BNA, INC.

PENSION & BENEFITS

BNA Employee-Owned Since 1947

DAILY



# *Hardt*, Attorneys' Fees in ERISA Litigation, and the Success on the Merits Rule

BY JASON H. EHRENBERG

Congress enacted the Employee Retirement Income Security Act in 1974 in part to protect the interests of benefit plan participants and beneficiaries by creating ''ready access to the Federal courts.''[1] Congress included in ERISA an attorneys' fees provision, Section 502(g) (29 U.S.C. § 1132(g)), which permitted a party to a certain subset of ERISA actions to pursue their attorneys' fees at the end of a lawsuit. That provision provided that a court had discretion to award attorneys' fees to either party in certain ERISA actions.

Congress amended Section 502(g) through the Multiemployer Pension Plan Amendments Act of 1980 by adding a subsection (g)(2), which provided for a mandatory award of attorneys' fees in certain cases brought by multiemployer plans and their fiduciaries. Subsection (g)(1) of Section 502 now provides that ''[i]n 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 attorney's fee and costs of action to either party.''[2]

Unfortunately, even after amending Section 502(g) in 1980, Congress did not provide much guidance with regard to the circumstances under which a party ''may'' be entitled to attorneys' fees under Section 502(g)(1). Consequently, courts developed a five-factor test that became widely accepted, but inconsistently applied.[3] Through the application of this five-factor analysis, courts struggled to determine the precise contours of when an award of attorneys' fees was appropriate in benefits litigation.

[1] 29 U.S.C. § 1001(b).

*Jason H. Ehrenberg is a partner in the Washington, D.C. office of Bailey & Ehrenberg PLLC. His practice focuses on benefits and employment litigation.*

[2] *Id.*

[3] *See, e.g., Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 2 EBC 1416 (9th Cir. 1980).

 ISSN

Enter *Hardt v. Reliance Standard Life Insurance Co.*,[4] an ERISA attorneys' fees case that most practitioners hoped would answer that question in the context of lawsuits brought by plan participants to challenge benefits denials and terminations. But, the U.S. Supreme Court's decision in *Hardt* that a party is eligible for attorneys' fees if they experience ''some degree of success on the merits,'' has left many practitioners with unanswered questions.

For example, what is the meaning of the phrase ''some success on the merits''? Does a court order of remand to a plan administrator to reconsider a benefits decision constitute ''some success on the merits''? How (if at all) should the *Hardt* decision change courts' analyses in determining the circumstances under which to grant a party attorney's fees?

What follows is an analysis of *Hardt*, its holding, and some suggested answers to the questions *Hardt* has left many practitioners asking.

## Background

Bridget Hardt worked as an executive assistant to the president of textile manufacturer Dan River Inc. After experiencing neck and shoulder pain, Hardt's doctors diagnosed her with carpal tunnel syndrome. Due to that condition, Hardt stopped working and applied for long-term disability benefits from Dan River's Group Long-Term Disability Insurance Program Plan (''Plan''), an ERISA covered plan. Reliance Standard Life Insurance Co. (''Reliance'') was the claims administrator for the plan. Reliance initially denied Hardt's claim, but later, on administrative appeal, reversed its decision in part, determining that Hardt was entitled to temporary disability benefits for 24 months based on Ms. Hardt's inability to perform her current position.[5]

Thereafter, Hardt applied to the Social Security Administration (''SSA'') for disability benefits. Hardt submitted with her application ''questionnaires completed by two of her treating physicians, which described Hardt's symptoms and stated the doctors' conclusion that Hardt could not return to full gainful employment because of her [small-fiber] neuropathy [(a condition she was diagnosed with while her administrative appeal was pending)] and other ailments.'' The SSA granted Hardt's application for benefits. Approximately two months later, Reliance informed Hardt that the 24-month temporary disability period was expiring and that to continue to receive benefits, she would have to establish that she is ''totally disabled from all occupations.'' Reliance further informed her that it held the view that she was not totally disabled.[6]

