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Attorney Fees in ERISA Benefits Litigation: Recent Cases

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This is the first of a two-part series of articles regarding the law relating to awards of attorney fees in cases governed by the Employee Retirement Income Security Act. In this article, we address the law relating to fee awards in cases involving claims for plan benefits. In our next article, we address fee awards in the context of claims for alleged breaches of fiduciary duty, including cases filed as class actions.

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The default "American Rule" in litigation provides that each party in a lawsuit must bear its own attorney fees, unless a statute provides otherwise. Employee Retirement Income Security Act (ERISA) Section 502(g)(1) grants courts in ERISA cases discretion to allow an award of "reasonable" attorney fees and costs to either party. In this article, we first examine the legal standards governing attorney fee awards in the context of lawsuits involving claims by individual participants for benefits. We then analyze the unique incentive structure this fee-shifting scheme creates for plaintiffs' attorneys in ERISA benefits cases.

As recent decisions by federal courts show, fee awards in cases that proceed to final judgment are not necessarily limited by the amount of the final judgment. Moreover, because plaintiffs need only achieve "some degree of success on the merits" to obtain a fee award under Section 502(g)(1), plaintiffs' attorneys can recover fees even where a case does not proceed to final judgment, which should make plan administrators and fiduciaries particularly cautious in administering benefits claims. We last consider the potential impact of the Supreme Court's decision in *Cigna Corp. v. Amara*, which empowers plaintiffs to cast a broader net in the discovery phase, in turn increasing the cost of defending ERISA benefits claims, and with it, plaintiffs' leverage in settlement negotiations. [Cigna Corp v. Amara, 563 U.S. 421 (2011)]

Legal Standards Governing Attorney Fee Awards in ERISA Benefits Cases

Deciding Whether to Award Attorney Fees

Under ERISA Section 502(g)(1), "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." In *Hardt v. Reliance Standard Life Ins. Co.*, the Supreme Court held that a fee claimant need not be a "prevailing party" to be eligible for an attorney fee award under Section 502(g)(1), but instead need only show "some degree of success on the merits." [Hardt v. Reliance Standard Life Ins. Co., 130 S.Ct. 2149 (2010)] Circuit courts have held that "some degree of success on the merits" includes remand for further administrative review by a plan claims administrator, settlements before and after a substantive ruling on the merits has been made, and partial awards for claims (even if the court is rejecting a majority of the claims brought).

Once a fee claimant has shown "some degree of success on the merits," *Hardt* authorizes (but does not require) courts to consider the following five-factor test which has long been applied by several circuit courts of appeal (with slight variations in formulation): (1) the degree of the opposing parties' culpability or bad faith; (2) ability of the opposing parties to satisfy an award of attorney fees; (3) whether an award of attorney fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorney fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions. [Simonia v. Glendale Nissan/Infiniti Disability Plan, 608 F.3d 1118, 1121 (9th Cir. 2010); Temme v. Bemis Co., 762 F.3d 544, 550 (7th Cir. 2014); Donachie v. Liberty Life Assur. Co. of Boston, 2014 WL 928971 (2d Cir. 2014); McKay v. Reliance Standard Life Ins. Co., 428 F. App'x 537, 545 (6th Cir. 2011)]

In theory, both plaintiffs and defendants can recover attorney fees under Section 502(g)(1). In practice, however, courts are more likely to award fees to plaintiffs than defendants. On its face, the aforementioned five-part test, in particular the second through fourth factors, favors awarding attorney fees to plaintiffs rather than defendants. Indeed, courts have expressly held that a "favorable slant toward ERISA plaintiffs is necessary to prevent the chilling of suits brought in good faith." [Toussaint v. JJ Weiser, Inc., 648 F.3d 108, 111 (2d Cir. 2011); *see also* West v. Greyhound Corp., 813 F.2d 951, 956 (9th Cir. 1987) ("these factors very frequently suggest that attorney fees should not be charged against ERISA plaintiffs.")] And even when defendants succeed in obtaining fee awards, the awards tend to be less than amounts awarded to plaintiffs. [*See*, *e.g.*, Thigpen v. Board of Trustees of Local 807 Labor-Management Pension Fund, No. 18-cv-162, 2019 WL 4756029 (E.D.N.Y. Sept. 29, 2019) (granting Defendant's request for attorney fees but only in the amount of $100 to "serve to deter Plaintiff from ill-advisedly continuing or bringing future litigation of this nature"); Spath v. Standard Ins. *Co.*, 151 F. Supp. 3d 973 (W.D. Mo. 2016) ("Given [Plaintiff's] minimal financial capabilities, but also the strong likelihood that [Defendant's] actual attorney fees and costs surpass $500, the Court orders her to pay [Defendant] in the amount of $500.")]

