Fee Awards Under ERISA – The Long and Winding Road to "Some Success on the Merits"

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ERISA's fee-shifting provisions are a significant factor in encouraging plaintiffs to file suit. Prior to 2010, parties seeking attorneys' fees under ERISA § 502(g)(1) typically were required to be the "prevailing party."[1] Section 502(g)(1) allows courts to grant attorneys' fees to "either party" in an ERISA action at their "discretion."[2] However, the "prevailing party" requirement limited courts' discretion by requiring the party seeking fees to be the party that prevailed on the merits. In 2010, the U.S. Supreme Court in *Hardt v. Reliance Standard Life Ins. Co.* rejected the "prevailing party" requirement and replaced it with a far more lenient standard.[3] The Court found that attorneys' fees may be awarded if a party obtains "some degree of success on the merits."[4] As is its prerogative, the Court did little to elucidate this standard, simply stating that the success must be more than "trivial" or "purely procedural," but need not be more than "some success" based on the "outcome of litigation."[5] In other words, much was left to the imagination of lower courts.

After *Hardt*, district courts set to work applying the "some success" standard and, in some cases, have struggled to do so. Moreover, although ERISA § 502(g)(1) authorizes fee awards to both defendants and plaintiffs, defendants continue to face an uphill battle to recover fees even after obtaining the level of success that regularly justifies fee awards to plaintiffs. Courts exercising discretion to determine if granting fees is appropriate consider a number of factors, including bad faith, ability to satisfy an award, deterrence, the motives of the party requesting fees, and the relative merits of the parties' positions.[6] When considering these factors, courts remain hesitant to exercise discretion in favor of defendants.

The U.S. Court of Appeals for the Ninth Circuit recently considered the results of a district court's wrestling with this standard in *Brasley v. Fearless Farris Service Stations, Inc.*[7] The case's history illustrates the courts' effort to construct a framework for applying the "some success" standard. The Ninth Circuit's decision followed an approximately seven-year dispute regarding a relatively small, approximately

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30-participant retirement plan. The Ninth Circuit's decision and the district court's handling of two separate fees requests by both parties demonstrates just how lenient the "some success" standard can be when applied to plaintiffs, and how that leniency can evaporate when the party seeking fees is the defendant.

Background

In April 2008, Edward Brasley brought suit against Fearless Farris Service Stations, Inc., its deferred compensation plan, and Fearless' owners, Charley Jones and Shawn Davis.[8] The dispute arose out of the owners' purchase of Fearless in 2002. Following their purchase, the owners terminated the plan and informed participants that Fearless no longer had a financial obligation to them.[9] Brasley alleged that defendants breached their fiduciary duties under ERISA § 404(a), and failed to provide participants necessary information regarding the plan, including a summary plan description, a summary annual report, and summary benefit statement as required by ERISA.[10] Brasley later filed an amended complaint adding four additional plaintiffs.[11] Although plaintiffs never pursued class certification, collectively they sought to recover personal benefits and benefits on behalf of plan participants.[12] Plaintiffs also sought civil penalties for defendants' alleged failure to provide the required disclosures.[13]

During litigation, the parties engaged in mediation. There, defendants conceded that they owed eligible plan participants benefits, and agreed to establish a new ERISA plan to provide those benefits.[14] Despite these concessions, the parties proceeded to trial because of differences over the parameters of the newly proposed plan.[15] In April 2010, after a two-day bench trial, the court found in favor of three of the four plaintiffs on the breach of fiduciary duties claim, and denied plaintiffs' civil penalties claim regarding the plan disclosures.[16] In addition, the court ordered defendants to fulfill their obligations to all the plan participants.[17]

The Parties' First Requests For Attorneys' Fees

Following the bench trial, plaintiffs and defendants sought attorneys' fees. Plaintiffs claimed that they were entitled to fees based on their "virtually total success" in recovering plan benefits.[18] Defendants claimed fees based on their "success" in defeating one of the plaintiff's claims and defeating the civil penalties claim.[19] The district court engaged in a two-step analysis to determine whether a fee award was appropriate. First, *Hardt* having been decided six months earlier, the court determined whether each party attained "some degree of success on the merits."[20] Second, the court considered whether, in its discretion, fees *should* be awarded based on the circumstances of the litigation.

