The Sixth Circuit's 2015 En Banc Opinions

By John A. Ferroli

Although issuing only four en banc opinions in 2015, the Sixth Circuit Court of Appeals tackled some interesting and difficult issues. Perhaps making the cases of greater interest to Michigan practitioners, each of the four arose in Michigan, and each en banc opinion was authored by one of the circuit's Michigan-based judges.

Disgorgement of profits under ERISA: *Rochow v Life Insurance Company of North America*[1]

In *Rochow*, the Sixth Circuit vacated an award under the Employee Retirement Income Security Act (ERISA)[2] of disgorged profits following an insurer's wrongful denial of disability benefits. In a prior decision,[3] the Sixth Circuit had affirmed the district court's determination that the defendant insurer acted arbitrarily and capriciously when it denied Rochow's claim for long-term disability benefits under ERISA. Following further proceedings in the district court, Rochow filed a motion seeking, among other things, an equitable accounting and request for disgorgement, arguing that because the insurer breached its fiduciary duties, disgorgement was necessary to prevent unjust enrichment resulting from profits earned on the wrongfully retained benefits. The district court granted the requested disgorgement, and a three-judge panel of the Sixth Circuit affirmed.

Rehearing the issue en banc, the Sixth Circuit held that Rochow could not recover under both his claim to recover benefits arbitrarily and capriciously denied by the insurer and his claim for disgorgement of profits realized by the insurer as a result of its breach of fiduciary duty. In an opinion authored by Judge McKeague, the court held that Rochow was made whole under ERISA § 502(a)(1)(B) through recovery of his disability benefits and attorney's fees and potential recovery of prejudgment interest, and that allowing Rochow to recover disgorged profits under ERISA § 502(a)(3) 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."[4] The court rejected Rochow's argument that he had suffered two distinct injuries, finding that in an action for wrongful denial of benefits, "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. . . . By withholding payment of benefits until the denial was either finalized or rectified, [the insurer] did not violate a second, distinct duty owed to Rochow and did not inflict a second injury."[5] The Sixth Circuit vacated the disgorgement award and remanded the case to the district court to determine whether prejudgment interest was appropriate.

Reasonable accommodation under the ADA: *Equal Employment Opportunity Commission v Ford Motor Company*[6]

In another opinion written by Judge McKeague, the Sixth Circuit held that the reasonable accommodation requirement of the Americans with Disabilities Act (ADA) did not require that Ford Motor Company allow an employee to work from home when it was an essential function of the employee's job to be present at the workplace. Harris, a Ford resale buyer who had irritable bowel syndrome, sought to work from home on an as-needed basis up to four days per week. Ford denied her request, contending regular attendance was essential to her job. The Equal Employment Opportunity Commission (EEOC) sued Ford under the ADA, alleging that Ford failed to reasonably accommodate Harris by denying her telecommuting request and retaliated against her for bringing the issue to the EEOC's attention. The district court granted summary judgment for Ford on both claims. The EEOC appealed, and a divided Sixth Circuit panel reversed on both claims.

Following rehearing en banc, the Sixth Circuit affirmed summary judgment for Ford, holding that regular, in-person attendance "is an essential function—and a prerequisite to essential functions—of most jobs, especially the interactive ones."[7] The court found that "[r]egular and predictable on-site attendance was essential for Harris's position, and Harris's repeated absences made her unable to perform the essential functions of a resale buyer."[8] In practice, the court found, all other resale buyers regularly and predictably attended work on site, and Harris conceded that many of her primary duties could not be performed from home. The court held that Harris's proposed accommodation—telecommuting—was unreasonable because it would exempt her from an essential function—regular and predictable on-site attendance. Going further, the court stated that the ADA "does not endow all disabled persons with a job—or job schedule—of their choosing."[9]

