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# **HARDT V. RELIANCE STANDARD LIFE INSURANCE COMPANY: ATTORNEY’S FEE AWARDS UNDER ERISA AND THE “SOME DEGREE OF SUCCESS” STANDARD**

MATTHEW D. GIMOVSKY\*

## INTRODUCTION

In *Hardt v. Reliance Standard Life Insurance Co.*,<sup>1</sup> the United States Supreme Court considered whether Section 1132(g)(1) of the Employee Retirement Income Security Act of 1974 (“ERISA”)<sup>2</sup> limits the availability of attorney’s fees to prevailing parties.<sup>3</sup> Reviewing the plain text of the statute, the Court held that a moving party need only show “some degree of success on the merits” to be eligible for a fee award and that Section 1132(g)(1) does not make prevailing party status a prerequisite for such an award.<sup>4</sup> In so holding, the Court correctly followed its precedent concerning statutory deviations from the American Rule of attorney’s fees<sup>5</sup> while concurrently resolving a disagreement between the United States Courts of Appeals.<sup>6</sup> The Court failed, however, to address the question of whether a remand order qualifies as “some degree of success on the merits” under its new standard and thereby fettered the important victory that it had just crafted for ERISA plaintiffs.<sup>7</sup> If the Court had found that a remand order constitutes “some degree of success on the merits,” it could have clarified

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1. 130 S. Ct. 2149 (2010).

2. 29 U.S.C. §§ 1001–1461 (2006).

3. *Hardt*, 130 S. Ct. at 2152.

4. *Id.* at 2156–58.

5. See *infra* Part IV.A.

6. See *infra* Part IV.A.

7. See *infra* Part IV.B.1.

how the lower courts should treat remand orders, which are an important judicially-created ERISA remedy, without the delay necessary for a representative case to be fully litigated.<sup>8</sup>

### I. THE CASE

Dan River, Inc., a textile manufacturing company, provides Group Long-Term Disability Insurance (“the Plan”) to its employees.<sup>9</sup> Although Dan River offers the insurance to its employees, Reliance Standard Life Insurance Company (“Reliance”) determines whether employees are entitled to benefits under the Plan and pays any claims made by employees against the Plan.<sup>10</sup> In 2000, Bridget Hardt, an employee at Dan River, began experiencing pain “in her neck and shoulders” and, after consultation with her physicians, was diagnosed with carpal tunnel syndrome.<sup>11</sup> Surgery was unable to remedy her complaints, and, on January 23, 2003, Ms. Hardt stopped working.<sup>12</sup> Several months later, Ms. Hardt petitioned Reliance for the payment of long-term disability benefits under the Plan.<sup>13</sup>

In response to the claim, Reliance provisionally approved an award of benefits to Ms. Hardt pending the outcome of a functional capacities evaluation (“FCE”).<sup>14</sup> Although the FCE demonstrated that Ms. Hardt “suffered from major limitations in moving her neck, upper extremity pain, decreased right hand dexterity and strength, restricted overhead reach, a restricted ability to squat and kneel . . . [and] decreased lift, carrying, and push and pull capabilities,”<sup>15</sup> Reliance denied an award of benefits based on its finding that Ms. Hardt was able to perform minor amounts of sedentary work.<sup>16</sup> Ms. Hardt appealed the denial of benefits, and Reliance responded

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8. See *infra* Part IV.B.2.

9. *Hardt v. Reliance Standard Life Ins. Co.*, 540 F. Supp. 2d 656, 657 (E.D. Va. 2008), *rev'd*, 336 F. App'x 332 (4th Cir. 2009), *rev'd*, 130 S. Ct. 2149 (2010).

10. *Id.*

11. *Id.* See generally *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184, 199 (2002) (“[C]ases of severe carpal tunnel syndrome are characterized by muscle atrophy and extreme sensory deficits [and] mild cases generally. . . create only intermittent symptoms of numbness and tingling.”).

12. *Hardt*, 540 F. Supp. 2d at 657.

13. *Id.* In her request, Ms. Hardt explained that she “suffered from numbness, tingling, loss of feeling, and extreme pain in her arms, hands, shoulders, and neck.” *Id.*

14. *Id.*

15. *Id.*

16. *Id.* Hand Rehabilitation of Hampton Roads administered the FCE on behalf of Reliance and provided an evaluation of the results. *Id.* The evaluator found that Ms. Hardt “could perform a sedentary level of work and lift 4 to 5 pounds on occasion with her right hand, and 2 to 3 pounds on a frequent basis.” *Id.* Reliance grounded its denial of benefits on those findings, but reversed itself “based on Ms. Hardt’s inability to perform her current position.” *Id.* at 658.

by offering her benefits for a twenty-four month period.<sup>17</sup> In the months following the temporary award, Ms. Hardt's health worsened, resulting in a diagnosis of small-fiber neuropathy—a condition evidenced by loss of temperate sensation and burning pain.<sup>18</sup> While Ms. Hardt underwent treatment for neuropathy, she applied for disability benefits from the Social Security Administration.<sup>19</sup> To support her claim, Ms. Hardt submitted questionnaires from her treating physicians that concluded that her physical condition would neither allow her to return to her former position with Dan River, nor would it enable her to attain any other sedentary employment.<sup>20</sup> The Social Security Administration concluded that Ms. Hardt was "disabled" under the terms of the Social Security Act for the same reasons provided by her treating physicians.<sup>21</sup>

Shortly after Ms. Hardt began receiving Social Security benefits, Reliance informed her that it would discontinue its contributions after the initial twenty-four month period because, under the terms of the Plan, further benefits could not accrue unless she was totally disabled from all occupations.<sup>22</sup> Reliance determined that Ms. Hardt was not totally disabled, in part due to negative magnetic resonance image ("MRI")<sup>23</sup> and electromyogram examinations,<sup>24</sup> and in part due to the report of a Reliance-hired physician who concluded that Ms. Hardt's prognosis was either "excellent or fair to good."<sup>25</sup> In the report he provided to Reliance, Dr. Leibowitz failed to consider the questionnaires used by Hardt in her application to Social Security, as well as other pertinent evidence produced by Hardt's treating physicians.<sup>26</sup> After following the appellate procedures prescribed by the Plan, Ms. Hardt filed suit in the United States District Court for the Eastern District of Virginia, alleging that Reliance's wrongful denial of long-term disability benefits constituted a violation of ERISA.<sup>27</sup>

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17. *Id.* at 657–58.

18. *Id.* at 658 & n.1.

19. *Id.*

20. *Id.*

21. *Id.* at 659. The Social Security Administration determined that "it was impossible for her to return to her former employment or make an adjustment to perform other work." *Id.*

22. *Id.*

23. *Id.* See generally Jennifer Kulynych, Note, *Psychiatric Neuroimaging Evidence: A High-Tech Crystal Ball?*, 49 STAN. L. REV. 1249, 1255 (1997) ("In MRI, grayscale images are constructed from the electromagnetic signals that are emitted by the proton nuclei of hydrogen atoms, which are found predominantly in tissue water.").

24. *Hardt*, 540 F. Supp. 2d at 659. See generally Andrew B. Lustigman, Comment, *A New Look at Thermography's Place in the Courtroom: A Reconciliation of the Conflicting Evidentiary Rules*, 40 AM. U. L. REV. 419, 428 (1990) ("Electromyography provides a continuous recording of the electrical activity of a muscle measured by electrodes inserted into the muscle fibers.").

25. *Hardt*, 540 F. Supp. 2d at 659.

26. *Id.* at 659–60.

27. *Id.* at 660.

Because Reliance failed to consider all of the available evidence before it concluded that Ms. Hardt was not completely disabled within the terms of the Plan, the district court found that Reliance violated ERISA.<sup>28</sup> The district court remanded the case to Reliance with instructions that it undertake a comprehensive review of the record,<sup>29</sup> cautioning that failure to do so within thirty days would result in the granting of a favorable judgment to Ms. Hardt.<sup>30</sup> Reliance followed the district court's mandate, and shortly thereafter, Ms. Hardt filed a motion in the district court for attorney's fees "based upon her status as the prevailing party."<sup>31</sup> The district court granted the motion because its remand order had "sanctioned a material change in the legal relationship of the parties by ordering [Reliance] to conduct the type of review to which [Hardt] was entitled."<sup>32</sup> On appeal to the United States Court of Appeals for the Fourth Circuit, Reliance challenged the award of attorney's fees to Ms. Hardt.<sup>33</sup> In vacating the award, the Fourth Circuit held that Hardt had not won an enforceable judgment on the merits and was therefore not eligible to receive attorney's fees under Section 1132(g)(1).<sup>34</sup> The United States Supreme Court granted certiorari to consider whether a fee claimant must be a prevailing party in order to recover attorney's fees under Section 1132(g)(1).<sup>35</sup>

## II. LEGAL BACKGROUND

The so-called American Rule,<sup>36</sup> as developed by the United States Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*,<sup>37</sup> provides that a "prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."<sup>38</sup> Under the American Rule,

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28. *Id.* at 659, 661–63. After itemizing all of the evidence Reliance failed to consider, the district court found that the bases for Dr. Leibowitz's "medical conclusions [were] extremely vague and conclusory." *Id.* at 661. It also found that Reliance "ignored the substantial amount of pain medication Ms. Hardt's treating physicians had prescribed to her" and "failed to consider medical records submitted by Ms. Hardt that demonstrated she was suffering from neuropathy." *Id.* at 663.

29. *Id.* at 664.

30. *Id.*

31. *Hardt v. Reliance Standard Life Ins. Co.*, 336 F. App'x 332, 334 (4th Cir. 2009), *rev'd*, 130 S. Ct. 2149 (2010).

32. *Id.* Because Ms. Hardt "received precisely the benefits she had sought" the court found that she qualified as a "prevailing party" within the meaning of the statute. *Id.*

33. *Id.*

34. *Id.* at 336.

35. *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2155–56 (2010).

36. The American Rule is "[t]he general policy that all litigants, even the prevailing one, must bear their own attorney's fees." BLACK'S LAW DICTIONARY 98 (9th ed. 2009).

37. 421 U.S. 240 (1975).

