

RESOLVING THE DISPUTE OVER WHEN ATTORNEY'S FEES
SHOULD BE AWARDED UNDER ERISA IN TWO WORDS:
PLAINTIFF PREVAILS

I. INTRODUCTION

Early pension plans were subject to abuse in the administration and investment of fund assets such as theft and embezzlement; some employers would simply cancel the plan and take the money without paying any of the promised benefits. In an effort to combat these problems, the Employee Retirement Income Security Act (ERISA) was enacted in 1974 to protect the interests of participants and their beneficiaries in private pension plans.¹ ERISA achieves this primary purpose 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."² The intent to protect plan participants is particularly evident in that private participants and beneficiaries are specifically authorized to bring actions enforcing the rights guaranteed under ERISA,³ and, in an effort to encourage aggrieved parties to seek redress under ERISA, section 1132(g)(1) allows the trial court to award attorney's fees in benefits claims.⁴

It seems as though this statute would be significant in giving participants of limited means access to the courts by diminishing expenses, one of the major obstacles to filing suit. However section 1132(g)(1) of ERISA is flawed in that it does not indicate how the courts should determine a fee award, but merely states that it is in the court's discretion to award fees and to award them to either party.⁵ When courts turned to the legislative history for guidance, they found it lacking any standard

1. 29 U.S.C. §§ 1001-1461 (1994).

2. *Id.* § 1001(b).

3. *See id.* 1132(a)(1).

4. *Id.* § 1132(g)(1). This section states that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." *Id.*

5. 29 U.S.C. § 1132(g)(1).

for determining an award.⁶ The references in the legislative history merely repeat the same wording of section 1132(g)(1), with no other suggestion as to how Congress intended the fee-shifting provision to be applied.⁷

Left to their own devices, most circuit courts have adopted a five-factor test that was established by the Tenth Circuit in *Eaves v. Penn.*⁸ This test has not been applied consistently throughout the circuit courts, however, due to the varying degrees of importance the factors are given among the courts.⁹ Alternatively, some courts follow standards set forth in other federal statutes for awarding attorney's fees.¹⁰

Allowing courts complete discretion regarding fee determinations is not the statute's only flaw. ERISA also gives complete discretion to award fees to either party.¹¹ This language is so broad that fees *could* be awarded to a non-prevailing party and denied to a prevailing party without the court having to be concerned with reversal. This provision is not a problem when the prevailing party is the plaintiff because the fee provision is viewed primarily as one of the "important mechanisms for furthering ERISA's remedial purpose,"¹² and taxing attorney's fees against wrongful defendants would further this purpose. Awarding fees to prevailing defendants, however, could have a chilling effect on actions brought by plan participants asserting their rights or policing the actions of trustees over their own plans.

II. FEDERAL COMMON LAW GOVERNING FEE-SHIFTING UNDER ERISA

Under section 1132(g)(1), courts have discretionary power to award fees to either party. The lack of guidelines in the Act's legislative history and in the fee-shifting provision has caused the courts to develop their own tests, drawing theories from many different sources or even none at all.

6. See *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 591 (9th Cir. 1984) (Wallace, J., concurring) (noting that the statute makes no mention of the wide equitable goals cited by the majority); *Credit Managers Ass'n of S. Cal. v. Kennesaw Life & Accident Ins. Co.*, 25 F.3d 743, 752 (9th Cir. 1994) (Boochever, J., dissenting) (observing that there is nothing in the legislative history that would suggest any greater awards than those in the plain language of the statute).

7. H.R. CONF. REP. NO. 93-1280 (1973), reprinted in 1974 U.S.C.A.N. 5038, 5107; H.R. REP. NO. 93-533 (1973), reprinted in 1974 U.S.C.A.N. 4639, 4659.

8. 587 F.2d 453, 465 (10th Cir. 1978).