Hardt appealed Reliance's decision. She provided to Reliance all of her medical records, the questionnaires she submitted to the SSA, and an updated questionnaire from one of her treating physicians. Reliance hired a physician and a vocational rehabilitation counselor to help it resolve Hardt's appeal. The physician did not examine Hardt. Rather, he reviewed some—but not all—of Hardt's medical records. The physician provided a report to Reliance, which report did not mention Hardt's pain medications or the questionnaires that her attending physicians completed as part of her application for SSA benefits. Reliance affirmed its decision, relying in large part on the physician's report.[7]

Subsequently, Hardt filed a lawsuit against Reliance in the United States District Court for the Eastern District of Virginia alleging that Reliance violated ERISA by wrongfully denying her claim for long-term disability benefits. Both parties moved for summary judgment which the court denied.

The district court denied Reliance's motion because it ''thought it 'clear that Reliance's decision to deny Hardt long-term disability benefits was not based on substantial evidence.''[8] The district court denied Hardt's motion because it did not find that Reliance's decision was unreasonable as a matter of law. The district court noted, however, that it ''found 'compelling evidence' in the record that 'Ms. Hardt [wa]s totally disabled due to her neuropathy'' and stated that it was '' 'inclined to rule in Ms. Hardt's favor.' ''[9] But, recognizing that ''Ms. Hardt did not get the kind of review to which she was entitled under [ERISA]'' the court remanded the case to Reliance with instructions to consider all the evidence or ''judgment will be issued in favor of Ms. Hardt.'' On remand, Reliance found Hardt eligible for long-term disability benefits.[10]

Hardt moved the district court for attorneys' fees and costs under ERISA Section 502(g)(1). The district court applied a three-step inquiry adopted by the U.S. Court of Appeals for the Fourth Circuit in determining Hardt's entitlement to attorneys' fees and costs.

That inquiry requires a court to first consider whether the fee claimant is a prevailing party. Second, if the fee claimant is a prevailing party, the court must consider five factors in determining whether to use its discretion to grant attorney's fees. Those five factors are:

- ''the degree of the opposing parties' culpability or bad faith'';
- ''the ability of the opposing parties to satisfy an award of attorneys' fees'';
- ''whether an award of attorneys' fees against the opposing party would deter other persons acting under similar circumstances'';
- ''whether the parties requesting attorney's fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself''; and
- ''the relative merits of the parties' position.''

Third, the court must consider whether the attorneys' fees are reasonable if the five factors weigh in favor of granting a fee award. The district court awarded Hardt her attorneys' fees.[11]

On appeal, the Fourth Circuit vacated the district court's order holding that Hardt failed to satisfy the first step, that she was a prevailing party. The Fourth Circuit ''reasoned that because the remand order 'did not require Reliance to award benefits to Hardt,' it did 'not constitute an enforceable judgment on the merits . . ., thus precluding Hardt from establishing prevailing party status.''[12] Hardt filed a petition for writ of certio-

[4] 560 U.S. __, 2010 U.S. LEXIS 4164, 49 EBC 1001 (2010) (99 PBD, 5/25/10; 37 BPR 1294, 6/8/10).
[5] 2010 U.S. LEXIS 4164 at *8.
[6] *Id*. at *8.
[7] *Id*. at *8.
[8] *Id*. at *11.
[9] *Id*. at *11.
[10] *Id*. at *12.
[11] *Id*. at *13-14.
[12] *Id*. at *15.

  ISSN

rari to the Supreme Court challenging the Fourth Circuit's decision.[13]

**The Circuit Court Split.** At the time Hardt sought review of the Fourth Circuit's decision, there existed a circuit court split on the issue of whether a party must be a ''prevailing party'' to qualify for an award of attorneys' fees and costs under Section 502(g). The U.S. Courts of Appeals for the First, Seventh and Tenth Circuits appeared to agree with the Fourth Circuit that to qualify for the award of attorneys' fees a party needed to be a ''prevailing party.''[14] Other circuit courts disagreed with the Fourth Circuit's ''prevailing party'' position.[15]

All circuits applied the second two steps of the inquiry adopted by the Fourth Circuit to determine when to use their discretion to award attorneys' fees under ERISA.[16]