38. *Id.* at 247.

unless the narrow bad faith exception<sup>39</sup> or the common fund doctrine<sup>40</sup> applies, federal courts may award attorney's fees only in those instances specially identified by statute.<sup>41</sup> Section 1132(g)(1) of ERISA specifically provides federal courts with the authority to award attorney's fees; it states that "[i]n any action under this subchapter . . . 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."<sup>42</sup>

#### *A. The American Rule for the Payment of Attorney's Fees*

The Supreme Court first announced what has become known as the American Rule in the 1796 case *Arcambel v. Wiseman*.<sup>43</sup> In that case, the victorious plaintiff argued that attorney's fees should be recoverable as damages.<sup>44</sup> The Court disagreed and overturned the award of attorney's fees, noting that "[t]he general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute."<sup>45</sup>

Today, the "basic point of reference"<sup>46</sup> and "general rule"<sup>47</sup> employed by courts considering attorney's fee awards is the American Rule,<sup>48</sup> which

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39. See, e.g., *Chambers v. Nasco, Inc.*, 501 U.S. 32, 45–46 (1991) (recognizing that it is within a court's discretion to determine "[t]he degree of punishment for contempt" and allowing the court to levy as part of the punishment attorney's fees amounting to the entire cost of the litigation) (quoting *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 428 (1923)); *Vaughn v. Atkinson*, 369 U.S. 527, 530–31 (1962) (awarding attorney's fees where the "callous . . . attitude" of the respondents caused the libellant "to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old").

40. See, e.g., *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 125–27 (1885) (finding that the award of attorney's fees is appropriate where the litigation establishes a common fund for restitution and the award was granted to members of a class, and not to petitioners individually); *Trustees v. Greenough*, 105 U.S. 527, 537 (1881) (upholding attorney's fees where the purpose of litigation was "reclaiming and rescuing [a] trust fund").

41. See *Evans v. Jeff D.*, 475 U.S. 717, 748 (1986) (noting that "only Congress [can] authorize awarding fees").

42. 29 U.S.C. § 1132(g)(1) (2006).

43. 3 U.S. (3 Dall.) 306 (1796); see also *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717–18 (1967) (noting that the Court first announced the American Rule in *Arcambel* and explaining its rationale).

44. *Arcambel*, 3 U.S. at 306; see also *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851) (recognizing "that damages, assessed by way of example, may . . . indirectly compensate the plaintiff for money expended in counsel-fees; but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction").

45. *Arcambel*, 3 U.S. at 306.

46. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 (1983).

47. *Perdue v. Kenny A.*, 130 S. Ct. 1662, 1671 (2010).

48. *Ruckelshaus*, 463 U.S. at 683.

posits that “each party must pay its own attorney’s fees and expenses,”<sup>49</sup> except where Congress has explicitly provided otherwise via statute.<sup>50</sup> Because the outcome of litigation cannot be predetermined, the American Rule prevents litigants from being penalized for pursuing colorable, though ultimately losing claims, and mitigates the impact that a lack of individual financial means might otherwise have on the role of adjudication.<sup>51</sup>

### *1. The American Rule Permits Statutory Deviations and Narrowly Construed Exceptions*

Although the federal judiciary has recognized exceptions to the American Rule and awarded attorney’s fees to a prevailing party where an “opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons,”<sup>52</sup> statutes and private agreements provide the two primary avenues by which courts award attorney’s fees.<sup>53</sup>

49. *Perdue*, 130 S. Ct. at 1671.

50. *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 126 (1974) (“The so-called ‘American Rule’ governing the award of attorneys’ fees in litigation in the federal courts is that attorneys’ fees ‘are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.’”) (quoting *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967)); *Flanders v. Tweed*, 82 U.S. (15 Wall.) 450, 452–53 (1872) (“Attorneys, solicitors, and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed or recovered as cost against the opposite party . . .”). For an in-depth discussion of the common law antecedents to the American Rule, see generally Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849 (1929).

51. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967); *see also Farmer v. Arabian Am. Oil. Co.*, 379 U.S. 227, 237 (1964) (Goldberg, J., concurring) (“It has not been [an] accident that the American litigant must bear his own cost of counsel and other trial expense save for minimal court costs, but a deliberate choice to ensure that access to the courts be not effectively denied those of moderate means.”) (internal citations omitted). The American Rule is further supported by the fear that the time and expense inherent in determining a fair attorney’s fee is a drain on judicial resources. *See Oelrichs v. Spain*, 82 U.S. (15 Wall.) 211, 231 (1872) (noting that it might be necessary to engage other court personnel in determining what a reasonable attorney’s fee is and that this “litigation might possibly be more animated and protracted than that in the original cause”).

52. *F.D. Rich Co.*, 417 U.S. at 129; *see also McEnteggart v. Cataldo*, 451 F.2d 1109, 1112 (1st Cir. 1971) (upholding an award of attorney’s fees where the “plaintiff was forced to go to court [by the defendant] to obtain the statement of reasons to which he was constitutionally entitled”); *Bell v. Sch. Bd. of Powhatan Cnty., Va.*, 321 F.2d 494, 500 (4th Cir. 1963) (finding that an award of attorney’s fees was appropriate given the defendants “long continued pattern of evasion and obstruction”). The American Rule also contains an exception for the creation of common funds, where litigation “creates or traces a ‘common fund,’ the economic benefit of which is shared by all members of the class.” *Hall v. Cole*, 412 U.S. 1, 5 n.7 (1973).

53. *Trytek v. Gale Indus., Inc.*, 3 So.3d 1194, 1198 (Fla. 2009). Maryland follows the American Rule such that a prevailing party is not able to recover fees “unless (1) the parties to a contract have an agreement to that effect, (2) there is a statute that allows the imposition of such fees, (3) the wrongful conduct of a defendant forces a plaintiff into litigation with a third party, or (4) a plaintiff is forced to defend against a malicious prosecution.” *Nova Research, Inc., v. Penske Truck Leasing Co.*, 952 A.2d 275, 281 (Md. 2008) (citations omitted).

Federal courts are not empowered to award attorney's fees as part of the costs of litigation except where expressly provided the right to do so by statute.<sup>54</sup> The United States Supreme Court solidified this rule in *Alyeska Pipeline Service Co., v. Wilderness Society*.<sup>55</sup> In *Alyeska*, the Wilderness Society, as plaintiff, sought to enjoin the Secretary of the Interior from issuing the necessary permits that would allow the Alyeska Pipeline Service Company to construct a trans-Alaskan oil pipeline on the grounds that the proposed pipeline failed to comply with the National Environmental Policy Act of 1969 and Section 28 of the Mineral Leasing Act of 1920.<sup>56</sup>

Although the Wilderness Society lost on the merits, the Court of Appeals for the District of Columbia Circuit found that the Society could recover attorney's fees.<sup>57</sup> The Supreme Court reversed, making three critical findings.<sup>58</sup> First, the Court reaffirmed the American Rule, stating that "[i]n the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."<sup>59</sup> Second, the Court recognized that Congress had not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted."<sup>60</sup> Third, the Court noted that "Congress has made specific provision for attorneys' fees under certain federal statutes[.]"<sup>61</sup> By denying fee-shifting to a losing party, the *Alyeska* Court, through its findings, demonstrated the effect a loss on the merits of a case has on the propriety of attorney's fee awards. In addition, the *Alyeska* Court narrowed the scope of judicial analysis given to fee awards. The Court instructed that the lower courts must consider the authority given by Congress to the judiciary to make awards, review the express language of

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54. See, e.g., *Key Tronic Corp., v. United States*, 511 U.S. 809, 814 (1994) ("Our cases establish that attorney's fees generally are not a recoverable cost of litigation 'absent explicit congressional authorization.'" (quoting *Runyon v. McCrary*, 427 U.S. 160, 185 (1976)); *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 561-62 (1986) ("[T]here are exceptions to [the American Rule], the major one being congressional authorization for the courts to require one party to award attorney's fees to the other."); *In re Joslyn*, 224 F.2d 223, 225 (7th Cir. 1955) (finding that attorney's fees may be awarded "only as specifically provided by the [Bankruptcy] Act").

55. 421 U.S. 240 (1975).

56. *Id.* at 242-43.

57. *Id.* at 245. The D.C. Circuit found that Alyeska could be liable for the award of attorney's fees because plaintiffs litigation "had ensured that the governmental system functioned properly; and were entitled to attorneys' fees lest the great cost of litigation of this kind, particularly against well-financed defendants such as Alyeska." *Id.* at 245-46.

58. *Id.* at 241.

59. *Id.* at 247.

60. *Id.* at 260.

61. *Id.* at 254-55.



the statute in question, and require something more than a loss on the merits before granting a motion for attorney's fees.<sup>62</sup>

2. Ruckelshaus, *Some Degree of Success on the Merits, and the Role of the American Rule*

Statutes providing the courts with authority to award attorney's fees take many different forms. Certain statutes allow for fee awards to the "prevailing party"<sup>63</sup> while others sanction attorney's fees when a party "substantially" prevails.<sup>64</sup> The term "prevailing party" is not a modern term of art introduced by the legislature to govern contemporary fee-shifting provisions.<sup>65</sup> Rather, it has been part of the United States Code since the enactment of the Bankruptcy Act of 1876.<sup>66</sup> The term commonly refers to "a judicial finding of liability."<sup>67</sup> When defining "prevailing party" under 42 U.S.C. § 1988, the commonly used attorney's fee provision for civil right claims brought under 42 U.S.C. § 1983, the United States Supreme Court has found that "any significant issue in litigation which achieve[s] some of the benefit the parties sought in bringing suit"<sup>68</sup> merits a fee award.<sup>69</sup> While the majority of fee-shifting statutes contain prevailing party

62. Attorney's fees were not specifically allowed under either the National Environmental Policy Act of 1969 or the Mineral Leasing Act of 1920. *See id.* at 245 (noting that the Court of Appeals considered other exceptions to the American Rule because there was no statutory authorization for an award of attorney's fees).

63. *See, e.g.*, Fair Housing Amendments Act, 42 U.S.C. § 3613(c)(2) (2006) ("[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs."); Americans With Disabilities Act, 42 U.S.C. § 12205 (2006) ("[T]he court . . . in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . and costs."). Prevailing party generally means "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded." BLACK'S LAW DICTIONARY 1232 (9th ed. 2009).

64. *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552(E)(i) (2006 & Supp. 2007) (authorizing attorney's fees where the "complainant has substantially prevailed"). The Code defines the "substantially prevailed" standard as follows: "[f]or purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—(I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position . . ." *Id.* §§ 552(E)(ii)(I)–(II).

65. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 610 (2001) (Scalia, J., concurring). In the words of Justice Scalia, the term [prevailing party] "is not some newfangled legal term invented for use in late-20th-century fee-shifting statutes." *Id.*

66. *Id.* at 611.

67. *Id.* at 614.

68. *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791–92 (1989) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278–79 (1978)); *see also* *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) ("Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail.").