Determining the Amount of an Award of Attorney Fees

Once a court decides to award attorney fees to a party under Section 502(g)(1), it must then decide how much to award. This question typically is answered by resorting to the Lodestar method of calculating attorney fees, which requires the district court to assess the "reasonable number of hours expended on the litigation and the reasonable hourly rates for the participating attorneys, and then multiply the two figures together to arrive at the 'lodestar.'" [Lain v. UNUM Life Ins. Co. of Am., 279 F.3d 337, 348 (5th Cir. 2002) (*citing* Wegner v. Standard Ins. Co., 129 F.3d 814, 822 (5th Cir. 1997)); *see also* McElwaine v. U.S. West, Inc., 176 F.3d 1167, 1173 (9th Cir.1999) (using a hybrid lodestar/multiplier approach, wherein the court may adjust the lodestar in "rare and exceptional cases")]

ERISA benefit claims often are brought by plaintiffs with limited means seeking relatively small benefit amounts. ERISA Section 502(g)(1), and the body of law that surrounds it, have enabled plaintiffs' attorneys to take on these types of cases, with the understanding that if they achieve at least some degree of success they will be able to recover their fees separate and apart from the plan benefits the plaintiff may recover. From the perspective of the defense, the amount of a plaintiff's potential attorney fee award (and the unlikely recovery of a similar award if the defendant is successful) creates pressure to settle cases early, and thereby avoid the additional expense that will flow from litigating a case through trial. This is particularly true because the potential fee award under the lodestar method increases with every attorney hour spent working on a case.

Recent Cases Involving Attorney Fees Awards Under ERISA Section 502(g)(1)

Cases in Which Fee Awards Exceeded Judgment Amount

In deciding the amount of an attorney fee award under Section 502(g)(1) following an entry of judgment, courts are not necessarily constrained by the amount of the monetary award in the case. These cases serve to incentivize plaintiffs' attorneys to take on ERISA benefits cases, even where the amount of benefits at issue is small.

For example, in *Dragu v. Motion Picture Industry Health Plan for Active Participants*, the plaintiff brought a claim under ERISA Section 502(a)(1)(B) to recover dental benefits. [Dragu v. Motion Picture Industry Health Plan for Active Participants, 159 F. Supp. 3d 1121 (N.D. Cal. Feb. 5, 2016)] The plan paid some, but not all, of the plaintiff's claims, and the plaintiff claimed she should not have had to pay additional amounts out of pocket. On summary judgment, the plaintiff argued that the plan was not administered according to its terms and that the decision to deny a portion of her claims was arbitrary and capricious. The district court agreed, granted the plaintiff's motion for summary judgment, and awarded approximately $25,288 in plan benefits and $114,570 in attorney fees.

Analyzing its decision to award fees under the aforementioned five-factor test, the court found that the plan was liable because its decision to deny benefits was arbitrary and capricious, and because the plaintiff's efforts to obtain her own benefits also benefited other participants by clarifying the scope of the dental benefits available under the plan. The court further noted that the fact that "[plaintiff's] fee request is 4.75 times the damages at issue in this case is not, by itself, a reason to reduce the award of attorney fees." The court placed the blame for this fee award on the defendant, observing that "[m]any of these fees could have been avoided with early resolution, but the Plan chose to proceed to judgment knowing that it may be subject ultimately to [Plaintiff's] fees."

Similarly, in *Gurasich v. IBM Retirement Plan*, [No. 14-cv-02911, 2016 WL 3683044 (N.D. Cal. Jul. 12, 2016)] the plaintiff prevailed on her claim for retirement benefits and was awarded $47,966.10 in damages. The court also awarded the plaintiff $249,871.50 in attorney fees, finding that the award was merited given the defendant's abuse of discretion in denying plaintiff's claim for benefits. [*See also*, Spears v. Liberty Life Assurance Company of Boston, No. 16-02231, 2018 WL 5928140 (D. Conn. May 12, 2020) (awarding $124,343.50 in damages and $329,073.55 in attorney fees and costs in connection with a claim for long term disability benefits)]

But courts also can exercise their discretion to reduce a fee award if the attorney fees exceed the benefit award by too significant a degree. In *Solnin v. Sun Life & Health Ins. Co.*, for instance, the Second Circuit affirmed the lower court's award of $222,320.94 in attorney fees, plus costs and interest. [Solnin v. Sun Life & Health Ins. Co., 776 F. App'x 731 (2d Cir. 2019)] There, plaintiff brought a claim in connection with a denial of long-term disability benefits, and was awarded $188,936.77. Plaintiff's counsel initially

requested an award of $502,456.50, reflecting billing rates of $720 per hour. In affirming the lower court's decision to limit the fee award to less than half the amount requested, the Second Circuit noted that "[w]e are not convinced that a 'reasonable, paying client' in an ERISA litigation matter would be willing to pay an hourly rate resulting in attorney fees so far in excess of the amount of recovery, even considering the successful procurement of future benefits in this case."

Cases in Which Fee Awards Did Not Exceed Judgment Amount

Conversely, there are numerous cases in which the amount of the final judgment exceeds the amount of the attorney fee award. Many factors may explain this discrepancy, including relatively low billing rates in certain less densely populated areas, or very substantial benefit awards. [*See, e.g.*, Opheim v. Standard Ins. Co., 293 F. Supp. 3d 846 (N.D. Iowa 2018) (awarding $65,000 in life insurance benefits to plaintiff and $6,216 in attorney fees to plaintiff's counsel, whose rate was $210 per hour); Brown v. United of Omaha Life Ins. Co., 2015 WL 6506548 (S.D. Ohio Oct. 28, 2015) (awarding plaintiff $181,666.67 in benefits under a life insurance plan and $27,040.00 in attorney fees); Doe v. Unum Life Ins. Co. of Am., 2016 WL 335867 (S.D.N.Y. Jan. 28, 2016) (awarding plaintiff $219,385.34 in attorney fees following bench trial and entry of $780,756 judgment against defendant); Doe v. Prudential Ins. Co. of Am., 258 F. Supp. 3d 1089 (C.D. Cal. Jul 7, 2017) (following bench trial, awarding plaintiff $1,025,219 in long term disability benefits and $348,595 in attorney fees)]

Cases Involving Fee Awards That Did Not Proceed to Final Judgment

Often, federal cases are resolved prior to entry of a final judgment. In these instances, a plaintiff may still be entitled to an award of attorney fees under *Hardt*'s "some degree of success on the merits" standard. For instance, courts sometimes remand cases to plan administrators for a "full and fair review" of the benefit claim. In some of those cases, courts have awarded the plaintiff the cost of fees incurred prior to the remand to the plan administrator. [*See, e.g.*, Benjamin v. Oxford Health Ins., Inc., 355 F.Supp.3d 131 (D. Conn. Jan. 8, 2019) (remanding claim for treatment for mental health disorder to plan administrator and awarding $33,022.50 in attorney fees); Dwinnell v. Federal Express Long Term Disability Plan, 2017 WL 1371254 (D. Conn. Apr. 14, 2017) (awarding $40,657.75 in attorney fees following order remanding claim for long term disability benefits to plan administrator for reconsideration of its denial of benefits); Koning v. United of Omaha Life Ins. Co., 2016 WL 7971266 (W.D. Mich. May 3, 2016) (awarding $76,010 in attorney fees following remand of claim for long-term disability benefits to plan administrator for full and fair review)] Similarly, courts sometimes award attorney fees to plaintiffs who succeed in favorably settling benefit claims, when the only issue remaining in dispute is the amount of fees to be awarded. [*See, e.g.*, Hartle v. Life Ins. Co. of North Am., 2019 WL 195087 (W.D. Wash. Jan. 14, 2019) (awarding $20,400 in attorney fees to plaintiff following settlement); Rangel v. Aetna Life Ins. Co., 2016 WL 1449539 (C.D. Cal. Apr. 12, 2016) (awarding plaintiff $41,650 in attorney fees and $2,495.90 in costs following settlement of claim for disability benefits); Harrison v. Metropolitan Life Ins. Co., 2016 WL 4414851 (N.D. Cal. Jun. 21, 2016) (awarding $115,298 in attorney fees following settlement of long term disability claim)]

Potential Impact of *Cigna Corp. v. Amara* on Benefits Claim Litigation

The potential that plaintiffs' attorneys may recover attorney fees in excess of the amount of benefits to be awarded takes on new significance in the wake of the Supreme Court's 2011 decision in *Cigna Corp. v. Amara*. Prior to *Amara*, plaintiffs in ERISA benefit claim litigation often were limited by courts to a single claim for relief under ERISA Section 502(a)(1)(B). In cases brought under that statute, discovery typically is limited to the administrative record relating to the benefit claim at issue, and facts that may tend to show that the claims administrator acted under a conflict of interest. However, *Amara* and cases decided in its wake arguably changed this dynamic by empowering plaintiffs to bring claims for equitable relief for breach of fiduciary duty under ERISA Section 502(a)(3) alongside claims for benefits under Section 502(a)(1)(B). When claims under Section 502(a)(3) are allowed to go forward, plaintiffs may be able to conduct discovery outside of the confines of the administrative record, opening the door for time-consuming depositions and document productions, and potentially exponentially increasing the cost associated with litigation.

Conclusion

Although the case law provides guidelines as to whether and how to award attorney fees, courts retain broad discretion in doing so. As recent cases show, courts may decide to award fees far in excess of the amount of benefits at issue in a case, or they may decide to limit such awards if they become too disproportionate to the benefits in dispute. With the prospect of increased litigation costs created by *Amara*, courts will no doubt continue to grapple with the question of how wide this gap can and should be. ■

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