

No. 12-2074

**In the
United States Court of Appeals
for the Sixth Circuit**

**TODD ROCHOW and JOHN ROCHOW,
as personal representatives of the
ESTATE OF DANIEL J. ROCHOW,**

Plaintiffs-Appellees,

v.

LIFE INSURANCE COMPANY OF NORTH AMERICA,

Defendant-Appellant.

**On Appeal from the Judgment of District Judge Arthur J. Tarnow,
United States District Court for the Eastern District of Michigan**

PETITION FOR REHEARING *EN BANC* OF DEFENDANT-APPELLANT

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I. STATEMENT OF WHY *EN BANC* REVIEW IS APPROPRIATE

Judge McKeague explained in his dissent from the panel majority's opinion that:

The majority has taken an unprecedented and extraordinary step to expand the scope of ERISA coverage. The disgorgement of profits undermines ERISA's remedial scheme and grants the plaintiff an astonishing \$3,797,867.92 windfall under the catchall provision in § 502(a)(3).

Rochow v. Life Insurance Co. of North America, --- F.3d ---, No. 12-2074, 2013 WL 6333440, at *15 (6th Cir. Dec. 6, 2013) (hereinafter "*Rochow II*") (emphasis added).¹ Judge McKeague's assessment is correct.

En banc review of the panel majority's decision is necessary because the majority's decision conflicts with the decision of the United States Supreme Court in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), and this Court's decision in *Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609 (6th Cir. 1998). *See Rochow II*, 2013 WL 6333440, at *16-17 (McKeague, J. dissenting) (panel majority's decision "flies in the face of the Court's decision in *Varity*;" also discussing *Wilkins*).

Specifically, the panel majority opinion affirmed the district court's award of \$3.8 million to Mr. Rochow under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), on a breach of fiduciary duty theory where (1) the *only* breach of fiduciary duty identified was the denial of disability benefits and (2) Mr. Rochow already had

¹ A copy of the opinion is attached as Exhibit A.

obtained relief for that same denial of benefits (approximately \$900,000) under ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). This is inconsistent with *Varity* and contrary to *Wilkins*. Consideration by the full court is necessary to secure and maintain uniformity of this Court's decisions and adherence to the decisions of the Supreme Court.

Moreover, *en banc* review is appropriate because the panel majority's decision is a precedent-setting error of exceptional public importance that impacts not only how all claims seeking insured benefits under ERISA-governed plans will be litigated, but also the cost of and potential exposure in such claims. *See Rochow II*, 2013 WL 6333440, at *18 (McKeague, J. dissenting) (“[D]isgorgement under the circumstances of this case *fundamentally alters how denied disability-benefits claims are litigated*. . . .”) (emphasis added). As Judge McKeague explained, “[T]he majority’s approach is . . . willfully blind to the negative repercussions that undoubtedly will ensue.” *Id.* at *19.

Lastly, the panel majority’s decision undermines bedrock principles about the finality of judgments and the limit of appellate jurisdiction. If the panel majority correctly determined that the June 24, 2005 “JUDGMENT” entered by the district court was not a final judgment, then this Court’s decision in 2007 in *Rochow v. Life Insurance Co. of North America*, 482 F.3d 860 (6th Cir. 2007) (hereinafter “*Rochow I*”), should be vacated for lack of jurisdiction because the only basis for this Court’s

jurisdiction in that appeal was 28 U.S.C. § 1291, which only affords appellate jurisdiction over final judgments. If, on the other hand, the June 24, 2005 judgment was a final judgment (as the parties agreed in *Rochow I*), then the post-judgment fiduciary breach finding and disgorgement award violates the final judgment rule and the Supreme Court’s decision in *Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304, 305-06 (1948) (district court has no “power or authority” to add prejudgment interest or “give any other or further relief” after final judgment and mandate issue).

For these reasons, Life Insurance Company of North America (“LINA”) respectfully submits that its petition for rehearing *en banc* should be granted.

II. ISSUES PRESENTED

1. Whether the panel majority improperly held that Mr. Rochow could pursue a breach of fiduciary duty claim under 29 U.S.C. § 1132(a)(3) based exclusively on the wrongful denial of disability benefits, where Mr. Rochow already challenged the denial and was awarded those benefits under 29 U.S.C. § 1132(a)(1)(B)?

