This article was originally published in the February 2012 issue of New Jersey Lawyer Magazine, a publication of the New Jersey State Bar Association, and is reprinted here with permission.

Attorneys' Fees in ERISA Cases

by Brian R. Lehrer

The Employment Retirement Income Security Act of 1974 (ERISA) applies to most employee welfare benefits plans.[1] Jurisdiction in federal courts is automatic, regardless of the amount in controversy or the citizenship of the parties.[2]

Pursuant to 29 U.S.C. § 1132(a), a participant or beneficiary of an ERISA plan may bring an action to recover benefits due or to enforce his or her rights under the plan. Attorneys' fees in ERISA actions are permitted in two circumstances: 1) in any action by a fiduciary on behalf of the plan to recover delinquent employer contributions to a multi-employer plan; and 2) in any action by a participant, beneficiary or fiduciary where the court in its discretion allows reasonable attorneys' fees and costs to either party.[3] The former is pretty straightforward; the latter is not.

This article will address attorneys' fees in ERISA actions that may be awarded pursuant to 29 U.S.C. § 1132(g)(1), which unlike Section 1132(g)(2) does not provide that a court *shall* award reasonable attorneys' fees.

The text of 29 U.S.C. § 1132(g)(1) is rather simple and straightforward. The section provides as follows:

> In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary or fiduciary, the court in its discretion may allow a reasonable attorneys' fee and costs of action to either party.

The statutory section provides no markers other than the court's discretion for an award of attorneys' fees. It is silent on whether attorneys' fees may only be awarded to a "prevailing party," a "substantially prevailing" party, or a "successful" litigant. These questions were addressed and resolved in a recent United States Supreme Court decision.[4] In *Hardt*, the Court held that a court may, in its discretion, award fees and costs to either party as long as the fee claimant has achieved some degree of success on the merits, and is not required to establish that it was a "prevailing party."

Bridgette Hardt was employed by Dan River, Inc., and sought long-term disability benefits under her employer's long-term disability plan. Dan River administrated the plan, but Reliance Standard Life decided whether or not a claimant qualified for benefits. Hardt had numerous medical problems. She was ultimately awarded disability benefits by Social Security. She received some benefits under the Dan River plan, but ultimately the plan cut her off.

Hardt filed an administrative appeal, which was rejected. She filed suit alleging that Reliance violated ERISA by wrongfully denying her claim for long-term disability benefits pursuant to 29 U.S.C. § 1132(a)(1)(B). The district court denied both parties' motions for summary judgment, but found compelling evidence that Hardt was totally disabled, and remanded the case to Reliance for a review of the applicable medical evidence. It instructed Reliance to act on her application by considering all of the evidence within 30 days, otherwise judgment would be entered in favor of Hardt. Reliance reviewed the evidence, and ultimately determined that Hardt was eligible for long-term disability benefits and paid her accrued and past due benefits.

Hardt then moved for attorneys' fees and costs under 29 U.S.C. § 1132(g)(1). The district court granted her fee application, but the appeals court reversed, holding that she had failed to establish that she was a prevailing party. The issue for the Supreme Court was as follows: Did the court of appeal correctly conclude that Section 1132(g)(1) permits courts to award attorneys' fees only to a prevailing party? The Supreme

Court held that the answer is no, and reversed the Fourth Circuit's holding.

The court pointed out that the words "prevailing party" do not appear in Section (g)(1). Nothing else in the statute's text purported to limit the availability of attorneys' fees to a prevailing party, and therefore the court held that a fee claimant need not be a prevailing party to be eligible for attorneys' fees under Section (g)(1).

The next question to be addressed was: Under what circumstances is a fee claimant entitled to attorneys' fees? Under the "American Rule," each litigant pays his or her own attorneys' fees win or lose, unless a statute or contract provides otherwise.[5] While numerous statutes outline various standards for awarding legal fees, the Court limited its analysis to precedent-addressing statutes that do not limit attorneys' fees awards to the prevailing party. The principal case in this line is *Ruckelshaus*.[6]

Ruckelshaus involved an interpretation of Section 307(f) of the Clean Air Act, which authorizes a court to award fees "whenever it determines that such an award is appropriate."[7] The Court concluded in that case that by using the less stringent "whenever... appropriate" standard instead of the traditional prevailing party standard, Congress had expanded the class of parties eligible for fee awards from prevailing parties to partially prevailing parties. Therefore, the Court held that, absent some degree of success on the merits by the claimant, it is not "appropriate" for a federal court to award attorneys' fees under Section 307(f).

Reliance did not dispute that the *Ruckelshaus* standard governed. However, it argued that Hardt had not satisfied it because a court order remanding an ERISA claim for further consideration can never constitute some success on the merits, even if the remand resulted in an award. The Supreme Court disagreed.

