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No Prevailing Party Requirement to Recover Attorney Fees Under ERISA

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In its most recent term, the Supreme Court of the United States accepted certiorari to decide whether the prevailing party requirement imposed by the majority of circuits as a condition precedent to recover attorney fees under the ERISA fee-shifting statute is the appropriate standard. A unanimous Supreme Court subsequently decided that the Fourth Circuit erred in applying a prevailing party requirement since that language does not appear in the statute. *Hardt v. Reliance Standard Life Insurance Co.*, ___ S. Ct. ___, No. 09-448, 2010 WL 2025127 (May 24, 2010). Now, a party must only achieve “some success on the merits” to be eligible for an award of fees.

Claim Background

Hardt involved a claim for long-term disability benefits under an insured employee welfare benefit plan of Dan River, Inc. Before she stopped working, Ms. Hardt was employed by Dan River, Inc. as an Executive Assistant to the company President. In 2000, she began to experience pain in her neck and shoulders. She eventually stopped working in January 2003 and submitted a claim for disability benefits. In October 2003, Reliance Standard asked Ms. Hardt to undergo a Functional Capacity Evaluation (“FCE”) which concluded that Ms. Hardt was capable of performing sedentary work as long as she was limited to lifting four to five pounds on an occasional basis and two to three pounds on a frequent basis. Based on the testing, Reliance Standard concluded that Ms. Hardt was totally disabled from her “regular occupation” but that benefits would likely be limited to 24 months when the “any occupation” standard applied to the claim. Thereafter, Ms. Hardt was notified by Reliance Standard in 2005 that she was no longer eligible for benefits under the Plan.

District Court Proceedings

Ms. Hardt later filed suit against Reliance Standard and the Plan in the United States District Court for the Eastern District of Virginia. On cross-motions for summary judgment, the district court entered an Opinion and Order denying the summary judgment motions of both parties and remanding the claim to Reliance Standard for reconsideration of Ms. Hardt’s claim. During the remand, the claimant submitted new medical records for consideration and Reliance Standard requested an Independent Medical Examination (IME). Based on the new evidence, Reliance Standard concluded that Ms. Hardt was eligible for additional long-term disability benefits. Thereafter, Ms. Hardt filed a motion for attorney fees and costs based on Reliance Standard’s approval of the claim. Reliance Standard opposed the motion, arguing in part that Ms. Hardt did not “prevail” on her claim for benefits. The district court granted Ms. Hardt’s motion and awarded fees.

The Fourth Circuit Decision

The only issue brought before the Fourth Circuit was whether the district court erred in awarding fees to Ms. Hardt. In an unpublished decision, the Fourth Circuit reversed the district court’s award of attorney fees. *Hardt v. Reliance Standard Life Ins. Co.*, 2009 WL 2038759 (4th Cir. Jul. 14, 2009). Relying on *Buckhannon Bd. & Care, Inc. v. W. Va. Dep’t of Health and Human Res.*, 532 U.S. 598 (2001), which involved fee claims under the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990, the Fourth Circuit held that to recover fees under the ERISA statute, a plaintiff must also be a “prevailing party.” While the district court ordered the remand of the claim which eventually led to the award of benefits, the claimant did not seek a remand as a form of relief in her complaint. Therefore, according to the Fourth Circuit, she did not prevail on any of her claims and the award of fees was erroneous.

continued on page 2 ...

1. Mr. Bachrach represented Reliance Standard in the Fourth Circuit in *Hardt*.



The Supreme Court Decision

Ms. Hardt filed a petition for a writ of certiorari in the Supreme Court which was granted. Specifically, the Court agreed to review: (1) Whether Section 502(g)(1) of ERISA provides a district court with discretion to award reasonable attorney fees only to a prevailing party; and (2) whether a party is entitled to attorney fees under Section 502(g)(1) when she persuades a district court that a violation of ERISA has occurred, successfully secures a judicially ordered remand requiring a re-determination of her entitlement to benefits and she subsequently receives the benefits sought on remand.

Of note, prior to the Supreme Court's decision in *Hardt*, the majority of circuits imposed a prevailing party requirement on litigants seeking fees under ERISA. Even the Supreme Court stated in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 89 n.14 (1982), that in an ERISA action, "attorney's fees are normally awarded only to prevailing parties...." *Id.* However, the issue of the standard for an award of fees was not squarely before the Court in that case. Also, unlike the fee statutes at issue in *Buckhannon* and numerous other federal fee-shifting statutes, the words "prevailing party" do not appear in Section 502(g)(1) of the ERISA statute.

In an opinion written by Justice Thomas, the Court held that a party seeking attorney fees under ERISA does not need to be a "prevailing party." Instead, adopting the reasoning of *Ruckelshaus v. Sierra Club* 463 U.S. 680 (1983), a case involving a claim for fees under the Clean Air Act which likewise does not include "prevailing party language, the Court held that a court may award fees and costs under the statute if the claimant has achieved "some degree of success on the merits."

