IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LAWRENCE G. RUPPERT and
THOMAS A. LARSON, on behalf
of themselves and all others similarly
situated,

Plaintiffs,

OPINION AND ORDER

08-cv-127-bbc

v.

ALLIANT ENERGY CASH BALANCE
PLAN,

Defendant.

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Near the end of this long-running litigation, the parties remain at odds over a number of collateral issues relating to the determination of prejudgment interest and the calculation of awards to plaintiffs in the year of payout: (1) whether the rate of prejudgment interest should be the prime rate as of the time of judgment, the prime rate at the time the benefit was first paid out or an average of the prime rates in effect for the years in question (1998 to the date of entry of judgment); (2) whether the interest should be simple or compound interest; (3) if it is compounded, whether it should be compounded on a yearly or monthly

basis; (4) alternatively, whether the court should treat the awards to plaintiffs as a second distribution of their lump sum benefits and accordingly, apply the § 417(e) interest rate prescribed by the Internal Revenue Service used to determine the amount of the distribution itself; and (5) whether the court should calculate the awards to plaintiffs in the year of payout in the same way it calculates awards in prior years, that is, by projecting future interest earnings at 8.2%, or whether it should treat the distribution as equal to 4% in the year of distribution, as the plan provides. For the reasons that follow, I conclude that the prime rate for award calculation purposes should be the average prime rate in effect from 2006 to the time judgment is entered, that interest on the improperly withheld portion of the lump sum benefits should be compounded to restore plaintiffs to the positions they would have been in had they been paid the correct amounts at the time they took those benefits; and, finally, that the projected future interest on the benefit in the year of distribution should be limited to 4%, consistent with the plan terms.

A. Prejudgment Interest

When the parties filed cross motions for summary judgment last year, plaintiffs argued that prejudgment interest should be applied to the damages award for the class and that the applicable rate should be the § 417(e) rate. (Some background: plaintiffs' claim in this case is that defendant violated the provisions of ERISA by the manner in which it

calculated the lump sum benefits to which plaintiffs were entitled when they left their employment before retirement age. I agreed with plaintiffs that defendant had erred in using the same rate (the preceding October's 30-year Treasury bond rate) both to project a participant's future interest on his cash balance account that it used to determine the present value of his account. When plaintiffs use the term "§ 417(e) rate," they are referring to the interest crediting rate that I concluded defendant should have paid.)

In deciding the parties' summary judgment motions, I denied plaintiffs' request to use the applicable § 417(e) rate as a prejudgment interest rate. Dkt. #316. Plaintiffs had argued that under § 417(e) the value of the original payment should be added to the discounted value of the "second payment (made currently)" as of the original payment date so that the value of the correct lump sum is paid to the plan participant. "This is algebraically equivalent to crediting the second payment with interest at the same rate as used to discount the lump sum from age 65 to the original payment." Plts.' Reply Br., dkt. #279, at 32. I found this proposal unpersuasive and denied it, explaining that plaintiffs would be entitled to receive prejudgment interest payments, "not as a convoluted function of the original lump calculations, but as a remedy for [defendant's] failure to make a total payment." Order, dkt. #316, at 62. I found instead that the rate would be the prime rate in effect on the date of judgment, which defendant had proposed in its motion for summary judgment and to which plaintiffs had made no objection.

In a motion filed more than eight months later, on February 21, 2011, plaintiffs asked the court to reconsider the determination that the prejudgment interest rate should be the prime rate at the time of judgment and cited Fed. R. Civ. P. 54(b), which acknowledges that courts may revise at any time their orders or other decisions that adjudicate fewer than all of the claims in the case. Defendant objects to the court's giving the matter any reconsideration, arguing that plaintiffs have not met the high standard required for a successful motion brought under Rule 54(b), as set out in Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d 246, 251 (7th Cir. 1987). In Rothwell, the court applied the Rule 59 standard to a motion to reconsider, without explaining why this would be appropriate. In fact, as the rule suggests, courts are generally open to revising their orders any time they are persuaded that an earlier ruling was erroneous or incomplete. This does not mean that they must revise their orders if they are not persuaded that the movant has raised anything requiring revision, which was the situation in Rothwell. However, a judge should be open to reconsideration of previously decided matters before the entry of judgment if it appears that a mistake has been made or a matter overlooked. I will review the motion for that purpose.

First, it must be determined whether defendant is correct when it asserts that plaintiffs waived any argument about the determination of the proper prime rate when they failed to raise it in their opening brief in support of their own motion for summary judgment

and gave it short shrift in their reply brief. It is true that plaintiffs limited their prejudgment interest argument to the § 417(e) issue, but that is not the same as conceding the correctness of defendant's view on the proper interest rate if the court rejects their argument. I am not persuaded that waiver occurred in this context.

As to plaintiffs' renewed § 417(e) argument, it is no more persuasive at this juncture than it was at summary judgment. Plaintiffs are mixing their claim for proper payments with their claim for reimbursement for the time value of the money wrongfully withheld. An award of prejudgment interest will give them fair compensation for the delay in obtaining their proper benefits without treating the underpayments as a second violation of defendant's obligations under ERISA.