9. See *infra* note 21 and accompanying text.

10. See *infra* notes 24, 30-31 and accompanying text.

11. See 29 U.S.C. § 1132(g)(1).

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

A. *Eaves and the Five-Factor Test*

In *Eaves v. Penn*,¹³ the United States Court of Appeals for the Tenth Circuit developed the test for determining fee awards that has been most widely adopted by the circuits. In *Eaves*, the trustees of an employee stock ownership plan violated ERISA by failing to act solely in the interests of the plan participants and beneficiaries.¹⁴ The trial court awarded attorney's fees to the plaintiffs, but the fees were to be paid from the assets recovered on behalf of the plan, not out of the pockets of the breaching fiduciaries.¹⁵ The Secretary of Labor contested the fee award from the plan assets as an abuse of discretion.¹⁶

On appeal, the Tenth Circuit determined that the trustees had violated their duties under ERISA, but the issue of attorney's fees was remanded to the trial court.¹⁷ The trial court had based its decision for the award on the common fund exception to the general American rule that each party bears its own costs of litigation, and the Tenth Circuit found that because section 1132(g)(1) specifically authorized attorney's fees, the need to use the common fund exception may not apply.¹⁸ The Tenth Circuit instructed the trial court, in determining whether to award the fees from the common fund or from the culpable defendant, to consider 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 personally satisfy an award of attorneys fees;
- (3) whether or not an award of attorneys 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.¹⁹

The *Eaves* court remanded with these instructions, but failed to explain its method for formulating the five factors or why the trial court should consider them.²⁰

Today, nearly all of the courts have applied the five-factor test or an approximate version of it in at least some decisions, although each

13. 587 F.2d 453 (10th Cir. 1978).

14. *Eaves*, 587 F.2d at 456.

15. *Id.*

16. *Id.* at 464.

17. *Id.* at 463-65.

18. *Id.* at 464-65.

19. *Eaves*, 587 F.2d at 465.

20. See *id.*; see generally David E. Gordon & Robert N. Eccles, *ERISA Attorneys' Fees: An Unpredictable Situation*, 10 *INSIDE LITIG.* 17, 17 (1992) (noting that the *Eaves* court announced the factors, "without citation and apparently from thin air").

court's interpretation of the test has produced varying results.²¹ These varied results have prevented the formation of more precise guidelines. However, the *Eaves* test is not being applied to determine whether fees should be paid from a common fund or from the offending trustees, as it was in that case, but is being applied to every ERISA action where one party seeks to have its fees paid by another party. This is undoubtedly due to the generality and flexibility of the test, which leaves almost no room for reversal due to an abuse of discretion. A finding of clear error is practically impossible with factors such as these that can easily be manipulated to justify any outcome.²²

B. *Alternate Approaches in Determining Fee Awards*

Seven circuits—the first, second, third, fifth, sixth, tenth and eleventh—seem to consistently apply the *Eaves* test. The other circuits have adopted alternate tests to determine fee awards with any mention of the five-factor test as a mere formality.

1. Bittner's "Modest" Prevailing Party Presumption

In *Bittner v. Sadoff & Rudoy Indus.*,²³ the Seventh Circuit considered an appeal by an unsuccessful plaintiff against whom the trial court had awarded the defendant's attorney's fees for asserting a frivolous claim.²⁴ The court declined to follow the *Eaves* five-factor test, stating that the factors were more oriented toward a case involving a prevailing

21. See *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 257-58 (1st Cir. 1986) (holding that the *Eaves* five-factor test is the best approach for determining awards although not every factor must be considered); *Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 871 (2d Cir. 1987); *McPherson v. Employees' Pension Plan*, 33 F.3d 253, 254 (3d Cir. 1994); *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1029 (4th Cir. 1993) (en banc); *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980) (adopting the five-factor *Eaves* test as guideline for assisting district courts in exercising discretion); *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1303-04 (6th Cir. 1991) (holding that the *Eaves* factors can be looked at two ways: (1) as limitations of fee-shifting once bad faith is found on one litigant or (2) that each factor is an independent ground for awarding fees); *Janowski v. Int'l Bhd. of Teamsters*, 673 F.2d 931, 940 (7th Cir. 1982); *Lawrence v. Westerhaus*, 749 F.2d 494, 496 (8th Cir. 1984); *Credit Managers Ass'n of S. Cal. v. Kennesaw Life & Accident Ins. Co.*, 25 F.3d 743, 748-49 (9th Cir. 1994) (applying the *Eaves* five-factor test for determining an award to the defendant); *Nachwalter v. Christie*, 805 F.2d 956, 961-62 (11th Cir. 1986) (holding that the five factors should guide fee determinations but noting that ERISA's remedial purpose of protecting beneficiaries often counsels against charging fees against ERISA beneficiaries); *Eddy v. Colonial Life Ins. Co.*, 59 F.3d 201, 206 (D.C. Cir. 1995) (explicitly adopting the five-factor test in an action by a participant for breach of fiduciary duty).