## The Supreme Court's Decision

The Supreme Court granted certiorari and reversed the Fourth Circuit's judgment. In doing so, the Supreme Court considered two issues: (1) whether the Fourth Circuit ''correctly conclud[ed] that § 1132(g) permits courts to award attorney's fees only to a 'prevailing party' ''; and (2) whether the Fourth Circuit ''correctly identif[ied] the circumstances under which a fee claimant is entitled to attorney's fees under § 1132(g)(1)''.[17]

With regard to the first issue, the Supreme Court held that ''a fee claimant need not be a 'prevailing party' to be eligible for an attorney's fees award under § 1132(g)(1).''[18] In deciding this first issue, the court used as a ''point of reference'' the ''American Rule,'' which requires each party to a litigation to pay their own attorneys' fees unless a statute or contract provide otherwise.[19] The court found that Section 502(g)(1) presents a circumstance where Congress intended to make a statutory change to the American Rule. The court noted that unlike most statutory deviations from the American Rule that contain an express ''prevailing party'' requirement, Congress did not expressly provide in Section 502(g)(1) that a party had to prevail.[20]

The court also based its holding on the long-recognized principle of statutory construction *expressio unius est exclusion alterius*—the mention of some implies the exclusion of others not mentioned. The court reasoned that ''[t]he words 'prevailing party' do not appear'' in Section 502(g)(1) ''[n]or does anything else in § 1132(g)(1)'s text purport to limit the availability of attorney's fees to a 'prevailing party.' ''[21]

This language, according to the court, stands in stark contrast to the language governing the availability of attorneys' fees under Section 502(g)(2) (governing delinquent contribution actions under ERISA Section 515) to ''plaintiffs who obtain 'a judgment in favor of the plan' '' and evidences that ''Congress knows how to impose express limits on the availability of attorney's fees in ERISA cases.''[22] Therefore, Congress's failure to ''include in § 1132(g)(1) an express 'prevailing party' limit on the availability of attorney's fees'' shows that Congress did not intend to limit the award of attorneys' fees under Section 502(g)(1) to the prevailing party.[23]

With regard to the latter issue—the circumstances under which a fee claimant is entitled to attorneys' fees under Section 502(g)(1)—the Supreme Court held that ''a court 'in its discretion' may award fees and costs 'to either party,' . . . as long as the fee claimant has achieved 'some degree of success on the merits.' ''[24] The court noted that although a court may consider the five factors adopted by the Fourth Circuit in deciding the circumstances under which a fee claimant is entitled to attorneys' fees, the ''five factors bear no obvious relation to § 1132(g)(1)'s text or to our fee shifting jurisprudence . . . .''[25]

Thus, the five factors do not provide the proper circumstances under which attorneys' fees should be awarded under Section 502(g)(1). Instead, its decision in *Ruckelshaus v. Sierra Club* lays down the proper markers to guide a court in exercising the discretion that Section 502(g)(1) grants:

> As in the statute at issue in *Ruckelshaus*, Congress failed to indicate clearly in § 1132(g)(1) that it 'meant to abandon historic fee-shifting principles 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 § 1132(g)(1). A claimant does not satisfy that requirement by achieving 'trivial success on the merits or a purely procedural victor[y], but does satisfy it if the court can fairly call the outcome of the litigation some success on the merits without conducting a lengthy inquir[y] into the question whether a particular party's success was substantial or occurred on a ''central issue.''[26]

Applying this reasoning to the facts at issue in Hardt's case, the Supreme Court held that Hardt was eligible for attorneys' fees. The court rejected Reliance's argument ''that a court order remanding an ERISA claim for further consideration can never constitute 'some success on the merits,' even if such a remand results in an award of benefits'' because that argument ''misses the point given the facts of this case.'' The court believed that Hardt had ''achieved 'some success on the merits' '' because the district court (1) ''found 'compelling evidence that Ms. Hardt is totally disabled due to her neuropathy''; (2) ''stated that it was 'inclined to rule in Ms. Hardt's favor' on her benefits claim''; and

---

[13] *Id*. at *15.