The court found that both parties met the "some success" standard.[21] It held that there was "no question" plaintiffs met this standard, because they were successful on their breach of fiduciary duties claim and were able to obtain equitable relief on behalf of all of the plan's participants.[22] Defendants also met the "some success" threshold by defeating plaintiffs' civil penalties claim, a claim the court viewed as "significant."[23] The court noted, however, that under the facts of the case having one of the plaintiffs' claims totally dismissed was insufficient to meet the "some success" standard.[24] The court concluded that dismissal of that claim was "trivial" in light of defendants being required to provide benefits to all the remaining plan participants.[25]

Thus, concluding that both parties had attained some degree of success, the district court awarded fees to plaintiffs but not defendants.[26] In doing so, it considered the following five factors used to guide courts' discretion in the Ninth Circuit[27]:

> (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.[28]

The court found that all five factors weighed in favor of plaintiffs.[29] Regarding the first factor, the court noted that defendants had been held liable in another jurisdiction for their conduct related to terminating the plan, and defendants displayed "some degree of . . . bad faith" by forcing plaintiffs to seek similar relief.[30] Regarding the third factor, the court rejected defendants' claim that deterrence was irrelevant, and found that a fee award would deter similarly-situated defendants from attempting to terminate a retirement plan.[31] In analyzing the fifth factor, the court found that the results of the litigation made clear that plaintiffs' claims outweighed the merits of defendants' claims.[32] Finally, the court noted that defendants had already conceded that they could afford to pay fees and that plaintiffs brought their action, in part, to benefit all the plan participants.[33] Based on these considerations, the court awarded plaintiffs $390,153.60 in attorneys' fees.[34]

In contrast, the court concluded that none of the five factors weighed in favor of defendants. The court found that plaintiffs demonstrated no bad faith in bringing their civil penalties claim, which had "some validity" based on the facts.[35] The court also explained that there was "no indication" plaintiffs had an ability to satisfy a fee award and the court wanted to avoid deterring others from acting similarly to plaintiffs.[36] Moreover, the court concluded that plaintiffs' claims were "more meritorious" than defendants' as evidenced by the overall outcome of the case.[37] In short, the court "exercise[d] its discretion" to not "grant [d]efendants' request for a fee award."[38]

The Parties' Second Requests For Attorneys' Fees

After the court awarded attorneys' fees to plaintiffs, the parties engaged in a five-year dispute over the equitable remedies the court had ordered related to establishing a new plan. During the dispute, the court appointed a special master and ultimately adopted his recommendation that the plan be terminated and defendants pay plaintiffs lump sum benefit amounts.[39] Plaintiffs claimed that they were entitled to the fees incurred during the post-judgment litigation because they obtained the relief they sought in their complaint.[40] The defendants claimed that they were allowed fees because the court ultimately rejected plaintiffs' positions regarding administration of the plan by terminating the plan altogether.[41]

The district court denied both parties' requests.[42] In doing so, it expressed its frustration with the post-judgment dispute, describing it as "more frustrating than almost any other case" the court had adjudicated over a nearly thirty-year period.[43] In somewhat conclusory fashion, the court determined that neither party met the "some success" threshold requirement and denied both parties' requests.[44] Plaintiffs appealed.

The Ninth Circuit disagreed with the court's conclusion that plaintiffs failed to demonstrate some degree of success in the post-judgment litigation.[45] The court found that because the defendants were required to make lump sum benefits payments, plaintiffs had met the "some success" threshold.[46] However, the Ninth Circuit did not direct the district court to award the plaintiffs fees. Rather, the court remanded the case back to the district court to consider the five discretionary factors outlined above—a decision that does not seem calculated to delight the district court.[47]

Conclusion

Although it is a small case, the district court's handling of the multiple fees requests and the Ninth Circuit's decision in *Brasley* are interesting because of the ways they illustrate the practical difficulties of applying the *Hardt* standard, particularly with respect to the implementation of equitable remedies. The district court's handling of defendants' fee petition demonstrates why defendants in ERISA actions should keep in mind that, in pursuing fees, they risk snatching defeat from the jaws of victory. Particularly in small cases that have an extended litigation history, a fee award may be worth as much or more as the relief plaintiffs seek. Defendants may be better off asking the court to reduce or withhold a fee award to plaintiffs as a result of partial success than asking for their own award.

In addition, the Ninth Circuit's decision should remind defendants that the fee-awarding portion of a case does not end with the district court's decision. The plaintiffs in *Brasley* had already recovered fees once for their success in the underlying ERISA suit. However, the Ninth Circuit viewed plaintiffs' ability to obtain enforcement of their judgement as another independent success entitling them to fees. The decision shows just how flexible the "some success" standard can be.