22. See *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1303 (6th Cir. 1991) (citing generally Mark Berlind, *Attorney's Fees Under ERISA: When is an Award Appropriate?*, 71 CORNELL L. REV. 1037 (1986)).

23. 728 F.2d 820 (7th Cir. 1984).

24. *Bittner*, 728 F.2d at 826.

plaintiff.²⁵ The *Bittner* court analogized a request under section 1132(g)(1) to a request of attorney's fees under the Equal Access to Justice Act (EAJA) to provide a model of the meaning of the word "discretion" in the ERISA statute.²⁶ This standard, which gives a prevailing plaintiff or a prevailing defendant the same opportunity to collect fees, entitles the prevailing party to fees "unless the court finds that the position of the [plaintiff or defendant] was substantially justified or that special circumstances make an award unjust."²⁷ The court reversed the award to the defendant and remanded the case to the trial court to determine if an award was proper under this standard.²⁸

The standard endorsed by the *Bittner* court is known as the "modest prevailing party presumption."²⁹ This is because the losing party will not be taxed the costs of fees so long as the position taken in the action had a solid, though not necessarily correct, basis in fact and law—more than merely not frivolous, but less than meritorious.³⁰

Defendants will prefer the *Bittner* test to the *Eaves* test. It is better for the losing defendant because fees would not have to be paid to the prevailing plaintiff so long as the defendant could prove that his position had merit. Defendants have a much greater hurdle to get over if the *Eaves* test is applied because even if the position of the defendant was meritorious, that is only one of the considerations courts take into account. Prevailing defendants would also prefer the *Bittner* test because they would be entitled to an award, absent special circumstances, without having to prove that the plaintiff's suit was frivolous. This is because "the plaintiff's good faith is not enough to alone prevent the court from awarding the defendant a reasonable attorney's fee—otherwise the 'substantially justified' test would be set at naught."³¹

2. The Prevailing Plaintiff Presumption

Although the *Bittner* court expressly rejected a prevailing plaintiff presumption,³² other circuits have adopted just that presumption. The Eighth Circuit in *Landro v. Glendenning Motorways, Inc.*,³³ and the Ninth Circuit in *Smith v. CMTA-IAM Pension Trust*,³⁴ have incorpo-

25. *Id.* at 829.

26. *Id.* at 830.

27. 28 U.S.C. § 2412(d)(1)(A) (1994).

28. *Bittner*, 728 F.2d at 831.

29. *See id.* at 830.

30. *Id.*

31. *Id.*

32. *Id.* (stating that "[i]t does not follow that whoever wins . . . is entitled to attorney's fees as a matter of course under section 1132(g)(1)").

33. 625 F.2d 1344, 1356 (8th Cir. 1980).

34. 746 F.2d 587, 590 (9th Cir. 1984).

rated the standard under the Fees Award Act into ERISA.³⁵ Under this standard, section 1132(g) is read broadly to mean that a prevailing plan participant or beneficiary "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."³⁶ The courts' reasoning is that ERISA is remedial legislation, and like other federal remedial legislation, section 1132(g) should be construed liberally in favor of those persons it was meant to protect.³⁷ By awarding the prevailing plaintiff the costs of attorney's fees, trustees are less likely to oppose benefit claims where plaintiffs have a great chance of success.³⁸

While analogizing section 1132(g) to the Fees Award Act requires that prevailing plaintiffs are awarded fees in all but special circumstances, different considerations govern awarding fees to prevailing defendants.³⁹ Prevailing defendants will be awarded fees only if the plaintiff's suit was either frivolous or brought in bad faith.⁴⁰ This is because in both civil rights and ERISA cases "the reason for awarding fees to defendants is to discourage frivolous suits, and in both instances it is important not to punish plaintiffs whose actions fail even though they seemed reasonable at the outset."⁴¹

III. COURTS SHOULD NOT APPLY THE *EAVES* FIVE-FACTOR TEST TO DETERMINE ATTORNEY'S FEES UNDER SECTION 1132(g)

The inconsistent application of the *Eaves* test has resulted in erratic and conflicting fee award determinations among the circuit courts. These results are inappropriate for a federal statute because they do not approximate the intent of Congress in enacting section 1132(g)(1): to protect employee rights and secure effective access to federal courts.⁴² The language of section 1132(g)(1) allows an award of reasonable fees to either party, and the guidelines established by the five-factor test are consistent with the statute in that they do not explicitly differentiate between plaintiffs and defendants. But, as several courts have recognized, the five-factor test is more oriented toward the case where a

35. 42 U.S.C. § 1988 (1994 & Supp. 1999). This statute allows the court, in its discretion, to award reasonable attorney's fees to the prevailing party. *See id.*

36. *Landro*, 625 F.2d at 1356; *see also Smith*, 746 F.2d at 590.

