinct injuries. Rochow contends that he suffered his first injury when LINA improperly denied his benefits, and he suffered his second "injury" when LINA used the funds it owed him to generate $3.7 million in profits for its own account without remitting the profits to him. Yet, in an action for wrongful denial of benefits, like this one, the denial of benefits necessarily results in a continued withholding of benefits until the denial is either finalized or rectified. The denial is the injury and the withholding is simply ancillary thereto, the continuing effect of the same denial. Together they comprise a single injury. By withholding payment of benefits until the denial was either finalized or rectified, LINA did not violate a second, distinct duty owed to Rochow and did not inflict a second injury.

Nor can it be said that Rochow suffered a second injury, or that his injury was exacerbated, as a result of any gain realized by LINA before it paid the wrongfully withheld benefits. Rochow's loss remained exactly the same irrespective of the use made by LINA of the withheld benefits. Despite Rochow's creative use of semantics, the reality remains clear: Rochow suffered one injury, the denial of his benefits. And neither Rochow nor the dissent has succeeded in identifying any way in which the remedy available under § 502(a)(1)(B) – i.e., recovery of benefits and

attorney's fees and, potentially, prejudgment interest – is inadequate to make Rochow whole. The remedy Congress chose to make available under § 502(a)(1)(B) having thus not been shown to be inadequate, it follows that permitting Rochow to obtain further equitable relief for the same injury under § 502(a)(3) would contravene the scheme established by Congress as well as the Supreme Court's teaching in *Varity.*

Rochow cites two cases to support his claim that he is entitled to equitable relief under § 502(a)(3). He contends that *Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406 (3d Cir.2013), stands for the proposition that disgorgement of profits may be an appropriate remedy for breach of fiduciary duty even in the absence of a showing of financial loss by the claimant. The discussion in *Edmonson* on which Rochow relies is addressed solely to the question whether an ERISA claimant had standing to bring a claim for disgorgement of profits notwithstanding a lack of showing of financial loss. The court answered this question in the affirmative, based on trust law principles. *Id.* at 415-17. However, the court ultimately denied relief for lack of a showing of a breach of fiduciary duty and lack of a showing that any such breach proximately caused injury to the claimant. *Id.* at 423-26. There was no claim in *Edmonson* for benefits wrongfully denied, but only a stand-alone claim for breach of fiduciary duty. Hence, the *Edmonson* court did not have occasion to address the interplay of § 502(a)(1)(B) and § 502(a)(3) or to consider whether the availability of

other remedies under ERISA rendered equitable relief under § 502(a)(3) inappropriate. *Edmonson*'s observations about standing, viewed in context, are of limited significance to the issue before us.

Rochow also relies on *CIGNA Corp. v. Amara*, ___ U.S. ___, 131 S.Ct. 1866, 1881, 179 L.Ed.2d 843 (2011), to support his argument that the failure to show a second, distinct injury is not fatal to his disgorgement award under § 502(a)(3). In *Amara*, he contends, the Court recognized that in an action for equitable relief under § 502(a)(3), the requisite "actual harm" may consist simply of "the loss of a right protected by ERISA or its trust-law antecedents." *Id.* at 1881. Again, the argument misses the point. There is no dispute that "appropriate equitable relief" may be obtained under § 502(a)(3) to redress an ERISA violation by a plan fiduciary. The point, as detailed above, is that Rochow did not suffer an injury remediable under § 502(a)(3) in this case. Rochow suffered the wrongful denial of his benefits, an injury adequately remedied under § 502(a)(1)(B). Despite Rochow's insistence to the contrary, his breach-of-fiduciary-duty claim for disgorgement of profits is nothing but a repackaged claim for benefits wrongfully denied, a claim for which, per *Varity*, additional equitable relief is not appropriate because not necessary to make Rochow whole. Rochow's reliance on *Amara* is to no avail.

Rochow insists that *Varity* and *Amara*, read together, indicate that a plaintiff may obtain relief under both § 502(a)(1)(B) and § 502(a)(3) if "other

appropriate equitable relief" is necessary to make the plaintiff whole for injury caused by the wrongful denial of benefits. He argues that *Varity* made clear that "other appropriate equitable relief" may be available under § 502(a)(3) when a party cannot obtain relief under § 502(a)(1)(B). Further, *Amara* identified a range of equitable remedies potentially available under § 502(a)(3), including surcharge.[4] Reading *Varity* and *Amara* together thus supports the notion, Rochow contends, that disgorgement of profits is available in the instant case because recovery of benefits under § 502(a)(1)(B) did not make him whole for the injury caused by LINA's breach of fiduciary duty.

Rochow's reading misses a logical step: "other appropriate equitable relief" is not necessary to make him whole. While *Varity* certainly acknowledges the possibility of equitable relief, and *Amara* outlines the

---

[4] The statements made by the Supreme Court in *Amara* regarding the equitable remedies available to courts under § 502(a)(3) are merely dicta. The sole question before the Court in *Amara* was whether the district court applied the correct legal standard in determining whether CIGNA's failure to inform its employees of changes to the benefits plan caused its employees sufficient injury to warrant legal relief. *Amara*, 131 S.Ct. at 1871. The Court also discussed whether § 502(a)(1)(B) authorized the relief the district court awarded. In finding that § 502(a)(1)(B) was not the appropriate remedy, the Court went on to acknowledge that § 502(a)(3) authorizes forms of relief similar to § 502(a)(1)(B). However, the Court did not decide what remedies were available, and did not conclusively decide which remedy was appropriate in the case before it. *Id.* at 1880.

scope of potential equitable relief, when appropriate, the Supreme Court has never stated that recovery under both § 502(a)(3) and § 502(a)(1)(B) may be warranted for a single injury. Rochow claims two injuries – the arbitrary and capricious denial of benefits, and the breach of fiduciary duty consisting of the continued withholding of the wrongfully denied benefits. These "injuries," however, as explained above, are indistinguishable. The Court in *Varity* made clear that equitable relief is not ordinarily appropriate where Congress has provided adequate relief for a claimant's injury. The purpose behind ERISA continues to be remedial, and Rochow's injury was remedied when he was awarded the wrongfully denied benefits and attorney's fees – as potentially supplemented by award of prejudgment interest, still to be determined. Despite Rochow's attempts to obtain equitable relief by repackaging the wrongful denial of benefits claim as a breach-of-fiduciary-duty claim, there is but one remediable injury and it is properly and adequately remedied under § 502(a)(1)(B). Rochow and our dissenting colleagues wholly fail to explain *how* his § 502(a)(1)(B) remedies are inadequate to remedy his *injury*.

Rochow's final argument is that even if the disgorgement relief is not available under § 502(a)(3), he is entitled to prejudgment interest under § 502(a)(1)(B), a matter the district court failed to address. We acknowledge that prejudgment interest may be awarded in an appropriate case under ERISA. "Though ERISA does not address the propriety of

awarding prejudgment interest, prejudgment interest may be awarded in the discretion of the district court. Awards of prejudgment interest are *compensatory*, not punitive, and a finding of wrongdoing by the defendant is not a prerequisite to such an award." *Tiemeyer v. Cmty. Mut. Ins. Co.*, 8 F.3d 1094, 1103 (6th Cir.1993), *cert. denied*, 511 U.S. 1005, 114 S.Ct. 1371, 128 L.Ed.2d 48 (1993) (internal quotations and citations omitted); *see also Wells v. U.S. Steel*, 76 F.3d 731, 737 (6th Cir.1996) (holding that district court did not abuse its discretion in awarding prejudgment interest when pension fund wrongfully withheld benefits).

Prejudgment interest cannot be awarded, however, at a rate so high that the award amounts to punitive damages:

> Although prejudgment interest is typically not punitive, an excessive prejudgment interest rate would overcompensate an ERISA plaintiff, thereby transforming the award of prejudgment interest from a compensatory damage award to a punitive one in contravention of ERISA's remedial goal of simply placing the plaintiff in the position he or she would have occupied but for the defendant's wrongdoing.

Ford v. Uniroyal Pension Plan, 154 F.3d 613, 616 (6th Cir.1998). An interest award should "simply compensate a beneficiary for the lost interest value of money wrongfully withheld from him or her." *Rybarczyk v. TRW, Inc.*, 235 F.3d 975, 985 (6th Cir.2000) (quoting

Ford, 154 F.3d at 618). An excessive prejudgment interest rate would "contravene ERISA's remedial goal of simply placing the plaintiff in the position he or she would have occupied but for the defendant's wrongdoing." *Schumacher v. AK Steel Corp. Retirement Accumulation Pension Plan*, 711 F.3d 675, 686 (6th Cir.2013). Conversely, an exceedingly low award would fail to make the plaintiff whole. *Id.*

Rochow's request for prejudgment interest appears to be a remedy the district court could have granted, though not at an excessive rate. In his initial complaint, Rochow requested various forms of relief, including an "[o]rder compelling Defendant to pay Plaintiff forthwith the full amount of employee benefits due him and to continue such payments for a period set forth in the Plan, including interest on all unpaid benefits." R. 1, Compl. at 6, Page ID 6. Rochow also requested "[r]easonable attorney fees and costs" and "[s]uch other relief as may be just and appropriate." *Id.* When the case was remanded to the district court following *Rochow I*, the parties treated prejudgment interest as a live issue, fully briefing the issue in connection with the proceedings on equitable remedies. Yet when disgorgement of profits was ordered, the question of prejudgment interest was given no further consideration. Rochow thus prayed for such relief in his complaint and has preserved his request throughout the proceedings. The issue having been thus far been [sic] pretermitted through no fault of the parties, we remand the case once more to the

district court for fresh consideration of Rochow's entitlement to prejudgment interest.

III

For the reasons stated above, we **VACATE** the district court's disgorgement award under § 502(a)(3) and **REMAND** the case to the district court for consideration of whether and, if so, to what extent, award of prejudgment interest is warranted under § 502(a)(1)(B) to make Rochow whole.

JULIA SMITH GIBBONS, Circuit Judge, concurring.

If one accepts the rather charitable assumptions made in footnote 1 of the majority opinion, its reasoning is entirely correct. For that reason I concur in it. I write separately to note, however, that if one does not make those assumptions, the district court's disgorgement order cannot stand for purely procedural reasons.

Rochow's complaint stated two claims: He alleged that LINA wrongfully denied him benefits under 29 U.S.C. § 1132(a)(1)(B), and he alleged that in doing so, LINA breached its fiduciary duties under 29 U.S.C. § 1104(a). The second claim was styled as one arising under 29 U.S.C. § 1132(a)(3). In his prayer for relief, in addition to seeking an order compelling LINA to pay him the benefits he believed he was due,

Rochow sought disgorgement of any profits that LINA had obtained as a result of its conduct.

The parties filed cross-motions for summary judgment. LINA requested that the district court affirm its denial of Rochow's claim for benefits. Rochow asserted only that LINA erroneously denied him benefits pursuant to § 1132(a)(1)(B).[1] He styled his summary judgment motion as a motion for partial summary judgment, did not argue his breach-of-fiduciary-duty claim under § 1104(a) and § 1132(a)(3), and did not mention disgorgement. When the district court issued an order memorializing its from-the-bench grant of Rochow's motion, it granted summary judgment in full and made no mention of Rochow's second claim.

Were there any doubt that Rochow's § 1132(a)(3) claim no longer remained in the suit, the district court's judgment ordered the case "DISMISSED." This was a final judgment, conferring upon the *Rochow I* panel appellate jurisdiction pursuant to 28 U.S.C. § 1291. There was no other basis for appellate jurisdiction, as the district court did not issue an injunction triggering the application of 28 U.S.C. § 1292(a), nor did it certify the case for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Rochow

---

[1] Among the other relief he sought, Rochow requested "[a] full and accurate accounting by Defendant of all computations for Plaintiff's disability benefits in sufficient detail so that Plaintiff may ascertain that his benefits are being paid in the proper amount."

raised no issue on appeal regarding the district court's failure to address his breach of fiduciary duty claim. The *Rochow I* panel affirmed the district court's grant of Rochow's motion for summary judgment, thus ending the case. The district court had ordered the case dismissed. A panel of this court had affirmed. And the panel did *not* remand the case to the district court.

Pursuant to the parties' stipulation, however, the district court agreed to accept "post-remand" motions. But the case had never been remanded, and, of course, the parties could not stipulate to the district court's retention of jurisdiction. Still, the district court permitted Rochow to resuscitate his abandoned disgorgement claim, after Rochow moved for the court "to supervise the equitable accounting granted with summary judgment." This motion was highly problematic. For starters, the district court never granted equitable accounting as part of its summary judgment order. And to the extent Rochow mentioned "accounting" in his motion for summary judgment, he sought an accounting of the amount of benefits due so that he could ensure "that his benefits [we]re being paid in the proper amount," not equitable accounting tantamount to disgorgement. LINA is not without fault either. It spent years litigating the case without bringing these procedural defects to the district court's attention.

When the district court finally granted Rochow's motion for equitable accounting and ordered LINA to disgorge profits, it violated the mandate rule. The

mandate rule is a multifaceted "rule" governing the relationship between the courts of appeals and the district courts. Its fundamental principle is straightforward: A district court may not contravene an appellate court's mandate. *United States v. Campbell*, 168 F.3d 263, 265 (6th Cir.1999). For instance, if a case is remanded, the mandate rule "forecloses relitigation of issues expressly or *impliedly* decided by the appellate court." *United States v. O'Dell*, 320 F.3d 674, 679 (6th Cir.2003) (internal quotation marks omitted). And "where an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, the mandate rule generally prohibits the district court from reopening the issue on remand unless the mandate can reasonably be understood as permitting it to do so." *Id.*

Here, the *Rochow I* panel did not remand the case to the district court, so any "post-remand" litigation was contrary to this court's mandate. *See United States v. Hamilton*, 440 F.3d 693, 697-98 (5th Cir.2006); *Green v. Nevers*, 196 F.3d 627, 632 (6th Cir.1999). Even if *Rochow I* could be read as remanding the case to the district court for the issuance of a remedy, a district court violates the mandate rule when it orders an additional remedy beyond that contemplated by the appellate panel's opinion. *See Briggs v. Pa. R.R. Co.*, 334 U.S. 304, 306, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948); *Schake v. Colt Indus. Operating Corp. Severance Plan for Salaried Emps.*, 960 F.2d 1187, 1191 (3d Cir.1992); *Stiller v. Squeez-A-Purse Corp.*, 296 F.2d 504, 506 (6th Cir.1961). Since

Rochow had abandoned his claim for disgorgement under § 1132(a)(3) by not seeking its resolution in the district court after that court treated a motion for "partial" summary judgment as one warranting summary judgment on all issues and by not raising the district court's failure to resolve the breach of fiduciary duty claim on appeal, the district court violated the mandate rule when it ordered disgorgement.

Our mandate issued on May 3, 2007. Over *seven* years later this case is still being litigated. The majority's charitable view of the case's procedural history allows that unfortunate history to continue with some legitimacy. In short, while I agree with the majority's analysis if one accepts its accommodations in footnote 1 to reposition the case for *en banc* review, I am unable to refrain from presenting another take on the history of this case, one which would preclude the district court's jurisdiction to order any further relief, except the prejudgment interest directed by the majority opinion.

HELENE N. WHITE, Circuit Judge, concurring in part and dissenting in part.

I write separately because I do not entirely agree or disagree with either the majority or dissenting opinion. I would vacate the judgment on the basis that the order of disgorgement is not adequately supported. I would, however, permit consideration of

a refashioned disgorgement remedy on remand if properly supported.[1]

There is less light between the two opinions than might appear on the surface. The majority understands Rochow's fiduciary-duty claim as a repackaging of his benefits-denial claim, for which it believes Rochow obtained adequate relief as a result of *Rochow I*, 482 F.3d 860 (6th Cir.2007), and a potential award of prejudgment interest on remand. Operating under this conclusion, the majority holds the district court erred when it ordered LINA to disgorge its profits because ERISA, in its view, precludes "a duplicative or redundant remedy . . . to redress the same injury." Maj. Op. 373. The majority opinion does not, however, appear to foreclose disgorgement as an appropriate equitable remedy under § 502(a)(3) in some cases. The dissent too interprets ERISA to authorize equitable relief, including disgorgement of profits, to remedy distinct injuries, such as a plan administrator's breach of a fiduciary duty owed to plan participants and beneficiaries. Thus, all appear to agree disgorgement of profits is a potential remedy under ERISA. The two opinions part on whether Rochow's fiduciary-duty claim is merely a repackaging of his benefits-denial claim. This, I believe, is a false dichotomy that imposes a requirement not found in ERISA.

---

[1] This is not to say that such a remedy would be appropriate, only that it might be and that I would not foreclose it at this point.

I do not agree that the dispositive inquiry governing the availability of equitable relief under § 502(a)(3) is whether the claim is a repackaging of a benefits-denial claim. Rather, the governing inquiry under ERISA is whether other equitable relief is appropriate under the circumstances, and the extent to which the equitable disgorgement claim duplicates the benefits-denial claim is one factor to be considered in making that determination.

The statutory framework that authorizes "other appropriate equitable relief" confides the determination whether and what equitable relief is appropriate to judges, who presumably are well equipped to determine when a particular set of circumstances warrants additional relief by focusing on ERISA's objectives. This understanding of and respect for the discretionary role of the courts in evaluating claims for equitable relief is consistent with the Supreme Court's statements in *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), which contemplate courts' sound exercise of their discretion in fashioning appropriate equitable relief:

> We should expect that courts, in fashioning "appropriate" equitable relief, will keep in mind the special nature and purpose of employee benefit plans, and will respect the policy choices reflected in the inclusion of certain remedies and the exclusion of others. 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."

Id. at 515, 116 S.Ct. 1065 (citations and internal quotation marks omitted). *Varity* does not require a showing of a "separate and distinct" injury. Maj. Op. 372; *cf. id.* at 371 (recognizing that *Varity* "emphasized that ERISA remedies are concerned with the adequacy of relief to redress the claimant's injury"). Rather, it speaks of injury for which adequate relief has not been elsewhere provided, uses the qualifying terms "likely" and "normally," and ultimately focuses on the governing word "appropriate." We should, therefore, address whether additional equitable relief is appropriate here, even discuss the types of considerations that should guide the determinations whether and what equitable relief is appropriate, but we should not preemptively disallow equitable remedies in particular circumstances where ERISA has not done so.