Turning to the facts of Ms. Hardt's case, the Court concluded that the standard for being eligible for an award of fees was met. The Court based its conclusion on the district court's statements in remanding the claim that the defendant's pre-suit review of the claim failed to comply with ERISA and that there was already "compelling evidence" in the record that Ms. Hardt was disabled as well as the eventual award of benefits during the remand. The Court specifically declined to accept Ms. Hardt's argument that a remand of the claim "without more" makes one eligible for fees. The Court left that question open.

The Supreme Court addressed an additional question related to fee claims under ERISA. Most if not all circuits employ a five factors test to determine whether an eligible party is entitled to an award of fees. The factors considered under this test are: (1) the degree of the opposing party's culpability or bad faith; (2) the ability of the opposing party to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions. The Court concluded that this test does not apply to determine whether a party is *eligible* for fees. Eligibility is based on achieving some level of success on the merits. However, the five factors may still be used to decide whether fees *should* be awarded to a particular party.

Analysis

It is too soon to see the impact of *Hardt* on ERISA attorney fee claims. Perhaps the biggest question left open by the decision is whether a remand alone makes a party eligible for fees. Allowing a party to recover fees solely based on a remand, especially when benefits are not later awarded by the plan or a court, seems improper. A remand alone is a procedural "victory," not generally one based on the merits of the claim. As the Supreme Court stated in *Ruckelshaus*, which formed the basis for the Court's decision in *Hardt*, "[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.'" *Hardt*, 2010 WL 2025127, *3 (quoting *Ruckelshaus*, 463 U.S. at 688, n. 9). An award of fees based solely on a procedural irregularity, even if it leads to a remand, would provide a substantive remedy which circuits have uniformly held is improper for such a procedural violation.

Permitting a court to award fees based solely on a remand would appear to be wrong for additional reasons. Following *Hardt*, claimants who achieve a remand but are unsure of their ultimate success on the claim for benefits may file a motion for attorney's fees even before the remand is decided. A court should not decide the issue of fees on this incomplete record. After all, the ultimate award of benefits to Ms. Hardt was one of the factors that led the Supreme Court to conclude that she achieved some success on the merits.



NO PREVAILING PARTY REQUIREMENT

Awarding fees based only on a remand is also unjust because, with the exception of the Seventh and (sometimes) Ninth Circuits, a party cannot appeal the decision to remand the claim. If a court has remanded a claim based on an incorrect conclusion that there has been a procedural violation, the court is also likely to award fees. While the decision to award fees may be appealed, the decision to award fees is reviewed for abuse of discretion by the appellate court and the cost to appeal may also be prohibitive.

Let us look, for example, at *Hardt*. The district court found a procedural violation because, according to the court, the defendant wrongly rejected Ms. Hardt's complaints of pain. In support of this conclusion, the district court cited to *Hines v. Barnhardt*, 453 F.3d 559 (4th Cir. 2006). This is a Social Security disability decision and while a Social Security disability applicant may rely exclusively on subjective complaints of pain, there is no



equivalent regulation under ERISA. In fact, the same reasoning used by the district court on this point was expressly *rejected* in *Smith v. Cont'l Cas. Co.*, 369 F.3d 412 (4th Cir. 2004), an ERISA case. However, Reliance Standard had no ability to appeal the remand.

Allowing recovery of fees based solely on a remand may also have an adverse impact on claimants. If a party can be liable for fees even when it voluntarily awards benefits based on new evidence, a defendant may have less incentive to approve the claim during the remand, especially when the decision is a close call. This is especially true when the defendant has discretionary authority and its decision will be reviewed for abuse of discretion. Liberal awards of fees to claimants can only lead to increased court involvement and delays in benefit awards to claimants who are entitled to them.

In the end, the decision in *Hardt* left open many questions. In addition to the question of whether fees may be awarded based only on a court's remand, other questions remain. The Seventh Circuit employs a mild presumption in favor of awarding fees to a qualifying claimant. The Ninth Circuit has stated in the past that fees should be awarded to a "prevailing" claimant absent "special circumstances." Do these presumptions survive *Hardt*? Of note, in *Simonia v. Glendale Nissan/Infiniti Disability Plan*, ___ F.3d ___, 2010 U.S. App. LEXIS 13015 (9th Cir. Cal. June 24, 2010), the Ninth Circuit's first decision to discuss *Hardt*, the court upheld the denial of fees to the claimant who, although she lost the benefit claim, she still prevailed on the defendant's claim of an overpayment. The court did not even mention the "special circumstances" test but concluded that fees should not be awarded under the five factors test.

Hardt will likely be the precursor to a more thorough discussion on the issue of fees under ERISA by the Supreme Court. Just like the narrow decision on ERISA subrogation in *Knudson* led the Court to accept review in *Sereboff* just a few years later to elaborate on its earlier decision, the Court's narrow decision in *Hardt* may require further discussion by the Court at a later date.

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