No. 15-163

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

PETITIONERS' REPLY BRIEF

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I. There Is A Circuit Conflict Regarding The Remedy For An Unlawful Delay In The Payment Of An ERISA-Covered Benefit

(1) The Sixth Circuit made two distinct holdings regarding the standard for remedying an unlawful delay in the payment of a benefit covered by ERISA:

> (a) a court may not order disgorgement of the illicit profits that a fiduciary garnered by withholding benefits in violation of ERISA (App. 11a-25a),[1] and
>
> (b) a court may not set the rate of prejudgment interest higher than the level needed to make whole the beneficiary, even if a higher rate is needed to prevent unjust enrichment of the fiduciary. App. 25a-27a.

Those related holdings frame the circuit conflict regarding the remedies provided by ERISA, and illustrate why this case is an ideal vehicle for resolving that conflict.

The brief in opposition repeatedly intimates – without saying it in so many words – that the court of appeals decided only the first of those issues. "[T]his case ... is about the much narrower question of whether plaintiff may bring ... an equitable claim ...

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[1] LINA notes that the Sixth Circuit permits disgorgement for other types of ERISA claims. Br.Opp. 12 n.4. But the question presented concerned benefit denials, which are the most common ERISA claim.

seeking disgorgement." Br.Opp. 1. "[T]he issue [singular] actually decided by the Sixth Circuit en banc [is] whether ERISA § 502(a)(3) allows disgorgement of profits as a remedy for ... a wrongful denial of benefits ... remediable ... under ERISA § 502(a)(1)(B)." Br.Opp. 18. The only Question Presented, LINA states, is whether "§ 502(a)(3) ... allows disgorgement of profits as a remedy" in a benefit denial case. Br.Opp. i.

If the Sixth Circuit had decided only the disgorgement issue, this would indeed be a poor candidate for certiorari. That would mean that the Sixth Circuit might in the future hold that a prejudgment interest rate could be set at a level intended to prevent unjust enrichment and that Rochow could in that manner obtain the very relief awarded by the district court. Or it might be possible that in the future the Sixth Circuit would permit use of the 12% Michigan prejudgment interest rate. So the passages on pages i and 1 of the brief in opposition suggest that this Court should wait and see what rule the Sixth Circuit adopts regarding the standard and rate for prejudgment interest in ERISA benefit cases.

But one need wait only until page 9 of the brief in opposition to learn the Sixth Circuit standard. There LINA frankly acknowledges that the Sixth Circuit indeed decided this very issue in the instant case, and that the court of appeals expressly limited awards of prejudgment interest to the amount and rate sufficient to make the plaintiff whole. "The majority emphasized that Rochow can still seek prejudgment interest on the § 502(a)(1)(B) claim, but

only as a compensatory measure...." Br.Opp. 9 (emphasis added). LINA points out that the Sixth Circuit held that an award of prejudgment interest in an amount greater than needed to make whole the plaintiff "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.'" *Id.* (quoting Pet.App. 27a; emphasis added). The Sixth Circuit's holding limiting the rate of prejudgment interest is set out at pages 25a-27a. *Rybarczyk v. TRW, Inc.*, 235 F.3d 975 (6th Cir. 2000), held that this previously established Sixth Circuit limitation necessarily precludes use of the Michigan 12% prejudgment interest rate in ERISA benefit cases.

The parties expressly litigated in the court of appeals and the district court the legal standard that governs the rate of prejudgment interest in this type of case. Rochow repeatedly contended that the rate should be set at the level which assures that a fiduciary which unlawfully withheld a benefit would not be unjustly enriched as a result of that violation.[2] LINA

[2] Appellees' Supplemental En Banc Brief, 4 ("Even if disgorgement were unavailable, prejudgment interest would be set at a rate avoiding unjust enrichment to LINA."), 22 ("prejudgment interest rates should prevent unjust enrichment"), 24 ("Given the extraordinary profits from LINA's wrongdoing, the district court needed to prevent unjust enrichment. Setting prejudgment interest accordingly is an uncontroversial application of settled law."); Appellees' Response Brief, 50-51 ("As an additional alternative grounds for affirmance, LINA's profits could have been 'disgorged' via prejudgment interest.... [P]rejudgment interest ... '[using] the interest rate actually realized

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argued, to the contrary, that prejudgment interest should be limited to the level sufficient to make whole the plaintiff, even if the result is that the plan profits from its unlawful action.[3] The Sixth Circuit adopted the rule advanced by LINA.