Nevertheless, the majority fashions a bifurcated standard, holding that a breach-of-fiduciary-duty claim is actionable under § 502(a)(3) where the claim is based on "an *injury* separate and distinct from the denial of benefits *or* where the remedy afforded by Congress under § 502(a)(1)(B) is otherwise shown to be inadequate." *Id.* at 372 (second emphasis added). I find this standard both confusing and unnecessary. If the remedy afforded by Congress under § 502(a)(1)(B) is adequate, it should not matter that the beneficiary suffered an injury separate and distinct from the denial of benefits; I doubt the majority intends

otherwise. Conversely, if the remedy afforded by Congress under § 502(a)(1)(B) is inadequate, it also should not matter whether the claimant suffered distinct injuries. Ultimately the question must rest on the majority's second inquiry – whether the "remedy afforded by Congress under § 502(a)(1)(B) is otherwise shown to be inadequate." I have no doubt that whether the beneficiary suffered multiple injuries is a factor that is relevant to the ultimate question whether § 502(a)(1)(B) provides adequate relief. But the majority's focus on whether a fiduciary's breach of its duties in denying benefits and then withholding them are "separate and distinct" injuries or a single injury seems irrelevant in light of its conclusion that Rochow failed to show that the relief already received together with the relief that might be awarded on remand is inadequate. The majority implicitly acknowledges the dispositive inquiry with its conclusion that Rochow made "no showing that the benefits [he] recovered . . . , plus the attorney's fees awarded, plus the prejudgment interest that *may* be awarded on remand, are inadequate to make [him] whole." *Id.* at 371-72.

Further undermining the separate-and-distinct-injury requirement for relief under § 502(a)(3) is the majority's acknowledgement that a plaintiff who recovers benefits under § 502(a)(1)(B) can also obtain "other appropriate equitable relief" under § 502(a)(3) in the form of prejudgment interest, an equitable remedy. The majority allows an interest award even as it asserts that Rochow suffered only one injury

that was "adequately remedied under § 502(a)(1)(B)," and that he "did not suffer [a separate and distinct] injury remediable under § 502(a)(3)." *Id.* at 374-75. Clearly, Rochow was not made whole by the award of benefits and attorney's fees. Nearly seven years elapsed between the time he sought benefits and when LINA finally paid all benefits that were due. Further equitable relief is necessary to compensate Rochow for LINA's extraordinary delay in paying benefits. The majority concedes as much in its remand order directing the district court to consider the award of interest, although it leaves the ultimate determination to the district court. But, having acknowledged the possibility that delay in payment might require further appropriate equitable relief, the majority does not explain why one equitable remedy (interest) may be appropriate in a benefits-denial case, but another equitable remedy (disgorgement) is never appropriate in such a case, except to say that there is only one injury.

There is a valid distinction between the two equitable remedies that has nothing to do with whether there is an injury separate and distinct from the denial of benefits: Interest is generally compensatory, while disgorgement is generally geared toward deterring future misconduct. *See Drennan v. Gen. Motors Corp.*, 977 F.2d 246, 253 (6th Cir.1992); The Law of Trusts and Trustees § 484. I share the majority's concern that Congress did not intend to turn the routine denial of benefits into the basis for a recovery of benefits and also an array of equitable relief, but I

would direct that concern to the question whether, in light of the historic distinction between the two equitable remedies, disgorgement constitutes "other appropriate equitable relief" under the facts of a particular case, and would refrain from announcing what appears to be a blanket rule that bars equitable relief in a benefits-denial case.

Turning to the instant case, the district court did not find that disgorgement of profits is necessary to make Rochow whole, or that Rochow could have earned the same rate of return had he been paid his benefits on time.[2] Rather, the court's primary basis for awarding further equitable relief was LINA's unjust enrichment, Order, R. 67 at 5-6, and the disgorgement of profits was largely based on the finding that LINA did not segregate Rochow's wrongfully withheld benefits and instead left the amount in its general fund to be used for general operating expenses, *Rochow v. Life Ins. Co. of N. Am.*, 851 F.Supp.2d 1090, 1097-98 (E.D.Mich.2012). The district court reasoned that LINA earned a rate of return on Rochow's benefits that it would not have earned had it segregated the funds in an investment account, and that because Rochow's money was inseparable from LINA's money, he is entitled to a percentage of LINA's return on its investments during this period. However, the district court did not find that either the

---

[2] The circumstances might, however, support a finding that interest at the actual market rates during the period of delay would be inadequate compensation for the delay.

Plan or ERISA required that Rochow's disputed benefits be segregated pending resolution of the claim. Nor is it apparent on what basis the dissent concludes that LINA engaged in prohibited self-dealing under 29 U.S.C. § 1106(b). There has been no finding that Rochow's disputed benefits constituted "plan assets," or that LINA's actions in failing to segregate the disputed benefits and leaving them in the general fund constituted self-dealing under ERISA. Without such findings or further explanation, I cannot agree that disgorgement is justified based only on the maxim emphasized by the district court – "if you take my money and make money with it, your profit belongs to me." *Rochow*, 851 F.Supp.2d at 1094 (internal quotation marks omitted).

In the absence of such justifications, disgorgement as an equitable remedy in a denial-of-benefits case should be premised on a finding that the decision to deny benefits was not only arbitrary and capricious but also based on impermissible considerations that call for an equitable judicial response geared toward deterring similar decision making in the future, as, for example, where the denial of benefits is not the product of particular claims evaluators' misguided evaluations, but rather, an organizational policy to delay paying valid claims for as long as possible; or where repeated wrongful denials lead to the conclusion that disgorgement is necessary to assure proper claims processing in the future. *See Hill v. Blue Cross & Blue Shield of Mich.*, 409 F.3d 710, 718 (6th Cir.2005); *Parke v. First Reliance Standard Life Ins.*

Co., 368 F.3d 999, 1008 (8th Cir.2004) (quoting 1 Dobbs § 4.3(5), at 611 n.16); Restatement (Third) of Restitution and Unjust Enrichment § 51 (2011). Further, even when these types of considerations support disgorgement, the court should consider the effect of disgorgement on innocent participants in the plan and tailor the remedy accordingly.

To be clear, a finding that disgorgement is an appropriate remedy in such circumstances would be based on the totality of the circumstances of the denial, as well as the consequences of disgorgement, and would not depend on a finding of a separate and independent injury, which, although relevant, may or may not be present.

In sum, to the extent the majority's bifurcated rule identifies two circumstances or considerations that might justify an award of additional equitable relief, I agree that those circumstances or considerations are relevant; however, to the extent the majority intends to announce a rule that either dictates an award of additional equitable relief where either of those circumstances is present or prohibits such an award where neither is present, I disagree. Ultimately, the governing inquiry is whether additional equitable relief is appropriate, a decision normally left to the sound discretion of the district courts, to be exercised according to the totality of the circumstances surrounding the denial, and subject to review for abuse of discretion. *See Tiemeyer v. Cmty. Mut. Ins. Co.*, 8 F.3d 1094, 1103 (6th Cir.1993). Addressing that question, I conclude that the record as it stands

does not support the district court's exercise of its discretion in awarding the disgorgement ordered here. Thus, I agree that the order should be vacated. I would, however, permit the district court to address on remand the concerns raised here and in the majority opinion, and would not foreclose a disgorgement remedy as "other appropriate equitable relief" if properly supported on remand.

STRANCH, Circuit Judge, dissenting.

The issue before us arises under a remedial statute, fashioned on the precepts of equity, which empowers a plan participant to bring a civil action to "recover benefits due" and "to obtain other appropriate equitable relief." 29 U.S.C. §§ 1132(a)(1)(B) & (a)(3). In the parlance of ERISA and equity jurisprudence, the remedy is to "make whole" the injured. Here, Rochow – a company president whose mental capacity was destroyed over time by a brain infection – sought disability benefits from LINA starting in 2002. Over five years later, in October 2007, he received his first benefit payment (a lump sum of over $300,000), and monthly benefits began. In June 2009, almost seven years after the disability date and eight months after Rochow died in October 2008, LINA paid a second lump sum for underpayment of benefits approximating $420,000.

Rochow sought, and the district court awarded, a make-whole remedy for two ERISA violations committed by LINA, failure to pay benefits due and breach of

fiduciary duty. Based on evidence presented, the district court found that LINA engaged in deliberate and willful wrongful acts, created non-existent insurance policy requirements, concocted a knowingly false rationale for its second denial of benefits, closed the administrative record without medical input or evidence, and acted in bad faith. R. 67, Order; *Rochow v. Life Ins. Co. of N. Am.*, 851 F.Supp.2d 1090, 1101 (E.D.Mich.2012). Proceedings in the district court confirmed that LINA also engaged in prohibited self-dealing under 29 U.S.C. § 1106(b) in the course of delaying payment of Rochow's disability benefits for more than seven years. During that lengthy period of delay, rather than segregating the disability benefits it owed to Rochow in an interest-bearing account for his later use, LINA commingled Rochow's benefits with company funds in a general equity account used in part for corporate investment. Because Rochow earned a high salary before the onset of his disability, LINA's intentional delay in paying Rochow's substantial disability benefits for more than seven years allowed LINA to earn millions of dollars in profit for its own gain, in breach of its fiduciary duty not to engage in self-dealing. 29 U.S.C. §§ 1104(a)(1), 1106(b). Based on expert evidence, the district court found that LINA's average rate of return during the seven-year period was 26%. Rochow's health deteriorated during that time and he was forced to meet the financial demands of everyday living and serious illness without employment income or the disability benefits promised under the Plan. LINA's fiduciary wrongdoing and self-dealing warrant

equitable remedies under § 1132(a)(3) – an accounting and disgorgement of the considerable profits LINA earned on the benefits it withheld from Rochow.

The majority avers that such equitable remedies are prohibited under ERISA jurisprudence because obtaining a remedy under both § 1132(a)(1)(B) and § 1132(a)(3) amounts to double recovery. Its insistence that Rochow is not entitled to disgorgement of LINA's profit under § 1132(a)(3) rests on a faulty premise – its assumption that Rochow suffered the single injury of LINA's arbitrary and capricious denial of benefits. Maj. Op. at 369-70. The majority states that, [a]llowing Rochow to recover disgorged profits under § 502(a)(3), in addition to his recovery under § 502(a)(1)(B), based on the claim that the wrongful denial of benefits also constituted a breach of fiduciary duty, would – absent a showing that the § 502(a)(1)(B) remedy is inadequate – result in an impermissible duplicative recovery, contrary to clear Supreme Court and Sixth Circuit precedent. Maj. Op. at 370-71. Relying primarily on *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), and *Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609 (6th Cir.1998), the majority concludes that "Rochow is not entitled to relief under the catchall provision" of § 1132(a)(3) because "such relief is unnecessary and unavailable" and "he has an adequate remedy under" § 1132(a)(1)(B). Maj. Op. at 372-73.

I will demonstrate below that *Varity Corp.* and numerous cases decided after it fully support Rochow's recovery of benefits under § 1132(a)(1)(B) and the

disgorgement of LINA's profit under § 1132(a)(3). *Wilkins* is inapplicable to the issues before us because it is legally and factually distinguishable. Wilkins sued for disability benefits under § 1132(a)(1)(B) and failed to prove that his medical condition warranted payment of plan benefits. *Wilkins*, 150 F.3d at 612-13. Trying a second time to obtain plan benefits, he "repackaged" the benefits claim as a breach of fiduciary duty under § 1132(a)(3), but he sought a traditionally legal remedy – compensatory damages. *Id.* at 613-14. We barred the "repackaging" of the claim because Wilkins had an adequate remedy to recover benefits under § 1132(a)(1)(B) and recovery of compensatory damages would not constitute "other appropriate equitable relief" under § 1132(a)(3). *Id.* at 615-16. *Wilkins* thus insures that a plan participant cannot make an end-run around a denial of benefits under § 1132(a)(1)(B) by "repackaging" the claim and seeking compensatory damages under § 1132(a)(3).

In contrast to the facts of *Wilkins*, LINA injured Rochow in two distinct ways: by arbitrarily and capriciously denying his disability benefits claim and by breaching its fiduciary duties to him. LINA's denial of benefits breached the Plan terms; LINA's breach of its fiduciary obligations violated ERISA statutes and added the element of wrongdoing to the contract breach. Equity has long recognized that "[a] trustee (or a fiduciary) who gains a benefit by breaching his or her duty must return that benefit to the beneficiary." *Skinner v. Northrop Grumman Retirement Plan B*, 673 F.3d 1162, 1167 (9th Cir.2012). Unlike

Wilkins, Rochow sued under § 1132(a)(1)(B) to recover Plan benefits *and* under § 1132(a)(3) to obtain an accounting and disgorgement of profits wrongfully earned through LINA's breach of its fiduciary duties – two separate remedies for two separate injuries under two separate sections of § 1132. Unlike Wilkins, Rochow proved that his medical condition warranted payment of Plan benefits. And unlike Wilkins, Rochow sought his second remedy to attain make-whole relief. These two remedies are not duplicative and neither repackages the other. Both remedies are necessary, working in tandem, to make Rochow whole for LINA's ERISA violations.

By falsely characterizing the wrongs Rochow suffered and by denying the availability of equitable remedies, the majority opinion stands at odds with governing law and with the facts before us. Supreme Court opinions, our precedent, and cases from our sister circuits support the availability of dual ERISA remedies where two distinct injuries exist and two remedies are necessary to make the plan participant or beneficiary whole. I would affirm the district court, but I would remand the case for a recalculation of the amount of profit LINA must disgorge. Accordingly, I must respectfully dissent from the majority opinion.

I. ERISA DEFINES LINA'S DUTIES AS A FIDUCIARY

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). Congress imposed fiduciary duties on ERISA plan sponsors and administrators that are the highest known to the law, *Gregg v. Transp. Workers of Am. Int'l*, 343 F.3d 833, 841 (6th Cir.2003), and in doing so, Congress drew much of ERISA's content from the common law of trusts. *Varity Corp.*, 516 U.S. at 496, 116 S.Ct. 1065. These fiduciary duties attach to particular persons or entities engaged in the performance of specific ERISA functions. *Edmonson v. Lincoln Nat'l Life. Ins. Co.*, 725 F.3d 406, 413 (3d Cir.2013).

A fiduciary's first obligation is to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). This duty of loyalty extends to the individual plan participants and beneficiaries, not only to the ERISA plan itself. *Varity Corp.*, 516 U.S. at 507, 116 S.Ct. 1065; *Cent. States, S.E. & S.W. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 571-72, 105 S.Ct. 2833, 86 L.Ed.2d 447 (1985). A fiduciary has "an unwavering duty" to act as a prudent person would act in a similar situation and "for the exclusive purpose" of insuring that benefits are provided to plan participants and their beneficiaries. 29 U.S.C. § 1104(a); *Hi-Lex Controls, Inc. v. Blue*

Cross Blue Shield of Mich., 751 F.3d 740, 751 (6th Cir.2014); *Gregg*, 343 F.3d at 841; *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 448-49 (6th Cir.2002). ERISA expressly forbids a fiduciary from "deal[ing] with the assets of the plan in his own interest or for his own account." 29 U.S.C. § 1106(b)(1). The "absolute bar against self dealing" prevents a fiduciary from "realizing a financial gain" at the expense of the plan participants or beneficiaries. *Hi-Lex Controls, Inc.*, 751 F.3d at 750 (quoting *Brock v. Hendershott*, 840 F.2d 339, 341 (6th Cir.1988)); *Pipefitters Local 636 Ins. Fund v. Blue Cross and Blue Shield of Mich.*, 722 F.3d 861, 868 (6th Cir.2013).

II. ERISA DEFINES REMEDIES FOR BREACH OF FIDUCIARY DUTY

A. Congress authorized equitable remedies in § 1132(a)(3)

Congress designed ERISA to include equitable remedies that run directly to the individual plan participant or beneficiary who is injured by a fiduciary breach. The Supreme Court tells us that the "words of [§ 1132(a)(3)] – 'appropriate equitable relief' to 'redress' any 'act or practice which violates any provision of this title' – are broad enough to cover individual relief for breach of a fiduciary obligation." *Varity Corp.*, 516 U.S. at 510, 116 S.Ct. 1065. The structure of § 1132 reveals that one of the two catch-all provisions providing appropriate equitable relief for breaches of fiduciary duty that run to an injured beneficiary is § 1132(a)(3). *Id.* at 512, 116 S.Ct. 1065.

This catchall remedial provision acts "as a safety net, offering appropriate equitable relief for injuries caused by violations that [§ 1132] does not elsewhere adequately remedy." *Id.*

In the majority's view, *Varity Corp.* emphasizes "that ERISA remedies are concerned with the adequacy of relief to redress the claimant's injury" and that "equitable relief is not ordinarily appropriate where Congress has elsewhere provided adequate means of redress for a claimant's injury. In other words, a claimant cannot pursue a breach-of-fiduciary-duty claim under § [1132](a)(3) based solely on an arbitrary and capricious denial of benefits where the § [1132](a)(1)(B) remedy is adequate to make the claimant whole." Maj. Op. at 371. If that were the case, the majority worries, then any arbitrary and capricious denial of plan benefits would potentially subject a plan fiduciary to disgorgement of profits under § 1132(a)(3) "after the claimant recovered for wrongful denial of benefits" under § 1132(a)(1)(B). Maj. Op. at 371-72.

This unfounded fear is allayed by a proper interpretation of *Varity Corp.*, the cases following it, and the Supreme Court's recent decision in *CIGNA Corp. v. Amara*, ___ U.S. ___, 131 S.Ct. 1866, 179 L.Ed.2d 843 (2011). These cases demonstrate that a participant or beneficiary may recover under § 1132(a)(1)(B) for an arbitrary and capricious denial of plan benefits and may recover further equitable relief under § 1132(a)(3) to redress a breach of fiduciary duty.

Together these remedies provide the make-whole relief Congress intended.