2. Whether the panel majority correctly concluded that the June 24, 2005 “JUDGMENT” entered by the district court that “ORDERED AND ADJUDGED that this case shall be DISMISSED” was *not* a final judgment pursuant to 28 U.S.C. § 1291, and, if so, whether the panel majority was required to vacate this Court’s opinion in *Rochow I* for lack of appellate jurisdiction, where the sole basis for this

Court's jurisdiction in *Rochow I* was 28 U.S.C. § 1291, which only affords appellate jurisdiction from final judgments?

III. BACKGROUND

In November 2002, Mr. Rochow filed an administrative claim for long-term disability benefits that was denied by LINA. Mr. Rochow exhausted the claims and appeal process and then filed suit in September 2004 challenging the denial of benefits. The parties took no discovery and filed cross-motions for summary judgment based on the administrative record on which the district court ruled from the bench in June 2005 – granting Mr. Rochow's motion and denying LINA's motion. The district court thereafter entered a "JUDGMENT" that "ORDERED . . . that this case shall be DISMISSED." (Judgment, RE 17, Pg ID 106).

LINA appealed, but this Court affirmed the district court in its entirety. *See Rochow I*, 482 F.3d at 866. In their appellate briefings in *Rochow I*, both parties agreed that this Court had appellate jurisdiction pursuant to 28 U.S.C. § 1291.

After this Court issued its mandate, Mr. Rochow pursued a breach of fiduciary duty theory based *entirely* on the same denial of benefits that already had been litigated. There were no allegations of misconduct by LINA (as to Mr. Rochow or plan administration generally) and no findings by the district court that LINA had done anything wrong except deny Mr. Rochow's benefits. Nevertheless, the district court concluded that "an arbitrary and capricious denial of benefits can

count as a breach of fiduciary duty.” (Order Granting Motion for Equitable Accounting, RE 67, Pg ID 932-43, at 935).

The parties thereafter engaged in months of discovery into LINA’s finances, expert reports and depositions, and ultimately went to trial. At the conclusion of the trial, the district court awarded Mr. Rochow \$3.8 million on a disgorgement theory under 29 U.S.C. § 1132(a)(3) – based exclusively on LINA’s denial of benefits.

On December 6, 2013, a panel of this Court affirmed the breach of fiduciary duty award in a 2-1 decision. LINA now moves for a rehearing *en banc*.

IV. ARGUMENT

A. LINA’s Petition Should Be Granted Because The Panel’s Decision Conflicts With This Court’s Decision In *Wilkins* And The Supreme Court’s Decision In *Varity*.

Judge McKeague recognized in his dissent that the panel majority’s opinion conflicts with this Court’s decision in *Wilkins* and the Supreme Court’s decision in *Varity*. *See Rochow II*, 2013 WL 6333440, at *16-17 (McKeague, J. dissenting).

1. The Panel Majority’s Decision Conflicts With *Wilkins*.

In *Wilkins*, the plaintiff alleged that he was entitled to disability benefits, and also alleged that the denial of disability benefits was a breach of fiduciary duty. *Wilkins*, 150 F.3d at 615. Specifically, plaintiff claimed “that LINA breached its fiduciary duty to act solely in [his] interest for the exclusive purpose of providing benefits to him.” *Id.* This is the same breach of fiduciary duty claim asserted by

Mr. Rochow here and granted by the district court. *See Rochow II*, 2013 WL 6333440, at *10 (“[T]he district court in the instant suit *based its breach of fiduciary duty finding on the fact that LINA had been arbitrary and capricious in its denial of benefits. . . .*”) (emphasis added).

This Court in *Wilkins* rejected the breach of fiduciary duty claim – not based on the relief sought or the sufficiency of any particular remedy – but instead because the plaintiff could not maintain a fiduciary breach claim based solely on a denial of benefits. *Wilkins*, 150 F.3d at 615. This Court held:

Because § 1132(a)(1)(B) provides a remedy for [plaintiff’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 § 1132(a)(3).

Id. More to the point, this Court held in *Wilkins* that “[t]o rule in [plaintiff’s] favor would allow him and other ERISA claimants to simply characterize a denial of benefits as a breach of fiduciary duty, a result which the Supreme Court expressly rejected.” *Id.* at 616 (emphasis added). Yet that is precisely what the panel majority allowed in *Rochow II*.²

² The majority expressed that its opinion was a “logical extension” of this Court’s decisions in *Hill v. Blue Cross & Blue Shield of Michigan*, 409 F.3d 710 (6th Cir. 2005) and *Gore v. El Paso Energy Corp. Long Term Disability Plan*, 477 F.3d 833 (6th Cir. 2007). As Judge McKeague recognized, *Hill* and *Gore* were explicitly predicated on allegations of separate and distinct injuries *aside from the denial of benefits*. *See Gore*, 477 F.3d at 840-41 (permitting claim under 29 U.S.C.