LINA's acknowledgement that the Sixth Circuit actually decided the standard governing the rate of prejudgment interest eliminates the linchpin of the brief in opposition. LINA objects that (most of) the cases in which other circuits approved awards to prevent retention of ill-gotten gains were prejudgment interest cases, not disgorgement cases. Br.Opp. 10-20. But since the Sixth Circuit below forbad district courts to use prejudgment interest (or disgorgement) for that purpose, any distinction between prejudgment interest and disgorgement is irrelevant. LINA advances an extended merits argument that ERISA does not permit a claim under § 503(a)(3) for disgorgement (Br.Opp. 25-31), but makes no effort to defend the Sixth Circuit's limitation on the amount or rate of prejudgment interest.[4] LINA repeatedly urges

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by [LINA] on the relevant funds seems an appropriate way of avoiding unjust enrichment.'" (Quoting *Rybarczyk v. TRW, Inc.*, 235 F.3d 975, 986 (6th Cir. 2000)).

[3] Supplemental Brief of Defendant-Appellant, 13-14 n.8; Reply Brief of Defendant-Appellant, 27.

[4] LINA repeatedly objects that the relief awarded by the district court in this case was "duplicative" or involved "double dipping." Br.Opp. 2, 10. But the issue here is not double recovery. See App. 45a, 71a. The payment of back benefits and the disgorgement order (or prejudgment interest) correct distinct

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that review by this Court would be premature, since the district court has not yet selected the rate of prejudgment interest. Br.Opp. 19-24. But the decision of the Sixth Circuit – as LINA urged in the court of appeals – specifically precludes the district court from selecting a rate to prevent unjust enrichment, and thus eliminates any discretion to do so. There therefore is no possibility that "ongoing proceedings in the district court may obviate the need for this Court's review." Br.Opp. 3. The Sixth Circuit – at LINA's insistence – has already expressly forbidden the district court to award the relief that Rochow seeks.

(2) The Sixth Circuit's insistence that the rate of prejudgment interest must be limited to the amount needed to make whole the plaintiff is obviously inconsistent with decisions in the Second, Third, Seventh, Eighth and District of Columbia Circuits, all of which permit or require a district court to use a higher rate if needed to prevent unjust enrichment. Pet. 18-26.

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injuries; the former remedies LINA's failure to pay the required benefits, while the latter remedies the multi-year delay in making that payment. What LINA is actually objecting to is the use in a single case of two different remedial provisions of ERISA – § 501(a)(3) (requiring payment of unlawfully withheld benefits) and § 502(a)(1)(B) (authorizing equitable relief such as disgorgement). But it is common for statutes to authorize remedies in, and for courts to provide relief under, several different statutory provisions. In the instant case the two provisions involved, § 502(a)(1)(B) and § 502(a)(3), are part of a single sentence in subsection (a); those subsections are connected with the conjunction "and," not "or."

In one passage the brief in opposition appears to suggest that these other circuits – like the Sixth – limit the use of prejudgment interest (and the determination of the appropriate prejudgment interest rates) to making whole the plaintiff. "Though the rates obviously vary somewhat among the courts, the goal [singular] is the same – to compensate the beneficiary for the lost time value of the beneficiary's money." Br.Opp. 18.

But elsewhere the brief in opposition repeatedly, and correctly, acknowledges that outside the Sixth Circuit other circuits have expressly approved the use of prejudgment interest for the distinct purpose of preventing unjust enrichment. "[M]any courts have expressly noted that prejudgment interest ... is the proper means of avoiding unjust enrichment." Br.Opp. 10.[5]

The Second, Third, Seventh and Eighth Circuits have held that the rate of prejudgment interest

[5] Br.Opp. 13 "[The opinions in other circuits cited in the petition] were simply explaining ... that an award of prejudgment interest can also serve the purpose of avoiding unjust enrichment."); 13-14 ("[Third Circuit decisions relied on in the petition] mentioned unjust enrichment as a reason for prejudgment interest"); 14-15 ("Seventh Circuit cases ... explained that prejudgment interest helps prevent unjust enrichment"), 17 ("[one Second Circuit case] acknowledges ... the ... unjust enrichment rationale[ ] for [the award of] prejudgment interest"; "The Second Circuit's opinion in *Jones v. UNUM Life Ins. Co. of Am.*, 223 F.3d 130 (2d Cir. 2000) ... instructed the district court to ... take into account the interest rate that the fiduciary would have paid – a prejudgment interest concept.").

should be fixed at the level necessary to assure that a fiduciary that improperly denied benefits is not enriched by that violation. Pet. 18-26. That is precisely what Rochow asked the Sixth Circuit to permit, and what the Sixth Circuit forbids. Under the Sixth Circuit standard, if no prejudgment interest is needed to make whole the plaintiff, prejudgment interest could not be awarded at all, even though the fiduciary had benefitted from an unlawful refusal to pay a benefit.[6] But the Third, Seventh and Eighth Circuits require an award of prejudgment interest in such cases in order to prevent unjust enrichment. Pet. 20-24.

(3) The Fifth, Tenth and Eleventh Circuits authorize the use of state prejudgment interest rates in ERISA cases. Pet. 26-29. Those state rates are all considerably higher than the interest a beneficiary would earn if he or she were paid a benefit and deposited it in the bank. Pet.App. 141a. In the Fifth, Tenth and Eleventh Circuits, district courts routinely use those state prejudgment interest rates, which vary from 5% to 18%. App. 132a-136a, 141a.

On the other hand, the Sixth Circuit decision in *Rybarczyk v. TRW, Inc.*, 235 F.3d 975, 985 (6th Cir. 2000), cited by the en banc court in the instant case

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[6] That situation occurs, for example, when a fiduciary improperly refuses to pay a hospital bill covered by a medical plan, but the hospital does not charge the beneficiary interest for the resulting delay.

(App. 26a-27a), expressly forbids district courts in the Sixth Circuit from using state rates (specifically the prejudgment rate in Michigan, the state where this dispute arose), because those rates would exceed the level needed to make whole the plaintiff. And the Ninth Circuit, also rejecting utilization of state prejudgment rates, instead favors use of the federal *post*judgment interest rate in 28 U.S.C. § 1961(a). Pet. 30-31. District courts applying that § 1961(a) rate have for years been using a rate of under 1%. The lower courts have repeatedly recognized the circuit conflict about this issue. Pet. 32 n.20.

LINA dismisses these widely inconsistent legal standards and prejudgment interest rates as merely reflecting the fact that "differing facts and circumstances have resulted in differing awards of prejudgment interest." Br.Opp. 18. But the only "facts and circumstances" dictating those considerable differences are the circuit, and the state within a circuit, in which the cases arose. This is precisely the type of circuit-based difference in outcome that weighs heavily in favor of review by this Court.

(4) LINA insists that no circuit has permitted the use of disgorgement as a remedy to deal with a fiduciary that would otherwise make money from its unlawful refusal to pay a benefit. Br.Opp. 10-20. Even if that were correct, it would not eliminate the conflict at issue, because – contrary to the rule in the Sixth Circuit – five other circuits direct district courts to obtain the same result by setting the prejudgment interest rate high enough to prevent unjust enrichment,

and three other circuits favor use of state prejudgment interest rates that are well above the rate of return for a savings account or certificate of deposit. There is no practical difference between setting a rate to bring about disgorgement of illicit profits, and setting a rate to prevent unjust enrichment. "Profit" and "enrichment" both refer to a gain accruing to the fiduciary that violated ERISA, and "illicit" and "unjust" both refer to the wrongful nature of that gain. Either doctrine would result, in any given case, in the same rate. That is precisely why in the litigation below Rochow sought either disgorgement or a prejudgment interest rate calculated to prevent unjust enrichment, and why LINA opposed and the Sixth Circuit rejected both.