In *Varity Corp.*, the plaintiffs' employer, serving also as administrator of a self-funded employee welfare benefit plan, persuaded the plaintiffs by deception to transfer their employment to a newly-formed subsidiary, thereby withdrawing voluntarily from the welfare benefit plan and forfeiting benefits under it in exchange for the employer's assurances that the plaintiffs would receive the same benefits following transfer. 516 U.S. at 491-94, 116 S.Ct. 1065. Just as Varity Corporation had planned, the insolvency of the new subsidiary stripped the employees of welfare benefits. *Id.* at 494, 116 S.Ct. 1065. The employees could not sue under § 1132(a)(1)(B) to recover benefits because the plan was defunct. They could, however, and did sue for and obtain "appropriate equitable relief" under § 1132(a)(3) – their reinstatement to a different employee plan. *Id.* at 495, 116 S.Ct. 1065.

The Supreme Court affirmed the reinstatement, holding that individuals may sue under the catchall provision of § 1132(a)(3) to obtain "other appropriate equitable relief" to remedy a breach of fiduciary duty. *Id.* at 510-13, 116 S.Ct. 1065. Given the objectives of the ERISA statute, the case explains, "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." *Id.* at 513, 116 S.Ct. 1065.

Like the majority here, the *amici* in *Varity Corp.* worried that an individual would be able to "repackage" a denial of benefits claim that is normally reviewed deferentially under the arbitrary and capricious standard of *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), and transform it into a breach of fiduciary duty claim decided under the "rigid level of conduct" expected of fiduciaries. *Id.* at 513-14, 109 S.Ct. 948.

The Supreme Court dismissed their concern. "[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." *Id.* at 514, 109 S.Ct. 948. "After all, *Firestone* . . . based its decision upon the same common-law trust doctrines that govern standards of fiduciary conduct." *Id.* at 514-15, 109 S.Ct. 948. Dismissing *amici*'s concern that "lawyers will complicate ordinary benefit claims by dressing them up in 'fiduciary duty' clothing," *id.* at 514, 109 S.Ct. 948, the Court explained "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.'" *Id.* at 515, 109 S.Ct. 948 (emphasis added).

The majority transforms the Supreme Court's conditional language into an absolute bar to Rochow's claims, misconstruing the Court's instruction that ERISA authorizes "further equitable relief" if relief available "elsewhere" is inadequate. This may be the

unusual case that entails two injuries, but *Varity Corp.* provides no basis for denying an equitable remedy necessary to accomplish make-whole relief. The repackaging fears the majority expresses, like those raised by *amici* in *Varity Corp.*, should be met with the same response: there is not "any ERISA-related purpose that denial of a remedy would serve. Rather, . . . granting a remedy is consistent with the literal language of the statute, the Act's purposes, and pre-existing trust law." *Id.*

B. Remedies under § 1132(a)(3) were traditionally available in equity

Section 1132(a)(3) "countenances only such relief as will enforce" ERISA's provisions or the terms of the plan, and it "authorizes the kinds of relief 'typically available in equity' in the days of 'the divided bench,' before law and equity merged." *US Airways, Inc. v. McCutchen*, ___ U.S. ___, 133 S.Ct. 1537, 1544, 1548, 185 L.Ed.2d 654 (2013) (quoting *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 256, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993)). The most definitive explanation of the types of equitable remedies available under § 1132(a)(3) is found in the Supreme Court's pronouncement in *Cigna Corp. v. Amara*, ___ U.S. ___, 131 S.Ct. 1866, 179 L.Ed.2d 843 (2011). Because Congress specified that courts may grant "other appropriate equitable relief" under § 1132(a)(3), courts may employ remedies that were traditionally available in equity, including reformation of contract, injunctions, mandamus, restitution, and surcharge, which is a monetary remedy

against a trustee or fiduciary. *Id.* at 1878-80. "[T]he fact that this relief takes the form of a money payment does not remove it from the category of traditionally equitable relief." *Id.* at 1880. This is because courts sitting in equity "possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment." *Id.* (citing Restatement (Third) of Trusts § 95, and Comment *a* (Tent. Draft No. 5, Mar. 2, 2009)). The surcharge remedy extends "to a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary" and can be used to accomplish "make-whole relief." *Id.* The equity courts did not require a showing of detrimental reliance in surcharge cases but "would 'mold the relief to protect the rights of the beneficiary according to the situation involved.'" *Id.* at 1881 (quoting Bogert's Trusts & Trustees § 861, at 4). A fiduciary may be surcharged under § 1132(a)(3) if the plaintiff proves actual harm and causation by a preponderance of the evidence, and actual harm might "come from the loss of a right protected by ERISA or its trust-law antecedents." *Id.*

In explaining the scope of equitable remedies available under § 1132(a)(3), *Amara* also clarified two previous Supreme Court cases, correcting lower court decisions that had interpreted the cases as narrowing the scope of "other appropriate equitable relief" available under § 1132(a)(3). *Amara*, 131 S.Ct. at 1878 (referring to *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993), and *Great-West*

Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002)). *Mertens* does not foreclose equitable relief against a plan fiduciary, as some courts had held, because in that case a plan beneficiary sought compensatory damages from a non-fiduciary, a private firm that provided actuarial services to a trustee. *Id.* (citing *Mertens*, 508 U.S. at 253, 255, 256, 113 S.Ct. 2063). Relief was not available under § 1132(a)(3) because the beneficiary sought traditionally legal, not equitable relief, against a non-fiduciary. *Id.* In *Great-West*, the suit was brought by the fiduciary against the beneficiary. After the injured beneficiary recovered compensatory damages from a tortfeasor, the fiduciary sought reimbursement for the medical expenses it had paid on the beneficiary's behalf. *Id.* The fiduciary tried to place a lien on the money the beneficiary collected, but a lien is traditionally considered to be legal, not equitable, relief. *Id.* at 1878-79. Because the fiduciary did not seek an equitable remedy – the placement of a constructive trust on the particular money the tortfeasor paid to the beneficiary – the Court determined that equitable relief under § 1132(a)(3) was not available. *Id.* *Mertens* and *Great-West* thus do not present any obstacle to Rochow's use of § 1132(a)(3) to recover traditional equitable relief from LINA, a breaching fiduciary, even if that remedy is formulated to avoid the unjust enrichment of the fiduciary. *See Amara*, 131 S.Ct. at 1879-80.

Reading *Amara* and *Varity Corp.* together, we see that the remedies awarded to Rochow comport with

the statute, its purposes, and trust law. The principle is clear that a plaintiff may pursue relief under both § 1132(a)(1)(B) and (a)(3) if wrongly denied benefits are recovered under (a)(1)(B) and "other appropriate equitable relief" – something in addition to the award of benefits – is necessary to make the plaintiff whole for a breach of fiduciary duty. In this case, requiring LINA to disgorge its profits earned on wrongly withheld benefits, accomplished under (a)(3), was necessary to make Rochow whole and to prevent LINA's unjust enrichment.

Our sister circuits recognize that *Amara* corrects misunderstandings of the lower courts that have led to the denial of equitable remedies authorized by § 1132(a)(3). After *Amara*, the Fourth Circuit explained, it is clear "that Section § 1132(a)(3) allows for remedies traditionally available at equity and that those remedies include surcharge and estoppel[,]" remedies "at the heart" of the appeal before that court. *McCravy v. Metro. Life Ins. Co.*, 690 F.3d 176, 177-78 (4th Cir.2012). The Fifth Circuit characterized *Amara* as stating "an expansion of the kind of relief available" under § 1132(a)(3) "when the plaintiff is suing a plan fiduciary and the relief sought makes the plaintiff whole for losses caused by the defendant's breach of a fiduciary duty." *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 450 (5th Cir.2013). The Seventh Circuit pointed to *Amara* as "clarify[ing] that equitable relief may come in the form of money damages when the defendant is a trustee in breach of a fiduciary duty." *Kenseth v. Dean Health Plan, Inc.*,

722 F.3d 869, 878-79 (7th Cir.2013). The Eighth Circuit observed that "*Amara* changed the legal landscape by clearly spelling out the possibility of an equitable remedy under [§ 1132(a)(3)] for breaches of fiduciary obligations by plan administrators." *Silva v. Metro. Life Ins. Co.*, 762 F.3d 711, 722 (8th Cir.2014). And the Ninth Circuit recently reversed and remanded an ERISA case in part so that the district court could determine in the first instance under § 1132(a)(3) whether a trustee's fiduciary breach injured the beneficiary and whether the surcharge remedy discussed in *Amara* is available to the beneficiary. *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 962-63 (9th Cir.2014).

Members in the majority here have read *Amara* to leave "open the possibility that 'appropriate equitable relief' could potentially be awarded" under § 1132(a)(3). *Lipker v. AK Steel Corp.*, 698 F.3d 923, 931 n. 4 (6th Cir.2012). In this case, the majority *agrees* with *Lipker* and the other circuit cases cited above that equitable relief is available under § 1132(a)(3) "to redress an ERISA violation by a plan fiduciary." Maj. Op. at 374. And two of our prior cases acknowledge the availability of dual ERISA claims and remedies under certain circumstances. In *Hill v. Blue Cross & Blue Shield of Michigan*, 409 F.3d 710, 718 (6th Cir.2005), we reversed the dismissal of a claim under § 1132(a)(3), because that claim challenged defects in systemic, plan-wide claims-handling procedures, an injury different from the denial of claims for individual benefits brought under § 1132(a)(1)(B).

Similar reasoning is apparent in *Gore v. El Paso Energy Corp. Long Term Disability Plan*, 477 F.3d 833, 840-41 (6th Cir.2007), where we determined that the plaintiff asserted two distinct injuries permitting claims and recovery under both § 1132(a)(1)(B) and (a)(3). We thus learn from our own cases that ERISA's remedy provisions are not mutually exclusive.

III. LINA BREACHED ITS FIDUCIARY DUTY TO ROCHOW

The majority nonetheless denies relief on the ground that "Rochow did not suffer an injury remediable" under § 1132(a)(3). Maj. Op. at 374. That statement is plainly contrary to the factual record and extensive case law concerning the types of injuries that plan participants or beneficiaries may redress through equitable remedies available under § 1132(a)(3).

We previously recognized that LINA breached its fiduciary duties, *Rochow v. Life Ins. Co. of N. Am.*, 482 F.3d 860, 866 (6th Cir.2007) ("*Rochow I*"), and the majority acknowledges as much. Maj. Op. at 366-67. We ruled in the earlier appeal that LINA's decision to deny Rochow disability benefits was not made solely in Rochow's interest – in other words, LINA breached its duty of loyalty to Rochow – and LINA's decision to deny benefits was not made for the exclusive purpose of providing benefits to Rochow as required by § 1104(a)(1). *Rochow I*, 482 F.3d at 866.

The majority opinion and the concurrence point out that this case comes to us with a complex procedural history, pockmarked by irregularities. While I don't disagree that the case is procedurally complex, I do disagree with the conclusion that the district court reached a final judgment prior to our decision in *Rochow I* and that it violated the mandate rule by permitting the parties to litigate the disgorgement remedy for the breach of fiduciary duty claim after *Rochow I.* To be sure, the district court clerk docketed a separate document entitled "Judgment" on the same day that the district court entered the summary judgment order later affirmed in *Rochow I*, but the "record demonstrates . . . that [this] document was not a judgment but a mere clerical error." *Philhall Corp. v. United States*, 546 F.2d 210, 213 (6th Cir.1976). The court had ruled on LINA's liability in the context of Rochow's motion for partial summary judgment and LINA's cross-motion for summary judgment. The court had not made the requisite determination of the remedy. With this important issue outstanding, certainly the district court did not "intend[ ] the document to be a final judgment." *Id.*; 15B Charles Alan Wright, Arthur R. Miller, et al., *Federal Practice & Procedure* § 3914.28 (2d ed.) ("[A] summary judgment that determines liability but leaves damages or other relief open for further proceedings is not final.")

Moreover, the document purporting to be a final judgment "was not legally sufficient to constitute a final judgment." *Philhall Corp.*, 546 F.2d at 213. The

Supreme Court has instructed that "it is necessary to determine whether the language . . . (of any purported judgment) embodies the essential elements of a judgment for money and clearly evidences the judge's intention that it shall be his final act in the case. If it does so, it constitutes his final judgment." *Id.* (quoting *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 232, 78 S.Ct. 674, 2 L.Ed.2d 721 (1958)). "[A] final judgment for money must, at least, determine or specify the means for determining, the amount." *F. & M. Schaefer Brewing Co.*, 356 U.S. at 233, 78 S.Ct. 674. As in *Philhall Corp.*, 546 F.2d at 213, the document entered by the clerk below "did not have the indicia of a final judgment" because it failed to state that Rochow had prevailed and it did not memorialize any monetary award. Instead, the document erroneously "dismissed" the case, clearly contradicting the district court's summary judgment order finding in favor of Rochow on liability. LINA filed a notice of appeal, effectively divesting the district court of jurisdiction to proceed with the litigation pending resolution of the appeal.

After our mandate issued in *Rochow I*, the concurrence posits, the district court lacked jurisdiction to take any further action in the case by operation of the mandate rule. The *Hamilton* case cited in the concurrence points out that the mandate rule is "discretionary, rather than jurisdictional," *United States v. Hamilton*, 440 F.3d 693, 697 (5th Cir.2006), and we have said the same thing, albeit in an unpublished case. *Mylant v. United States*, 48 Fed.Appx. 509, 512

(6th Cir.2002) (observing that the mandate rule is one of "policy and practice, not a jurisdictional limitation"). "The basic tenet of the mandate rule is that a district court is bound to the scope of the remand issued by the court of appeals." *United States v. Campbell*, 168 F.3d 263, 265 (6th Cir.1999). The concurrence recognizes that the *Rochow I* panel affirmed the district court's summary judgment order on liability and did not issue any type of remand to the district court. Although the district court was bound to honor our *Rochow I* decision in completing the litigation, as "with all applications of the law of the case doctrine," the district court could "consider those issues not decided expressly or impliedly by the appellate court." *Jones v. Lewis*, 957 F.2d 260, 262 (6th Cir.1992). Taking up the case again after the *Rochow I* appeal, the district court determined with finality a monetary award for Rochow that included disgorgement for LINA's fiduciary breach. The court's final decision in no way conflicted with the *Rochow I* mandate. In this second appeal, a panel of our court affirmed the district court's final decision, *Rochow v. LINA*, 737 F.3d 415 (6th Cir.2013) ("*Rochow II*"), and that same final decision is presently before us for *en banc* review. Consequently, any procedural missteps that occurred earlier in the case are ultimately immaterial for purposes of our *en banc* decision.

Contrary to the majority's assertion that the district court failed to identify any grounds to support a breach of fiduciary duty claim, Rochow asks us to affirm the district court's findings that LINA's conduct

involved a number of deliberate and willful wrongful acts, including requiring Rochow to meet insurance policy requirements that did not exist, devising a knowingly false rationale for denying his benefits appeal, and acting without appropriate medical input or evidence. R. 67, Order; *Rochow*, 851 F.Supp.2d at 1101. On the record before us, these findings are not clearly erroneous. *See Cultrona v. Nationwide Life Ins. Co.*, 748 F.3d 698, 706 (6th Cir.2014). LINA's fiduciary wrongdoing, separate from its arbitrary and capricious denial of plan benefits, warrants an equitable remedy under § 1132(a)(3).

IV. BREACH OF FIDUCIARY DUTY REQUIRES A REMEDY

Persisting in the fiction that Rochow seeks to recover twice for the same injury, the majority incorrectly posits that "the district court thus treated its finding of an arbitrary and capricious denial of benefits, in and of itself, as a breach of fiduciary duty," and claims to be unaware of any "persuasive authority for the proposition that a wrongful denial of benefits in and of itself constitutes a breach of fiduciary duty." Maj. Op. at 370 n. 1. Even if that were the issue – and it is not because LINA engaged in fiduciary misconduct in addition to denying Rochow's benefits – at least four circuits besides our own (the Second, Third, Seventh, and Eighth) recognize that a fiduciary's arbitrary and capricious delay in paying benefits due under a plan *in itself* can constitute a breach of fiduciary duty. I begin with our own precedent.

More than twenty years ago we stated the well-established principle that "ERISA requires that a retirement plan be operated for the exclusive benefit of the employees and beneficiaries." *Sweet v. Consol. Aluminum Corp.*, 913 F.2d 268, 270 (6th Cir.1990). Although we assumed there that a trustee acted prudently in withholding pension funds until a certain date, we nonetheless held that the delay in payment conferred a benefit on the trustee. *Id.* "Any additional time one gains, rightfully or wrongfully, in not having to submit payment of a sum of money owed another is without doubt a benefit. Moreover, the payee . . . has been deprived of the benefit of those payments." *Id.* We expressly held that "[t]o allow the Fund to retain the interest it earned on funds wrongfully withheld from a beneficiary would be to approve of an unjust enrichment. Further, the relief granted would fall short of making the beneficiary whole because he has been denied the use of money which was his." *Id.* (internal quotation marks omitted).

Ten years after *Sweet* we upheld a district court's decision requiring an ERISA fiduciary to pay to the plan participant class certain benefits along with the rate of return the fiduciary actually realized on the use of that withheld money. *Rybarczyk v. TRW, Inc.*, 235 F.3d 975, 977-78, 986 (6th Cir.2000). TRW argued that imposing the actual rate of return was "unprecedented," *id.* at 986, but we disagreed, pointing to the Seventh Circuit's decision in *Lorenzen v. Employees Retirement Plan of Sperry & Hutchinson Co.*, 896 F.2d 228 (7th Cir.1990). In that case an employee's widow

contended that the administrator of a retirement plan violated its fiduciary duties to her and to her deceased husband causing a loss in retirement benefits. *Id.* at 230. The Seventh Circuit held that § 1132(a)(3) authorizes a civil action by a participant or beneficiary to obtain "appropriate equitable relief" for a violation of plan terms and that equitable relief to remedy a breach of fiduciary duty can include a payment of money. *Id.* (citing *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 154 n. 10, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985)). Because the retirement plan had held money that belonged to the widow, the Seventh Circuit stated: "Now that the collateral dispute is over, the plan must return [the money] to her *together with the fruits that it has gleaned by holding on to it.*" *Id.* at 236-37 (emphasis added). Relying on this passage from *Lorenzen* and our own prior opinion on unjust enrichment, *Sweet*, 913 F.2d at 270, we held that using the rate of return "actually realized by TRW on the relevant funds seems an appropriate way of avoiding unjust enrichment." *Rybarczyk*, 235 F.3d at 986. Importantly, we said that requiring TRW to pay the actual rate of return "*merely deprives TRW of its profit on the wrongfully denied benefits.*" *Id.* (emphasis added). We decided this approach was equitable, not punitive, and appropriate under the circumstances where TRW "would arguably receive a windfall" if we permitted TRW to pay compensation for the delayed payment of benefits to the plaintiff that was lower than TRW's actual rate of return. *Id.* at 987.