69. *Tex. State Teachers Ass'n*, 489 U.S. at 791–92.

language,<sup>70</sup> where statutes do not expressly refer to a prevailing party, courts rely on a separate doctrine.<sup>71</sup>

In *Ruckelshaus v. Sierra Club*<sup>72</sup> the Supreme Court provided guidance on how to decide cases arising under statutes that deviate from the American Rule, but that do not explicitly make fee awards available only to prevailing parties.<sup>73</sup> The unsuccessful plaintiffs in *Ruckelshaus* (the Sierra Club) moved for attorney's fees under Section 307(f) of the Clean Air Act,<sup>74</sup> which permits the award "whenever [the court] determines that such an award is appropriate."<sup>75</sup> The United States Supreme Court granted certiorari to consider whether it was appropriate "within the meaning of Section 307(f) of the Clean Air Act, to award attorney's fees to a party that achieved no success on the merits of its claims."<sup>76</sup>

At the time the case was decided, a majority of the 150 federal statutes providing for the recovery of attorney's fees required some degree of success on the merits before a claimant could succeed in fee-shifting.<sup>77</sup> While statutes varied in their use of "prevailing party" or "substantially" prevailing party language, the rule mandated that a party must achieve some litigation success in order for fee shifting to be appropriate.<sup>78</sup> Based on the evidence before it, the *Ruckelshaus* Court found that it was inappropriate to award attorney's fees to a losing plaintiff.<sup>79</sup> Instead, the Court held that "the term 'appropriate' modifies but does not completely reject the traditional rule that a fee claimant must 'prevail' before it may recover attorney's fees."<sup>80</sup> Under *Ruckelshaus*, where the Court found that it is not clear that "Congress meant to abandon historic fee-shifting principles and intuitive notions of fairness" in a fee-shifting statute,<sup>81</sup> plaintiffs seeking attorney's

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70. See, e.g., *Sole v. Wyner*, 551 U.S. 74, 77 (2007) (reviewing a petition for attorney's fees under 42 U.S.C. § 1988); *Farrar v. Hobby*, 506 U.S. 103, 109 (1992) (ruling on attorney's fees under the Civil Rights Attorney's Fees Awards Act); see also *Marek v. Chesny*, 473 U.S. 1, 43–51 (1985) (Brennan J., dissenting) (listing statutes that contain fee-shifting provisions in an appendix to Justice Brennan's opinion); *Coulter v. Tennessee*, 805 F.2d 146, 152–55 (6th Cir. 1986) (listing federal statutes that authorize the award of attorney fees).

71. See *infra* text accompanying notes 73–84.

72. 463 U.S. 680 (1983).

73. *Id.* at 682–83.

74. Clean Air Act, 42 U.S.C. §§ 7401–7671q (2006).

75. *Ruckelshaus*, 463 U.S. at 681–82. In its decision, the Court noted that sixteen federal statutes use identical language in allowing the recovery of attorney's fees, *id.* at 682 n.1, and over 150 federal statutes provide for an award of attorney's fees where some degree of success on the merits was achieved. *Id.* at 684.

76. *Id.* at 682.

77. *Id.* at 684.

78. *Id.*

79. *Id.* at 686.

80. *Id.*

81. *Id.*

fees must win something greater than “trivial success on the merits, or [a] purely procedural victor[y.]”<sup>82</sup> Where a statute authorizes attorney’s fees, but does not expressly limit their authorization to “prevailing parties,” a party must show “some degree of success on the merits” to prevail on a motion for a fee award.<sup>83</sup> ERISA is a prime example of a statute that falls under the rubric created by the Court in *Ruckelshaus v. Sierra Club*, and the application of its principles ultimately played a vital role in Ms. Hardt’s successful attempt to enforce her legal rights.

*B. ERISA Was Designed to Protect Pension Plan Beneficiaries and Courts Have Looked to Congressional Intent to Evaluate the Statute’s Protection Scheme and the Role Attorney’s Fees Play Under the Statute*

The Employee Retirement Income Security Act of 1974 was created to protect “the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.”<sup>84</sup> By enacting ERISA, Congress created a far-reaching piece of legislation that includes broad enforcement procedures aimed towards safeguarding the value that employees accrue in their retirement plans.<sup>85</sup>

Rapid growth in the value of pension plans and minimal existing regulation spurred Congress into enacting ERISA.<sup>86</sup> In its Report on the bill, the House Committee on Education and Labor, concluded that:

[T]he legislative approach of establishing minimum standards and safeguards for private pensions is not only consistent with retention of the freedom of decision-making vital to pension plans, but in furtherance of the growth and development of the private pension system. At the same time, the Committee recognizes the absolute need that safeguards for plan participants be sufficiently adequate and effective to prevent the numerous inequities to workers under plans which have resulted in tragic hardship in so many.<sup>87</sup>

ERISA lays out a framework of “standards and safeguards” designed to mediate and “prevent the numerous inequities” that Congress found prevalent in existing private pension plans, including the inadequate vesting

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82. *Id.* at 688 n.9.

83. *Id.* at 694.

84. 29 U.S.C. § 1001(b) (2006).

85. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985)); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (quoting *Shaw v. Delta Airlines, Inc.* 463 U.S. 85, 90 (1983)).

86. H. REP. NO. 93-533, at 3–4 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4641.

87. *Id.*

of pension funds, the loss of benefits due to plan termination, and the misuse of pension funds.<sup>88</sup> ERISA also creates an overlapping enforcement system, which includes a private right of action for plan beneficiaries,<sup>89</sup> the creation of fiduciary obligations for plan administrators,<sup>90</sup> and the availability of criminal sanctions.<sup>91</sup>

At its heart, ERISA recognizes that it is vital to protect the ever-increasing population of employees and retirees by safeguarding their pension plans.<sup>92</sup> In the words of the Second Circuit, “private actions by beneficiaries seeking in good faith to secure their rights under employee benefits plans are important mechanisms for furthering ERISA’s remedial purpose.”<sup>93</sup> In *Meredith v. Navistar International Transportation Corp.*,<sup>94</sup> the Seventh Circuit reiterated that ERISA’s central goal is “to protect beneficiaries of pension plans.”<sup>95</sup> The *Meredith* court added that “[a]dherence to this [remedial] policy often counsels against charging fees against ERISA beneficiaries since private actions by beneficiaries seeking in good faith to secure their rights under employee benefit plans are important mechanisms for furthering ERISA’s remedial purpose.”<sup>96</sup>

### *1. The Power to Award Attorney’s Fees and Private Enforcement Under ERISA*

A critical part of ERISA’s comprehensive remedial scheme is its private right of action, which allows a plan participant or beneficiary to

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88. *Id.*; S. REP. NO. 93-383, at 3–4 (1973), reprinted in 1974 U.S.C.C.A.N. 4890, 4892–93. The House Committee on Education and Labor further notes that “[u]nderlying the provisions of this Act is a recognition of the necessity for a comprehensive legislative program dealing not only with malfeasance and maladministration in the plans, or the consequences of lack of adequate vesting, but also with the broad spectrum of questions such as adequacy of funding, plant shut downs and plan terminations, adequate communication to participants, and, in short, the establishment of certain minimum standards to which all private pension plans must conform if the private pension promise is to become real rather than illusory.” H.R. REP. NO. 93-533, at 9, reprinted in 1974 U.S.C.C.A.N. 4639, 4647–48.

89. 29 U.S.C. § 1132(a)(1)(B) (2006). The statute also creates civil liability under § 1109 where fiduciary obligations are not met. *Id.* § 1132(a)(2).

90. *Id.* § 1104(a). The fiduciary, among other things, must discharge his or her duties “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” *Id.* § 1104(a)(1)(B).

91. *Id.* § 1131. This Section imposes penalties, including up to 10 years imprisonment for the violation of reporting and disclosure duties and for the making of false statements and representations. *Id.*

92. *Id.* § 1001a(a)(3).

93. *Salovaara v. Eckert*, 222 F.3d 19, 28 (2d Cir. 2000).

94. 935 F.2d 124 (7th Cir. 1991).

95. *Id.* at 129.

96. *Id.* (quoting *Nachwalter v. Christie*, 805 F.2d 956, 962 (11th Cir. 1986)).

bring a “civil action . . . to recover benefits due to him under the terms of his plan [or] to enforce his rights under the terms of the plan[.]”<sup>97</sup> This language places a valuable, albeit expensive, tool in the litigant’s hands, and, highlighting the need for a fee-shifting provision, the Seventh Circuit noted that while “Congress wants even small violations of certain laws to be checked through private litigation . . . , [it] is expensive.”<sup>98</sup> Due to the high cost of bringing suit, the expense of pursuing a claim can surpass the amount in controversy, complicating the vindication of plan participants’ rights.<sup>99</sup> However, to minimize the burden on plaintiffs and to catalyze enforcement procedures, Congress permits fee-shifting in ERISA actions—which empowers litigants to move the court for an award of its attorney’s fees payable by the opposing party.<sup>100</sup>

The Seventh Circuit, in *Anderson v. AB Painting & Sandblasting*,<sup>101</sup> has reasoned that “[f]ee-shifting provisions signal Congress’ intent that violations of particular laws be punished, and not just large violations that would already be checked through the incentives of the American Rule.”<sup>102</sup> The *Anderson* court added that “[t]he function of an award of attorney’s fees is to encourage the bringing of meritorious . . . claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel.”<sup>103</sup> As the Eleventh Circuit warned in *National Cos. Health Benefit Plan v. St. Joseph’s Hospital of Atlanta, Inc.*,<sup>104</sup> “[w]ith nothing to lose but their own litigation costs, other ERISA-plan sponsors might find it worthwhile to force underfinanced beneficiaries to sue them to gain their benefits or accept undervalued settlements.”<sup>105</sup> Congress included a fee-shifting provision within ERISA to encourage private enforcement litigation. Although ERISA’s remedial purposes are facilitated by fee-shifting, the United States Courts of Appeals disagree on what showing is sufficient to shift attorney’s fees in an ERISA action.

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97. 29 U.S.C. § 1132(a)(1)(B).

98. *Anderson v. AB Painting & Sandblasting Inc.*, 578 F.3d 542, 545 (7th Cir. 2009).

99. *See, e.g., Tuf Racing Prods., Inc. v. Am. Suzuki Motor Corp.*, 223 F.3d 585, 592 (7th Cir. 2000) (recognizing the fact that an award of attorney’s fees in excess of damages is not decisive because “one purpose of fee shifting is to enable such claims to be litigated, and the purpose would be thwarted by capping the attorneys’ fees award at the level of the damages award”).

100. Brief for Am. Ass’n of Retired Pers. & Nat’l Emp’t Lawyers Ass’n as Amici Curiae Supporting Petitioner at 7, *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149 (2010) (No. 09-448).

101. 578 F.3d 542 (7th Cir. 2009).

102. *Id.* at 545.