LINA's contention regarding disgorgement decisions in circuits outside the Sixth Circuit is also incorrect. LINA actually acknowledges that the Seventh Circuit indeed upheld such a use of disgorgement in *Lorenzen v. Emp. Ret. Plan of Sperry & Hutchison Co.*, 896 F.3d 228, 236-37 (7th Cir. 1990). See Br.Opp. 15. LINA argues that the particular misconduct of the fiduciary in *Lorenzen* was worse than the misdeeds in which LINA itself engaged. "[M]aking receipt of [benefits] contingent on [the beneficiary] abandoning her other claims [in *Lorenzen*] ... is a far cry from contesting a denial of benefits claim ... based on an incorrect interpretation of the plan [in the instant case]." Br.Opp. 15. But the Sixth Circuit rule and LINA's contention regarding the standard in other circuits concern *any* use of disgorgement to

remedy an improper refusal to pay benefits, and are not limited to refusals involving a particular level or kind of misconduct. The Sixth Circuit in the instant case held that disgorgement under § 502(a)(3) is *never* available in a benefits-denial case, a holding squarely inconsistent with the Seventh Circuit's ruling in *Lorenzen.*

II. The Question Presented Is Of Great Importance

This multi-faceted dispute about the proper remedy for improper delay in the payment of ERISA-covered benefits is of great practical importance.

With regard to the differences among the interest rates in the circuits that use state prejudgment interest rates, LINA asserts that "the range is neither substantial nor cause for concern given that ... the rates range between 5 and 18 percent." Br.Opp. 18. But such differences in rates are of course very substantial; the rate selected may greatly affect the size of the total amount awarded, particularly where substantial delays have occurred. In the instant case the difference between 5% and 18% would be more than a million dollars. The inter-circuit differences are even greater when the Ninth Circuit is considered, because there awards under section 1961(a) are typically less than 1%. Prejudgment interest of 1% is generally lower than the rate of inflation; on the other hand, prejudgment interest at an 18% rate will double the amount owed in little more than four years. From the

perspective of a plan fiduciary deciding whether to unlawfully withhold ERISA-covered benefits, the difference between 1% and 18% will usually determine whether or not there is a financial incentive to comply with Federal law.

III. This Case Is An Ideal Vehicle For Resolving The Question Presented

Because the en banc court decided both the availability of disgorgement and the standard for prejudgment interest in an ERISA benefit case, this appeal provides an ideal vehicle for resolving both aspects of the circuit conflict.

In the litigation in the courts below, LINA opposed on several other grounds Rochow's request for a remedy to address the improper delay in payment of benefits. Those other objections were unsuccessful, and LINA did not file a cross-petition seeking review of those aspects of the Sixth Circuit's decision. Having failed to do so, LINA cannot renew in this Court its objection that the district court in 2012 lacked jurisdiction to award additional relief, or its argument that there was no breach of fiduciary duty.

It is not true, as LINA asserts, that all members of the Sixth Circuit en banc court agreed on the "ultimate outcome" of this case. Br.Opp. 24. The majority held that disgorgement is never available in an ERISA benefit denial case, and that prejudgment interest in such a case is limited to the rate sufficient to make whole the plaintiff. App. 11a-28a. Judge

White concluded that disgorgement is available in such cases, but would have remanded for certain additional findings she believed necessary to justify such an award in this case. App. 32a-41a. Judge Stranch and six other judges concluded that disgorgement is available in such cases and that that remedy was justified in this case, but would have remanded for a recalculation of the amount to be disgorged. App. 41a-73a.

In the court of appeals Rochow pointed out – as did one of the dissenting opinions (App. 42a, 60a) – that the district court had found LINA engaged in particularly egregious misconduct. We noted as well the district court finding that LINA had garnered extraordinary profits from its ERISA violation.[7] The considerable magnitude in this case of the underlying misconduct and the profits it generated are not, as LINA argues, reasons to deny relief. Br.Opp. 24. To the contrary, the fact that the majority opinion permits a fiduciary to profit so handsomely from its own protracted and blatant violations of federal law illustrates the great practical importance of the issues at stake.

[7] Appellees' Supplemental En Banc Brief, 4 ("[this case is unusual] because of the district court's findings about LINA's level of malfeasance, [and] the length of delay, and because of LINA's extraordinary profits from that malfeasance....").

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,

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