Sweet and Rybarczyk align closely with the law of our sister circuits. The Second Circuit considered a case in which MetLife denied benefits for nearly five years after submission of a claim, but then reversed its prior denials without explanation and paid retroactive benefits in a lump sum without compensating the claimant for the delay in payment. *Dunnigan v. Metro. Life Ins. Co.*, 277 F.3d 223, 226 (2d Cir.2002). Having received disability payments after almost five years of delay, Dunnigan filed suit under § 1132(a)(3) alleging that MetLife breached its fiduciary duties by delaying payment and MetLife was unjustly enriched through its breach. *Id.* at 226-27. Dunnigan asked for a constructive trust on the amount MetLife earned by failing to pay the delayed benefits when due or, alternatively, restitution equal to the amount MetLife earned on the late payment and/or disgorgement of MetLife's profits. *Id.* at 227. The Second Circuit ruled that MetLife's delay in paying benefits long after Dunnigan was entitled to receive them constituted a breach of fiduciary duty because the "delay enriche[d] the fiduciary at the expense of the beneficiary." *Id.* at 230. The court further concluded that no showing of bad faith by MetLife was required in order for Dunnigan to prevail, *id.* at 229-30, and she was entitled to an "equitable make-whole remedy" under § 1132(a)(3) for MetLife's breach of fiduciary duty. *Id.* at 229. The court vacated the dismissal of Dunnigan's suit and remanded for further proceedings. *Id.* at 232.

The Seventh Circuit reached similar decisions in two cases, *Clair v. Harris Trust & Savings Bank*, 190

F.3d 495 (7th Cir.1999), and *May Department Stores Co. v. Federal Insurance Co.*, 305 F.3d 597 (7th Cir.2002), both involving § 1132(a)(3) claims for equitable remedies in addition to payment of benefits. In *Clair*, participants in a defined-contribution retirement plan sued for breach of fiduciary duty because their benefits were not paid to them in a timely fashion and no compensation for the delay was offered. *Clair*, 190 F.3d at 496-97. The participants characterized their remedy as "restitution of the wrongful gain that the plan obtained by having the interest-free use of money rightfully theirs under the terms of the plan." *Id.* at 498. Explaining that restitution can be either legal or equitable, the court noted that restitution is equitable when the person seeking the remedy complains of a breach of trust, as the plaintiffs did. *Id.* Constructive trust "is an equitable remedy commonly sought and granted in cases of unjust enrichment. It operates much like restitution – indeed it is sometimes referred to as a restitutionary remedy, but it is securely equitable because it is never a legal remedy." *Id.* (citing 1 Dan B. Dobbs, *Law of Remedies* § 4.3, at 587 (2d ed.1993)). According to the Seventh Circuit, "such relief is squarely within the scope of" § 1132(a)(3). *Id.* at 499. Although the plaintiffs in *Clair* did not prevail on the merits, the court determined that they were "entitled to maintain this suit" under § 1132(a)(3). *Id.*

In *May Department Stores Co.*, 305 F.3d at 603, the Seventh Circuit followed *Clair* and the Second Circuit's *Dunnigan* opinion to conclude that the

"wrongful withholding of benefits due can entitle the beneficiary to impose a constructive trust on interest on the withheld benefits, an equitable remedy that results in a money payment to the plaintiff" under § 1132(a)(3). The court explained:

> By withholding benefits, a plan can obtain interest that would otherwise be obtained by the beneficiary. That interest is not itself a benefit, and so the beneficiary cannot bring a suit under (a)(1)(B) to recover it. But he can sue to recover it under (a)(3), because it is an amount by which the plan has unjustly enriched itself, and unjust enrichment is a basis, indeed the usual basis, for imposing a constructive trust on a sum of money.

Id. at 603 (citing *Wsol v. Fiduciary Mgt. Assoc., Inc.*, 266 F.3d 654, 656 (7th Cir.2001), and *Fisher v. Trainor*, 242 F.3d 24, 31 (1st Cir.2001)).

The same principles govern in the Third Circuit. In *Fotta v. Trustees of United Mine Workers of America*, 165 F.3d 209, 211 (3d Cir.1998), a plan participant invoked § 1132(a)(1)(B) and § 1132(a)(3) to recover compensation for delayed payment of benefits where the benefits ultimately were paid without litigation. The Third Circuit determined that § 1132(a)(3) was "the appropriate vehicle" to recover monetary compensation for delayed benefits because such an award "serves to prevent unjust enrichment. Restitution – the traditional remedy for unjust enrichment – is widely, if not universally, regarded as a tool of equity." *Id.* at 213 (citing *Chauffeurs, Teamsters &*

Helpers, Local No. 391 v. Terry, 494 U.S. 558, 570, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990) ("Money damages are considered equitable when 'they are restitutionary.'")). The court rejected the notion that it was engrafting a remedy on a statute that Congress did not intend to provide. *Id.* at 214. Rather, the court determined that it "effectuate[d] ERISA's objectives by recognizing, under principles of equity, that beneficiaries should be fully compensated and that any unjust enrichment of plans at beneficiaries' expense should be avoided." *Id.* Accordingly, relying on § 1132(a)(3), the court held "that a beneficiary of an ERISA plan may bring an action for interest on delayed benefits payments . . . irrespective of whether the beneficiary also seeks to recover unpaid benefits. Because the remedy we recognize here is equitable in nature, its award involves an exercise of judicial discretion." *Id.*

Significantly, Supreme Court Justice Alito, then a circuit judge on the Third Circuit, concurred in the *Fotta* opinion, observing:

> If the plaintiff in this case can establish that the trustees violated the plan by failing to pay his benefits on time, an award of interest would constitute "appropriate equitable relief." Such an award is recognized as appropriate equitable relief in comparable circumstances under the law of trusts. *See* Restatement (2d) of Trusts § 207 at 470 (1959); 3 Austin Wakeman Scott and William Franklin Fratcher, *The Law of Trusts* § 207.1 at 262-63 (4th ed.1987); *Nedd v. United Mine*

> *Workers of America*, 556 F.2d 190, 207 (3d Cir.1977); *Toombs v. Daniels*, 361 N.W.2d 801, 810 (Minn.1985). Thus, this is not a case like *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985), in which we were asked to supplement the remedies specified in the statute.

Id. at 215.

In addition to the Second, Third and Seventh Circuits, the Eighth Circuit also adheres to the proposition that a fiduciary's delay in paying benefits due under a plan constitutes a breach of fiduciary duty that may be rectified through an action filed under § 1132(a)(3). "It is undisputed that an accounting for profits – the remedy that allows for the disgorgement of profits awarded by the district court – is a type of relief that was typically available in equity and therefore is appropriate under § 1132(a)(3)(B)." *Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1008 (8th Cir.2004). "An accounting for profits is one of a category of traditionally restitutionary remedies in equity, and is often invoked in conjunction with a constructive trust." *Id.* The court explained that "[a]n accounting is imposed when the property subject to the constructive trust produces profits while in the defendant's possession. The defendant is forced to disgorge those profits, although it is not necessary for the plaintiff to identify any particular *res* or fund of money holding the profits." *Id.*

Significantly, "[u]nder traditional rules of equity, a defendant who owes a fiduciary duty to a plaintiff may be forced to disgorge any profits made by breaching that duty, *even if the defendant's breach was simply a failure to perform its obligations under a contract. Id.* (emphasis added)." If a fiduciary breaches a contract and also breaches a fiduciary duty, that fiduciary can be forced to disgorge the profits he earned as a result of his wrong. *Id.* (quoting 1 Dobbs § 4.3(5), at 611 n.16). "The important ingredient added by the fiduciary status, however, is not that status in itself; what is added is wrongdoing as distinct from contract breach." *Id.* at 1008-09 (quoting 1 Dobbs § 4.3(5), at 611 n.16; *Valdes v. Larrinaga*, 233 U.S. 705, 709, 34 S.Ct. 750, 58 L.Ed. 1163 (1914)) ("holding that a 'proper case for equitable relief' existed where the defendant breached a fiduciary duty to the plaintiff by failing to pay money owing under the contract"). Based on these principles, the Eighth Circuit held that First Reliance owed a fiduciary duty to Parke, First Reliance breached that duty, and First Reliance could be forced under § 1132(a)(3) to disgorge its profits earned as a result of the breach. *Id.* at 1009. *See also Skretvedt v. E.I. DuPont De Nemours*, 372 F.3d 193, 212-14 (3d Cir.2004) (following *Fotta* and *Parke* to hold that an ERISA beneficiary could force disgorgement of profits earned on withheld benefits). As do several other circuits, the Eighth Circuit authorizes the remedy that the district court below awarded to Rochow.

Thus, our own cases and a litany of others from four of our sister circuits undermine the majority's premise that no legal basis exists to conclude that LINA's delay in payment of benefits to Rochow constituted both an arbitrary and capricious denial of plan benefits under § 1132(a)(1)(B) *and* a breach of LINA's fiduciary duties remediable under § 1132(a)(3). The majority ignores these cases because they correct the majority's mistaken impression that the district court's "award reflects concern that LINA had wrongfully gained something, a consideration beyond the ken of ERISA make-whole remedies." Maj. Op. at 371. Not only does the district court's award appropriately address LINA's wrongful gain at Rochow's expense, but the relief for the wrongful gain falls squarely within ERISA's equitable remedies, as recognized by the Supreme Court, our court, and other circuits. "ERISA's duty of loyalty bars a fiduciary from profiting even if no loss to the plan occurs," and the remedy of disgorgement exists to deprive "wrongdoers of ill-gotten gains," not "to compensate for a loss." *Edmonson*, 725 F.3d at 415 (internal quotation marks omitted); *Leigh v. Engle*, 727 F.2d 113, 122 (7th Cir.1984) ("ERISA clearly contemplates actions against fiduciaries who profit by using trust assets, even where the plan beneficiaries do not suffer direct financial loss."). According to the majority, the payment of benefits, attorney's fees, and prejudgment interest are sufficient to compensate Rochow for his injuries. But only the disgorgement of ill-gotten profits can wholly remedy LINA's breach of its fiduciary duties.

The court below got it exactly right. By arbitrarily and capriciously failing to pay Rochow benefits owed under the terms of the plan and by delaying the payment of full benefits for more than seven years to enrich itself, LINA violated both the plan terms and its fiduciary duties under ERISA. LINA's wrongful gain of profit, earned through breach of its fiduciary duties, can be equitably remedied under § 1132(a)(3) by ordering an accounting and by directing LINA to disgorge the profit and pay it directly to Rochow. *See Great-West Life & Annuity Ins. Co.*, 534 U.S. at 214 n. 2, 122 S.Ct. 708 (recognizing "an accounting for profits, a form of equitable restitution"). "The elementary rule of restitution is that if you take my money and make money with it, your profit belongs to me." *Nickel v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 290 F.3d 1134, 1138 (9th Cir.2002).

V. THE DISGORGEMENT AWARD MUST BE RECALCULATED

I would return the case to the district court, however, for a recalculation of the award to Rochow. The figure awarded by the district court seems to derive from the total shown on Rochow's corrected Exhibit A filed on May 25, 2012, plus daily interest the court added until July 24, 2012, when the court filed its Order Requiring Disgorgement. R.121-2 Page ID 3712.

LINA objected below to the corrected Exhibit A, pointing out several significant errors in it. The most

conspicuous problem is that full profits are calculated through March 2012, R. 1212 Page ID 3725 (and by the court through July 2012), even though Exhibit A confirms that LINA made all required payments to Rochow or his estate by September 2009, with the exception of $2,065.52. R. 121-2 Page ID 3722. The additional errors LINA identified in its June 2012 filing with the district court, R. 122, may warrant further reductions in the amount of profits ordered disgorged by the district court. I would therefore reverse the award as calculated and remand the case to the district court for reconsideration.

VI. CONCLUSION

We do not create new, double remedies out of whole cloth if we affirm the district court's decision to require LINA to disgorge the profit it earned by breaching its fiduciary duties to Rochow. Nor will the sky fall if we affirm this remedy, as the Supreme Court aptly pointed out in response to the concerns of *amici* in *Varity Corp.*, 516 U.S. at 513-14, 116 S.Ct. 1065. By recognizing that some few cases may include claims and remedies for injuries incurred under both § 1132(a)(1)(B) and § 1132(a)(3), we simply join the mainstream view of our sister circuits acknowledging the trust law principles that undergird ERISA's equity jurisprudence.

In this case, the disgorgement remedy is appropriate based on the evidence and the district court's findings concerning LINA's malfeasance, the length of

the delay in paying benefits due, and the extraordinary profit LINA reaped from its malfeasance. Practical considerations abound. Allowing LINA to retain its profit creates an incentive for claims administrators to delay paying much-needed benefits to participants and beneficiaries while investing that money for their own gain. LINA's conduct undercompensates the participant or beneficiary by forcing him to absorb expenses incurred as a result of the delay in the payment of benefits while LINA gains from delaying the claims process as long as possible. Permitting LINA to keep its profit also encourages fiduciaries to commingle plan assets with company funds.

The courts will not often come across a case as troubling as this one. I recognize, as will district courts, that disgorgement of profit should be used sparingly and only when equity requires it. In the ordinary benefits case – where there is a wrongful denial of benefits but no breach of fiduciary duties like the ones here – an award of prejudgment interest might be sufficient to compensate the beneficiary for the lost time value of money. *See, e.g.*, *Schumacher v. AK Steel Corp. Retirement Accumulation Pension Plan*, 711 F.3d 675, 679, 686 (6th Cir.2013); *Ford v. Uniroyal Pension Plan*, 154 F.3d 613, 616 (6th Cir.1998). But where an arbitrary and capricious denial of benefits is coupled with a breach of fiduciary duty, as it is here, ERISA provides a make-whole remedy that includes appropriate equitable relief under § 1132(a)(3).

Because the majority holds that ERISA bars the make-whole remedy awarded to Rochow, I respectfully dissent.

---

851 F.Supp.2d 1090
United States District Court,
E.D. Michigan,
Southern Division.

Patrick **ROCHOW**, Personal Representative of the Estate of Daniel J. **Rochow**, Plaintiff,
v.
LIFE INSURANCE COMPANY OF NORTH AMERICA, Defendant.

Case No. 04-73628. | March 23, 2012.

Attorneys and Law Firms

John J. Cooper, Cooper Law Firm, Troy, MI, for Plaintiffs.

John D. Pirich, Brian T. Quinn, Honigman, Miller, Lansing, MI, for Defendant.

ORDER SETTING METHOD OF ACCOUNTING

ARTHUR J. TARNOW, Senior District Judge.

Before the Court are the competing position statements of Plaintiff and Defendant with regard to the proper method of determining equitable accounting. This accounting is for the purpose of correctly determining the amount of unjust enrichment derived by Defendant from the wrongful withholding of disability benefits to Plaintiff, so that Defendant may disgorge said profits as previously ordered by this Court. For the reasons stated below, the Court finds that Defendant has failed to rebut Plaintiff's method

of accounting and has failed to justify various offsets to the amount of profits to be disgorged.

I. Background

This case stems from the wrongful denial of disability benefits for Plaintiff Daniel Rochow ("Rochow") by Defendant LINA. On June 24, 2005, this Court granted Plaintiff's Motion for Summary Judgment [12], finding that Defendant LINA had acted arbitrarily and capriciously in denying Plaintiff benefits under LINA's long-term disability plan. This Court's order granting summary judgment was affirmed in *Rochow v. Life Ins. Co. of N. Am.*, 482 F.3d 860 (6th Cir.2007). Subsequent to the mandate from the Sixth Circuit Court of Appeals, Plaintiff filed his Motion for an Equitable Accounting [46] on November 10, 2008. Argument was heard on this motion on February 5, 2009, and in an Order [67] issued on June 16, 2009, the Court found that an equitable accounting and disgorgement by Defendant was an appropriate remedy.

On August 23, 2010, Defendant [88] and Plaintiff [89] submitted position statements regarding the method the court should use to calculate the amount of unjust enrichment derived by Defendant from its wrongful withholding of benefits to Plaintiff. Both Defendant [91] and Plaintiff [92] submitted responses. On November 4, 2011, the Court held an evidentiary hearing regarding the parties' positions. Plaintiff [106] and Defendant [105] submitted supplemental

briefs on November 18, 2011. On February 3, 2012, the Court heard additional argument regarding the parties' positions on the proper method of equitable accounting.

II. Analysis

Unjust enrichment is the principle that "a fiduciary may not profit by his breach of the duty of loyalty." *Amalgamated Clothing Workers v. Murdock*, 861 F.2d 1406, 1411 (9th Cir.1988). In this case, it has already been determined that Defendant owed Plaintiff a duty of loyalty and breached this duty through its arbitrary and capricious denial of disability benefits to Plaintiff. Defendant has, in whole or nearly in whole, already paid to Plaintiff the actual amount of benefits that were wrongfully withheld. Thus, the question before the Court is the amount of financial benefit that Defendant derived from withholding benefits to Plaintiff. As set out in this Court's Order [67] requiring an equitable accounting and disgorgement by Defendant, Defendant is required to remit any profits derived from Plaintiff's wrongfully withheld benefits. The parties have provided extensive briefing on how the Court should arrive at this amount, and have had two opportunities to argue their positions before the Court.