The Court noted that Hardt had persuaded the district court to find that the plan administrator had failed to comply with the ERISA guidelines. While she had failed to win summary judgment, the district court had found compelling evidence that she was totally disabled. She thus obtained an order instructing Reliance to act on her application or face judgment within 30 days. Therefore, Hardt had achieved far more than trivial success on the merits or a purely procedural victory, and was entitled to attorneys' fees.

> ...*Ruckelshaus* lays down the proper markers to guide a court in exercising the discretion that Section 1132(g)(1) grants. As in the statute at issue in *Ruckelshaus*, Congress failed to indicate clearly in Section 1132(g)(1) that it meant to abandon historic fee-shifting principals and intuitive notions of fairness. Accordingly, a fees claimant must show some degree of success on the merits before a court may award attorney's fees under Section 1132(g)(1). A claimant does not satisfy that requirement by achieving trivial success on the merits or a purely procedural victory, but does satisfy it if the court can fairly call the outcome of the litigation some success on the merits without conducting a lengthy inquiry into the question whether a particular party's success was substantial or occurred on a central issue.[8]

In statutes where attorneys' fees are awarded to a prevailing party, courts normally apply a five-factor test to determine whether the prevailing party is entitled to fees. The five factors are as follows: 1) the degree of opposing parties' culpability or bad faith; 2) the ability of opposing parties to satisfy an award of attorneys' fees; 3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; 4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and 5) the relative merits of the parties' positions.

The Supreme Court rejected the prevailing party requirement. However, in a footnote the Court indicated it was not foreclosing the possibility that once a claimant has satisfied the standard of some success on the merits set forth in its opinion and becomes eligible for a fee award under ERISA, a court may consider the five factors in deciding whether to award attorneys' fees.

Since the issuance of the *Hardt* opinion, there has only been one published case in the circuit courts. Appropriately, the case has come out of the Fourth Circuit, the same circuit that dealt with the *Hardt* case.[9]

In *Williams*, the Fourth Circuit upheld a district court's finding that the administrator of the benefit plan at issue had abused its discretion when it terminated the plaintiff's long-term disability benefits. The district court had awarded attorneys' fees and the Fourth Circuit affirmed that finding as well, and in its opinion addressed the recently issued *Hardt* holding.

Having achieved a degree of success on the merits in the district court, the Fourth Circuit held that Williams was clearly eligible for attorneys' fees under the *Hardt* decision. The Fourth Circuit interpreted the *Hardt* decision as holding that the five-factor test still applies once the presumption in favor of attorneys' fees has been triggered by a degree of success on the merits, as opposed to holding that a degree of success on the merits automatically entitles a party to fees and costs.

> We observe that the Supreme Court's decision in *Hardt* does not preclude our continued use of the five-factor

> approach.... The Supreme Court simply cautioned against employing these five factors in the first step of the analysis, namely, in determining whether a party has satisfied the requirement of achieving some success on the merits.... Therefore, we conclude that once a court in this circuit determines that a litigant in an ERISA case has achieved some degree of success on the merits, the court should continue to apply [the five-factor test] when exercising its discretion to award attorney's fees to an eligible party.[10]

As of this writing, the Third Circuit has not addressed the *Hardt* holding, nor the five factors test. Still, it appears that the standard for recovering fees in an ERISA case is ultimately not an exacting one. The twist in the statute is that it provides for attorneys' fees to *either* party. This raises the possibility that a plan that is successful in a denial of benefits could seek fees from the claimant. Furthermore, "some degree of success on the merits," will be addressed on a case-by-case basis. Realistically, it is hard to imagine a court awarding a plan legal fees when it has successfully denied a non-frivolous claim for benefits by an insured. In light of this reality, it appears the Fourth Circuit has correctly read *Hardt* in that some degree of success on the merits triggers the consideration of its five-factor test for ultimately awarding attorneys' fees.

The *Hardt* decision and the presumptive application of the five-factor test, following the initial trigger of some success on the merits, appears to be a fair resolution for claimants who are seeking benefits under ERISA plans—particularly for health or disability claims, where they may not have the resources ultimately to pay an attorney to obtain the benefits they are entitled to under the ERISA plans.

Endnotes

1. 29 U.S.C. § 1001 *et. seq.*
2. 29 U.S.C. § 1132(f).
3. 29 U.S.C. § 1132(g)(1) and (2).
4. *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149 (2010).
5. *Alyeski Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).
6. *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983).
7. 42 U.S.C. § 7607(f).
8. *Hardt, supra*, 130 S. Ct. at __ (2010) (citations omitted).
9. *Williams v. Metropolitan Life Ins. Co., et al.*, 609 F. 3d 622 (2010).
10. *Id.* at 636.

Brian R. Lehrer *is with the law firm of Schenck, Price, Smith & King, LLP. He is a member of* New Jersey Lawyer Magazine *Editorial Board.*