103. *Id.* (quoting *City of Riverside v. Rivera*, 477 U.S. 561, 578 (1986)).

104. 929 F.2d 1558 (11th Cir. 1991).

105. *Id.* at 1575; *see also Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 692, 698 (7th Cir. 1991) (finding that attorney’s fees were appropriate where defendants had been “stubborn” in resisting what was not “a close case”).

2. *ERISA Fee-Shifting and the Prevailing Party Requirement Divide the Federal Circuits*

The Court in *Hardt* granted certiorari in order to consider two questions.<sup>106</sup> First, the Court asked whether the Fourth Circuit was correct in concluding that Section 1132(g)(1) applies only to prevailing parties.<sup>107</sup> Second, the Court inquired into the “circumstances” where a litigant would be entitled to a fee award.<sup>108</sup> Although secondary to the Court’s direct concern in judging these questions, it also noted that “[t]he Courts of Appeals are divided” as to the first question.<sup>109</sup> To explore the extent of the disagreement between the federal circuits regarding a prevailing party requirement, cases from the First, Third, Fourth, Fifth, Seventh, Ninth, and D.C. Circuits will be examined in further detail.

It is well settled in the Fourth Circuit that only a prevailing party is entitled to consideration for attorney’s fees in an ERISA action.<sup>110</sup> For example, in *Martin v. Blue Cross & Blue Shield of Virginia, Inc.*,<sup>111</sup> the Fourth Circuit, ruling on a denial of benefits claim, found that ERISA contains an implied prevailing party requirement.<sup>112</sup> Before reversing the district court’s award of attorney’s fees, the *Martin* court undertook a searching analysis of the protocol followed by other Federal Courts of Appeals when ruling on motions for attorney’s fees under Section 1132(g)(1).<sup>113</sup> Based on its review, the *Martin* court concluded that its “sister circuits have imposed a ‘prevailing party’ limitation on the availability of attorneys’ fees” under ERISA.<sup>114</sup> However, the Fifth Circuit Court of Appeals, in *Gibbs v. Gibbs*,<sup>115</sup> explained that the *Martin* court’s assessment may not be entirely correct. The Fifth Circuit observed that,

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106. *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2155–56 (2010).

107. *Id.* at 2155.

108. *Id.* at 2155–56.

109. *Id.* at 2155 n.2. In the same footnote, the Court remarked that “[s]ome [circuits] agree with the Court of Appeals’ conclusion here that only prevailing parties are entitled to fees under §1132(g)(1) . . . [while o]ther Courts of Appeals have rejected or disavowed that position.” *Id.*

110. See, e.g., *Martin v. Blue Cross & Blue Shield of Va. Inc.*, 115 F.3d 1201, 1210 (4th Cir. 1997) (“We have also suggested, without explicitly holding, that only prevailing parties are entitled to be considered for an award of attorneys’ fees under ERISA.”); *Freeman v. Cent. States, Se. & Sw. Areas Pension Fund*, 32 F.3d 90, 94 (4th Cir. 1994) (simultaneously reversing a judgment in favor of plaintiff and an award of attorney’s fees); *Elmore v. Cone Mills Corp.*, 23 F.3d 855, 863 n.8 (4th Cir. 1994) (explaining that “reversal of the prior judgment also requires that we vacate the award of attorneys’ fees to Plaintiffs”); *Custer v. Pan Am. Life Ins. Co.*, 12 F.3d 410, 423 (4th Cir. 1993) (holding that a plaintiff “must demonstrate more than merely being the prevailing party on a single issue to demand entitlement to attorney’s fees”).

111. 115 F.3d 1201 (4th Cir. 1997).

112. *Id.* at 1210.

113. *Id.*

114. *Id.*

115. 210 F.3d 491 (5th Cir. 2000).

while several circuits find prevailing party status to be a sufficient basis for awarding attorney's fees, prevailing party status is not always a prerequisite for such an award.<sup>116</sup> Specifically, the *Gibbs* court noted that "many of the circuits, while stating that awards of attorneys' fees are appropriate for prevailing parties in ERISA actions, do not in so stating, foreclose the ability of non-prevailing parties to obtain an award of fees."<sup>117</sup>

*i. The Court of Appeals for the First Circuit*

To support its claim that other circuits have found that prevailing party status is a prerequisite for an award of attorney's fees, the *Martin* court cites *Cottrill v. Sparrow, Johnson & Ursillo, Inc.*,<sup>118</sup> a First Circuit case that declares that fee awards are determined by employing a five factor test. The relevant factors include:

(1) the degree of culpability or bad faith attributable to the losing party; (2) the depth of the losing party's pocket, i.e., his or her capacity to pay an award; (3) the extent (if at all) to which such an award would deter other persons acting under similar circumstances; (4) the benefit (if any) that the successful suit confers on plan participants or beneficiaries generally; and (5) the relative merit of the parties' positions.<sup>119</sup>

*Cottrill* is the only First Circuit case cited by the *Martin* court in support of its position. By contrast, however, other First Circuit precedent holds that attorney's fees are *normally* available to the prevailing party, but are not exclusively available to it.<sup>120</sup> Furthermore, the *Cottrill* decision is not wholly supportive of the *Martin* court's position. Indeed, the First Circuit noted in *Cottrill* that "ERISA does not provide for a virtually automatic award of attorneys' fees to prevailing plaintiffs."<sup>121</sup> Instead, the opinion stressed that fee shifting under ERISA is wholly within the court's discretion.<sup>122</sup> The First Circuit previously explained that the five-factor test employed in *Cottrill* applies with equal force to prevailing plaintiffs and defendants alike.<sup>123</sup> Although *Martin* identifies the test used by the First Circuit in evaluating motions for attorney's fees under Section 1132(g)(1),

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116. *Id.* at 501.

117. *Id.*

118. 100 F.3d 220 (1st Cir. 1996).

119. *Id.* at 225.

120. *Doe v. Travelers Ins. Co.*, 167 F.3d 53, 61 (1st Cir. 1999).

121. *Cottrill*, 100 F.3d at 225.

122. *Id.*

123. *Gray v. New Eng. Tel. & Tel. Co.*, 792 F.2d 251, 258 (1st Cir. 1986).

further cases highlight the power given to the judiciary to award fees to either party at its discretion.

*ii. The Court of Appeals for the Third Circuit*

As evidence of a prevailing party requirement in the Third Circuit, *Martin* points to *McPherson v. Employees' Pension Plan of American Re-Insurance Co.*<sup>124</sup> In *McPherson*, the court recognized that “[a]ttorneys’ fees may be awarded to prevailing parties in actions brought under [ERISA].”<sup>125</sup> A recent case also held that ERISA “provides that fees may be awarded to a prevailing litigant upon a showing, *inter alia*, of culpability or bad faith of the party in violation of the statute.”<sup>126</sup>

While *McPherson* provides a test similar to that used by the First Circuit,<sup>127</sup> the Third Circuit, as stated in *Anthuis v. Colt Industries Operating Corp.*,<sup>128</sup> does not “automatically mandate an award to a prevailing party.”<sup>129</sup> Moreover, in *Ellison v. Shenango Inc. Pension Board*<sup>130</sup> the court made clear that “[w]e do not think a presumption in favor of granting attorney’s fees to prevailing plaintiffs is required or appropriate under [Section 1132(g)(1)].”<sup>131</sup> *Martin* highlights that fee-shifting is appropriate for a prevailing party. However, similar to the case law of the First Circuit, the law in the Third Circuit suggests that prevailing in the litigation is not a necessary element of, but is simply sufficient for, a successful motion for attorney’s fees under ERISA.

*iii. The Court of Appeals for the Fifth Circuit*

*Martin* cites *Boggs v. Boggs*<sup>132</sup> as support for the fact that ERISA contains a prevailing party requirement based on language in that case which indicates that ERISA “allows the court to award ERISA

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124. 33 F.3d 253 (3d Cir. 1994).

125. *Id.* at 254.

126. *Fields v. Thompson Printing Co.*, 363 F.3d 259, 275 (3d Cir. 2004).

127. *McPherson*, 33 F.3d at 254. In the Third Circuit, the factors relevant to attorney’s fee awards are:

(1) the offending parties’ culpability or bad faith; (2) the ability of the offending parties to satisfy an award of attorneys’ fees; (3) the deterrent effect of an award of attorneys’ fees against the offending parties; (4) the benefit conferred on members of the pension plan as a whole; and (5) the relative merits of the parties’ position.

*Id.*

128. 971 F.2d 999 (3d Cir. 1992).

129. *Id.* at 1010.

130. 956 F.2d 1268 (3d Cir. 1992).

131. *Id.* at 1275.

132. 82 F.3d 90 (5th Cir. 1996).



beneficiaries, participants, and fiduciaries reasonable attorney's fees and costs when they are the prevailing party."<sup>133</sup> However, in *Gibbs v. Gibbs*<sup>134</sup> and *Todd v. AIG Life Insurance Co.*<sup>135</sup> the Fifth Circuit repudiates the *Martin* court's conclusion. The *Gibbs* court found that "the greater weight of authority, from outside and within our own circuit, supports the notion that a party need not prevail in order to be eligible for an award of attorneys' fees under §1132(g)(1) of ERISA."<sup>136</sup> Similarly, in *Todd*, the court noted that "ERISA does not use the prevailing party language in its attorneys' fees provision."<sup>137</sup> Instead of directing that fees are automatically awarded upon one party showing that it has prevailed, the *Todd* court presented a two-step analysis for courts to follow when ruling on a motion for attorney's fees.<sup>138</sup> Under *Todd*, the court should first apply the five-factor test to determine if the party is eligible for an award of attorney's fees.<sup>139</sup> Second, it must determine the amount of the fee award by using the loadstar method.<sup>140</sup> Despite "a strong presumption that the court will award costs to the prevailing party,"<sup>141</sup> the case law from the Fifth Circuit suggests that a fee award is available to both parties in an action under Section 1132(g)(1) and is not restricted solely to the prevailing plaintiff.<sup>142</sup>

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133. *Id.* at 94 n.1

134. 210 F.3d 491 (5th Cir. 2000).

135. 47 F.3d 1448 (5th Cir. 1995).

136. *Gibbs*, 210 F.3d at 503.

137. *Todd*, 47 F.3d at 1459 (internal quotations omitted).

138. *Id.*

139. *Id.* The five-factor test varies slightly between circuits, but the test referenced here is the test used in *Iron Workers Local # 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980). Specifically, a court must consider:

(1) the degree of culpability or bad faith on the part of the opposing party; (2) the ability of the opposing party to satisfy any award; (3) the deterrent value of the award to those acting in circumstances similar to the opposing party's; (4) whether the fee requesting party 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.