[14] *See, e.g., Cottrill v. Sparrow, Johnson & Ursillo Inc.*, 100 F.3d 220, 225, 28 EBC 180 (1st Cir. 1996); *Tate v. Long Term Disability Benefit Plan for Salaried Employees of Champion Int'l Corp.*, 545 F.3d 555, 564, 45 EBC 1385 (7th Cir. 2008) (183 PBD, 9/22/08; 35 BPR 2179, 9/23/08); *Graham v. Hartford Life and Accident Ins. Co.*, 501 F.3d 1153, 1162, 42 EBC 1712 (10th Cir. 2007) (167 PBD, 8/29/07; 34 BPR 2057, 9/4/07).

[15] *See, e.g., Miller v. United Welfare Fund*, 72 F.3d 1066, 1074, 19 EBC 2378 (2d Cir. 1995); *Gibbs v. Gibbs*, 210 F.3d 491, 503, 24 EBC 1487 (5th Cir. 2000) (27 BPR 1152, 5/2/00); *Freeman v. Continental Ins. Co.*, 996 F.2d 1116, 1119 (11th Cir. 1993).

[16] *See, e.g., Eddy v. Colonial Life Ins. Co.*, 59 F.3d 201, 206 n. 11, 19 EBC 1609 (D.C. Cir. 1995) (citing cases).

[17] 2010 U.S. LEXIS 4164 at *16.

[18] *Id*. at *19.

[19] *Id*. at *19-20.

[20] *Id*. at *20-21.

[21] *Id*. at *18.

[22] *Id*. at *18-19.

[23] *Id*. at *19.

[24] *Id*. at *6 (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983)).

[25] *Id*. at *23, 24 & n. 8.

[26] *Id*. at *23-24 (internal citations and quotation marks omitted).

(3) and on remand ''Reliance reversed its decision and awarded Hardt the benefits she sought.''[27]

## The *Hardt* Effect

Although the Supreme Court's decision in *Hardt* purports to provide guidance to courts in determining when to award attorneys' fees under Section 502(g)(1), the decision leaves some important questions unanswered. This is made clear by the disparate reactions practitioners on both sides of the aisle have had to the decision.

Plaintiffs' lawyers have hailed the decision as a ''significant'' victory, arguing that the decision allows trial courts to grant attorneys' fees when a benefit claim is remanded to a plan administrator and opining that a ruling that sets aside an administrator's decision and remands a claim for reconsideration certainly amounts to more than a mere procedural victory.

In contrast, members of the defense bar have asserted that the decision is but a narrow ruling that did not decide the issue that arises in most remands—what should happen when a claim is remanded because of a defect in the procedural process (such as a mere failure to consider certain documentation).[28]

*Hardt* does make clear that Section 502(g)(1) permits attorneys' fees awards to partially, and not just fully, prevailing parties. Put differently, a party need not establish that they ''prevailed 'essentially' on 'central issues.' ''[29] Rather, a party need only ''show 'some degree of success on the merits' '' to be eligible for attorneys' fees.[30] *Hardt* also advises that a party that has ''no degree of success on the merits'' (the unsuccessful party) is not eligible for attorneys' fees because ''Congress failed to indicate clearly in § 1132(g)(1) that it 'meant to abandon historic fee-shifting principles and intuitive notions of fairness' '' which suggest that ''a successful party need not pay its unsuccessful adversary's fees.''[31]

Unfortunately, the court did not explicitly define the phrase ''some degree of success on the merits.'' Rather, the court merely advised that one has achieved ''some degree of success on the merits'' if a ''court can fairly call the outcome of the litigation some success on the merits without conducting a 'lengthy inquir[y] into the question whether a particular party's success was 'substantial' or occurred on a 'central issue.' '' What does this mean?

Perhaps, the answer lies in the meaning of the term ''merits.'' ''The 'merits' of a case are the 'elements or grounds of a claim or defense; the substantive consideration to be taken into account in deciding a case.' ''[32] Hence, ''some success on the merits'' presumably means some success on a claim or defense asserted in an ERISA lawsuit.