The court also held that Ford was entitled to summary judgment on Harris's retaliation claims, finding that, among other things, Harris did not show that Ford's proffered reason was not the real reason for its action or that Ford's real reason was unlawful. Although the court noted that Ford's

discharge of Harris only four weeks after her EEOC charge "seems suspicious," it observed that pretext cannot be based solely on such temporal proximity.[10] In the court's view, "[n]o reasonable jury could find that Ford terminated Harris for a reason other than poor performance."[11]

Habeas petition under the AEDPA: *Hill v Curtin*[12]

In *Hill*, the Sixth Circuit affirmed the district court's denial of a habeas petition based on the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA).[13] On the first day of Hill's criminal trial in Wayne County Circuit Court, as potential jurors were on their way to the courtroom, Hill informed the trial court that he wanted to represent himself. The trial court denied the request, stating that preparing the defendant to follow the "rules of asking questions and rules of evidence" would cause delay.[14] The Michigan Supreme Court affirmed, holding that Hill's right to self-representation was not violated because his request was untimely and disruptive. The federal district court denied Hill's petition for habeas corpus, but a three-judge panel of the Sixth Circuit granted the writ, finding that Hill's right to self-representation had been violated.

The Sixth Circuit, following rehearing en banc, affirmed the district court's denial of the habeas petition. In an opinion written by Judge Griffin, the court noted that under the "unreasonable application" clause of AEDPA § 2254(d)(1), habeas relief is available only if the state court's application of the facts to the governing legal principle from United States Supreme Court decisions is objectively unreasonable. Under the objectively unreasonable standard, the court noted, clear error does not suffice. Rather, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[15] The court held that the Michigan Supreme Court's finding that Hill's right to self-representation was not violated was not objectively unreasonable, stating, among other things, that the United States Supreme Court "has never held that a court must inquire into the basis of a defendant's request before denying it as untimely"[16] and "has never afforded defendants a right of self-representation based on dissatisfaction with counsel without regard to timing."[17] The court held that a trial judge "may fairly infer on the day of trial—as the jurors are on their way to the courtroom—that a defendant's last-minute decision to represent himself would cause delay, whether or not the defendant requests a continuance."[18]

Protected speech under the First Amendment: *Bible Believers v Wayne County*[19]

In an opinion written by Judge Clay, the Sixth Circuit in *Bible Believers* held that the First Amendment rights of religious protesters at the 2012 Arab International Festival in Dearborn were violated when, due to civil unrest created by their speech, they were excluded from the festival by government and police officials. Exercising their First Amendment rights, the Bible Believers attended the festival to spread their anti-Islam religious message. When hecklers began throwing bottles and other garbage at the Bible Believers, an officer with the Wayne County Sheriff's Office (WCSO) demanded that the Bible Believers stop using a megaphone to amplify their speech. Later, a WCSO officer told the Bible Believers they would be cited for disorderly conduct if they did not immediately leave the festival. The Bible Believers were thereafter escorted from the festival. Officers then pulled over the Bible Believers' van a few blocks from the festival and issued them a ticket for having removed the van's license plate before departing. The Bible Believers sued, but the district court granted summary judgment to the defendants, holding that the defendants' actions did not violate the First Amendment. A three-judge panel of the Sixth Circuit affirmed the district court.

Sitting en banc, the Sixth Circuit held that the defendants violated the Bible Believers' First Amendment rights because "there can be no legitimate dispute based on this record that the WCSO effectuated a heckler's veto by cutting off the Bible Believers' protected speech in response to a hostile crowd's reaction."[20] The court observed, among other things, that under the First Amendment, "the government cannot favor the rights of one private speaker over those of another."[21] The court expounded: "[p]unishing, removing, or by other means silencing a speaker due to crowd hostility will seldom, if ever, constitute the least restrictive means available to serve a legitimate government purpose."[22] Unless the speaker's message constitutes unprotected speech, the court held, "the message does not lose its protection under the First Amendment due to the lawless reaction of those who hear it. Simply stated, the First Amendment does not permit a heckler's veto."[23] The court concluded that the defendants could have taken a number of measures short of removing the Bible Believers, such as increasing police presence, erecting a barricade, or arresting law-breaking hecklers. Remanding the case for entry of summary judgment in favor of the plaintiffs and calculation of damages, the court saliently observed:

> Throughout the harassment and violence directed at them, the Bible Believers remained calm and peaceful. While the Deputy Chiefs conferred with Corporation Counsel, and prior to the Bible Believers being forced to leave the Festival, there were approximately a dozen officers milling about in the background. Many of those officers were sufficiently unoccupied to follow the Bible Believers and observe their fellow officer ticket them for driving a vehicle without a license plate. By the WCSO's own admission in its post-operation report, the totality of the officers' attempt to enforce the law constituted only a few verbal warnings being directed at the lawless adolescents and one individual being cited.
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> Wayne County disputes the sufficiency of their manpower to quell the crowd, but this contention is specious. The video record evinces next to no attempt made by the officers to protect the Bible Believers or prevent the lawless actions of the audience. The record also indicates a substantial police presence that went virtually unused. Wayne County claimed to have assigned more law enforcement personnel to the Festival than had previously

been assigned to crowd control when the President of the United States visited the area. We cannot justifiably set the bar so low for the police officers sworn to protect our communities (and occasionally the President) that there is any debate as to whether it is reasonable that the result of a purportedly sincere effort to maintain peace among a group of rowdy youths is few verbal warnings and a single arrest.[24] ■

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ENDNOTES

1. *Rochow v Life Ins Co of N Am*, 780 F3d 364 (CA 6, 2015).
2. 29 USC 1001 *et seq.*
3. See *Rochow v Life Ins Co of N Am*, 482 F3d 860 (CA 6, 2007).
4. 780 F3d at 371.
5. *Id.* at 374.
6. *EEOC v Ford Motor Co*, 782 F3d 753 (CA 6, 2015).
7. *Id.* at 762–763.
8. *Id.* at 763.
9. *Id.* at 757.
10. *Id.* at 767.
11. *Id.* at 767.
12. *Hill v Curtin*, 792 F3d 670 (CA 6, 2015).
13. 28 USC 2254(d).
14. 792 F3d at 674.
15. *Id.* at 676, citing *White v Woodall*, ___ US ___; 134 S Ct 1697, 1702; 188 L Ed 2d 698 (2014).
16. *Id.* at 678.
17. *Id.* at 680.
18. *Id.* at 681.
19. *Bible Believers v Wayne Co*, 805 F3d 228 (CA 6, 2015).
20. *Id.* at 243.
21. *Id.* at 247.
22. *Id.* at 248.
23. *Id.* at 252.
24. *Id.* at 253–254.

Interest Rates for Money Judgments

Under MCL 600.6013 (Revised January 1, 2016*)

I. [MCL 600.6013(8)] FOR ALL COMPLAINTS FILED ON OR AFTER JANUARY 1, 1987 UNLESS SECTION II, III, or IV APPLIES:

Interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. See interest rate chart below.

II. [MCL 600. 6013(7)] FOR COMPLAINTS FILED ON OR AFTER JULY 1, 2002 THAT ARE BASED ON A WRITTEN INSTRUMENT WITH A SPECIFIED INTEREST RATE:

Interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. If the rate in the written instrument is a variable rate, interest shall be fixed at the rate in effect under the instrument at the time the complaint is filed. The rate under this subsection shall not exceed 13% per year compounded annually.

III. [MCL 600. 6013(5 and 6)] FOR COMPLAINTS FILED ON OR AFTER JANUARY 1, 1987, BUT BEFORE JULY 1, 2002 THAT ARE BASED ON A WRITTEN INSTRUMENT:

Interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, unless the instrument has a higher rate of interest. In that case, interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.

Notwithstanding the prior paragraph, if the civil action has not resulted in a final, nonappealable judgment as of July 1, 2002, and if a judgment is or has been rendered on a written instrument that does not evidence indebtedness with a specified interest rate, interest is calculated as provided in Section I above.