*Id.*

140. *Todd*, 47 F.3d at 1459. The loadstar method, a commonly used method to calculate the amount of attorney's fees, "is accomplished by multiplying the number of hours expended on the matters at issue in the case by a reasonable hourly rate." *Id.*; see also *Salley v. E.I. DuPont de Nemours & Co.*, 966 F.2d 1011, 1017 (5th Cir. 1992) (describing the calculation of a reasonable fee).

141. *Salley*, 966 F.2d at 1017.

142. See *supra* notes 132–140 and accompanying text.

*iv. The Court of Appeals for the Seventh Circuit*

From the Seventh Circuit, *Martin* cites *Little v. Cox's Supermarkets*,<sup>143</sup> which states "the bottom-line question" when ruling on a fee award—whether "the *losing* party's position [was] substantially justified and taken in good faith."<sup>144</sup> Accordingly, in the Seventh Circuit, *Little* holds that there is a weak presumption that a prevailing party is entitled to a fee award.<sup>145</sup> The Seventh Circuit has also reversed a motion for attorney's fees where it has first reversed its judgment on the merits because the moving party no longer qualifies as prevailing, and on that basis, cannot be eligible for a fee award.<sup>146</sup>

Other Seventh Circuit decisions indicate, however, that the court does not automatically award fees to a prevailing party.<sup>147</sup> Rather, it follows one of two procedures for ruling on a motion for attorney's fees "after [a party] has attained prevailing party status."<sup>148</sup> Either the court must

look[] at the following five factors: 1) the degree of the offending parties' culpability or bad faith; 2) the degree of the ability of the offending parties to satisfy personally an award of attorney's fees; 3) whether or not an award of attorney's fees against the offending parties would deter other persons acting under similar circumstances; 4) the amount of benefit conferred on members of the pension plan as a whole; and 5) the relative merits of the parties' positions<sup>149</sup>

or it must "look[] to whether or not the losing party's position was 'substantially justified.'"<sup>150</sup> The Seventh Circuit has also noted that while a court may be more likely to grant a motion for attorney's fees to a prevailing as opposed to a non-prevailing party, it is not strictly necessary for a party to prevail in order to succeed in fee-shifting under Section 1132(g).<sup>151</sup> The review of cases from the Seventh Circuit suggests that courts enjoy far more discretion when awarding attorney's fees than the Fourth Circuit in *Martin* represents.

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143. 71 F.3d 637 (7th Cir. 1995).

144. *Id.* at 644 (emphasis added).

145. *Id.*

146. *Trustmark Life Ins. Co. v. Univ. of Chi. Hosps.*, 207 F.3d 876, 884 (7th Cir. 2000).

147. *See infra* notes 148–151 and accompanying text.

148. *Quinn v. Blue Cross & Blue Shield Ass'n*, 161 F.3d 472, 478 (7th Cir. 1998).

149. *Id.*

150. *Id.* (quoting *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 830 (7th Cir. 1984)). The court has also found that the "principles that sometimes entitle a party to recover his attorneys' fees limit that entitlement to prevailing parties." *Poteete v. Capital Eng'g Inc.*, 185 F.3d 804, 807–08 (7th Cir. 1999).

151. *Marquardt v. N. Am. Car Corp.*, 652 F.2d 715, 718 n.2 (7th Cir. 1981).

*v. The Court of Appeals for the Ninth Circuit*

*Martin* cites, as support for its position that courts may award attorney's fee to "prevailing parties" only, *Flanagan v. Inland Empire Electrical Workers Pension Plan & Trust*.<sup>152</sup> In *Flanagan*, the Ninth Circuit stated in dictum that the ERISA fee provision "permits an award of fees to a non-prevailing party," but also found that "plaintiffs cannot recover fees under section 1132(g)(1) until they 'succeed on any significant issue in litigation which achieves some of the benefit [they] sought in bringing suit.'"<sup>153</sup> Other Ninth Circuit precedent holds that "[s]uccessful plaintiffs in ERISA suits should ordinarily recover fees unless special circumstances would render such an award unjust."<sup>154</sup> Although *Martin* cites *Flanagan* as an example of a prevailing party requirement,<sup>155</sup> the Ninth Circuit has also held that fee awards under ERISA "do not rely on the prevailing-party doctrine,"<sup>156</sup> and that ERISA does not foreclose the possibility of attorney's fees for non-prevailing parties.<sup>157</sup> Further, the court has also noted "that Congress has permitted an award of fees to a non-prevailing party in ERISA cases."<sup>158</sup> Like its sister circuits before it, the state of the law in the Ninth Circuit is not as one dimensional as its portrait in *Martin* suggests. Rather than conclusively supporting a prevailing party requirement, the Ninth Circuit's case law tracks ERISA's language and allows a fee award to "either party."

*vi. The Court of Appeals for the District of Columbia Circuit*

*Martin* highlights that under *Eddy v. Colonial Life Insurance Co. of America*,<sup>159</sup> the District of Columbia Circuit considers "the *losing* party's culpability or bad faith" and "the *losing* party's ability to satisfy a fee award" when ruling on a motion for attorney's fees under Section 1132(g)(1).<sup>160</sup> Like several of its sister circuits, some D.C. Circuit precedent provides that a prevailing party should win on a motion for attorney's fees absent extenuating factors rendering the award unfair.<sup>161</sup>

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152. 3 F.3d 1246 (9th Cir. 1993).

153. *Id.* at 1253 (quoting *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984)).

154. *Elliot v. Fortis Benefits Ins. Co.*, 337 F.3d 1138, 1148 (9th Cir. 2003).

155. *Martin v. Blue Cross & Blue Shield of Va., Inc.*, 115 F.3d 1201, 1210 (4th Cir. 1997).

156. *Sokol v. Bernstein*, 812 F.2d 559, 561 (9th Cir. 1987).

157. *D'Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379, 1382 (9th Cir. 1990).

158. *Id.* at 1383.

159. 59 F.3d 201 (D.C. Cir. 1995).

160. *Id.* at 206 (emphasis added).

161. See, e.g., *Grand Union Co. v. Food Emp'rs Labor Relations Ass'n*, 808 F.2d 66, 71 (D.C. Cir. 1987) (noting that one of the attorneys' fee award standards applied in the context of civil

Other D.C. Circuit cases however, when ruling on motions for attorney's fees, focus on the financial protection ERISA provides.<sup>162</sup> When statutes that protect economic interests contain a fee-shifting provision, the D.C. Circuit does not apply a presumption in favor of the prevailing party.<sup>163</sup> The D.C. Circuit has moved away from the "presumption that attorneys' fees should be awarded to a prevailing party absent exceptional circumstances,"<sup>164</sup> and instead applies a five-factor test<sup>165</sup> without presuming that attorney's fees are precluded for non-prevailing parties.<sup>166</sup>

The questions presented to the Supreme Court in *Hardt* concerned the Fourth Circuit's interpretation of Section 1132(g)(1). While the Fourth Circuit has imposed a prevailing party requirement onto the plain statutory language, other Federal Courts of Appeals have either disagreed with this reasoning or have agreed with it only in part. The *Hardt* Court does not address the division between the circuits per se, but by grounding its holding in a textual analysis of ERISA, the Court clarifies the ambiguity within the statutory text while also resolving the exact questions presented to it.

### III. THE COURT'S REASONING

In *Hardt v. Reliance Standard Life Insurance Co.*,<sup>167</sup> the United States Supreme Court reversed and remanded the judgment of the Court of Appeals for the Fourth Circuit, holding that there is no express prevailing party requirement for the award of attorney's fees in an action under Section 1132(g)(1) of ERISA.<sup>168</sup> Writing for the majority, Justice Thomas explained that an implied prevailing party requirement was contrary to the

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rights actions calls for awarding them to "prevailing plaintiffs 'unless special circumstances would render such an award unjust'").

162. See, e.g., *Eddy v. Colonial Life Ins. Co. of Am.*, 59 F.3d 201, 205 (distinguishing between attorneys' fee award provisions in civil rights statutes versus those in statutes protecting economic interests).

163. *Id.*

164. *Becker v. Weinberg Grp., Inc.*, 554 F. Supp. 2d 9, 15 (D.D.C. 2008).

165. *Id.* The five-factor test in question comes from the Ninth Circuit case, *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980). The factors are:

(1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties 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.

*Id.*

166. *Becker*, 554 F. Supp. 2d at 15.

167. 130 S. Ct. 2149 (2010).

168. *Id.* at 2152.

plain text of the statute.<sup>169</sup> Justice Thomas further provided that as long as a party has achieved “some degree of success on the merits,”<sup>170</sup> it may move for attorney’s fees under Section 1132(g)(1) because that Section of the statute directly provides for a fee award to “*either* party.”<sup>171</sup>

In reaching this conclusion, Justice Thomas first examined the statutory language at issue.<sup>172</sup> Noting specifically that the Court must “enforce plain and unambiguous statutory language according to [the statute’s] terms,”<sup>173</sup> he made explicit that “[t]he words ‘prevailing party’ do not appear” in Section 1132(g)(1).<sup>174</sup> In direct contrast, Justice Thomas cited Section 1132(g)(2)(D), which states that “only plaintiffs who obtain ‘a judgment in favor of the plan’<sup>175</sup> may seek attorney’s fees[,]” as support for the proposition “that Congress knows how to impose express limits on the availability of attorney’s fees in ERISA cases.”<sup>176</sup> Had Congress wished to provide a prevailing party requirement, it would have done so plainly—as evidenced by the express inclusion of language creating a similar limitation in Section 1132(g)(2)(D).<sup>177</sup> Comparing these Sections allowed the Court to find that “a fee claimant need not be a ‘prevailing party’ to be eligible for an attorney’s fees award under § 1132(g)(1).”<sup>178</sup>

Justice Thomas acknowledged that under the American Rule “[e]ach litigant pays his own attorney’s fees, win or lose”<sup>179</sup> and that the rule is subject to statutory modification.<sup>180</sup> As a result, Justice Thomas interpreted Section 1132(g)(1) in light of the Court’s precedent regarding statutory deviations from the American Rule that do not expressly require prevailing party status.<sup>181</sup> Relying on its decision in *Ruckelshaus v. Sierra Club*,<sup>182</sup> Justice Thomas asked whether “Congress . . . ‘meant to abandon historic

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169. *Id.*

170. *Id.*

171. *Id.* (emphasis added). It remains within the discretion of the court whether to award fees and costs. *Id.*

172. *Id.* at 2156.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *See id.* (suggesting that “[t]he contrast between these two paragraphs makes clear that Congress knows how to impose express limits on the availability of attorney’s fees in ERISA cases”).

178. *Id.*

179. *Id.* at 2157.