(continued)

The panel majority's opinion in this case also runs afoul of *Wilkins* in another critical respect. *Wilkins* (and all of this Court's precedent relying on it) makes clear that it is the potential availability of relief for a denial of benefits under 29 U.S.C. § 1132(a)(1)(B) that precludes a breach of fiduciary duty claim based on the same denial of benefits, regardless of whether the specific relief was awarded, or was even available, under 29 U.S.C. § 1132(a)(1)(B). *Wilkins*, 150 F.3d at 615-16.³

Here, Mr. Rochow could have obtained prejudgment interest under 29 U.S.C. § 1132(a)(1)(B). *See, e.g., Schumacher v. AK Steel Corp. Ret. Accumulation Pension Plan*, 711 F.3d 675, 685-87 (6th Cir. 2013); *Ford v. Uniroyal Pension Plan*, 154 F.3d 613, 618 (6th Cir. 1998). The only reason Mr. Rochow was not awarded prejudgment interest is that he did not seek it. The panel majority recognized, moreover, that prejudgment interest was the "equivalent of lost profits." *Rochow II*, 2013 WL 6333440, at *9, n.6.⁴ Thus, even the panel majority recognized that Mr. Rochow could have obtained "the equivalent of" the disgorgement remedy under 29

§ 1132(a)(3) where the plaintiff alleged "two separate and distinct injuries;" (1) the denial of benefits and (2) a separate claim for misrepresentations); *Hill*, 409 F.3d at 718 (allowing 29 U.S.C. § 1132(a)(3) claim where plaintiff alleged "systemic, plan-wide claims-administration problems" separate from the denial of benefits).

³ *See also Tackett v. M&G Polymers, USA, LLC*, 561 F.3d 478, 491 (6th Cir. 2009); *Marks v. Newcourt Credit Grp., Inc.*, 342 F.3d 444, 454 (6th Cir. 2003).

⁴ Prejudgment interest, however, would not have averaged over 25% per year, and would not have yielded \$3.8 million. *See Schumacher, supra* (prejudgment interest cannot be too high).

U.S.C. § 1132(a)(1)(B). Under these circumstances, *Wilkins* (and *Varity, infra*) preclude Mr. Rochow from pursuing such “equivalent” relief under 29 U.S.C. § 1132(a)(3).

2. The Panel Majority’s Opinion Conflicts With *Varity*.

In *Varity*, the Supreme Court addressed the limited availability of relief under 29 U.S.C. § 1132(a)(3). There, a group of former plan participants asserted a breach of fiduciary duty claim under 29 U.S.C. § 1132(a)(3) alleging that the plan administrator lied and tricked them into withdrawing from their plans and forfeiting their benefits. *Varity*, 516 U.S. at 492. Because they were no longer participants, the plaintiffs could not pursue a claim for benefits under 29 U.S.C. § 1132(a)(1)(B). Therefore, they sought a remedy under 29 U.S.C. § 1132(a)(3) reinstating them as participants. *Id.* The Supreme Court held that they could pursue a breach of fiduciary duty claim under 29 U.S.C. § 1132(a)(3), but with a critical caveat.

Specifically, the Supreme Court explained that the structure of ERISA’s remedial scheme suggests that 29 U.S.C. § 1132(a)(3) was intended to act as a “safety net.” *Id.* at 512. As such, 29 U.S.C. § 1132(a)(3) is a remedy of last resort, to be relied upon only to remedy those injuries “that § 502 does not elsewhere adequately remedy.” *Id.*

Here, Mr. Rochow suffered only *one injury*: the denial of his benefits. As explained by Judge McKeague in his dissent:

In a wrongful denial of benefits case, like this one, every time there is a denial of benefits, there will necessarily be a withholding of the benefits. As even plaintiff Rochow has acknowledged, the denial is the injury, and the withholding is an ancillary effect. Together they comprise a single injury that must be remedied.

Rochow II, 2013 WL 6333440, at *15 (McKeague, J. dissenting).

