

**SIXTH CIRCUIT'S EN BANC DECISION IN ROCHOW**

*Rochow v. Life Ins. Co. of N. Am.*, No. 12-2074, 2015 WL 925794 (6th Cir. Mar. 5, 2015)

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In late 2013, the Sixth Circuit shocked the industry by affirming the Eastern District of Michigan's almost \$3.8 million disgorgement award to a participant of a long-term disability plan under ERISA § 502(a)(3), which was in addition to an almost \$1 million benefit award under ERISA § 502(a)(1)(B). See *Rochow v. Life Ins. Co. of N. Am.*, 737 F.3d 415, 420 (6th Cir. 2013) ("*Rochow I*"). The Sixth Circuit vacated *Rochow II* in February 2014, and just yesterday issued its en banc decision. *Rochow v. Life Ins. Co. of N. Am.*, No. 12-2074, 2015 WL 925794 (6th Cir. Mar. 5, 2015). The industry can now breathe a sigh of relief.

Describing the issue as whether Rochow is "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," the majority found he was not and vacated the district court's disgorgement award under § 502(a)(3). It then remanded the case to the district court to consider whether and to what extent prejudgment interest was appropriate under § 502(a)(1)(B).

Finding Rochow was made whole by relief allowed under § 502(a)(1)(B) (*i.e.* benefits owed, attorney's fees, and potential prejudgment interest), the majority rejected Rochow's claim that he could not be made whole unless LINA disgorged to him the profits it earned from the use of his money. Rochow's theory and the disgorgement award, the majority found, improperly focused on the "concern that LINA had wrongfully gained something, a consideration beyond the ken of ERISA make-whole remedies," rather than "the relief available to make Rochow whole."

The majority then identified the core of the problem: "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 claim-

ants whole." Finding Rochow impermissibly repackaged his benefit claim as a § 502(a)(3) claim, the majority explained: "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)."

The majority further described why Rochow's claimed separate injuries were actually a single injury: since a wrongful denial of benefits "necessarily results in a continued withholding of benefits until the denial is either finalized or rectified," the majority explained, the *benefit denial is the injury* and the withholding is "simply ancillary thereto, the continuing effect of the same denial." Rochow could not recover under § 502(a)(3) because his "loss remained exactly the same irrespective of the use made by LINA of the withheld benefits." The Sixth Circuit thus vacated the district court's disgorgement award.

The majority did acknowledge, however, that Rochow may be entitled to prejudgment interest under § 502(a)(1)(B), although not at an excessive rate. It then remanded the case to the district court to consider this issue.

Along with the majority's opinion (which was authored by the sole dissenting judge in *Rochow II*) came a concurrence, a concurrence in part and dissent in part, and a dissent that are worth reading.

*If you have any questions about this Client Bulletin, please feel free to contact any of the attorneys listed or the CMN attorney with whom you regularly work.*

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