180. *Id.*

181. *Id.*

182. 463 U.S. 680 (1983).

fee-shifting principles and intuitive notions of fairness.”<sup>183</sup> Based on that test, the Court found that “a fees claimant must show ‘some degree of success on the merits’” in order to obtain an award of attorney’s fees under § 1132(g)(1)<sup>184</sup> and explained that “[a] claimant does not satisfy [this] requirement by achieving ‘trivial success on the merits’ or by winning a ‘purely procedural victor[y].’”<sup>185</sup> A claimant may, however, satisfy the “some degree of success on the merits” requirement when a court could label the outcome of the litigation a success without a “lengthy inquir[y] into the question whether a party’s success was ‘substantial’ or occurred on a ‘central issue.’”<sup>186</sup>

Referring to the district court’s findings that Reliance failed to meet ERISA’s standards and its statement that it would rule for Ms. Hardt if remand proved to be an insufficient remedy,<sup>187</sup> the Court concluded that “[t]hese facts establish that Hardt has achieved far more than ‘trivial success on the merits’ or a ‘purely procedural victory.’”<sup>188</sup> Finally, the Court recognized that the “District Court properly exercised its discretion to award Hardt attorney’s fees in this case.”<sup>189</sup> The Court declined to “decide . . . whether a remand order, without more, constitutes ‘some degree of success on the merits’ sufficient to make a party eligible for attorney’s fees under §1132(g)(1).”<sup>190</sup>

Justice Stevens concurred in the judgment and with Parts I and II of the opinion.<sup>191</sup> Justice Stevens did not join Part III because he found that the Court’s opinion in *Ruckelshaus* “should [not] be given any special weight in the interpretation of this-or any other-different statutory provision.”<sup>192</sup> Emphasizing that *Ruckelshaus* was “closely divided” and turned on the reading of the Clean Air Act’s specific legislative history, Justice Stevens stressed that he would “examine the text, structure, and history” of any federal statute providing for the award of attorney’s fees

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183. *Hardt*, 130 S. Ct. at 2158 (quoting *Ruckelshaus*, 463 U.S. at 686). In *Ruckelshaus*, the Court interpreted a Section of the Clean Air Act that allows attorney’s fees “whenever it determines that such an award is appropriate.” *Id.* at 2157.

184. *Id.* at 2158.

185. *Id.*

186. *Id.* (quoting *Ruckelshaus*, 463 U.S. at 688 n.9).

187. *Id.*

188. *Id.* at 2159.

189. *Id.*

190. *Id.* at 2159. The Court reached this decision “[b]ecause these [aforementioned] conclusions resolve[d] th[e] case,” so it determined that it “need not decide today whether a remand order, without more, constitutes some ‘success on the merits’ . . . .” *Id.*

191. *Id.* at 2159 (Stevens, J., concurring). Part I of the Court’s opinion relayed the facts of the case, *id.* at 2152–56, and Part II concerned the statutory language and the Court’s textual analysis. *Id.* at 2156.

192. *Id.* at 2159.

before using *Ruckelshaus* for guidance to determine if the two statutes shared a similar Congressional intent, thereby rendering the comparison between the two judicially useful.<sup>193</sup> Although Justice Stevens argued that the Court's reliance on *Ruckelshaus* was misplaced, he concurred with the majority on the larger point that Section 1132(g)(1) "does not impose a 'prevailing party' requirement."<sup>194</sup>

#### IV. ANALYSIS

In *Hardt v. Reliance Standard Life Insurance Co.*,<sup>195</sup> the United States Supreme Court held that a party must enjoy "some degree of success on the merits" before attorney's fees may be awarded under Section 1132(g)(1) of ERISA.<sup>196</sup> In so holding, the Court correctly followed its precedent concerning statutory deviations from the American Rule and resolved a disagreement between the federal circuits on ERISA fee awards.<sup>197</sup> However, by failing to address the impact of a remand order under its newly announced standard, the Court placed a significant restriction on the victory it crafted for ERISA plaintiffs.<sup>198</sup> If the Court had found that a remand order satisfies the "some degree of success on the merits" test, it could have added clarity to this important aspect of ERISA litigation without the delay required for a representative case to be fully adjudicated.<sup>199</sup>

##### *A. Ruckelshaus Is the Correct Legal Standard for Determining Fee Awards Under Section 1132(g)(1)*

In his concurrence in *Hardt*, Justice Stevens argued that *Ruckelshaus* should not apply because the legislative history of ERISA and the Clean Air Act are not similar enough to permit meaningful comparison.<sup>200</sup> In the Court of Appeals' decision in *Hardt*, Chief Judge Wilkinson and Circuit Judge Faber, who sat by designation, took this position further. Instead of applying *Ruckelshaus* to the *Hardt* facts, Judges Wilkinson and Faber considered Ms. Hardt's motion for attorney's fees under the standard set forth by the United States Supreme Court in *Buckhannon Board & Care*

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193. *Id.*

194. *Id.*

195. 130 S. Ct. 2149 (2010).

196. *Id.* at 2158.

197. *See infra* Part IV.A.

198. *See infra* Part IV.B.I.

199. *See infra* Part IV.B.II.

200. *Hardt*, 130 S. Ct. at 2159 (Stevens, J., concurring).

*Home, Inc., v. West Virginia Department of Health & Human Resources*.<sup>201</sup> In *Buckhannon*, petitioners sought a fee award under the Fair Housing Amendments Act of 1988 (“FHAA”)<sup>202</sup> and the Americans With Disabilities Act of 1990 (“ADA”).<sup>203</sup> Under the FHAA, “the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee and costs.”<sup>204</sup> Similarly, under the ADA, “the court . . . in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee, including litigation expenses, and costs.”<sup>205</sup>

Justice Thomas explained in his majority opinion, however, that because the language of those statutes contains a prevailing party requirement, *Buckhannon* cannot govern the facts of *Hardt*.<sup>206</sup> In other words, because ERISA (the statute under which attorney’s fees were sought in *Hardt*) contains no prevailing party requirement, *Buckhannon* (where attorney’s fees were sought under the FHAA and ADA—each of which contains a prevailing party requirement) is not applicable to *Hardt*. This observation reflects a textual distinction between the statutes that demands different standards of application.<sup>207</sup> Indeed, the Supreme Court has

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201. *Hardt v. Reliance Standard Life Ins. Co.*, 336 F. App’x 332, 336 (4th Cir. 2009), *rev’d*, 130 S. Ct. 2149 (2010). *Buckhannon* raises several interesting legal issues not central to the discussion here. One of them is the Catalyst theory of damages, under which “plaintiffs [may be] eligible for attorney’s fees if their lawsuit provoked the change they sought in their complaint,” despite a lack of formal judgment in the plaintiff’s favor. Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL’Y 1, 31 (2008). Every circuit except the United States Court of Appeals for the Fourth Circuit embraces some version of the Catalyst theory. Erwin Chemerinsky, *Losing Faith: The Supreme Court and the Abandonment of the Adjudicatory Process*, 60 HASTINGS L.J. 1129, 1140 (2009).

202. 42 U.S.C. §§ 3601–3631 (2006).

203. 42 U.S.C. §§ 12101–12213.

204. 42 U.S.C. § 3613(c)(2).

205. 42 U.S.C. § 12205.

206. *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2157 (2010). *Buckhannon* is not applicable in this case. For an in-depth discussion of where the impact of *Buckhannon* will continue to be felt, see generally Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087 (2007).

207. See, e.g., Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1761 (2010) (recognizing that principles of statutory construction demand that the courts construe statutes to avoid “absurd results”); Bradford C. Mank, *Textualism’s Selective Cannons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 534–35 (1998) (recognizing that “Congress makes a very clear statement in the text of its intent”); Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621, 647–48 (1994) (noting that while the broad language used by Congress in the Clean Air Act could have been interpreted as a blank check for the judiciary, Chief Justice Rehnquist “[i]nstead . . . framed the inquiry in terms of the general understanding associated with the American Rule prohibiting any fee shifting absent special legislative authorization” (internal quotation marks omitted)); Lucia A. Silecchia, *The Catalyst Calamity: Post-Buckhannon Fee-Shifting in Environmental Litigation and a Proposal*



previously acknowledged that, “[a] contrast between the language used in . . . two standards . . . certainly indicate[s] that Congress intended the two standards to differ.”<sup>208</sup> Additionally, the Court has also commented that “[t]he assumption of inadvertent omission [of necessary language] is rendered especially suspect upon close consideration of ERISA’s interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a ‘comprehensive and reticulated statute.’”<sup>209</sup> Because of the plain textual differences between the fee-shifting language in the statutes at issue in *Hardt* and *Buckhannon*, it was error for the Fourth Circuit to consider Ms. Hardt’s motion for attorney’s fees under *Buckhannon*. Instead, the correct guidance for the question posed by *Hardt* is found in *Ruckelshaus v. Sierra Club*.

*Buckhannon*, like *Ruckelshaus*, begins with the recognition that under the American Rule, courts generally do not award attorney’s fees to prevailing parties without statutory authorization.<sup>210</sup> However the two cases depart at the point where Justice Rehnquist notes in *Buckhannon* that Congress chose the legal term of art—prevailing party—to govern attorneys’ fees litigation under the FHAA and ADA.<sup>211</sup> By contrast, in *Ruckelshaus*, Justice Rehnquist, considered the fee-shifting issue from the perspective Congress would have used, had it explicitly addressed the issue.<sup>212</sup> Justice Rehnquist then looked to other statutes that contained fee-shifting provisions in order to demonstrate that fee awards are normally reserved for prevailing parties only.<sup>213</sup>

This discussion warrants three powerful conclusions. First, the textual differences between the attorney’s fee language used in the FHAA and ADA, and in ERISA, demand that the court employ specifically tailored legal standards if any distinction between the two is to be maintained.<sup>214</sup>

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for Congressional Action, 29 COLUM. J. ENVTL. L. 1, 23 (2004) (noting that “importantly, . . . *Ruckelshaus* addressed the distinction between the ‘whenever . . . appropriate’ standard and the ‘prevailing party’ standard[s]” relating to when a court may award attorneys’ fees).

208. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).

209. *Ma. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980)).

210. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 602 (2001).

211. *Id.* at 603.

212. Merrill, *supra* note 207, at 647–48.

213. *Id.* at 648.