A. Burden of Proof

An equitable suit for accounting is tried in two stages. First, the party seeking accounting must

establish that there is a right to an accounting. Am.Jur.2d *Accounts and Accounting* § 66 (2005). This Court has already found that Plaintiff has a right to an accounting. Once this right has been established, Plaintiff must produce evidence from which the Court can make a "reasonable approximation" of Defendant's unjust enrichment. If a Plaintiff cannot provide a reasonable approximation, the claim of unjust enrichment is merely speculative and disgorgement will not be allowed. However, this "reasonable approximation" is not a high burden. In *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231-32 (D.C.Cir.1989), the Court of Appeals for the D.C. Circuit held that a showing of the "actual profits" on tainted transactions presumptively shifted the burden to the defendants to demonstrate why the approximation provided by the plaintiff (the defendant's actual profits) was not a reasonable one. Similarly, in *Nickel v. Bank of Am.*, 290 F.3d 1134 (9th Cir.2002), a bank (later acquired by Bank of America) improperly charged $24,000,000 in fees to various trusts. The Ninth Circuit Court of Appeals found that the district court's focus on the "speculative" nature of the disgorgement in question was incorrect. The court found that focusing on questions of traceability simply insulated the wrongdoer, the bank, and violated a rule of restitution, namely "if you take my money and make money with it, your profit belongs to me." *Id.* at 1138. The court also found that if the manner in which the bank had utilized the money was not traceable, there was a presumption that the bank was deriving profit from the funds. Thus, an appropriate remedy was a

proportional share of the bank's profits for the period the funds were utilized. *Id.* at 1139.

Once a reasonable approximation has been provided, the accounting process proceeds to the second stage. The burden at this stage switches to the party "in control of the books" who has "[t]he burden of proving the correctness of an account." Am.Jur.2d, *Accounts and Accounting* § 66 (2005). Defendant has the burden of proving the correctness of its accounting and methodology of disgorgement because "every reasonable doubt is resolved in favor of the party wronged." George E. Palmer, The Law of Restitution § 2.14, 180 (1978).

Defendant argues that "a plaintiff seeking disgorgement of profits is not entitled to defendant's general profits where it is possible to identify which of the defendant's profits flowed from the wrongdoing." Def.'s Br. at 5.[1] While true, it is Defendant's burden to demonstrate which profits flowed from its wrongdoing; it is not the burden of the Plaintiff. *See Nickel*, 290 F.3d at 1138 ("the problem of showing where the money went is the tortfeasor's problem"). Defendant has failed to do that here.

In similar cases, courts have required violators to return "all profits" that derive from the tainted activity. *See SEC v. First City Fin. Corp.*, 890 F.2d at

---

[1] References to Plaintiff's and Defendant's briefs refer to their position statements, docket numbers [88] and [89].

1232 (requiring defendant to return all profits derived from tainted trades when defendant could not provide precise measure of profits derived from illegal trading). Similarly, analyzing a Louisiana law, the Fifth Circuit has ruled that "the burden is on [a fiduciary] to demonstrate that application of the usual rule [of complete disgorgement of profit] will produce a real injustice." *McDonald v. O'Meara*, 473 F.2d 799, 805-06 (5th Cir.1973). In *Leigh v. Engle*, 727 F.2d 113 (7th Cir.1984), the court placed the burden of accounting on the defendant, an ERISA fiduciary. The court, finding that there would be little reason to require restitution under ERISA's remedial provision, 29 U.S.C. § 1109(a), if "beneficiaries confronted an insurmountable obstacle in proving the extent of a fiduciary's profits," and placed "the burden of proof on the defendants here to ensure that the disgorgement remedy is effective." *Leigh*, 727 F.2d at 139; *see also Connelly Mgmt. Emp. Welfare Benefit Plan v. N. Am. Indemnity, N.V.*, 2008 WL 1336085 (S.D.Ind. Apr. 8, 2008) ("the burden shifts to the defendants to show that commingled trust assets are not 'profits' subject to . . . disgorgement . . . ") (citing *Leigh*, 727 F.2d at 138-139).

Reasonable Approximation

Defendant contends that Plaintiff has failed to present a "reasonable approximation" of the unjust enrichment because Plaintiff has not shown a "casual connection between LINA's withholding of benefits and a measurable increase in LINA's profit." Def.'s Br.

at 3. Defendant compares the situation to one described in *Taylor v. Meirick*, 712 F.2d 1112, 1122 (7th Cir.1983), wherein the Seventh Circuit Court of Appeals stated that "[i]f General Motors were to steal your copyright and put it in a sales brochure, you could not just put a copy of General Motors' corporate income tax return in the record and rest your case for an award of infringers' profits." The comparison to *Taylor* is inapposite. In *Taylor*, the plaintiff failed in any way to attempt to determine what portion of the defendant's sales were derived from the use of plaintiff's product, and instead simply created a percentage of the defendant's profits that the plaintiff claimed entitlement to. That is not the case here. Here, the amount of wrongfully withheld funds are already known.

At the hearing held on November 4, 2011, Plaintiff set forth a reasonable approximation of the unjust enrichment gained by Defendant through the withholding of benefits to Plaintiff. Plaintiff did so by calculating the amount of wrongfully-withheld principal, $910,629.24, which includes base interest on the principal, and then assumed that this figure, gradually accumulated over time by Defendant, was part of Defendant's general equity and used for all corporate purposes. Plaintiff then calculated Defendant's of profit rate during this period, compared the percentage gain to the amount of principal owed to Plaintiff, and arrived at an approximation of $2.1 million dollars of unjust enrichment on the part of Defendant.

Based on general principles of accounting, the burden then shifts to Defendant to provide some reason why this approximation is not reasonable.

Defendant's "Investment Account" Defense

Defendant's theory regarding why Plaintiff's approximation is not reasonable is that the money owed to Plaintiff was confined to an "investment account" which limited its use and the profits derived from the use of the money. Defendant asserts that it places money in these investment accounts, for instance in the following excerpt from Defendant's position statement:

> When LINA receives premiums from its customers, those premiums are invested in securities to generate investment income while providing the necessary liquidity to meet cash flow requirements and pay claims . . . [i]f claims were not paid in a timely manner, those funds remained in the investment portfolio longer than initially expected and generated increment income – *i.e.*, the causal connection . . . [t]he retained investment income totals $32,732.

Def.'s Br. at 6.

However, at the hearing held on November 4, 2011, it became clear that the idea of an "investment account" within which the money that Defendant unlawfully withheld from Plaintiff was kept segregated from Defendant's general account was inaccurate.

The following is an exchange between Plaintiff's counsel and Timothy. Holzli, Defendant's expert witness and Chief Accounting Officer of the Group Insurance Division at CIGNA Corporation, Defendant's parent company:

> Q. All right. There is a procedure at LINA for setting up a segregated account, is there not?
>
> A. What do you mean by "segregated account"?
>
> Q. An account that is separated off from the rest of LINA's investment funds.
>
> A. You used the term there is a separate account, which is a specific terminology.
>
> Q. But that would be segregated, wouldn't it?
>
> A. A separate account is a segregated account, yes.
>
> Q. And if that were done and the withheld benefit payments simply filed up in that account, and that account earned interest say from a bank that was added into the account, we could simply go to the bank or go to the account, check the records, see what the principal was and see what it earned over the time it wasn't paid. Mr. Rochow could take that and we would be done. Is that right?
>
> A. Correct.

. . .

Q. All right. In Mr. Rochow's case, LINA didn't establish a segregated – or, a separate account until it actually started paying his benefits, correct?

A. Are you referring to a separate account now?

Q. Yes.

A. The policy that Mr. Rochow's employer had with LINA was a general account obligation. So, there would have never been a separate account established under that type of policy.

Q. Okay. During the time period between 2002 when the claim was filed and late 2007 when LINA started paying on it, did LINA in any way earmark or segregate the money associated with Mr. Rochow's claim?

A. There's never a segregation in the general account assets, of assets to a specific beneficiary.

Q. How about earmarking?

A. Not in the general account assets, no.

THE COURT: Could it go to a reserve?

A. The only reserve that would have been established at that time, Your Honor, would have been the incurred, but not the full reserve, which is in the aggregate.

THE COURT: But that would be part of the aggregate at some point or not?

A. Yes, it would.

THE COURT: Okay.

Q. And as you sit here today, can you rule out the possibility that a portion of the funds LINA owed Mr. Rochow were used to pay for LINA's ongoing operating expenses?

A. No.

Q. Okay. And I would like to talk then about some of the outflows from the investment account.

Is it fair to say that LINA will be paying operating expenses out of the investment account?

A. That's normally how the process in an insurance company works, yes.

Tr. of Nov. 4, 2011 Hr'g at 119-23.

Thus, it appears that repeated references by Defendant to an "investment account" from which to pay claims out are not accurate, or at least are not accurate with respect to the money that should have been paid to Plaintiff. Defendant's expert admitted that the money withheld from Plaintiff was not segregated in any manner but would have been present in a general fund from which Defendant could pay out other claims or even general operating expenses. This seems to be precisely the situation described in *Connelly Mgmt. Emp. Welfare Benefit*

Plan, 2008 WL 1336085, at *12 (S.D.Ind. April 8, 2008) ("the burden shifts to the defendants to show that commingled trust assets are not 'profits' subject to . . . disgorgement . . . "). Finally, this seems to be precisely the situation in which Defendant acknowledged a duty to pay a percentage of all profits: "[A] plaintiff seeking disgorgement of profits is not always entitled to a percentage of all of the defendant's profits; rather, a plaintiff is so entitled, if at all, only where the defendant cannot specifically identify which of its profits flowed from the breach." Def.'s Resp. to Pl.'s Br. at 2 (citing *Leigh v. Engle*, 727 F.2d 113, 138 (7th Cir.1984)). Defendant cannot specifically identify which of its profits flowed from its wrongful withholding of Plaintiff's benefits.

Defendant has failed to specifically identify which of its profits flowed from the breach of Defendant's duty to Plaintiff. Plaintiff's money appears to have been placed in a general "pot" of equity, which could have been used for investment *or* for general operating expenses *or* for any other expense by Defendant. Defendant's contention regarding an "investment account" somehow segregated from general equity appears to be purely theoretical. Defendant has the burden of demonstrating that Plaintiff's approximation is not reasonable. The Court finds that Defendant has failed to meet this burden. Thus, as discussed below, the Court adopts Plaintiff's method of determining the profits derived by Defendant from the use of Plaintiff's unpaid benefits.

B. Method of Determining Profits

Calculating the amount of unjust enrichment is the function of four variables, of which the parties agree on the first three. First, the underlying principal amount due from LINA to Plaintiff's estate – $910,629.24, which is inclusive of simple interest on the base payments[2]. Second, the amount of time during which those amounts were unpaid – the parties agree that the principal should have been paid in equal monthly installments beginning in 2002. Third, the form of compounding – the parties agree that compounding of interest on the amount owed should take place on a monthly basis. Only the fourth variable is disputed – the amount of Defendant's unjust enrichment derived from use of the principal that was owed to Plaintiff.

Return on Equity Theory ("ROE")

Plaintiff argues that Defendant's profits from the use Plaintiff's unpaid benefits should be calculated using a "Return on Equity Theory." Under ROE theory, the correct measure of profit is Defendant's annual rate of growth in its net worth between 2002 and the present, that percentage rate varying annually between 11% and 39%, excluding certain growth in

---

[2] Plaintiff states that this total amount is the amount of payments made in multiple installments over three years, and that Plaintiff is still working to determine if this is the exact amount of principal. However, both parties seem to agree that this figure is at least a close approximation.

net worth, such as injection of capital by Defendant's parent company, CIGNA Corporation.

As discussed above, Plaintiff argues, and Defendant's expert admitted, that the withheld benefits were retained as funds that went straight to Defendant's "bottom line" equity. The profit from the withheld benefits could have been used by Defendant for any and all investments and/or corporate expenses (thus freeing up other money for investment). A useful case in analyzing how Defendant's profits should be determined is *Nickel v. Bank of America*, 290 F.3d 1134 (9th Cir.2002), a case where a bank improperly overcharged various trusts $24,000,000 over the course of fifteen years. Bank of America acquired the bank and later refunded the $24,000,000, along with $17,800,000 in simple interest. The district court agreed to this restitution, ruling that any account of profits derived from the improper overcharges would have been too "speculative" and too difficult to track given the relatively small amounts of various trusts. The Ninth Circuit reversed, finding that the district court's focus on the "speculative" nature of the remedy and traceability simply insulated the wrongdoer in this case, the bank, and violated a rule of restitution, namely "if you take my money and make money with it, your profit belongs to me." *Id.* at 1138. The court also found that if the manner in which the bank had utilized the money was not traceable, there was a presumption that the bank was deriving profit from

the funds. Thus, an appropriate remedy was a proportional share of the bank's profits for the period the funds were utilized. *Id.* at 1139.

Retained Investment Management Theory ("RIM")

Defendant's theory of how its profits should be measured has already been discussed and rejected above based on evidence that Defendant did not, in fact, maintain a separate "investment account" in which Plaintiff's withheld benefits were placed. The Court therefore does not accept Defendant's assertions regarding separate "underwriting" and "investment" income. Defendant had argued that its "retained investment" profit was roughly 1% per year.

Further, Defendant's assertions that unpaid claims that have been approved for payment are placed in "investment accounts" used only for limited investment purposes is inapplicable to the case at hand: Plaintiff brought suit to recover wrongfully withheld benefits from Defendant precisely because the benefits had *not* been approved by Defendant. Defendant argues that unpaid benefits that sit in "investment accounts" then generate only "incremental investment income." Def.'s Br. at 2. Again: it is unclear why Plaintiff's unpaid benefits would have been set aside in an investment account given that Plaintiff's benefits claim was wrongfully denied. Moreover, as discussed above, the argument that Defendant's "investment account" is somehow cabined

from Defendant's other sources of income and spending is inaccurate:

> Q. And as you sit here today, can you rule out the possibility that a portion of the funds LINA owed Mr. Rochow were used to pay for LINA's ongoing operating expenses?
>
> A. No.
>
> Q. Okay. And I would like to talk then about some of the outflows from the investment account.
>
> Is it fair to say that LINA will be paying operating expenses out of the investment account?
>
> A. That's normally how the process in an insurance company works, yes.

Tr. at 123.

The Court rejects Defendant's "Retained Investment Management" theory of profits and accepts Plaintiff's "Return on Equity" theory as a baseline measure of profits gained by Defendant as unjust enrichment through the use of Plaintiff's wrongfully withheld benefits. The Court must now determine whether the various "offsets" proposed by Defendant should reduce the baseline measure of profits.

C. Offsets

Defendant argues that, regardless of the method used by the Court to establish baseline profits, the

profits gained by Defendant as unjust enrichment through the use of Plaintiff's wrongfully withheld benefits should be reduced by various "offsets." The Court will analyze each proposed offset in turn.

Attorney's Fees

Defendant's original position statement and expert report indicated an offset of $232,000 for attorney's fees. At the evidentiary hearing held on November 4, 2011, however, Defendant indicated through counsel that attorney's fees were not an issue and "ha[d] never been an issue. . . ." Tr. at 89. The Court will therefore not consider attorney's fees as a potential offset.

Discount for Retained Income

Defendant argues that when a claim is approved it triggers "the establishment of a specific case reserve in Defendant's administrative and financial system." This reserve is the "present value of the amount to pay to the claimant over the expected duration of the claim," but is "discounted," (meaning that there is actually less in the case reserve than the actual value of the claim, because money "now" is worth less than money at the time the claim will be paid out) and will "increase each year simply due to the passage of time as the discount is unwound," i.e., as money approaches its present value. Def.'s Br. at 4. Defendant states that the income generated by the investment portfolio is "therefore intended to offset

that reserve increase over time . . . only the investment income generated in excess of the amount needed to offset the unwinding of the discount is truly retained by LINA" *Id.* at 4-5. This is true in the sense that only this amount is "pure profit" for Defendant; however, Defendant is profiting from ALL the money in the investment account, not just the amount that it can retain – the fact that Defendant offsets the payment to discount for payment in the future makes sense financially, but Defendant is benefitting from that offset by not having to use other funds to make up the difference in Plaintiff's benefit account.

Regardless, however, much like Defendant's general claims regarding an "investment account," there is no evidence that a "specific case reserve" was established for Plaintiff's claim. This makes sense as Plaintiff's claim was not approved by Defendant. It is thus unclear why Defendant would have created a specific case reserve. Moreover, Defendant's expert admitted during the hearing of November 4, 2011 that no such reserve existed:

> Q. So, the money just wasn't building up in a reserve account up to the point of payment. It was general equity as to LINA before that, wasn't it?
>
> A. LINA maintains incurred but not reported reserves, which are reserves in the aggregate and not associated with a specific claimant. So. LINA did have reserves on its books for disability benefits.

Q. But there was no reserves specific for Rochow, was there?

A. Not specifically to Mr. Rochow, no.

Tr. of Nov. 4, 2011 Hr'g at 93.

The Court therefore finds that Defendant may not discount its profits for retained income.

Net Income

Defendant next argues that after the gross amount of incremental investment is determined, "specific adjustments" are made to determine the amount Defendant actually retained. Defendant uses the metric of "net income" to determine its investment return, saying that this is "the standard metric used to measure profitability within the insurance industry." Def.'s Br. at 9. While not identifying what "specific adjustments" being referred to, Defendant's argument seems to be that it should be permitted to deduct the costs of running its investment portfolio from profits gained by the use of Plaintiff's wrongfully withheld benefits. This seems to be against the spirit of restitution, as Defendant is essentially reimbursing itself for the administrative costs of using Plaintiff's money to make a profit. As noted in *Nickel*, *supra*, "if you take my money and make money with it, your profit belongs to me." 290 F.3d at 1138. The Court finds that Plaintiff should not be required to compensate Defendant for the costs of administering Plaintiff's wrongfully withheld benefits.

The Court therefore finds that Defendant may not offset its profits to reflect a "net income" measurement.

Direct Interest Crediting

Defendant applies a 50% slash in the "rate of investment return" because it states that said amount is "returned to policyholders via direct interest crediting to the policyholders' benefit or indirectly as policy reserves increase due to the passage of time." While it is unclear how this amount would apply in comparison with overall profits, Defendant has again failed to demonstrate that this investment return actually applies to the benefit payments withheld from Plaintiff. The following exchange took place between Defendant's counsel and Defendant's expert Timothy Holzli:

> Q. Would you stop there and please explain to the Court who this crediting involves or what it involves.
>
> A. There are three specific circumstances where LINA credits investment income. The first of those is for group universal life contracts, which is a combination of a life insurance policy and an investment policy. Under those policies, the beneficiaries have a side account which is credited with a stated interest as per their policy documents.
>
> Q. Other than the first adjustment, what did you do next?

> A. The second adjustment refers to certain experience rated contracts. LINA has certain contracts with employer groups that pass the claims experience of that group back to the policyholder. So, to the extent that that policy – that employer group has favorable claims experience, LINA establishes a liability payable back to that employer group. On that liability, LINA again credits interest to that employer group based on a stated contractual rate.