Mr. Rochow's injury was remedied under 29 U.S.C. § 1132(a)(1)(B). He received all of the benefits to which he was entitled, using the system for resolving benefits disputes that Congress intended. *See Perry v. Simplicity Eng'g*, 900 F.2d 963, 967 (6th Cir. 1990). Moreover, he could have sought prejudgment interest – which the panel majority asserts is “equivalent” to disgorgement – under 29 U.S.C. § 1132(a)(1)(B). *See, e.g., Schumacher, Ford, supra*. Under these circumstances, to allow a breach of fiduciary duty claim and additional relief under 29 U.S.C. § 1132(a)(3) to be awarded based on the denial of benefits “flies in the face of the Court's decision in *Varity*. It converts the exception into the rule, the safety net into a first-line of attack.” *See Rochow II*, 2013 WL 6333440, at *16 (McKeague, J. dissenting) (internal quotations omitted).⁵ In short, the panel's decision expressly conflicts with *Varity* and *Wilkins*. Accordingly, a rehearing *en banc* is warranted.

⁵ Moreover, the panel majority's suggestion that relief is appropriate to “avenge” LINA's denial of benefits, *id.* at *9, is “directly at odds with the [Supreme] Court's admonition that § 502(a)(3) does not cover punitive damages.” *Id.* at *16 (McKeague, J. dissenting).

B. LINA’s Petition Should Be Granted Because The Panel Majority’s Decision Is A Precedent-Setting Error On A Matter Of Exceptional Importance.

If rehearing is not granted and the panel’s decision stands, ERISA plaintiffs will be permitted to maintain breach of fiduciary duty claims under 29 U.S.C. § 1132(a)(3) – and pursue expensive and time-consuming discovery – based solely on a denial of benefits. This will frustrate one of ERISA’s primary purposes – “to provide a method for workers and beneficiaries to resolve disputes over benefits inexpensively and expeditiously.” *Perry*, 900 F.2d at 967. As this Court has explained, “[p]ermitting or requiring district courts to consider evidence from both parties that was not presented to the plan administrator would seriously impair the achievement of that goal.” *Id.*

Allowing a claim for breach of fiduciary duty and a request for disgorgement of profits based on a wrongful denial of benefits undermines that important goal for the same reasons. *Rochow II*, 2013 WL 6333440, at *19 (McKeague, J. dissenting) (“The majority’s approach is completely counter to this underlying objective.”). Indeed, allowing such claims and such remedies makes the efficient and inexpensive adjudication of benefit claims impossible. As the Supreme Court explained, “[h]ad Congress intended such a system of review, we believe it . . . would have said more on the subject.” *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 116 (2008).

This case proves that very point. Mr. Rochow's entitlement to benefits under 29 U.S.C. § 1132(a)(1)(B) was adjudicated quickly based on the administrative record and cross-motions for summary judgment. There was no fact discovery, there were no expert witnesses or depositions, and there was no trial. After those motions were decided and the judgment was affirmed by this Court, however, the district court allowed Mr. Rochow to pursue a breach of fiduciary duty claim based on the same denial of benefits he was already awarded. That claim required extensive fact discovery into every aspect of LINA's financial records, multiple expert reports and expert depositions (about LINA's financials), and a full evidentiary hearing with witness testimony, i.e., a trial.

The implications of this precedent raise an issue of exceptional importance. If the panel's decision stands, it will transform how every insured denial of benefits case is litigated and adjudicated,⁶ prompting plaintiffs in such cases to routinely assert breach of fiduciary duty claims based on the denial of benefits (as Mr. Rochow did here) and to seek extensive discovery and expert analyses regarding the financial performance of the plan sponsors or insurers (as Mr. Rochow did here). Further, district courts will need to hold trials and hear expert testimony on those

⁶ The "lion's share" of denied benefits cases are governed by the arbitrary and capricious standard of review that applied here. *Glenn*, 554 U.S. at 116.

issues in every case. As Judge McKeague warned in his dissent:

[D]isgorgement under the circumstances in this case fundamentally alters how denied disability-benefits claims are litigated, forcing district courts to wrestle with complex calculations of profits and raising the specter that any claimant who was arbitrarily and capriciously denied benefits would have a viable claim for disgorgement.

Rochow II, 2013 WL 6333440, at *19 (McKeague, J. dissenting).