37. *Landro*, 625 F.2d at 1356.

38. *Smith*, 746 F.2d at 590.

39. H.R. REP. NO. 94-1558 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908; S. REP. NO. 94-1011 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908. The legislative history of the Civil Rights Attorney's Fees Award Act indicates that the purpose of the statute, despite its neutral wording, is to encourage meritorious litigation by allowing prevailing plaintiffs an award of fees almost as a matter of course, but awards to prevailing defendants only if the suit is frivolous. *Id.*

40. *See Marquardt v. North Am. Car Corp.*, 652 F.2d 715, 719-20 (7th Cir. 1981).

41. *Id.* at 720.

42. *See* 29 U.S.C. § 1001(b) (1994).

plaintiff prevails and seeks a fee award.⁴³

A. Inappropriateness of the Eaves Test for Determining Awards to Prevailing Plaintiffs

None of the *Eaves* factors are necessary when considering an award to the prevailing plaintiff. The first factor courts consider, the degree of the offending parties' culpability or bad faith,⁴⁴ is unnecessary because fees can be shifted without statutory authority when one of the parties is found to have acted in bad faith.⁴⁵ There is no reason to believe that Congress merely intended to codify this preexisting common law rule in section 1132(g). Therefore, this inherent power of the court need not be formally considered when making an award. The fact that Congress did not intend bad faith to be the determining factor is buttressed by the fact that a fee-shifting provision was included in the statute.⁴⁶ Also, when neither party acts in bad faith, the factor is canceled out and cannot be used in making a decision.⁴⁷ It is especially important to take notice of how unnecessary this particular factor is due to the trend in ERISA cases denying fees to prevailing plaintiffs based on a lack of evidence that the defendant acted in bad faith.⁴⁸

43. See, e.g., *Tingey v. Pixley-Richards West, Inc.*, 958 F.2d 908, 909 (9th Cir. 1992) (recognizing that the five-factor test very frequently suggests that attorney's fees should not be charged against individual ERISA beneficiaries); *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 258 (1st Cir. 1986) (recognizing that certain factors may favor a prevailing plaintiff more strongly than a prevailing defendant even though it chose to apply the test when making a fee determination); *Marquardt*, 652 F.2d at 719 (noting that "a reasonable exercise of discretion necessitates treating plaintiffs and defendants differently").

44. See *supra* note 19 and accompanying text.

45. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975). The general rule in the United States is that litigants pay their own attorney's fees and costs of litigation. See Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 651. This is known as the "American Rule" and is distinguishable from the "English Rule" which generally requires the losing party to pay reasonable attorney's fees to the winning party. *Id.* *Alyeska Pipeline* is the leading Supreme Court case enforcing the American Rule and provides limited exceptions to the general rule against fee-shifting. 421 U.S. 240, 257-59 (1975). One such exception is when the losing party has litigated "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 258-59. This exception is "unquestionably [an] assertion . . . of [the] inherent power in the court to allow attorneys' fees in particular situations." *Id.* at 259.

46. See, e.g., *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978) (noting that if Congress's objective is to permit attorney's fees only against defendants who acted in bad faith, then a statutory provision for fee-shifting is unnecessary because the American rule allows awards in those situations).

47. See *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 590 (9th Cir. 1984).

48. See, e.g., *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1304 (6th Cir. 1991) (finding that because the additional four factors *could be read* as limitations on fee-shifting once bad faith had been found, further consideration of these factors was pointless because the defendant had not acted in bad faith) (emphasis added); *Hooper v. Demco*, 37 F.3d 287, 294-95 (7th Cir. 1994) (denying an award of attorney's fees to the prevailing plaintiff because the defendant had acted fairly and in good faith in denying the plaintiff's claim). See generally *Custer v. Pan Am. Life Ins. Co.*, 12 F.3d 410, 422 (4th Cir. 1993) (noting that not all the factors need to be considered