Tr. of Nov. 4, 2011 Hr'g at 35-36 (the third "credit" is the "discount for retained income").

> A. [F]ifty percent represents the investment income that is, in fact, credited back to contract holders and policyholders.
>
> Q. By the way, that 50 percent figure, is that a number that you just picked out of the air?
>
> A. It is not. It's based on an internal analysis that we monitor. And over the years in question, it ranged between 45 and 55 percent.

Tr. of Nov. 4, 2011 Hr'g at 56.

While the Court credits Defendant's expert's statements that these credits do exist, Defendant has provided no evidence that the profits derived from the improper withholding of Plaintiff's benefits were or were not used for the purpose of refunding these credits. Nor is Plaintiff responsible for satisfying

payments due because of Defendant's contractual agreements with third parties.

As such, the Court therefore finds that Defendant may not offset its profits by "direct interest crediting."

Deduction of Taxes

Defendant argues that the "statutory rate" on its income is 35%. Defendant argues, based on *In Design v. K-Mart Apparel Corp.*, 13 F.3d 559, 567 (2d Cir.1994), that they may deduct income taxes from restitution, but fails to note that the Second Circuit Court of Appeals only permitted said deduction when the wrongful act leading to the unjust enrichment was not "willful and deliberate." There is a long line of cases running against Defendant that hold that taxes cannot be offset from restitution payments where a Defendant deliberately engaged in a wrongful act. *See, e.g.*, *Donell v. Kowell*, 533 F.3d 762, 778 (9th Cir.2008) (investor in Ponzi scheme could not offset unjust enrichment by amount of taxes); *SEC v. Razmilovic*, 2011 WL 4629022, at *31 (E.D.N.Y.2011) (no offset for income taxes in insider trading case); *SEC v. Svoboda*, 409 F.Supp.2d 331, 345 (S.D.N.Y.2006) (no deduction for capital gains taxes in securities fraud).

The Court finds that Defendant's underlying actions in this case in refusing to grant Plaintiff benefits qualify as "deliberate and willful" wrongful acts. The Court has already ruled that Defendant

acted in an arbitrary and capricious manner in its Order granting summary judgment to Plaintiff [12], and the Sixth Circuit has affirmed this ruling. *Rochow v. Life Ins. Co. of N. Am.*, 482 F.3d 860 (6th Cir.2007). In addition, in the Order [67] requiring disgorgement and an equitable accounting, this Court found that Defendant, in denying Plaintiff disability benefits, created "non-existent [insurance] policy requirements," concocted a "[k]nowingly false rationale for [the] second denial" of benefits, and closed the administrative record without medical input or evidence. This Court also found that Defendant had acted in bad faith. The Court finds that Defendants therefore acted in a "deliberate and willful" manner in carrying out the underlying wrongful act, the denial of benefits. Therefore, Defendant will not be permitted to deduct taxes from the disgorgement of their unjust enrichment.

Realized versus Unrealized Gains

Plaintiff argues that "unrealized gains" should be taken into account in determining Defendant's profit. Essentially, unrealized gains are gains in investments that Defendant has not yet "cashed in" or sold, but that have increased in value. Defendant argues that said gains are "paper gains" on investment that could decrease in value later, and thus it would be unfair to provide Plaintiff with a share of profits on investments that Defendant has not yet realized.

The circuits are divided on this question, and there is little clear caselaw. In *Ivan Allen Co. v. United States*, 493 F.2d 426 (5th Cir.1974), the court, in valuing securities for purposes of determining whether a corporation had unreasonably accumulated profits, set the value of the securities not at their original cost but at their fair market-value minus cost to realize said value. The court recognized that it was necessary, in considering profits, to look at the present fair-market value of an investment, particularly given the fact that the investments were easy to translate into liquid cash. The same rule applies in estate tax cases, where tax is assessed at the time of decedent's death, and investment value is based on fair-market value at time of death. *See Gump v. Comm'r of Internal Revenue*, 124 F.2d 540, 543 (9th Cir.1941). Thus, both cases seem to support Plaintiff's position that unrealized gains in value should be taken into account in determining profit, as they suggest that this Court should look at the "present value" of Defendant's assets, regardless of whether the gains are realized or unrealized.

On the other hand, in *C.I.R. v. Godley's Estate*, 213 F.2d 529, 532 (3d Cir.1954), the court, in attempting to define "dividends" as "a corporate distribution to its shareholders out of its earnings or profits," defined "profits," and found that "unrealized gains should not increase earnings or profits." This supports Defendant's position.

The Court finds that this situation is more similar to levying an estate tax or other tax where a

snapshot of fair-market value is necessary. Defendant has not and apparently cannot demonstrate that Plaintiff's withheld benefits were segregated into a fund from which it derived only realized gains. As the burden is on the Defendant to establish which profits flowed from its unjust enrichment, the Court must assume that Plaintiff's funds were used in both realized and unrealized investments. Defendant should not be able to reap a windfall in unrealized investments from the use of Plaintiff's funds down the road merely because Defendant has not yet chosen to cash in on those investments; Defendant will likely realize eventual profit from the day-to-day increase in value of those investments purchased in whole or in part through the fruit of its unjust enrichment. While it is, of course, possible that said investments may decline in value over time, uncertainty in this issue should be resolved against the tortfeasor, in this case the Defendant.

The Court therefore finds that Defendant's profits must include unrealized gains.

III. Conclusion

In summary, the Court finds that the Defendant has the burden of proof in demonstrating that its accounting is correct, and that uncertainty in accounting is resolved against Defendant. The Court finds that Defendant has failed to establish that the benefits wrongfully withheld from Plaintiff were segregated in a fund that limited profit to "investment

income," and thus the Court adopts Plaintiff's method of determining the extent of Defendant's profits during the relevant period. The Court also rejects the various offsets proposed by Defendant.

RELIEF

Plaintiff will, within two weeks from this order, submit a final amount to be disgorged by Defendant based upon the Court's rulings, above. Defendant may then submit a memorandum in response within seven days. This memorandum is limited only to any objections regarding the accuracy of Plaintiff's calculations based on this order, and is not an invitation to relitigate issues already decided by this Court.

SO ORDERED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PATRICK ROCHOW, Personal Representative of the Estate of DANIEL J. ROCHOW,

Plaintiff,

v.

LIFE INSURANCE COMPANY OF NORTH AMERICA,

Defendant.

Civil Case No. 04-73628

Honorable Arthur J. Tarnow

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION [46] FOR EQUITABLE ACCOUNTING; GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION [46] FOR ATTORNEY FEES; AND DENYING PLAINTIFF'S MOTION [60] TO STRIKE

(Filed Jun. 16, 2009)

Before the court are plaintiff's motions for equitable accounting and for attorney fees. These matters came on for a hearing on February 27, 2009. Also before the court are updated reports from plaintiff's expert, along with defendant's responses, as well as plaintiff's motion to strike the affidavit attached to one of defendant's response briefs.

This court and the Sixth Circuit have already concluded that defendant Life Insurance Company of North America (LINA) acted arbitrarily or capriciously when it denied plaintiff s claim for disability

benefits. *Rochow v. Life Ins. Co. of North Am.*, 482 F.3d 860 (6th Cir. 2007). Accordingly, Daniel Rochow, now deceased, is entitled to benefits, payable to his estate.

The controversy between the parties concerns the kind of remedy available to plaintiff, as well as the calculation of the benefit. There are four main areas of contention. First, is Rochow entitled to the remedy of disgorgement? Such a remedy would disgorge from LINA any gain that defendant had accrued while it had custody over money that it withheld from Rochow in breach of its fiduciary duty to him. The short answer is that the catchall provision of ERISA, 29 U.S.C. § 1132(a)(3)(B), recognizes plaintiff's entitlement to this remedy.

Second, the covered-earnings issue: what are Rochow's base earnings, from which his benefit is calculated? The court determines that plaintiff's entire actual earnings in the year prior to the onset of his disability, even those earnings that did not come from Rochow's employer, count as plaintiff's "covered earnings" under the plan.

Third, is the disability benefit subject to an automatic cost-of-living increase? No: the policy does not require cost-of-living adjustments, and there is no authority to support plaintiff's proposition that the failure of an insurer to inflation-index benefits is *per se* unconscionable.

Fourth, should attorney fees be award to plaintiff, and if so, is a 50% enhancement of the award

warranted? The court will award attorney fees but will only enhance the award by 20%.

I. Disgorgement

A. Does equitable accounting control this inquiry?

Plaintiff urges the court to apply the remedy of equitable accounting. Equitable accounting, according to Rochow, is required when a fiduciary breaches its duty. The court must then examine and adjust the accounts between the parties. Furthermore, at oral argument, plaintiff insisted that the remedy of equitable accounting subsumes the three areas of dispute, apart from the issue of attorney fees. In other words, the court's resolution of what income counts as "covered earnings" under the plan, of whether the benefit is indexed according to inflation, and of whether LINA's profits on the withheld benefits should be disgorged, the resolution of these issues would all be components of the remedy of equitable accounting.

The court is not persuaded by this theory. Rather, the statutory language in ERISA guides the award of benefits to Rochow. It is unnecessary to superimpose plaintiff's version of equitable accounting onto the structure that Congress has already established. Accordingly, the covered-earnings issue and the dispute over inflation-indexing are simply determinations that the court must make in order to calculate the benefits due to Rochow under the terms of his plan. 29 U.S.C. § 1132(a)(1)(B). Cognizant of this

statutory structure, equitable accounting is extraneous to the resolution of these two issues.

B. The basis for disgorgement

Likewise, the statute guides the court's analysis of whether the remedy of disgorgement is available. The benefits-recovery provision of ERISA, 29 U.S.C. § 1132(a)(1)(B), allows a plan participant to recover "benefits due to him." Profits unjustly accrued by LINA do not easily fit within this provision's requirement that "benefits" are what are recoverable under § 1132(a)(1)(B). Nor does the court choose to rely on the suggestion that disgorgement is recognized as relief incidental to the recovery of benefits. *See, e.g.*, 1A C.J.S. *Accounting* § 10 (2009) ("Equity frequently takes jurisdiction of an accounting . . . as incidental to some other relief within the jurisdiction of equity, as in the case of fiduciary relations"); *Peck v. Ayers & Lord Tie Co.*, 116 F. 273, 275 (6th Cir. 1902) (articulating principle that accounting is incidental relief to primary claim for breach of fiduciary's duty to prevent waste of a property); *Adams v. Catrambone*, 359 F.3d 858, 861 n.2 (7th Cir. 2004) ("An accounting is a form of equitable relief incidental to a substantive claim."). Even if other courts may have recognized disgorgement as incidental relief under the benefits-recovery provision, sturdier ground for disgorgement lies elsewhere.

Plaintiff offers two other bases for disgorgement: the inherent equitable power of the court and 29

U.S.C. § 1132(a)(3)(B), the catchall provision. *See, e.g.*, *Rybarczyk v. TRW, Inc.*, 235 F.3d 975, 986 (6th Cir. 2000) (in ERISA case, court set pre-judgment interest at the rate of defendant's earnings, meaning that statutory interest rate was not the court's only option and that setting pre-judgment interest rate at actual rate of return avoids unjust enrichment). The court declines to rely upon its inherent authority where Congress has otherwise expressly empowered the court to disgorge LINA's profits through the remedy of an accounting for profits. *See Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1008 (in benefits-denial case, court stated that "[i]t is undisputed that an accounting for profits – the remedy that allows for the disgorgement of profits awarded by the district court – is a type of relief that was typically available in equity and therefore is appropriate under § 1132(a)(3)(B)"). The catchall provision allows a plan participant to "obtain other appropriate equitable relief" to "redress . . . violations" of the plan or ERISA. Disgorgement through an accounting for profits is appropriate equitable relief.

C. The catchall provision

In a nutshell, LINA argues that plaintiff's lawsuit is necessarily a benefits-recovery suit controlled by 29 U.S.C. § 1132(a)(1)(B). Though plaintiff has invoked both the benefits-recovery and catchall provisions, defendant maintains that a plaintiff cannot plead both claims, under *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996). The court acknowledges

that benefits cannot be recovered under the catchall provision, and that the catchall provision is only available to those who cannot avail of other remedies afforded by ERISA. But this is not fatal to plaintiff's request for disgorgement through an accounting for profits. Furthermore, the court rejects LINA's argument that there has been no finding of a breach of fiduciary duty, which is required to trigger the availability of equitable relief under the catchall provision. As *Varity* explains, an arbitrary or capricious denial of benefits can count as a breach of fiduciary duty. *Id.* at 514-15. Furthermore, disgorgement, cognized under the catchall provision, is not an attempt to avoid the limitations of the benefits-recovery provision, because disgorgement seeks a different kind of relief than simply recovering benefits. Disgorgement through an accounting does not seek to compensate plaintiff for his injury or for the time-value of the withheld benefits. Rather, disgorgement remedies the unfairness of unjust enrichment. Therefore, disgorgement is available under the catchall provision as "other appropriate equitable relief," even when a plaintiff has recovered benefits. The court will now expand upon this summary.

In *Varity*, the Supreme Court explained that the catchall provision provides equitable relief for "injuries caused by violations that § 502 [of ERISA] does not elsewhere adequately remedy." *Varity*, *supra*, 516 U.S. at 512. LINA asserts that plaintiff's lawsuit is about recovering benefits due to him and that a catchall-provision claim is not relevant or cannot be

maintained. But plaintiff has pleaded for relief under both the benefits-recovery and catchall provisions. And the Sixth Circuit has recognized that under some circumstances a plaintiff may maintain catchall and benefits-recovery claims simultaneously. *Gore v. El Paso Energy Corp. Long Term Disability*, 477 F.3d 833, 839 (6th Cir. 2007).

Defendant also suggests that there has been no finding of a breach of fiduciary duty that would count as a "violation" of the plan or ERISA, under the catchall provision. But *Varity* explains that a denial of benefits can be a breach of fiduciary duty. *See Varity*, *supra*, 516 U.S. at 514-15 ("characterizing a denial of benefits as a breach of fiduciary duty" does not change the standard a court would apply when reviewing an administrator's decision to deny benefits, meaning that a catchall-provision claim related to the denial of benefits is not necessarily a repackaged benefits-recovery claim). In this instance, LINA's denial of benefits to Rochow was arbitrary or capricious. Surely, arbitrary or capricious action by a fiduciary is a breach of the high standards that the law imposes on fiduciaries. Accordingly, a denial of benefits can count as a violation that would trigger liability under the catchall provision.

The best argument that defendant can make is that disgorgement is not "appropriate" relief, even if a catchall claim could be simultaneously cognizable with a benefits-recovery claim. *See Varity*, *supra*, 516 U.S. at 515 (courts should expect that "where Congress has 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'"). But Rochow asks for a different kind of relief that does not merely duplicate the benefits that he is already entitled to recover. In other words, plaintiff's request for disgorgement under the catchall provision is "appropriate," because his claim is not merely a repackaged benefits-recovery claim, disguising itself as a catchall claim in order to circumvent the procedural strictures – judgment on an administrative record and deferential review, for instance – of the benefits-recovery provision.

The reason why, in Rochow's case, there is a "need for further equitable relief" under the catchall provision is this: disgorgement through an accounting offers a remedy distinct from the relief offered through the benefits-recovery provision. Disgorgement is not the same thing as compensating plaintiff for the time value of benefits that LINA has arbitrarily withheld. Disgorgement looks at the breaching fiduciary's unjust enrichment, rather than the beneficiary's loss or entitlement. And because disgorgement is distinct from simply recovering benefits due to a plan participant, plaintiff can invoke the catchall provision as a basis for requesting disgorgement, given that the benefits-recovery provision does not plainly recognize the availability of disgorgement. Therefore, any gain that LINA accrued from the money it withheld from Rochow will be disgorged.

The court will set an evidentiary hearing to determine the amount, if any, of this unjust enrichment.

II. Covered earnings

The parties dispute the amount of Rochow's base earnings, from which his benefit is calculated. The relevant language in the policy says that "Basic Monthly Earnings," related to "Covered Earnings," will be the greater of "your current monthly base salary or 1/12 of your prior year base earnings, overtime, and eligible bonus as determined at the time of disability. Covered Earnings are determined initially on the date an Employee applies for coverage."

Both sides agree that the "your monthly base salary" route of calculating covered earnings does not apply. Rather, the benefit is determined in Rochow's case by looking at prior-year earnings and dividing by 12. Both sides also agree that the "prior year" under this second route to calculate covered earnings is the year 2000, as this court and the Sixth Circuit determined that Rochow became disabled in 2001.

Rochow believes that his covered earnings in 2000 should be calculated by looking at his actual earnings from the entire year. He earned $269,000.

LINA, on the contrary, wants to calculate Rochow's benefits by looking only at the salary attributable to Gallagher, Rochow's employer, because the policy was issued to Gallagher. This would mean only counting the earnings attributable to the

Gallagher salary from June to December 2000, and then extrapolating from those earnings to arrive at a prior-year income of $150,000.

LINA's contention must be rejected. There is no language in the policy that requires prior-year earnings to only come from the policyholder. Defendant's secondary argument is that some of Rochow's non-Gallagher income came from Rochow's sale of Universico to Gallagher. Rochow denies that this is the case and submitted a supporting declaration. LINA has not come forward with any evidence to the contrary. Therefore, the court credits Rochow's representation that the $269,000 in covered earnings does not include money proceeding from the sale of Universico.

III. Cost-of-living increase

The court must decide whether the disability benefit is subject to an automatic cost-of-living increase. Here, the court rejects Rochow's assertions. Nothing in the policy requires cost-of-living adjustments to the benefit in Rochow's situation. Plaintiff cites the definition of "Indexed Covered Earnings" as support for the proposition that Rochow's benefits increase with inflation. But as LINA explains, Indexed Covered Earnings are only a basis for calculating the disability benefit when the "Work Incentive Benefit Calculation" is employed. And the Work Incentive Benefit Calculation only comes into play if the plan participant is "working while disabled." That

is clearly not the case in Rochow's situation, at least for the majority of the time for which the disability benefit must be calculated. Therefore, the Disability Benefit Calculation is denoted by the "schedule of benefits," which does not include any language about inflation indexing. The schedule of benefits merely states that the monthly benefit is based on the "Gross Disability Benefit," which is defined in relevant part as "60% of your monthly Covered Earnings." The definition of Gross Disability Benefit could have been based on *Indexed* Covered Earnings, but the text only refers to Covered Earnings. The plan reflects a distinction between Covered Earnings and Indexed Covered Earnings. Accordingly, the plan language does not support plaintiff's position.