214. This principle is related to the maxim “[i]nclusio unius est exclusio alterius,” which translates to “inclusion of the one is exclusion of the other.” Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 117 (2010). For a discussion of the common law origins of commonplace canons of statutory interpretation, see generally William N. Eskridge, Jr. *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001). Even though the standard in *Buckhannon* contemplates a Catalyst theory of attorney’s fees and cannot apply because it governs

Second, because the *Ruckelshaus* court began its decision by referencing the American Rule, it was compelled to require “some degree of success on the merits” even where Congress had purportedly vested the power to award attorney’s fees entirely in the judiciary.<sup>215</sup> Third, by requiring the federal courts to judge motions for attorney’s fees under the “some degree of success on the merits” standard necessitated by *Ruckelshaus*, the Court resolved the difference between the federal courts of appeals as evidenced by the review of *Martin* and the additional federal decisions.<sup>216</sup>

*B. By Failing to Rule that a Remand Order Is Sufficient to Satisfy the  
“Some Degree of Success on the Merits” Standard, the Court Harmed  
ERISA Plaintiffs*

Although ERISA includes an array of tools for the plaintiff’s benefit within its remedial structure, several limitations place a high value on the availability of attorney’s fees.<sup>217</sup> Further, because ERISA preempts state enforcement actions, it provides the sole remedy for plan beneficiaries.<sup>218</sup> Attorney’s fees provide a powerful aid in the litigation process and help

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only statutes that award fees to prevailing parties, it is possible that Ms. Hardt would have succeeded anyway because she qualifies as a “prevailing party” within the meaning established by the case law. See Brief for the United States as Amicus Curiae Supporting Petitioner at 9–10, *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149 (2010) (No. 09-448) (arguing that since the court retained jurisdiction over Reliance in order to compel it to act in accordance with its obligations under ERISA in the event remand proved unsatisfactory, the test in *Buckhannon* is satisfied and Ms. Hardt qualifies as a prevailing party).

215. An attorney’s fees analysis under the American Rule is grounded in the conclusion that a litigant cannot be entitled to a fee award where there has not been at least some modicum of success on the merits, even where Congress has given the court discretion to determine whether a fee award is appropriate. See Walter B. Russell, III & Paul Thomas Gregory, Note, *Awards of Attorney’s Fees in Environmental Litigation: Citizen Suits and the “Appropriate” Standard*, 18 GA. L. REV. 307, 322–23 (1984) (“Unlike the ‘prevailing’ standard, the ‘appropriate’ standard does not by its terms require any success as a prerequisite to an award of fees . . . [a]lthough the Supreme Court in *Ruckelshaus v. Sierra Club* has rejected this reading of the appropriate standard[.]”) (footnotes omitted)).

216. See *supra* Part II.B.2.

217. See, e.g., *Anderson v. Procter & Gamble Co.*, 220 F.3d 449, 452 (6th Cir. 2000) (recognizing that “ERISA [does] not permit [a plaintiff] to recover attorneys’ fees for work performed during the administrative appeals process”); *Smith v. Sydnor*, 184 F.3d 356, 364 (4th Cir. 1999) (noting that the “courts of appeals are in near unanimity that exhaustion of administrative remedies is required before a plaintiff can bring an ERISA action in federal court to recover benefits under a plan”); *Anderson v. Unum Life Ins. Co. of Am.*, No. 2:01cv894-ID, 2007 WL 604728, at \*6 (M.D. Ala. Feb. 22, 2007) (noting that ERISA does not allow either punitive or extra-contractual damages); John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefits Decisions Under ERISA*, 101 NW. U. L. REV. 1315, 1342 (2007) (discussing the impact that conflicts of interest and standards of review have on ERISA plaintiffs).

218. See, e.g., *Pilot Life Insurance Co. v. Dedcaux*, 481 U.S. 41, 41 (1987) (“The ‘pre-emption clause’ (§ 514(a)) of the Employee Retirement Income Security Act of 1974 (ERISA) provides that ERISA supersedes all state laws insofar as they ‘relate to any employee benefit plan . . . .’”).

ensure that plan administrators comply with their legal obligations under the statute.<sup>219</sup> Without the assistance that fee awards provide, many plaintiffs would be kept out of court because the cost of litigating generally exceeds the dollar amount of the benefits in controversy, at least for most non-class action ERISA litigation.<sup>220</sup> Although *Ruckelshaus* compels only a showing of “some degree of success on the merits,” the uncertainty regarding who qualifies under this standard could work hardship upon ERISA plaintiffs.<sup>221</sup> ERISA provides a valuable set of protections for pensioners and plan beneficiaries. At the same time, since it preempts all other avenues of judicial redress, making ERISA actions widely available and easily accessible to those in need of its remedial protection is extremely important. A key aspect of this protection, in addition to agency enforcement, is the private right of action. Since the fee-shifting provision fosters ERISA enforcement, it follows that clarifying the standard for fee-awards facilitates litigation while also lowering the price that ERISA plaintiffs pay to enforce their rights.

Fee awards play a critical role in enabling the enforcement scheme contemplated by Congress.<sup>222</sup> ERISA was designed to protect the value in pension plans and to preserve the rights of injured persons to bring actions in the federal courts.<sup>223</sup> Because of ERISA’s goals, any delay in clarifying

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219. See, e.g., *Nat’l Cos. Health Benefit Plan v. St. Joseph’s Hosp. of Atlanta, Inc.*, 929 F.2d 1558, 1575 (11th Cir. 1991) (finding that “the deterrent value of an award of attorneys’ fees . . . is high [in ERISA cases] . . . [because without it a defendant] would only be liable for what it should have covered before this litigation commenced”).

220. Cf. Brief for Am. Ass’n of Retired Pers. & Nat’l Emp’t Lawyers Ass’n as Amici Curiae Supporting Petitioner, *supra* note 100, at 23 (arguing that “benefit amounts are relatively small as compared with the potential costs of litigation, thus effectively precluding the use of contingency fee agreements”).

221. Any increase in the probability that a plaintiff will be unable to recover attorney’s fees decreases the chances that the suit will ever be filed. A persons’ belief as to whether or not a fee award will be available influences his or her understanding of how risky the lawsuit may be, and what the chances are that, once litigation has concluded, he or she will be left to satisfy his or her own attorney’s fees. See, e.g., Donald R. Philbin, Jr., *The One Minute Manager Prepares for Mediation: A Multidisciplinary Approach to Negotiation Preparation*, 13 HARV. NEGOT. L. REV. 249, 277 (2008) (“Even if the chances of success are held constant, some people are risk-takers and others are risk-adverse.”). For an interesting discussion on how information, or, more accurately perfect information, shapes behavior preferences, see *id.* at 283–84.

222. See Ann C. Bertino, Comment, *The Need for a Mandatory Award of Attorney’s Fees for Prevailing Plaintiffs in ERISA Benefits Cases*, 41 CATH. U. L. REV. 871, 886–87 (1992) (noting the practical difficulties of agency enforcement and highlighting the role private actions play in ERISA enforcement litigation).

223. Justin Cummins & Meg Luger Nikolai, *ERISA Reform in a Post-Enron World*, 39 J. MARSHALL L. REV. 563, 574 (2006) (recognizing that by enacting ERISA “Congress intended to maximize financial security for retirees and their families”); Brendan S. Maher, *Creating a Paternalistic Market for Legal Rules Affecting the Benefit Promise*, 2009 WIS. L. REV. 657, 661 (noting that “ERISA, through a series of expansive statutory definitions inspired by the law of

the legal standard under which motions for attorney's fees will be decided works hardships on ERISA plaintiffs in proportion to the amount that the newly injected uncertainty discourages enforcement litigation.<sup>224</sup>

Fee awards act as a legal subsidy.<sup>225</sup> By statutorily allowing for fee awards, Congress made the conscious choice to value its enforcement scheme over the right of plan administrators to violate ERISA's provisions.<sup>226</sup> This Congressional decision simultaneously lowers the cost of ERISA litigation and incentivizes plaintiffs to bring claims in order to protect their pension rights.<sup>227</sup> However, *Hardt*'s "some degree of success" test has an impact on the subsidy provided by Section 1132(g)(1) because it constricts the supply of readily available fee awards. Any confusion over what does or does not meet this test increases the price of ERISA litigation, decreases the effectiveness of the subsidy provision, and harms those plaintiffs who would have brought suit to enforce their rights if the decision to litigate involved less risk regarding the applicability of Section 1132(g)(1).

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trusts, federalized benefit promises [defined as employer promises of deferred compensation] . . . in order to provide benefit 'security'").

224. John Leubsdorf, *Recovering Attorney Fees as Damages*, 38 RUTGERS L. REV. 439, 441 (1986) (concluding that the effect of making fee-shifting more difficult "is to discourage litigation by plaintiffs and defendants whose chances of success appear relatively small, whose opponents have larger litigation expenses than they do, or who are more averse than their opponents to the risk of being held liable for costs"); Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 591 (1997) (discussing the notion that actors know "the harms that they cause will not be of sufficient importance to be worth a typical victim's while to pursue").

225. Subsidies generally work to spread the economic burden of providing a good or service and are widely used over a diverse spectrum. *See, e.g.*, Samuel R. Gross, *We Could Pass a Law . . . What Might Happen If Contingent Legal Fees Were Banned*, 47 DEPAUL L. REV. 321, 335 (1998) (noting that "the cost of legal aid (in a fee-shifting regime) would be comparatively cheap: a public subsidy equivalent to the private litigation insurance premiums the rest of us would pay"). *But cf.* Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 VAND. L. REV. 1069, 1073–74 (1993) (discussing objections to the theory of subsidy and outlining an optimal fee-shifting rule). For an interesting look at the nature of subsidy in our legal system, see generally Brendan S. Maher, *The Civil Judicial Subsidy*, 85 IND. L.J. 1527 (2010) (describing the rationales behind the idea of the judicial system as a subsidy).

226. A person may have the right to pursue a course of action, even if it is in contravention of the law. *See, e.g.*, Alan Schwartz & Robert E. Scott, *Market Damages, Efficient Contracting, and the Economic Waste Fallacy*, 108 COLUM. L. REV. 1610, 1667 (describing market damages when a seller prefers contract performance and when the seller prefers a breach of contract); Caroline O. Shoenberger, *Consumer Myths v. Legal Realities: How Can Businesses Cope?*, 16 LOY. CONSUMER L. REV. 189, 205 n.103 (2004) (describing how, as a matter of contract law, a party always has the right to void a contract and incur the requisite liability for damages).

227. The lower the cost or the greater the reward, the more of an item a consumer will prefer. In this case, if the cost of ERISA litigation is decreased, the investor will prefer it to higher cost options with similar risk profiles. *See, e.g.*, William F. Sharpe, *Capital Asset Prices: A Theory of Market Equilibrium Under Conditions of Risk*, 19 J. FIN. 425, 429 (1964) (describing how investors maximize utility as a function of cost versus expected return and risk).