Notes

1. *See, e.g.,* Tate v. Long Term Disability Plan for Salaried Employees of Champion Int'l Corp. No. 506, 545 F.3d 555, 564 (7th Cir. 2008); Cottrill v. Sparrow, Johnson & Ursillo, Inc., 100 F.3d 220, 225 (1st Cir. 1996).

2. 29 U.S.C. § 1132(g)(1).

3. 560 U.S. 242, 252, 255 (2010).

4. 560 U.S. at 255 (citations omitted).

5. *Id.*

6. *See, e.g.,* Honolulu Joint Apprenticeship & Training Comm. of United Ass'n Local Union No. 675 v. Foster, 332 F.3d 1234, 1238-39 (9th Cir. 2003); Temme v. Bemis Co., 762 F.3d 544, 547-48 (7th Cir. 2014); Plasterers' Local Union No. 96 Pension Plan v. Pepper, 663 F.3d 210, 223 (4th Cir. 2011).

7. 714 F. App'x. 790 (9th Cir. 2018) (*Brasley I*).

8. Brasley v. Fearless Serv. Stations, Inc., Case No. CV-08-173-S-BLW, 2010 WL 1727840, at *4 (D. Idaho April 26, 2010) (*Brasley II*).

9. *Brasley II*, 2010 WL 1727840, at *2.

10. *Id.* at *4.

11. *Id.* The complaint also added Stinker Stores Inc. as a defendant. *Id.* In 2007, Fearless and its subsidiaries were merged into a single entity called Stinker Stores Inc. *Id.* at *3.

12. *Id.* at *4, *11. Although it is often noted that ERISA's authorization of plan participants to seek relief on behalf of a plan as a whole arguably obviates the need for the class action vehicle, plaintiffs typically choose to seek class certification anyway. In this case, plaintiffs may have realized that they likely would have difficulty meeting at least the numerosity requirement to do so.

13. *Id.* at *4.

14. *Id.* at *4, *11.

15. *Id.* at *5, *12-15.

16. *Id.* at *14-15.

17. *Id.* at *16.

18. Pls' Mot. Att'y Fees, 13, ECF No. 156.

19. Brasley v. Fearless Farris Serv. Stations, Inc., No. 1:08-CV-173-BLW, 2010 WL 4867359, at *3 (D. Idaho November 23, 2010) (*Brasley III*). Defendants also argued that they were

entitled to recover fees because of their agreement to provide benefits to the plaintiffs during mediation. *Brasley III*, 2010 WL 4867359, at *3. The court quickly rejected defendants' argument noting that their concessions were "hollow" until a judgment was entered. *Id.*

20. *Id.* at *1, *3.

21. *Id.* at *1, *3.

22. *Id.* at *1.

23. *Id.* at *3.

24. *Id.*

25. *Id.*

26. *Id.* at *1, *3.

27. *Id.* at *1. Many circuits consider similar factors and have determined that doing so is consistent with *Hardt*. *See Temme*, 762 F.3d at 549-550 (noting that the "five factors" that guide courts' discretion have been adopted in "some form" by all the circuits and that "no Court of Appeals since *Hardt* has abandoned its five-factor test").

28. *Id.* at *1 (quoting Hummell v. S.E. Rykoff & Co., 634 F.2d 446 (9th Cir.1980)).

29. *Id.* at *1-*3.

30. *Id.* at *1-*2.

31. *Id.* at *2.

32. *Id.* at *3.

33. *Id.* at *2-*3.

34. *Id.* at *7.

35. *Id.* at *3.

36. *Id.* at *4.

37. *Id.*

38. *Id.*

39. Brasley v. Fearless Farris Serv. Stations, Inc., No. 1:08-CV-00173-BLW, 2016 WL 1032785, at *2 (D. Idaho March 14, 2016) (*Brasley IV*).

40. Pls.' Mot. Att'y Fees, 6, Jul. 24, 2015, ECF No. 313-1.

41. Defs.' Mot. Att'y Fees, 3, Jul. 27 2015, ECF No. 315.

42. *Brasley IV*, 2016 WL 1032785 at *2.

43. *Id.*

44. *Id.*

45. *Brasley I*, 714 F. App'x. at 790.

46. *Id.* at 791.

47. *Id.*