IV. ADDITIONAL CONSIDERATIONS:

If the complaint was filed before January 1, 1987, refer to MCL 600.6013(2)–(4).

Interest is not allowed on future damages from the date of filing the complaint to the date of entry of the judgment. [MCL 600.6013(1)]

The amount of allowable interest may be different in certain settlement and medical malpractice case scenarios. [MCL 600.6013(9-13)]

Effective Date	Average Certified by State Treasurer	Statutory 1%	Interest Rate
Jan. 1, 1987	6.66%	1%	7.66%
July 1, 1987	7.50%	1%	8.50%
Jan. 1, 1988	8.39%	1%	9.39%
July 1, 1988	8.21%	1%	9.21%
Jan. 1, 1989	9.005%	1%	10.005%
July 1, 1989	9.105%	1%	10.105%
Jan. 1, 1990	8.015%	1%	9.015%
July 1, 1990	8.535%	1%	9.535%
Jan. 1, 1991	8.26%	1%	9.26%
July 1, 1991	7.715%	1%	8.715%
Jan. 1, 1992	7.002%	1%	8.002%
July 1, 1992	6.68%	1%	7.68%
Jan. 1, 1993	5.797%	1%	6.797%
July 1, 1993	5.313%	1%	6.313%
Jan. 1, 1994	5.025%	1%	6.025%
July 1, 1994	6.128%	1%	7.128%
Jan. 1, 1995	7.38%	1%	8.38%
July 1, 1995	6.813%	1%	7.813%
Jan. 1, 1996	5.953%	1%	6.953%
July 1, 1996	6.162%	1%	7.162%
Jan. 1, 1997	6.340%	1%	7.340%
July 1, 1997	6.497%	1%	7.497%
Jan. 1, 1998	5.920%	1%	6.920%
July 1, 1998	5.601%	1%	6.601%
Jan. 1, 1999	4.8335%	1%	5.8335%
July 1, 1999	5.067%	1%	6.067%
Jan. 1, 2000	5.7563%	1%	6.7563%
July 1, 2000	6.473%	1%	7.473%
Jan. 1, 2001	5.965%	1%	6.965%
July 1, 2001	4.782%	1%	5.782%
Jan. 1, 2002	4.14%	1%	5.14%
July 1, 2002	4.36%	1%	5.36%
Jan. 1, 2003	3.189%	1%	4.189%
July 1, 2003	2.603%	1%	3.603%
Jan. 1, 2004	3.295%	1%	4.295%
July 1, 2004	3.357%	1%	4.357%
Jan. 1, 2005	3.529%	1%	4.529%
July 1, 2005	3.845%	1%	4.845%
Jan. 1, 2006	4.221%	1%	5.221%
July 1, 2006	4.815%	1%	5.815%
Jan. 1, 2007	4.701%	1%	5.701%
July 1, 2007	4.741%	1%	5.741%
Jan. 1, 2008	4.033%	1%	5.033%
July 1, 2008	3.063%	1%	4.063%
Jan. 1, 2009	2.695%	1%	3.695%
July 1, 2009	2.101%	1%	3.101%
Jan. 1, 2010	2.480%	1%	3.480%
July 1, 2010	2.339%	1%	3.339%
Jan. 1, 2011	1.553%	1%	2.553%
July 1, 2011	2.007%	1%	3.007%
Jan. 1, 2012	1.083%	1%	2.083%
July 1, 2012	0.871%	1%	1.871%
Jan. 1, 2013	0.687%	1%	1.687%
July 1, 2013	0.944%	1%	1.944%
Jan. 1, 2014	1.452%	1%	2.452%
July 1, 2014	1.622%	1%	2.622%
Jan. 1, 2015	1.678%	1%	2.678%
July 1, 2015	1.468%	1%	2.468%
Jan. 1, 2016	1.571%	1%	2.571%

*For the most up-to-date information, visit http://courts.michigan.gov/Administration/SCAO/Resources/Documents/other/interest.pdf.