*1. The Remand Order as a Discrete Point on the Spectrum Between 100% Victory and "Some Degree of Success on the Merits"*

In *Hardt*, the United States District Court for the Eastern District of Virginia deemed the case to be one where the plan administrator failed to meet the standard of care under ERISA and therefore remanded the case to Reliance, providing it with the opportunity to "fully and adequately assess" the denied claim.<sup>228</sup> In light of the facts and under the mandate of *Weaver v. Phoenix Home Life Mutual Insurance Co.*,<sup>229</sup> the district court correctly remanded the case in order to allow Reliance the opportunity to comprehensively and fairly review its decision.<sup>230</sup> Remand orders are a popular remedy in ERISA cases. For example, the First Circuit has recognized that "despite the fact that [ERISA] . . . does not explicitly authorize administrative remand as a remedy . . . [n]umerous decisions by this court and others have ordered, or approved the theory . . . and we have seen none holding that remand is impermissible."<sup>231</sup> Other Circuits have crafted their own remand jurisprudence, which defines when a remand order is the appropriate remedy.<sup>232</sup>

Although remand is a favored remedy, the federal courts of appeals disagree over whether remand constitutes an appealable judgment sufficient to warrant the award of attorney's fees.<sup>233</sup> This circuit split complicates the impact *Hardt* will have going forward to the extent that a remand order falls somewhere along the remedy spectrum in-between points on either extreme—complete success and outright dismissal.<sup>234</sup> *Ruckelshaus* teaches

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228. *Hardt v. Reliance Standard Life Ins. Co.*, 540 F. Supp. 2d 656, 664 (E.D. Va. 2008), *rev'd*, 336 F. App'x 332 (4th Cir. 2009), *rev'd*, 130 S. Ct. 2149 (2010).

229. 990 F.2d 154 (4th Cir. 1993).

230. *Id.* at 159 (referencing *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1007 n.4 (4th Cir. 1985)).

231. *Buffonge v. Prudential Ins. Co. of Am.*, 426 F.3d 20, 31 n.14 (1st Cir. 2005).

232. *See, e.g., Caldwell v. Life Ins. Co. of N. Am.*, 287 F.3d 1276, 1288 (10th Cir. 2002) (noting that "[t]he remedy when an ERISA administrator fails to make adequate findings or to explain adequately the grounds of her decision is to remand the case to the administrator for further findings or explanation."); *Saffle v. Sierra Pac. Power Co. Bargaining Unit Long Term Disability Income Plan*, 85 F.3d 455, 461 (9th Cir. 1996) (making explicit "that remand for reevaluation of the merits of a claim is the correct course to follow when an ERISA plan administrator, with discretion to apply a plan, has misconstrued the Plan and applied a wrong standard to a benefits determination").

233. Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 214, at 28 n.8. The First, Sixth, Eighth, and Eleventh Circuits have found that such orders are not final, the Ninth and Tenth Circuits make a case-by-case determination, and the Seventh Circuit has held that they do constitute final action. *Id.*

234. Theoretically, a remand order falls somewhere between the traditional standards of prevailing party cases and outright dismissal. The "prevailing party" standard is satisfied "only when a party has prevailed on the merits of at least some of his claims . . . [and] there [has] been a determination of the substantial rights of the parties, which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense

that outright dismissal is not a result sufficient to entitle a party to a fee award.<sup>235</sup> Outright victory, however, or some other measure of the relief sought compelled by judicial order, will qualify for award eligibility under the *Hardt* test.<sup>236</sup> Two issues remain unresolved. First, whether or not a remand order satisfies *Hardt*, and second, how long it will take for a representative case on the question to reach the Supreme Court.

*2. A Remand Order, Without More, Will Likely Satisfy Hardt, but the Time Required to Judicially Recognize this Fact Will Work to the Detriment of ERISA Plaintiffs*

It remains unknown when, or if, the United States Supreme Court will accept a case clarifying how the lower courts should treat remand orders for the purposes of satisfying *Hardt*. Although waiting will surely be required, it may be that courts will determine that a remand order satisfies the requirements of *Hardt* without the need for guidance from the Supreme Court.<sup>237</sup>

In *Hardt*, Justice Thomas instructs that a claimant “does not satisfy [the test] by achieving trivial success on the merits” or a “purely procedural victor[y].”<sup>238</sup> If, however, “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,” the *Hardt* standard will be satisfied.<sup>239</sup>

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of his own attorney.” *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (internal quotation marks omitted). Outright dismissal is akin to earning no degree of success on the merits and therefore renders the dismissed party ineligible for a fee award under even the most liberal standard. *See, e.g., Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983) (announcing the some degree of success on the merits standard).

235. *Ruckelshaus*, 463 U.S. at 694.

236. It is significant that the relief be accompanied by the necessary judicial imprimatur, otherwise the plaintiff falls victim to a scheme called tactical mootting. In a tactical mootting scheme, the defendant agrees to the relief plaintiff sought in bringing suit, but by conceding, has mooted the case, leaving no issue suitable for judicial review, and therefore making it impossible for the plaintiff to win a judgment on the merits. *See, e.g., Renee Newman Knake, The Supreme Court’s Increased Attention to the Law of Lawyering: Mere Coincidence or Something More?*, 59 AM. U. L. REV. 1499, 1522 (2010) (describing how Reliance argued its case under a tactical mootting theory so that it could guarantee “no judgment on the merits entitling the plaintiff to fees”).

237. As a practical matter, the Federal Courts of Appeals deal with a multitude of issues without guidance from above. Taken to a logical extreme, in every matter in which there has been a denial of certiorari, the federal courts are doing so. Therefore, without guidance from the Supreme Court, at least intermittently, the lower courts will implement the *Hardt* standard as they see fit. *See generally* Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227 (1979) (describing how the Supreme Court wields its power to grant or deny certiorari).

238. *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2158 (2010).

239. *Id.*

Substantial temptation exists to lump ERISA cases in with other familiar standards in the search for clarity. Under *Hensley v. Eckerhart*,<sup>240</sup> for example, plaintiffs are deemed to prevail where they succeed on a significant issue in the litigation that achieves the benefit the party sought in bringing suit.<sup>241</sup> At first blush, this instruction seems both to follow the directions of *Hardt* and to present an instructive standard. Critically, however, *Hensley* was decided under 42 U.S.C. § 1988, which provides that a court “in its discretion, may allow the *prevailing party*, other than the United States, a reasonable attorney’s fee as part of the costs.”<sup>242</sup> This distinction is analogous to the distinction between *Buckhannon* and *Ruckelshaus* discussed above, and therefore compels the same conclusion—that if the textual differences are to have any meaning, there must also be a tangible divergence over how the standards are interpreted judicially.<sup>243</sup> This situation almost requires the logical impossibility that on one hand success under *Hardt* and *Hensley* roughly equate, but on the other, the standards cannot mirror one another because Congress has chosen different statutory language for inclusion in civil rights litigation under Title 42 and for employee benefits litigation under ERISA.<sup>244</sup>

The fact that *Buckhannon* does not apply to the *Hardt* scenario—where no prevailing party language is used—allows an additional inference to be drawn. To “prevail” under *Buckhannon*, a party must have won an “enforceable judgment” or secured a “court ordered consent decree.”<sup>245</sup> Since *Buckhannon* cannot apply in the *Hardt* context, we know that *Hardt* must demand a lesser showing than that required under *Buckhannon*. As a matter of legal mathematics, therefore, since we know that *Hardt* compels a lesser showing than that required by either *Buckhannon* or *Hensley*, the possible scope of remedies that qualify under *Hardt* is limited. Therefore, as long as a remand order is judged to entail more than a defeat in an absolute sense, and less than a judicially enforceable judgment, it should be within the standards of *Hardt*.<sup>246</sup>

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240. 461 U.S. 424 (1983).

241. *Id.* at 433 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278–79 (1st Cir. 1978)).

242. 42 U.S.C. § 1988(b) (2006) (emphasis added).

243. See *supra* notes 206–16 and accompanying text.

244. Compare 42 U.S.C. § 1988(b) (employing the “prevailing party” standard), with 29 U.S.C. § 1132(g)(1) (allowing a fee award to “either party”).

245. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 604 (2001).

246. This excludes those judgments falling into the “purely procedural” or “trivial” category. *Hardt v. Reliance Standard Life Ins. Co.*, 130 S.Ct. 2149, 2158 (2010). As a practical matter, given the popularity of a remand order as the appropriate remedy, as long as a denial of benefits isn’t supported by substantial evidence, *Hardt* should be satisfied. See Christopher R. Stevenson, *Abusing Abuse of Discretion: Judicial Review of ERISA Fiduciaries’ Discretionary Decisions in*

The overall system for evaluating a remand order is governed by the fact that before attorney's fees are available, the plaintiff must achieve "some degree of success on the merits."<sup>247</sup> *Hardt* teaches that, with facts sufficient to show that an ERISA fiduciary has shirked its duties, a remand order qualifies for a fee award.<sup>248</sup> In this Note, I have put forward an argument suggesting that a remand order, without more, may satisfy the "some degree of success" test. It is unknown if the United States Supreme Court will further consider how attorney's fees are awarded under Section 1132(g)(1) of ERISA. It is clear, however, that while the Court has added simplicity to the process (we now know there is no express prevailing party requirement) the collateral uncertainty generated by the ruling (Does a remand order qualify under *Hardt*? How much success on the merits is enough?) may offset the benefits and affect unforeseen hardship by discouraging meritorious litigation.

#### V. CONCLUSION

In *Hardt v. Reliance Standard Life Insurance Co.*, the United States Supreme Court ruled that "some degree of success on the merits" is necessary to permit a court to award attorney's fees under Section 1132(g)(1) of ERISA.<sup>249</sup> In so holding, the Court properly followed its precedent dealing with statutory deviations from the American Rule, while also resolving a disagreement between the federal courts of appeals.<sup>250</sup> While the Court announced a new standard in *Hardt*, it failed to rule on whether a remand order sufficiently meets its standard. In so doing, the Court placed a significant restriction on an important aspect of ERISA litigation.<sup>251</sup> Although it is unknown how far the effect of the "some degree of success standard" will reach, attempts at crafting the outer contours of the test without direct guidance from the Supreme Court may prove harmful for ERISA plaintiffs if the new standard increases the difficulty of winning a fee award.<sup>252</sup>

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*Denial of Benefits Cases*, 27 HOFSTRA LAB. & EMP. L.J. 105, 116, 130 (2009) (reviewing cases that evaluate whether an ERISA fiduciary met its requirements under the statute).

247. *Hardt*, 130 S. Ct. at 2152.

248. *Id.*

249. *Id.*

250. See *supra* Part IV.A.

251. See *supra* Part IV.B.I.

252. See *supra* Part IV.B.II.