A similar analysis is true of the fourth *Eaves* factor, consideration of the amount of benefit conferred on members of the pension plan as a whole.⁴⁹ This resembles the common fund or common benefit doctrine under which courts can assess fees to the class that benefited from the litigation. Therefore, there is no need to formally consider this factor when a common benefit results from an ERISA action because courts have the inherent power to shift the costs of fees from the plaintiff to the benefited class.⁵⁰

The fifth factor, the relative merits of the parties' position,⁵¹ leads to an inquiry of the defendant's culpability. It is an improper guideline because an award would be denied if the position of the losing defendant had any merit and, therefore, was not culpable. This outcome would not serve the purpose of the statute, which is to encourage participants to enforce their rights, if some plaintiffs would be discouraged from bringing suit in close cases even though the plaintiff has a meritorious action. Also, under Rule 11 of the Federal Rules of Civil Procedure, courts can shift fees without a statutory provision if the court finds the opposing party's position was without merit.⁵²

When the plaintiff prevails, the second factor the courts assess is whether the defendant would be able to personally pay an award or if the money would have to come from the plan assets.⁵³ A fee award from the plan assets should not be denied to the prevailing plaintiff, even though it reduces benefits to plan participants. If participants knew that the plan trustees would be unable to personally pay a fee award, participants with limited funds would be deterred from bringing suit. Allowing fees to be paid from plan assets is beneficial to all participants because the decision of whether to bring an action for benefits would not have to include an assessment of the breaching trustee's financial condition.

The third factor of whether or not an award of attorney's fees against the offending trustee would deter other trustees acting under similar circumstances⁵⁴ is also unnecessary. ERISA awards plan partici-

because they were not developed as the single set of guidelines in making award determinations).

49. See *supra* note 19 and accompanying text.

50. Another historic power of equity providing the courts an exception to the American Rule is the common benefit or common fund doctrine. See *Rowe*, *supra* note 45. Both the courts and Congress developed this exception to award attorney's fees to a party who successfully maintains an action that benefits others in addition to himself. See *Alyeska Pipeline*, 421 U.S. at 257-58. This is allowed to prevent unjust enrichment to the others who benefited from the litigation without otherwise having to contribute to the expense of the litigation, and the fees are awarded from the fund or benefit recovered. *Id.*

51. See *supra* note 19 and accompanying text.

52. FED. R. CIV. P. 11.

53. See *supra* note 19 and accompanying text.

54. See *supra* note 19 and accompanying text.

pants compensatory damages when plan trustees do not comply with ERISA's standards. The fact that the culpable trustee has to pay compensatory damages as well as their own attorney's fees is enough to deter others from acting in a similar manner in violation of ERISA. Although fee awards are not necessary to "deter" improper conduct because of the other penalties for violations, they should be given to prevailing plaintiffs as an added "incentive" for plan trustees to comply with ERISA. This is especially true when courts take into account that the trustee is violating a federal law.

B. Inappropriateness of the Eaves Test for Determining Awards to Prevailing Defendants

The *Eaves* test is also inappropriate for considering an award to prevailing defendants for two reasons. First, the culpability of a losing plaintiff differs from that of a losing defendant. A losing defendant has deprived the plaintiff of benefits under a pension plan and violated a federal statute. A losing plaintiff may not necessarily be "culpable" but simply may be unable to prove his case or may have brought his case in error. If the plaintiff has in fact brought an unmeritorious case, then, as noted above, the courts can assess sanctions under Rule 11 of the Federal Rules of Civil Procedure. Second, a defendant-employer is usually in a much better position to pay its own legal fees while the employee is usually retired or disabled, surviving on a modest pension benefit. The "ability to pay" factor would rarely weigh in favor of an award to the prevailing defendant.

The third factor, deterrence, is also unnecessary in assessing fees against losing plaintiffs. The majority of the plaintiffs bringing benefits actions have limited funds so the possibility of having to pay their own fees and costs is sufficient to deter frivolous claims. Deterrence is achieved against plan trustees, on the other hand, because they will have the added incentive to comply with ERISA if they know they will be charged with the plaintiff's attorney's fees as well as their own. This is entirely fair because, even though assessing fees against a plaintiff could give them "added incentive" not to bring frivolous claims, it is the trustee who has violated a federal statute and should have to incur an extra penalty.