How much success does a party have to achieve on the claim or defense? The Supreme Court instructs that the success must be more than '' 'trivial success on the merits' '' or a '' 'purely procedural victor[y][.]' '' That seems to require that a court's findings and rulings come close to the relief ultimately sought for a fee claimant to be entitled to an award of attorneys' fees.

For example, in a benefits action (the nature of the action in *Hardt*), the relief a plaintiff generally seeks is a ruling that they are entitled to benefits under the terms of the plan and a court order requiring a defendant to pay those benefits. Thus, to have some success on the merits in a benefits action, a party must either win the benefits action or receive a determination by the court that they are likely entitled to the benefits. Indeed, the facts in *Hardt* support this conclusion.

The court's opinion in *Hardt* seems to downplay the fact that the district court remanded the case and focuses more on the fact that the district court ''found 'compelling evidence that Ms. Hardt is totally disabled due to her neuropathy'' and that the district court was '' 'inclined to rule in Ms. Hardt's favor' on her benefits claim.'' The court stated as much by noting that Reliance's argument ''that a court order remanding an ERISA claim for further consideration can never constitute 'some success on the merits,' even if such a remand results in an award of benefits'' ''misses the point given the facts of this case.''

Whether a remand alone makes a fee claimant entitled to attorneys' fees is yet to be determined; the Supreme Court did not rule on that issue. In fact, the court expressly left that issue open.

Presumably in a typical benefits case, a remand, without further findings by a court, is not sufficient because such a remedy by itself appears to resemble a mere ''procedural victory'' or ''trivial success on the merits''—given that the nature of relief sought in such cases is a determination of entitlement to benefits and/or an award of benefits. What happens, however, if a savvy plaintiff's lawyer asks for remand as part of the relief sought in his or her complaint? Does that convert a simply remand into more than ''trivial'' success on the merits? Can an artfully crafted complaint inform one's entitlement to attorneys' fees?

The *Hardt* decision also leaves unanswered the question of whether the ''success on the merits'' inquiry is just the first step in a two-part analysis. The decision informs courts that once a fee claimant has satisfied the requirement that they achieve ''some success on the merits,'' courts may—but do not have to—engage in the five factor test (or some variant thereof) adopted by the Fourth Circuit (and employed my most circuit courts) to assist in determining whether to award attorneys' fees under Section 502(g)(1).

This five factor test essentially inquires into whether the party against whom fees are sought maintained a position that was ''substantially justified and taken in good faith . . . .''[33] As the U.S. Court of Appeals for the Ninth Circuit recently stated in *Simonia v. Glendale Nissan/Infinit Disability Plan*, those ''factors provide helpful guideline to both district courts and litigants.''[34] Although the Supreme Court purported to do away with this five-factor analysis, it did recognize that, without that analysis (or some variant thereof) circuit courts would have a difficult time assessing whether lower

[27] *Id*. at *25-26.

[28] 99 PBD, 5/25/10; 37 BPR 1294, 6/8/10; 49 EBC 1001.

[29] *Ruckelshaus*, 463 U.S. at 688 (recognizing that courts define prevailing party as a party succeeding ''essentially'' on ''central issues.'').

[30] 2010 U.S. LEXIS 4164 at *23 (quoting *Ruckelshaus*, at 694).

[31] *Ruckelshaus*, 463 U.S. at 685.

[32] *Blue Skies Alliance v. Texas Comm'n on Envtl. Quality*, 265 Fed. Appx. 203, 207 (5th Cir. 2008) (quoting BLACK'S LAW DICTIONARY (8th ed. 2004))

[33] *Quinn v. Blue Cross and Blue Shield Association*, 161 F.3d 472, 478, 28 EBC 1278 (7th Cir. 1998)

[34] 2010 U.S. App. LEXIS 13015 *7 (9th Cir. ___, 2010).

  ISSN

courts abused their discretion in granting or denying attorneys' fees.[35]

## Conclusion

So who is right? Those on the plaintiffs' side who argue that *Hardt* is a significant victory, or those from the defense bar who argue that the decision is a narrow one with limited application?

In reality, neither view is completely accurate and the attorneys' fee issue likely will make its way back to the Supreme Court in due course.

[35] 2010 U.S. LEXIS 4164 at n. 8.