In short, the efficient and inexpensive adjudication of a claim for benefits on the basis of the administrative record would be impossible, leading to increases in the cost of employee benefits for plan sponsors, participants and beneficiaries, and thereby discouraging employers from offering benefits to their employees in the first place. That is not what Congress intended. *See Conkright v. Frommert*, 130 S. Ct. 1640, 1648-49 (2010) (“ERISA represents a careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans. Congress sought to create a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ERISA plans in the first place.”) (internal quotations, citations and brackets omitted); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002) (holding that ERISA reflects a policy choice to “induc[e] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has

occurred”).⁷

Notably the panel majority does not cite a single case authorizing disgorgement of profits as a remedy for a denial of benefits. The only case cited, *Parke v. First Standard Life Ins. Co.*, 368 F.3d 999 (8th Cir. 2003), did not actually order the disgorgement of profits. Instead, the Eighth Circuit used the concept of disgorgement to explain why prejudgment interest was proper under ERISA. *Id.* at 1009 (“In sum, we hold that an award of interest on wrongfully delayed benefits remains permissible. . . .”). *See also Rochow II*, 2013 WL 6333440, at *18

⁷ The panel majority recognized that its ruling would result in significant additional litigation costs, but expressed that these costs would incent insurance companies to administer plans correctly. *See Rochow II*, 2013 WL 6333440, at *10. First, Congress designed the system for adjudicating benefits disputes to be inexpensive and efficient, and placed the incentives where it believed appropriate. It is not for courts to use the threat of expensive discovery to alter those incentives. Second, the threat of discovery and potential greater financial exposure will increase the cost of adjudicating or resolving *all* benefits disputes, even those in which the fiduciaries behaved appropriately and reached the correct result. Defendants will be forced to pay more to settle even meritless claims to avoid potential discovery costs and the chance (however remote) of an adverse award that is four times the amount of the benefits due, as occurred here. That is directly contrary to the concerns articulated in *Frommert* and *Rush*. Third, there was no finding by the district court of any intentional misconduct or “bad faith” by LINA. All the district court found was that LINA’s denial of benefits was arbitrary and capricious – as occurs in many denied benefits cases. Although the panel majority suggests (on its own, without a district court finding) that LINA denied benefits “for five years after the initial request,” (1) two of those years were the claims and appeals process, during which Mr. Rochow made new arguments and submitted additional information for LINA to evaluate (as the administrative process is supposed to work), and (2) the other three years were LINA defending itself against Mr. Rochow’s claims *in court*.

(McKeague, J. dissenting) (discussing *Parke*). Of course, like the Eighth Circuit, this Court recognizes the availability of prejudgment interest. But neither the Eighth Circuit nor any other court of appeals has permitted what the panel majority in *Rochow II* authorized.

For this additional reason, this Court should grant a rehearing *en banc* of the panel's decision.

C. LINA's Petition Should Be Granted Because The Panel Majority's Decision Effectively Held That This Court Lacked Jurisdiction To Decide *Rochow I*, But Did Not Vacate *Rochow I* For Lack Of Appellate Jurisdiction.

The panel majority held that the June 24, 2005 "JUDGMENT" entered by the district court was not a final judgment even though it expressly "ORDERED AND ADJUDGED that this case shall be DISMISSED." *See Rochow II*, 2013 WL 6333440, at *4-5; Judgment, RE 17, Pg ID 106. The panel majority reached this conclusion even though the only basis for appellate jurisdiction in *Rochow I* was 28 U.S.C. § 1291, which authorizes appeals from final judgments. Based on this holding, the panel majority found that the district court could provide additional relief, post-judgment, without violating the final judgment and mandate rules.

If the panel majority's decision is correct (LINA submits it is not), then this Court lacked appellate jurisdiction under 28 U.S.C. § 1291 (or otherwise) to issue its opinion in *Rochow I*, and that opinion should be vacated, with all of the attendant consequences.

Moreover, if the June 24, 2005 judgment was a final judgment (as LINA argued), then after the final judgment was entered in 2005 and this Court affirmed in 2007, the district court lacked the power and authority to add prejudgment interest to the award, or “give any other or further relief.” *Briggs*, 334 U.S. at 305-06.

Either way, the panel majority should have addressed the consequences of its jurisdictional ruling. It cannot simply find that the June 24, 2005 judgment was not final without acknowledging the implications of that ruling.

V. CONCLUSION

For all of the foregoing reasons, Defendant-Appellant Life Insurance Company of North America’s petition for a rehearing of the panel’s decision *en banc* should be granted.

Dated: December 20, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeremy P. Blumenfeld, hereby certify that, on this 20th day of December 2013, I filed a PDF file of the foregoing Petition for Rehearing *En Banc* of Defendant-Appellant with the Clerk of the U.S. Court of Appeals for the Sixth Circuit using the Court's electronic filing and docketing system (CM/ECF), which electronically served the following registered attorneys by transmitting a Notice of Docket Activity:

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