Nor is the court persuaded by plaintiff's assertion that it is *per se* unconscionable for an insurance company to issue a policy whose benefit is not indexed for inflation. There is no authority for plaintiff's argument.

IV. Attorney fees and enhancement

ERISA allows the court to award attorney fees and costs. Under *Secretary of Dept. of Labor v. King*, 775 F.2d 666 (6th Cir. 1985), there are five factors that flexibly guide the court:

- the degree of the opposing party's culpability or bad faith
- the opposing party's ability to satisfy an award of attorney's fees

- the deterrent effect of an award on other persons under similar circumstances
- whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA and
- the relative merits of the parties positions.

The court will award attorney fees as well as a 20% enhancement.

A. Bad faith

Rochow notes that it is the norm for a court to deem a defendant culpable when that defendant has denied benefits arbitrarily and capriciously. Furthermore, plaintiff cites defendant's invocation of non-existent policy requirements, LINA's knowingly false rationale for the denial of Rochow's second appeal, defendant's closing of the administrative record without medical input or evidence, and LINA's inconsistency.

1. Non-existent policy requirements

Rochow says that LINA acted in bad faith when it initially denied his claim for benefits. Specifically, LINA – though conceding that Rochow experienced symptoms of encephalitis throughout 2001 – had decided that Rochow could not be considered disabled because he continued to work in 2001. Plaintiff calls

this the "walking wounded" defense. Plaintiff is right: there was nothing in the policy that said that working in a job would prevent a beneficiary from being considered disabled, even if a beneficiary would otherwise be considered disabled due to an inability to perform the material duties of one's regular occupation.

Likewise, Rochow is correct that there was no policy language requiring plaintiff to submit "medical evidence" to demonstrate his disability. The policy only required "satisfactory proof" Nevertheless, LINA persevered in trying to apply a standard that was foreign to the policy language.

2. Knowingly false rationale for second denial

Rochow explains that LINA's rationale for the denial of his second appeal was that he had filed his claim too late, as the claim was filed after Rochow's termination date.

However, nothing in the policy said that the claim was too late. Moreover, Rochow argues that LINA knew that such a rationale was false. Plaintiff points to an internal note handwritten by someone in LINA that said, "claim submitted late by [Rochow] but not more than one year late." LINA does not dispute this in its brief.

3. Closing the administrative record without medical input or evidence

Rochow maintains that LINA waited until the last administrative appeal to rely on a new rationale for denying plaintiff's claim. The new rationale was the lack of medical evidence. Although Rochow argued before the courts that medical evidence was not required under the policy, Rochow's point still stands. Plaintiff contends that LINA showed bad faith by waiting until the last administrative appeal to rely on this new rationale, which left plaintiff without any means to supplement the administrative record to include medical evidence that could have persuaded LINA.

LINA reminds the court that Rochow was challenging the need to provide medical evidence, suggesting that plaintiff cannot now say that LINA should have required medical evidence up front. The court rejects defendant's position.

Rochow also observes that LINA did not seek expert evaluations of the evidence that plaintiff did submit, considering the rarity of the herpes encephalitis that afflicted Rochow. This goes to the arbitrary and capricious nature of LINA's decision and also to LINA's bad faith.

4. Inconsistency

Several times Rochow asserts that inconsistency itself shows bad faith. In other words, if an insurer

keeps changing its reason for a denial, that demonstrates bad faith. The court need not reach this argument, because there are plenty of other reasons why LINA acted culpably.

B. Common benefit

Under the second *King* factor, Rochow contends that his case conferred a common benefit by resolving significant legal questions surrounding ERISA

Rochow notes that the Sixth Circuit's decision in *Rochow* has been cited over 30 times already, even though it's only two years old. Courts have discussed the rejection of insurance companies' "walking wounded" defense; the sufficiency of non-medical evidence to show "satisfactory proof" of disability; and the possibility that disability is present before a claim is filed and that retrospective diagnosis can establish this.

The court agrees with Rochow.

C. Relative Merits

It is clear that Rochow's victory, despite the arbitrary-or-capricious standard, shows that his position had more merit than LINA's. The question is whether plaintiff's victory was overwhelming. Rochow does not expand on this point much.

LINA cites this court's bench ruling, where the court stated "I agree with you; the letter is not – from

Dr. Forman is not overwhelming. But when you put it in the context of his job . . . I think the Plaintiff has prevailed."

In view of the arguments that Rochow makes to support a finding of bad faith, Rochow did win his claim for recovery of benefits overwhelmingly. LINA did not have serious arguments based in the policy language to support its position.

The other *King* factors – LINA's ability to pay and the deterrent effect of attorney fees are self-evident.

D. Hours and rates

Rochow wants nearly $194,000 in attorney fees. This figure does not account for interest that accrued from the times that the various fees were incurred.

LINA balks at the number of hours that Rochow's counsel worked on this case. While Rochow's trial attorney only worked 43 hours during the district-court proceedings, appellate and trial counsel present a bill for 608 hours on appeal. LINA suggests that this does not make sense, particularly considering that LINA's fees were only 1/3 of what plaintiff now seeks.

Rochow explains that much of the work at the district-court level built on work that plaintiff's counsel did during the administrative appeals. So much time was spent on appeal because Rochow

needed to defend a bench ruling before a Sixth Circuit panel.

LINA also asserts that some of the hours on appeal resulted from unsuccessful motions that were a waste of time. Rochow notes that LINA does not point out which motions were unsuccessful and why. Plaintiff explains why he needed to file these motions on appeal. The court finds these explanations reasonable.

LINA also maintains that hourly rates are excessive: $225 for trial counsel and $335 for appellate counsel. The court disagrees.

E. Enhancement

Rochow also asks for a 50% enhancement of the attorney-fee award. Deciding whether to award an enhancement is guided by 12 factors announced by the Supreme Court in *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989). *See also Murphy v. Reliance Standard Life Ins. Co.*, 247 F.3d 1313, 1314-15 (11th Cir. 2001) (ERISA attorney-fee statute similar to other federal attorney-fee statutes, which were at issue in *Blanchard*). These factors are

- the time and labor required
- the novelty and difficulty of the questions
- the skill requisite to perform the legal service properly

- the preclusion of other employment by the attorney due to acceptance of the case
- the customary fee
- whether the fee is fixed or contingent
- time limitations imposed by the client or the circumstances
- the amount involved and the results obtained
- the experience, reputation, and ability of the attorneys
- the “undesirability” of the case
- the nature and length of the professional relationship with the client
- awards in similar cases

The fact that a case is taken on a contingent-fee arrangement cannot be the basis for an enhancement. *Burlington v. Dague*, 505 U.S. 557, 567 (1992).

Rochow highlights the novelty and difficulty of the case, the skill needed, the preclusion of other employment, the results achieved, and the undesirability of the case. The undesirability of the case is demonstrated not only by the fact that this is an ERISA claim facing the usual substantial procedural obstacles, but that Rochow's first attorney encouraged Rochow to give up in the face of LINA's arguments. Trial counsel attaches a letter saying so. Plaintiff's counsel also present a declaration from an appellate expert, Nancy Wear, who read the papers in this case,

listened to oral argument, and reviewed counsel's billing request, which she supports.

Whether to award an enhancement is in the court's discretion, and the court believes some enhancement is warranted. Rochow asks for 50%. He presents a Sixth Circuit case, *Paschal v. Flagstar Bank*, 297 F.3d 431, 435 (6th Cir. 2002), where a 50% enhancement was affirmed. Instead, the court will award an enhancement of 20%.

V. Plaintiff's motion to strike affidavit

Shortly before oral argument on the motions for equitable accounting and for attorney fees, plaintiff moved to strike an affidavit that LINA had attached to one of its briefs. The parties have continued to brief the issue of LINA's profits. Therefore, plaintiff's motion is DENIED.

VI. Conclusion

The court grants the remedy of an accounting for profits. Any profits that LINA accrued on the benefits withheld from Rochow will be disgorged. The parties have briefed the issue of LINA's rate of return, so the court will set an evidentiary hearing.

The motions for equitable accounting and for attorney fees are GRANTED IN PART and DENIED IN PART.

SO ORDERED.

S/ARTHUR J. TARNOW
Arthur J. Tarnow
United States District Judge

---

482 F.3d 860
United States Court of Appeals,
Sixth Circuit.

Daniel J. ROCHOW, Plaintiff-Appellee,
v.
LIFE INSURANCE CO. OF NORTH AMERICA,
Defendant-Appellant.

No. 05-2100. | Argued: Sept. 19, 2006. |
Decided and Filed: April 3, 2007.

Attorneys and Law Firms

ARGUED: Angela M. Brown, Honigman, Miller, Schwartz & Cohn, Lansing, Michigan, for Appellant. Erik W. Scharf, Coconut Creek, Florida, for Appellee. **ON BRIEF:** Angela M. Brown, Honigman, Miller, Schwartz & Cohn, Lansing, Michigan, for Appellant. Erik W. Scharf, Coconut Creek, Florida, John J. Cooper, Cooper Law Firm, Rochester, Michigan, for Appellee.

Before: CLAY and GILMAN, Circuit Judges; OBERDORFER, District Judge.*

OPINION

OBERDORFER, District Judge.

Daniel Rochow, the former President of Arthur J. Gallagher & Co. ("Gallagher"), currently suffers from

---

* The Honorable Louis F. Oberdorfer, United States District Judge for the District of Columbia, sitting by designation.

HSV-Encephalitis, a rare and severely debilitating disease. The question in this case is whether or not the insurer, Life Insurance Company of North America ("LINA") acted arbitrarily and capriciously when it concluded that Rochow was not disabled on the date that he left his job, therefore denying his claim for disability benefits. The district court held that LINA's determination was arbitrary and capricious and unsupported by the administrative record. For the reasons hereinafter stated, we AFFIRM that decision.

BACKGROUND

A. Rochow's Symptoms and Diagnosis

The Administrative Record reveals the following facts. Daniel Rochow was the President of Gallagher for ten years. He had long-term disability coverage through Gallagher's Group Insurance Plan (the "Plan"), administered by LINA. In 2001, Rochow began to experience short-term memory loss, occasional chills, sporadic sweating, and stress at work. On June 15, 2001, he visited Dr. Bruce Forman to discuss his symptoms. Dr. Forman took notes, but did not record any conclusions.

In July 2001, Gallagher demoted Rochow from President to Sales Executive – Account Manager. According to Jack Tellerico, an Area Vice President and Rochow's co-worker at Gallagher, this demotion occurred because Rochow could no longer perform his duties as President.

On August 21, 2001, Rochow returned to Dr. Forman. He reiterated his concerns about his short-term memory loss, which had now been ongoing for six to eight months. Dr. Forman again took notes regarding Rochow's complaints. He concluded that Rochow was suffering from depression, prescribed anti-depressants, and referred him to a neurologist. [JA 131].

On October 2, 2001, Rochow saw a neurologist, Dr. Mary Ann McKee. According to Dr. McKee's notes, during the examination, Rochow was at times unable to answer her questions or describe his problems. He was tearful and cried often during the exam. He told Dr. McKee that the reason for his visit was "distractibility and difficult[sic] with memory." [JA 153]. He explained that "for the last six months he has noticed that he might think of something and then in the middle of his thoughts he will lose the rest of the thought and not be able to complete the sentence." [JA 153]. Dr. McKee concluded that "his memory difficulty is really secondary to depression and does not represent an organic brain disorder." [JA 154]. An MRI on October 9, 2001 was "unremarkable." [JA 156].

During this time, Rochow was having increasing difficulties at work. According to Tellerico, Rochow became unable to perform duties as a Sales Executive-Account Manager, which included budgeting revenue, developing sales plans, and identifying new clients or new products for existing clients; "[s]ince Mr. Rochow could not perform these material duties, he was not

able to continue working at Arthur J. Gallagher & Co." [JA 113]. January 2, 2002 was his last day of employment, and the day on which his disability coverage with LINA lapsed.

In February 2002, Rochow visited his son in Sarasota, Florida. On the evening of February 17, security guards discovered Rochow wandering alone in a parking lot, unable to explain why he was there. His speech was slurred, and he exhibited amnestic symptoms. The Sarasota Fire Department transported him to the emergency room at Sarasota Memorial hospital. There, Rochow believed he was in Michigan and continued to exhibit amnestic symptoms. A radiologic scan was again "unremarkable." [JA 415]. He was involuntarily civilly committed at a psychiatric hospital.

On February 20, 2002, Rochow was brought back to the emergency room because of a "sudden change and altered mental status." [JA 223]. The emergency room staff conducted a lumbar puncture. An infectious disease specialist and a neurologist diagnosed Rochow with HSV-Encephalitis. HSV-Encephalitis is an extremely rare form of herpes that can cause "brain trauma not unlike the sort associated with strokes, car accidents, or gunshot wounds." *In re Myrick*, 624 A.2d 1222, 1224 (D.C.Ct.App.1993). He was prescribed long-term anti-viral medications. On February 25, 2002, a physician attempted to interview Rochow; he was still unable to provide helpful information. Based on discussions with Rochow's ex-wife and a colleague, this physician concluded that

"[t]he patient's history fits better with a more slow onset process." [JA 262].

On March 5, 2002, Rochow was transferred by medical helicopter to Henry Ford Hospital in Michigan for continued treatment. He was discharged on March 14, 2002 with a recommendation for assisted living or 24-hour supervision at home, and with the sad prognosis that "he may never fully recover or be able to function on his own." [JA 467].

B. The Claims Process

In late December 2002, Rochow, through his personal representative, filed a claim for disability benefits pursuant to LINA's insurance plan. The plan provided in relevant part as follows:

WHEN COVERAGE ENDS

Your coverage ends on the earliest of the following dates:

> . . . the day you are no longer in Active Service.
>
> * * *

DESCRIPTION OF BENEFITS

WHAT IS COVERED

Disability Benefits

> We will pay Disability Benefits if you become Disabled while covered under this Policy. You

must satisfy the Elimination Period, be under the Appropriate Care of a Physician, and meet all the other terms and conditions of the Policy. You must provide to us, at your own expense, satisfactory proof of Disability before benefits will be paid.

* * *

DEFINITIONS

. . .

Active Service

If you are an Employee, you are in Active Service on a day which is one of your Employer's scheduled work days if either of the following conditions are met.

1. You are actively at work. This means you are performing your regular occupation for the Employer on a Full-time basis, either at one of the Employer's usual places of business or at some location to which the Employer's business requires you to travel.
2. The day is a scheduled holiday, vacation day or period of Employer approved paid leave of absence.

You are in Active Service on a day which is not one of the Employer's scheduled work days only if you were in Active

> Service on the preceding scheduled work day. . . .
>
> **Disability**
>
> You are considered Disabled if, solely because of Injury or Sickness, you are . . . unable to perform all the material duties of your Regular Occupation or a Qualified Alternative[.]

[JA 27-37].

Rochow's initial claim form incorrectly stated that he was still employed at the time of his medical crisis in February 2002. LINA issued its first denial letter on January 27, 2003, concluding that Rochow's actual employment terminated on January 2, 2002. Rochow, now represented by counsel, responded that his employment had indeed terminated on January 2, 2002, but that he had been disabled and suffered the effects of his condition throughout 2001.

LINA issued a second denial on April 3, 2003. It acknowledged Rochow's disease and symptoms but still concluded that Rochow was not disabled until his acute medical crisis:

> "[I]t is evident that Mr. Rochow experienced the affects [sic] of encephalitis throughout the calendar year of 2001[.] . . . According to the medical records, Mr. Rochow has experienced the symptoms of depressive disorders continuously while working in 2001. Because he continued to

> work, he cannot be considered disabled based on the policy's definition of disability. It appears his inability to function did not occur until February 18, 2002."

[JA 121-22].

Rochow again challenged the denial. He submitted a letter from Dr. Forman, dated September 28, 2003, stating: "it is my opinion that Mr. Rochow had memory problems that would have affected his ability to perform tasks as an Insurance Salesman in 2001." [JA 112]. On December 22, 2003, LINA issued a third denial suggesting that his claim was being denied for general lack of documentation. Finally, on July 16, 2004, at the end of the administrative appeals process, LINA denied his claim for lack of medical evidence.

PROCEDURAL BACKGROUND

Rochow's challenge of LINA's determination in the Eastern District of Michigan involves the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461. The district court ruled from the bench that LINA's determination that Rochow was not disabled on January 2, 2002 was arbitrary and capricious and unsupported by the administrative record. In the context of the record as a whole, the district court found that "the February 17th [2002] incident [was] corroborative evidence of a pre-existing disability."

Specifically, the district court reasoned as follows:

> [T]he fact that he was able to work is certainly evidence for the Defense. However, when we have Mr. Tellerico saying he was on the payroll, but he wasn't able to do the work that he had been doing before, and we have such a severe loss of memory, compounded by the depression, and it is clear that that memory loss – it seems to be clear that that memory loss may have contributed to his being demoted before he claimed disability, I think he has prevailed.
>
> And certainly the Defense is right; that the Plaintiff has the burden of proof initially as to disability and has a much heavier burden of proof, when he comes to this court, to show not only disability, but that the decision was arbitrary and capricious.
>
> The fact that he was collecting pay, I don't think is relevant. You've got a person who is the head of the agency, Arthur Gallagher & Company. . . . [T]he letter is not – from Dr. Forman is not overwhelming. But when you put it in the context of his job, career – his career path, which was downhill, and the lack of any medical evidence presented in support of finding him not disabled, I think the Plaintiff has prevailed.

[JA 552-54]. Defendant timely appealed.

The primary issue before us is whether Rochow presented sufficient evidence to establish that he was

disabled within the meaning of the Plan before or on January 2, 2002.

DISCUSSION

Rochow's claim is governed by ERISA. ERISA provides that insurance companies "shall discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries and [ ] for the exclusive purpose of [ ] providing benefits to participants and their beneficiaries . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter . . . " 29 U.S.C. § 1104(a)(1).