Because I erred in deciding that plaintiffs had conceded the correctness of applying the prime rate in effect on the date of judgment, it is proper now to apply what the Court of Appeals for the Seventh Circuit has held repeatedly to be the correct prime rate for extended litigation. E.g., Matter of Oil Spill by Amoco Cadiz off Coast of France, 954 F.2d 1279, 1332 (7th Cir. 1992) (court should use prime rate for setting prejudgment interest and use prime rate in effect "*during* the litigation—when the defendant had the use of the money that the court has decided belongs to the plaintiff—not the going rate at the end of the case"). See also Cement Div., National Gypsum Co. v. City of Milwaukee, 144 F.3d 1111, 1114 (7th Cir. 1998) ("In our opinion remanding for determination of prejudgment interest,

we indicated that 'the best starting point is to award interest at the market rate, which means an average of the prime rate for the years in question.'")

B. Simple or Compound Interest

Although defendant argues that any prejudgment interest award should be a simple interest calculation rather than a compounded one, the law in the circuit is to the contrary. Again, defendants contends that plaintiffs have waived this issue, but I am not persuaded that they did. Defendant argued in opposition to plaintiffs' motion for summary judgment that the interest should be simple interest; plaintiffs challenged defendant's position in their reply brief. Although their challenge was terse, it was enough to show that they did not waive their right to seek compound interest.

"Compound prejudgment interest is the norm in federal litigation." Matter of Oil Spill by Amoco Cadiz , 954 F.2d at 1332 (citing West Virginia v. United States, 479 U.S. 305 (1987); General Motors Corp. v. Devex Corp., 461 U.S. 648 (1983); Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc., 874 F.2d 431, 437 (7th Cir. 1989)). See also American National Fire Ins. Co. ex rel. Tabacalera Contreras Cigar Co. v. Yellow Freight Systems, Inc., 325 F.3d 924, 937-38 (7th Cir. 2003) (Carmac Amendment case).

The only other interest issue to be considered is whether the prejudgment interest should be compounded on a yearly or monthly basis. Seventh Circuit law provides no

guidance on this particular issue. At least two judges in the circuit have addressed the problem in unpublished decisions, Cabernoch v. Union Labor Life Ins. Co., 2009 WL 2497669 (N.D. Ill. 2009); Juszynski v. Life Insurance Co. of North America, 2008 WL 877977 (N.D. Ill. 2008), but neither relied on any precedent in doing so. In Cabernoch, which was a case brought under ERISA, the court chose monthly compounding because "monthly compounding of interest is standard on everything from mortgages to credit cars to car loans." Id. at *4. In Juszynski, the court ordered monthly compounding but did not explain its reasons for doing so. In the absence of any guidance one way or another, I will follow the lead of Congress in 28 U.S.C. § 1961, which provides for interest on money judgments in civil cases and specifies that interest is to be compounded annually.

C. Partial Year Interest Credit

In the relevant version of defendant's plan, trial exh. #323, § 3.5 provided that, as of December 31 of each year, starting in 1998, the cash balance account of every participant was to be credited with an amount equal to the product of the interest credit rate times the cash balance account, as of the first day of the plan year. These interest credit rates were to be allocated to participant accounts yearly until the participant's "annuity starting date," that is, the date chosen by the participant on or after the first day of the month after the participant's termination of employment upon which benefits are to begin in any form,

including a single lump sum. Id. at § 1.2(e). If the annuity starting date was not the last day of a plan year, "the Participant's Cash Balance Account shall be allocated an Interest Credit equal to the Participant's Cash Balance Account as of the first day of the Plan Year multiplied by" 4% for the number of complete months in the plan year the participant had worked.

At no time before or during trial did plaintiffs challenge this provision of the plan or even refer to it, not in their complaint, their motion for class certification, their motion for summary judgment, their statement of issues for trial or at the trial itself. It was not until the parties began the process of calculating the individual awards for each class member that the issue surfaced. Not surprisingly, defendant objects to any attempt by plaintiffs to raise it at this time, arguing that they have waived it. I agree. Plaintiffs had ample opportunity to bring this issue to the court's attention at a time when it could have been explored at trial. It is far from a straightforward question, but rather one that requires a careful development of the arguments that would support or refute plaintiffs' contention that defendant violated the provisions of ERISA and the Internal Revenue Code when it provided that the interest crediting rate would be fixed at 4% for the year in which any participant reached his or her annuity starting date. By waiting to raise the issue until eight months after trial, at a time when the actuaries and accountants are engaged in the final calculation of damage awards, plaintiffs have waived the issue.

D. Summary

Plaintiffs' motion for reconsideration of the manner in which prejudgment interest is to be determined is granted in part; plaintiffs are entitled to prejudgment interest calculated according to the average prime rate from the date on which a class member became a plan participant until the entry of judgment, with the prejudgment interest compounded annually. Plaintiffs' motion for reconsideration of the interest crediting rate to be applied to their cash balance accounts in the years in which they took their lump sum benefits or annuities will be denied because plaintiffs waived their right to raise this issue by not bringing it to the court's attention at a time when it could be fully developed.

ORDER

IT IS ORDERED that the motion for reconsideration filed by plaintiffs Lawrence G. Ruppert and Thomas A. Larson on behalf of themselves and all others similarly situated is DENIED with respect to application of the § 417(e) rate to plaintiffs' damages awards in lieu of interest and as to considering for the first time their contention that plan participants should not be limited to a 4% interest crediting rate in the year in which they took their lump sum benefits. The motion is GRANTED with respect to application of a prejudgment interest rate equal to the average prime rate between the date on which the class member

first became a participant in defendant plan and the date of judgment, compounded yearly.

Entered this 10th day of March, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge