New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 262—NO. 72
THURSDAY, OCTOBER 10, 2019

Outside Counsel

Attorney Fees Under ERISA §502(g)(1): An Exception to the American Rule

BY MICHAEL C. RAKOWER, MELISSA YANG AND DAMI PARK


By **Michael C. Rakower** And **Melissa Yang**

RAKOWER LAW · PLLC

The Employee Retirement Income Security Act (ERISA) marks one of those rare instances where Congress chose to depart from the American Rule to grant litigants an opportunity to seek attorney fees. ERISA §502(g)(1) vests courts with discretion to award attorney fees and costs in an action brought by a plan participant, beneficiary or fiduciary. This article examines the standards courts apply when assessing motions for these discretionary awards.

'Some Degree of Success On the Merits'

In 2010, the U.S. Supreme Court issued an opinion in *Hardt v. Reliance Standard Life Ins. Co.*, clarifying the standard under ERISA §502(g)(1). 560 U.S. 242 (2010). A litigant need not be a "prevailing party" to be eligible for a fee award; rather, the litigant must establish "some degree of success on the merits." Id. at 254-55. According to the Second Circuit, this is "the sole factor that a court *must* consider in exercising its discretion." *Donachie v. Liberty Life Assurance Co. of Boston*, 745 F.3d 41, 46 (2d Cir. 2014) (emphasis in original).

The "some degree of success on the merits" standard is met when a claimant obtains a "favorable judicial action on the merits." *Scarangella v. Grp. Health*, 731 F.3d 146, 152 (2d Cir. 2013). A summary judgment or trial verdict can, of course, meet this standard, see, e.g., *Buckley v. Slocum Dickson Med. Grp., PLLC*, 585 Fed. App'x 789, 794 (2d Cir. 2014) (stating employee entitled to seek attorney fees under ERISA §502(g)(1) after prevailing on summary judgment); *Toussaint v. JJ Weiser*, 648 F.3d 108, 110 (2d Cir. 2011) (acknowledging some degree of success requirement was met when summary judgment was affirmed in favor of the directors of ERISA plan sponsor), as can a favorable out-of-court settlement if it is triggered by court action, see, e.g., *Scarangella*, 731 F.3d at 154 (citing to *Perez v. Westchester Cnty. Dep't of Corr.*, 587 F.3d 143, 150-51 (2d Cir. 2009)). Even a remand to the plan administrator can qualify where it is premised upon a determination that the administrator's prior assessment of a claim was deficient or rendered in an arbitrary or capricious manner. See, e.g., *Gross v. Sun Life Assurance Co. of Canada*, 763 F.3d 73, 79 (1st Cir. 2014); *McKay v. Reliance Standard Life Ins. Co.*, 428 F. App'x 537, 546-47 (6th Cir. 2011); *Valentine v. Aetna Life Ins. Co.*, 2016 WL 4544036, at *4 (E.D.N.Y. Aug. 31, 2016); *Delprado v. Sedgwick Claims Mgmt. Servs.*, No. 1:12-CV-00673 BKS, 2015 WL 1780883, at *41 (N.D.N.Y. April 20, 2015) (concluding plaintiff obtained "some degree of success on the merits" when plaintiff's claim was remanded back to plan administrator because prior denial of disability benefits was arbitrary and capricious).

> While the majority of litigants seek attorney fees and costs at the conclusion of a litigation, parties who face financial adversity during the course of the litigation may seek an interim award so long as they can satisfy the "some success on the merits" standard.

MICHAEL C. RAKOWER *and* MELISSA YANG *are partners at Rakower Law PLLC.* DAMI PARK *is a former associate of the firm.*

In contrast, "trivial success on the merits" or a "purely procedural victory" is insufficient to merit an award of attorney fees. *Hardt*, 560 U.S. at 255. Accordingly, obtaining "relief due to the voluntary conduct of another party after minimal litigation" will not warrant a discretionary award. *Scarangella*, 731 F.3d at 155.

Favorable Slant Toward Plaintiffs

Case law shows that a court's discretion is guided by Congress' intent to encourage participants and beneficiaries to enforce their statutory rights under ERISA. *Salovaara v. Eckert*, 222 F.3d 19, 28 (2d Cir. 2000). As a result, even though ERISA §502(g)(1) contemplates that an award may be imposed against "either party," courts have construed attorney fee motions with a "favorable slant towards ERISA plaintiffs … to prevent the chilling of suits brought in good faith … ." Id. (internal citation omitted); see, e.g., *Critelli v. Fidelity Nat'l Title Ins. Co. of New York*, 554 F. Supp. 2d. 360 (E.D.N.Y. 2008) (declining to award attorney fees to employer because plaintiff did not act in bad faith and a fee award to employer could act as a disincentive to potentially meritorious ERISA actions). Rarely does a court award attorney fees against a participant or beneficiary; such instances tend to arise when a court not only rules against the claimant, but also deems the action to be frivolous. See, e.g., *Garlock v. Nelson*, No. 96-CV-1096(FJS), 1998 WL 315089, at *1 (N.D.N.Y. June 9, 1998) (considering defendant's application for fees after concluding defendant is entitled to a fee award because participant's claims under ERISA are frivolous).

(Discretionary) 'Chambless' Factors

Upon a finding of "some degree of success on the merits," a court in New York may (but is not required to) consider five additional factors to determine whether to grant a fee award. *Hardt*, 560 U.S. at 255 n.8 ("[A] court may consider the five factors adopted by the Court of Appeals … in deciding whether to award attorney fees."); *Donachie*, 745 F.3d at 46 ("Although a court may, without further inquiry, award attorney fees to a plaintiff who has had 'some degree of success on the merits,' *Hardt* also made clear that courts retain discretion to 'consider [] five [additional] factors … in deciding whether to award attorney's [sic] fees."). These factors, known as the "*Chambless* Factors," are set forth in *Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 871 (2d Cir. 1987) as follows:

> (1) the degree of the offending party's culpability or bad faith, (2) the ability of the offending party to satisfy an award of attorney's fees, (3) whether an award of fees would deter other persons from acting similarly under like circumstances, (4) the relative merits of the parties' positions, and (5) whether the action conferred a common benefit on a group of pension plan participants.

If the court looks to the *Chambless* Factors, then it must consider all of the factors; it cannot selectively weigh certain factors and disregard others. *Donachie*, 745 F.3d at 47. However, a court may grant a fee award after considering all of the *Chambless* Factors even if all factors do not weigh in favor of the award. *Locher v. Unum Life Ins. Co. of Am.*, 389 F.3d 288, 299 (2d Cir. 2004) (concluding that failure to satisfy fifth *Chambless* factor does not preclude an award of fees).

Interim Awards

While the majority of litigants seek attorney fees and costs at the conclusion of a litigation, parties who face financial adversity during the course of the litigation may seek an interim award so long as they can satisfy the "some success on the merits" standard. See, e.g., *Pagovich v. Moskowitz*, 865 F. Supp. 130, 139 (S.D.N.Y. 1994) (granting interim attorney fees to plaintiff after defendant admitted to liability for some benefits owed to plaintiff under the plan); *Aronoff v. Serv. Employees Local 32-BJ AFL-CIO*, No. 02-CIV-5386, 2003 WL 1900832, at *2 (S.D.N.Y. April 16, 2003) (acknowledging court's authority under ERISA to award interim attorney fees but declining to do so under the facts of the case). However, practically speaking, any litigant contemplating a motion for interim relief should recognize that establishing sufficient success to warrant discretionary relief will likely be more difficult in the middle of the case than at the end.

Recoverable Costs

Under ERISA §502(g)(1), litigants can recover attorney fees and other reasonable out-of-pocket expenses incurred by their attorneys, such as filing fees, service of process fees, courier charges and printing costs. *Algie v. RCA Glob. Commc'ns*, 891 F. Supp. 875, 898 n.13 (S.D.N.Y. 1994) ("Section 502(g)(1) of ERISA refers to an award of 'costs', but that term apparently covers not only taxable costs under 28 U.S.C. §1920, but also other disbursements that are customarily charged to the client."); *Severstal Wheeling v. WPN*, No. 10CIV-954LTSGWG, 2016 WL 1611501, at *4 (S.D.N.Y. April 21, 2016); *Cohen v. Metro. Life Ins. Co.*, No. 00 CIV 6112 LTS FM, 2007 WL 4208979, at *2 (S.D.N.Y. Nov. 21, 2007), aff'd in part, 334 F. App'x 375 (2d Cir. 2009); *Taaffe v. Life Ins. Co. of N. Am.*, 769 F. Supp. 2d 530, 544-45 (S.D.N.Y. 2011). These costs must have been incurred in connection with the prosecution or defense of a lawsuit in court. *Peterson v. Cont'l Cas. Co.*, 282 F.3d 112, 119 (2d Cir. 2002). Thus, pre-litigation costs incurred by litigants to exhaust their administrative remedies

or to attempt a negotiated settlement are not recoverable. See *Aminoff v. Ally & Gargano*, No. 95 CIV. 10535 (MGC), 1996 WL 675789, at *4 (S.D.N.Y. Nov. 21, 1996) (disallowing fee award to plaintiffs who expended resources to settle retirement plan dispute because no litigation was commenced). However, "fees incurred during an administrative remand ordered by the district court and over which the court retains jurisdiction are authorized by the statute." Id. at 122. ("The fact that a court orders additional fact finding or proceedings to occur at the administrative level does not alter the fact that those proceedings are part of the 'action' as defined by ERISA.")

Factors Affecting The Size of the Award

Any fee award under ERISA §502(g)(1) must be reasonable. In New York, courts generally apply the lodestar method, which multiplies the number of hours reasonably expended in the action by attorneys and paralegals against a reasonable hourly rate for each such timekeeper. *Conners v. Connecticut General Life Ins. Co.*, No. 98-CV-8522(JSM), 2003 WL 1888726, at *1 (S.D.N.Y. April 15, 2003). After determining the lodestar, the court may in its discretion deduct from that amount the cost of legal services rendered in connection with unsuccessful aspects of the case. Id. at *2. In this way, hours expended on failed claims *wholly unrelated* to the successful ones may be excluded from the fee award. *Grant v. Martinez*, 973 F.2d 96, (2d Cir. 1992). See also *Conners*, 2003 WL 1888726, at *2 (defining claims as unrelated if they are based on "'different claims for relief that are based on different facts and legal theories'") (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). But if all of the claims are interrelated (i.e., the claims involve a "common core of facts" or are "based on related legal theories"), then the court should "focus on the significance of the overall relief obtained" to determine whether any reduction to the lodestar is warranted. *Conners*, 2003 WL 1888726, at *2 (internal quotation marks and citation omitted). Of course, courts are always free to adjust a lodestar award by comparing it to the size of the plaintiff's recovery, even if no reduction for unsuccessful claims is warranted. In doing so, courts discharge their obligation to consider whether "[t]he amount of fees awarded [are] reasonable in relation to the results obtained." Id.

ERISA §502(g)(1) offers an exception to the American Rule to encourage participants, beneficiaries and fiduciaries of ERISA-governed plans to vindicate their rights in court.

Aside from the lodestar, courts may use their discretion to award an appropriate sum to further the goals of ERISA. This seems most apt in the case of fee award to a defendant who successfully defends against a frivolous action. Weighing the deterrent value of a fee award against a plaintiff for filing frivolous claims with the chilling effect that award would have on potential plaintiffs, courts have discretion to grant a defendant an award lower than the lodestar would support. See, e.g., *Christian v. Honeywell Retirement Ben. Plan*, No. 13-CV-4144, 2014 WL 1652222, *8 (E.D. Penn. April 24, 2014) (concluding that an award of $10,000 to defendant serves the purpose of protecting pension benefits and deterring conduct at odds with ERISA's purpose even though defendant incurred approximately $76,779.18 in succeeding on its motion to dismiss). Courts are also free to adjust the lodestar upward if, for example, a party's counsel exhibits its superior work product and exceeds the expectation of the party and normal levels of competence. *Feinstein v. Saint Luke's Hosp.*, No. 10-CV-4050, 2012 WL 4364641, at *6 (E.D. Penn. Sept. 25, 2012) (citing *Rode v. Dellarciprete*, 892 F.2d 1177, 1184 (3d Cir. 1990).)

Conclusion

ERISA §502(g)(1) offers an exception to the American Rule to encourage participants, beneficiaries and fiduciaries of ERISA-governed plans to vindicate their rights in court. A court's discretionary right to grant a fee award under this provision arises when a party achieves "some degree of success on the merits." Courts apply a plaintiff-friendly slant to motions for attorney fees in recognition of ERISA's fundamental purpose, which is to protect employees' rights. This approach generally insulates plaintiffs unsuccessful in litigation from the pain of an adverse fee award, but offers a valuable incentive to a party who may have been wrongly denied an applicable benefit.