We "review *de novo* the decision of a district court granting judgment in an ERISA disability benefit action based on an administrative record." *Glenn v. MetLife*, 461 F.3d 660, 665 (6th Cir.2006) (citing *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 613 (6th Cir.1998)), *petition for cert. filed*, 75 U.S.L.W. 3368 (U.S. Jan. 3, 2007) (No.06-92).

Where, as here, an insurance plan administrator is vested with discretion to interpret the plan, we review the denial of benefits under the arbitrary and capricious standard. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989); *Evans v. Unumprovident Corp.*, 434 F.3d 866, 875 (6th Cir.2006). This standard requires "review of the quality and quantity of the medical evidence and the opinions on both sides of

the issues." *McDonald v. W.-S. Life Ins. Co.*, 347 F.3d 161, 172 (6th Cir.2003). In conducting our review, we are limited to consideration of the pre-packaged administrative record. *See Moon v. Unum Provident Corp.*, 405 F.3d 373, 378 (6th Cir.2005). A decision should be upheld if it is "the result of a deliberate principled reasoning process" and "supported by substantial evidence." *Killian v. Healthsource Provident Adm'rs*, 152 F.3d 514, 520 (6th Cir.1998) (quoting *Baker v. United Mine Workers of Am. Health & Ret. Funds*, 929 F.2d 1140, 1144 (6th Cir.1991)).

We conclude that the record before us supports the district court's decision that the Plan Administrator's denial of Rochow's claims was arbitrary and capricious. The fact that Rochow remained on the payroll until January 2, 2002 is not determinative as to whether or not he was disabled during that time; there is no "logical incompatibility between working full time and being disabled from working full time." *Hawkins v. First Union Corp. Long-Term Disability Plan*, 326 F.3d 914, 918 (7th Cir.2003). Tellerico states that Rochow was demoted, and ultimately terminated, because he could no longer perform the duties required of his position. Rochow does not have to prove that he was disabled in 2001 due to HSV-Encephalitis; only that in 2001 he was unable to perform his duties due to injury or sickness. Furthermore, the policy does not require medical evidence, only "satisfactory proof."

The medical evidence in the record is inconclusive as to the reasons for Rochow's 2001 symptoms,

although we note that LINA's April 3, 2003 denial letter conceded that he was suffering from those symptoms throughout 2001. Contemporaneous medical notes document Rochow's cognitive deterioration. Competing evidence in the record showing that his 2001 symptoms were not disabling is conspicuously absent. The ultimate tragic incident in Sarasota and its extended onset and sequelae, Dr. Foreman's retrospective letter, Tellerico's account of Rochow's duties and his inability to perform them, and the entire record, viewed in perspective, confirm the district court's ruling that LINA's denial of benefits was arbitrary and capricious and unsupported by substantial evidence. *Killian*, 152 F.3d at 520. LINA's determination was not the result of a deliberate, principled reasoning process. *Id.*; *Glenn*, 461 F.3d at 666. Nor does the decision appear to have been made "solely in the interest of the participants and beneficiaries and [ ] for the exclusive purpose of [ ] providing benefits to participants and their beneficiaries" as required by ERISA. 29 U.S.C. § 1104(a)(1).

CONCLUSION

Accordingly, the district court's order is AFFIRMED.

Fifth Circuit District Court Cases Applying State Prejudgment Rates

Perez v. Bruister, 54 F.Supp. 3d 629, 680 (S.D.Miss. 2014) (applying Miss. Code Ann. § 75-17-1 (prejudgment interest of 8% for claims on notes, accounts and contracts))

Rucker v. Life Ins. Co. of North America, 2012 WL 956507 at *23 (E.D.La. March 20, 2012) (applying La.R.S. 13:4202 (5.5%))

Alexander v. Hartford Life and Accident Ins. Co., 2010 WL 3660054 at *3 (N.D.Tex. Aug. 30, 2010) (applying Tex.Fin.Code Ann. § 304.003(c) (at the relevant time state rate was the prime rate))

Humphrey v. United Way of the Texas Gulf Coast, 2008 WL 5070057 at *8 (S.D.Tex. Nov. 20, 2008) (applying Tex.Fin.Code Ann. § 304.003(c) (at the relevant time the state rate was 5% simple interest)

Ducre v. SBC-Southwestern Bell, 2007 WL 593616 at *2 (W.D.Tex. Feb. 21, 2007) (applying Tex.Fin.Code Ann. § 304.003(c) (at the relevant time the state rate was 8.25%))

Harris Methodist Fort Worth v. Sales Support Services, Inc., 2006 WL 2577826 at *8 (N.D.Tex. Sept. 7, 2006) (applying Tex.Fin.Code Ann. § 304.003(c))

IBEW-NECA Southwestern Health and Benefit Fund v. Gurule, 337 F.Supp. 2d 845, 860 (N.D.Tex. 2004) (applying Tex.Fin.Code Ann. § 304.003(c) (at the relevant time the rate was 6%))

Bowers v. Unumprovident Corp., 2002 WL 10467 at *8 (E.D.La. Jan. 2, 2002) (applying La.Civ.Code art. 2924)

Musmeci v. Schwegmann Giant Super Markets, 159 F.Supp. 2d 329, 356 (E.D.La. 2001) (applying La.Civ.Code art 2924 and La.R.S. 13:4202 (at the relevant time rate was 9.25%))

Roig v. Limited Long Term Disability Program, 2000 WL 1146522 at *15 (E.D.La. 2000) (applying La.Civ.Code art. 2924)

Carrabba v. Randalls Food Markets, 145 F.Supp. 2d 763, 775 (N.D.Tex. 2000) (applying Tex.Fin.Code.Ann. § 304.003(c) (at the relevant time the state rate was 10%))

Estate of Bratton v. National Union Fire Ins. Co., 24 F.Supp.2d 667, 671 (N.D.Miss. 1998) (applying Miss.Code § 75-17-1(1) (8%))

Bourg v. NN Investors Life Ins. Co., 1992 WL 28063 at *4 (Feb. 4, 1992) (applying La.Civ.Code art. 2924)

Tenth Circuit District Court Cases Applying State Prejudgment Rates

Lynn R. v. Valueoptions, AT&T, 2014 WL 4232519 at *9 (D.Utah Aug. 26, 2014) (applying Utah Code Ann. § 15-1-1(2) (10%))

Garrett v. Principal Life Ins. Co., 2013 WL 1914632 at *2 (W.D.Okl. May 8, 2013) (applying Okla. Stat. tit. 36 § 3629(B) (15%))

Gunderson v. Metropolitan Life Ins. Co., 2011 WL 6020575 at *6 (D.Utah. Dec. 1, 2011) (applying Utah Code Ann. § 15-1-1(2) (10%))

Dove v. Prudential Ins. Co. of America, 2011 WL 197880 at *3 (D.Kan. Jan. 20, 2011) (applying K.S.A. § 16-201 (10%))

Meek v. Zurich North America Ins. Co., 704 F.Supp. 2d 1069, 1076 (D.Colo. 2010) (applying Colo.Rev.Stat. 5-12-102 (8%))

Boggio v. Hartford Life and Accident Ins. Co., 2009 WL 1505536 at *7-*8 (D.Kan. May 28, 2009) (applying K.S.A. § 16-201 (10%))

Kellogg v. Metropolitan Life Ins. Co., 2009 WL 3064748 at *1 (D. Utah Sept. 21, 2009) (applying Utah Code Ann. § 15-1-1(2) (10%))

DeGrado v. Jefferson Pilot Financial Ins. Co., 2009 WL 1198173 at *2 (D.Colo. May 1, 2009) (applying Colo.Rev.Stat. 5-12-102 (8%))

Feldman v. Prudential Ins. Co. of America, 2008 WL 376252 at *2 (D.Utah. Feb. 11, 2008) (applying Utah Code Ann. § 15-1-1(2) (10%))

Kansas v. Titus, 452 F.Supp. 2d 1136, 1152 (D.Kan. 2006) (applying K.S.A. § 16-201 (10%))

Hornafius v. Exxon Mobil Corp., 2005 WL 2293654 at *2 (D.Colo. Sept. 16, 2005) (applying Colo.Rev.Stat. 5-12-102 (8%))

Wilson v. Metropolitan Life Ins. Co., 2005 WL 1661621 at *2 (D.Kan. July 15, 2005) (applying K.S.A. § 16-201 (10%))

DeGrado v. Jefferson Pilot Financial Ins. Co., 367 F.Supp. 2d 1315, 1328 (D.Colo. 2005)) (applying Colo.Rev.Stat. 5-12-102 (8%))

Toman v. Goldman, Sachs & Co. Medical Plan, 2004 WL 988983 at *7 (D.Utah April 8, 2004) (applying Utah Code Ann. § 15-1-1(2) (10%))

Mein v. Pool Company Disabled International Employee Long Term Disability Plan, 989 F.Supp. 1337, 1352 (D.Colo. 1998)

LaSelle v. Public Service Co. of Colorado, 988 F.Supp. 1348, 1354 (D.Colo. 1997)

Goad v. Rogers, 1996 WL 42132 at *2 (D.Kan. Jan. 22, 1996) (applying K.S.A. § 16-201 (10%))

Van Hoove v. Mid-America Building Maintenance, Inc., 841 F.Supp. 1523, 1536-37 (D.Kan. 1993) (applying K.S.A. § 16-201 (10%))

Eleventh Circuit District Court Cases Applying State Prejudgment Rates

Kinser v. Plans Administration Committee of Citigroup, Inc., 2008 WL 762200 at *1 (M.D.Ga. March 18, 2008) (applying O.C.G.A. § 7-4-12 (9%))

Borroughs v. BellSouth Telecommuncations, Inc., 446 F.Supp. 2d 1294, 1302 (N.D.Ala. 2006) (applying Ala. Code §§ 8-8-1, 8-8-8 (6%))

Engelhardt v. Paul Revere Life Ins. Co., 77 F.Supp. 2d 1226, 1236 (M.D.Ala. 1999) (applying Ala. Code § 27-1-17(b) (18%))

Anderson v. Unum Life Ins. Co. of America, 414 F.Supp. 2d 1079, 1110 (M.D.Ala. 2006) (applying Ala. Code § 27-1-17(b) (18%))

Levinson v. Reliance Standard Life Ins. Co., 2000 WL 193623 at *14 (S.D.Fla. Jan. 5, 2000) (applying Fla. Stat. §§ 55.03 and 687.01 (10%))

Waschak v. Acuity Brans, Inc. Senior Management Benefit Plan, 2009 WL 2461038 at *5 (N.D.Ga. Aug. 6, 2009) (applying O.C.G.A. § 7-4-12)

Lyons v. Georgia-Pacific Corp. Salaried Employees Retirement Plan, 196 F.Supp. 2d 1260, 1271 (N.D.Ga. 2002) (applying O.C.G.A. § 7-4-12 (12%))

DeMatte v. Brotherhood of Industrial Workers' Health and Welfare Fund, 1996 WL 588921 at *5 (M.D.Fla. Sept. 20, 1996) (applying Fla. Stat. § 687.01)

Ninth Circuit District Court Cases Applying Section 1961(a) Rate

Delaney v. Prudential Ins. Co. of America, 68 F.Supp.3d 1214, 1231-32 (D.Or. 2014)

Sullivan v. Prudential Ins. Co. of America, 2014 WL 3529974 at *36 (E.D.Cal. July 15, 2014)

Avila v. Pediatrix Medical Group, Inc., 2014 WL 1569502 at *3 (D.Alaska April 16, 2014)

Topits v. Life Insurance Co. of North America, 2013 WL 5524129 at *11-*12 (D.Or. April 11, 2013)

Rabbat v. Standard Ins. Co., 894 F.Supp.2d 1311, 1323 (D.Or. 2012)

Abdullah v. Accentcare Long Term Disability Plan, 2012 WL 4112291 at *12 (N.D.Cal. Sept. 19, 2012)

Lasheen v. Loomis Co., 2013 WL 1178209 at *9 (E.D.Cal. March 21, 2013)

Taylor v. Reliance Std. Life Ins. Co., 2012 WL 113558 at *5 (W.D.Wa. Jan. 13, 2012)

Letvinuck v. Aetna Life Ins. Co., 2011 WL 6056878 at *1 (C.D.Cal. Dec. 2, 2011)

Mazet v. Halliburton Co. Long-Term Disability Plan, 2011 WL 148269 at *1 (D.Ariz. Jan. 18, 2011)

Galvin v. Provident Life and Accident Ins. Co., 2010 WL 3619572 at *5-*6 (N.D.Cal. Sept. 13, 2010)

Stone v. Bayer Corp. Long Term Disability Plan, 2010 WL 2595675 at *3-*4 (D.Or. June 21, 2010)

Schramm v. CNA Financial Corp. Insured Group Benefits Program, 718 F.Supp. 2d 1151, 1165 (N.D.Cal. 2010)

Verderose v. Envisedge, LLC, 2010 WL 1531066 at *4 (D.Ariz. April 15, 2010)

Lee v. Sun Life Assurance Co. of Canada, 2010 WL 2231943 at *7 (D.Or. April 1, 2010)

Smyrni v. US Investigations Services, LLP, 2010 WL 807445 at *4-*5 (N.D.Cal. March 5, 2010)

Perryman v. Provident Life and Accident Insurance Co., 690 F.Supp.2d 917, 955-56 (D.Ariz. 2010)

Langston v. North American Assert Development Corp. Group Disability Plan, 2010 WL 330085 at *9-*10 (N.D.Cal. Jan. 20, 2010)

Porco v. Prudential Ins. Co. of America, 682 F.Supp.2d 1057, 1082 (C.D.Cal. 2010)

Gemmel v. Systemhouse, Inc., 2009 WL 3157263 at *19 (D.Ariz. Sept. 28, 2009)

Dube v. Netmanage, Inc. Long-Term Disability Plan, 2009 WL 2356191 at *3 (N.D.Cal. July 29, 2009)

Frank v. Wilbur-Ellis Co. Salaried Employees Ltd Plan, 2009 WL 1812826 at *14 (E.D.Cal. June 25, 2009)

Minton v. Deloitte and Touche USA LLP Plan, 631 F.Supp.2d 1213, 1220-21 (N.D.Cal. 2009)

Lona v. Prudential Ins. Co of America, 2009 WL 801868 at *14 (S.D.Cal. March 24, 2009)

Fontana v. Guardian Life Ins., 2009 WL 585811 at *1 (N.D.Cal. March 4, 2009)

Kowalski v. Farella, Braun & Martel, LLP, 2008 WL 5397511 at *15 (N.D.Cal. Dec. 23, 2008)

McAfee v. Metropolitan Life Ins. Co., 625 F.Supp.2d 956, 972 (E.D.Cal. 2008)

Caplan v. CNA Financial Corp., 573 F.Supp.2d 1244, 1253 (N.D.Cal. 2008)

Lasheen v. Loomis Co., 2008 WL 2880408 at *7 (E.D.Cal. July 22, 2008)

Leick v. Hartford Life and Accident Ins. Co., 2008 WL 1882850 at *10-*11 (E.D.Cal. April 24, 2008)

Cyr v. Reliance Std. Life Ins. Co., 2008 WL 7095148 at *12-*13 (C.D.Cal. Jan. 16, 2008)

Archuleta v. Reliance Std. Life Ins. Co., 504 F.Supp.2d 876, 886 (C.D.Cal. 2007)

Gardner v. Bear Creek Corp., 2007 WL 2318969 at *20 (N.D.Cal. Aug. 6, 2007)

Schwartz v. Metropolitan Life Ins. Co., 2007 WL 2023476 at *2 (D.Ariz. July 12, 2007)

Hawkins-Dean v. Metropolitan Life Ins. Co., 514 F.Supp.2d 1197, 1200-01 (C.D.Cal. 2007)

Younkin v. Prudential Ins. Co. of America, 2007 WL 1378413 at *8 n. 3 (D.Mont. May 3, 2007)

Scott v. Unum Life Ins. Co. of America, 2007 WL 666320 at *3 (N.D.Cal. March 2, 2007)

Kniespeck v. Unum Life Ins. Co. of America, 2007 WL 496346 at *2 (E.D.Cal. Feb. 13, 2007)

Rorabaugh v. Continental Casualty Co., 2006 WL 4384712 at *8 (C.D.Cal. Dec. 8, 2006)

Hyder v. Kemper National Services, Inc., 2006 WL 2917956 at *1 (N.D.Cal. Oct. 11, 2006)

Cherry v. Digital Equitment Corp., 2006 WL 2594465 at *11-*12 (E.D.Cal. Sept. 11, 2006)

Shane v. Albertson's Inc. Employees Disability Plan, 2005 WL 6141287 at *2 (C.D.Cal. Sept. 9, 2005)

Fleming v. Kemper National Services, 373 F.Supp.2d 1000, 1012 (N.D.Cal. 2005)

Hamilton v. Plumbers and Pipefitters National Pension Fund, 2004 WL 5571414 at *5 (W.D.Wa. July 23, 2004)

Sabatino v. Liberty Life Assurance Co. of Boston, 2003 WL 23932613 at *2 (N.D.Cal. Dec. 9, 2003)

State Interest Statutes
Utilized in ERISA Cases
in the Fifth, Eighth and Eleventh Circuits

Fifth Circuit

Louisiana Statutes Ann. – R.S. 13:4202 B(1) (after 2002 rate is Federal Reserve Bank discount rate plus 3.25%)

Mississippi Code Ann. § 75-17-1(1) (8%)

Vernon's Texas Code Ann., Finance Code, § 3004.003 (prime rate, but no less than 5% and no more than 15%)

Tenth Circuit

Colorado Revised Statutes Annotated § 5-12-102 (8%)

Kansas Statutes Annotated 16-201 (10%)

New Mexico Statutes Annotated §§ 56-8-3 (15%), 56-8-4 (8 3/4%)

36 Oklahoma Statutes Annotated § 3629 (15%)

Utah Code Annotated § 15-1-1 (10%)

Wyoming Statutes Annotated § 40-14-106 (7%)

Eleventh Circuit

Alabama Code 1975 § 27-1-17(c) (1.5% per month)

Florida Statutes Annotated § 55.03 (Federal Reserve Bank discount rate plus 400 basis points)

Ga. Code Ann., § 7-4-12 (prime rate plus 3%)