Fourth, the common benefit factor is also primarily relevant to awarding fees to plaintiffs. Plaintiffs have added incentive to bring suits that will benefit all participants in the fund if they know the defendant will pay their attorney's fees. The winning defendant is not in the same position to do this.

Fifth, the relative merits of the parties' position is related to culpa-

bility in the first factor. The plaintiff's culpability is determined by the lack of merit in his suit, while a defendant's culpability is determined by his actions, which led to the plaintiff bringing suit.

For these reasons, consideration of these factors will seldom result in an award against an ERISA plaintiff. The policy reason behind this is that the essential purpose of ERISA is to protect beneficiaries of private pensions and adherence to this purpose often weighs against charging fees to ERISA beneficiaries.⁵⁵

C. The EAJA is also an Inappropriate Model for Determining Fee Awards to Prevailing Plaintiffs or Prevailing Defendants

The Equal Access to Justice Act (EAJA) is also an inappropriate standard for awarding attorney's fees.⁵⁶ One reason is that the EAJA only provides for recovery against the United States, while ERISA's provision allows either party to recover. The EAJA attorney's fees standards can not readily be transferred to ERISA because the concerns about ability to pay and deterrence are not the same. Another reason why this statute cannot be appropriately analogized to ERISA is that the prevailing plaintiff would always be denied benefits if the defendant's position had merit. This does not meet the remedial purposes of ERISA because plaintiffs would be deterred from bringing actions in close cases. Also, if the defendant were to prevail he would be entitled to fees unless some special circumstance existed which would also have a chilling effect on potential plaintiffs.

IV. PREVAILING PLAINTIFFS SHOULD MANDATORILY BE AWARDED ATTORNEY' FEES UNDER SECTION 1132(g)

ERISA is remedial legislation that, as most courts will agree, "was enacted primarily 'to promote the interests of employees and their beneficiaries in employee benefit plans,' to 'protect contractually defined benefits' of plan participants, and 'to safeguard employees from the abuse and mismanagement of funds that had been accumulated to fi-

55. See *Nachwalter v. Christie*, 805 F.2d 956, 962 (11th Cir. 1986); *Marquardt v. North Am. Car Corp.*, 652 F.2d 715, 719-21 (7th Cir. 1981). In *Marquardt*, a retired man in his sixties voluntarily dismissed his claim for pension benefits, with prejudice. 652 F.2d at 719-21. The court found it would be unjust to order him to pay attorney's fees because he would have to sacrifice part of his modest pension to do so. *Id.* Cf. *Credit Managers Ass'n of S. Cal. v. Kennewick Life & Accident Ins. Co.*, 25 F.3d 743 (9th Cir. 1994) (awarding attorney's fees against a plaintiff who was *not* an individual beneficiary, but a receiver for four insolvent health insurers) (emphasis added).

56. See, e.g., *Gordon & Eccles*, *supra* note 20, at 18 (noting that the award for creativity in fashioning an alternative belongs to the 7th Circuit).

nance various types of employee benefits.’”⁵⁷ Part of this protection is specifically defined in section 1132(a)(1), which authorizes participants to bring actions enforcing their rights in court. But, in order to assure optimum protection, attorney’s fees must be mandatorily awarded to prevailing participants.

There are several reasons why courts should take this approach. One reason is that when fees are not shifted to the prevailing party, participants have to pay their own fees thereby effectively reducing their recovery. This is significant in that most participants who pursue a claim are supported by limited means and in fact seeking a higher benefit.⁵⁸ The statute was enacted to protect participants in their accrued benefits. Assuming this means *all* benefits, the entire purpose of ERISA is defeated if participants are prevented from getting benefits to which they are entitled because of having to pay attorney’s fees.

Another reason is that participants seeking to recover benefits to which they are entitled have difficulty bringing their case to court because of the lack of attorneys willing to take ERISA cases.⁵⁹ Most attorneys are deterred from taking ERISA cases because the complexity and substantial time commitment involved in these types of cases outweighs, to the lawyer, the modest benefit that is recovered. Even if these factors did not deter lawyers from taking benefits cases, the financial condition of most participants prevents them from even attempting to hire an attorney.⁶⁰

If fees were shifted to prevailing plaintiffs as a matter of course these problems would be solved. Benefits would not be reduced, and lawyers would be secure in knowing that they would be paid for their time and effort in bringing meritorious claims against culpable plan trustees.

A. *Resolving the Ambiguity of Section 1132(g)*

There are two ways to implement a mandatory award to a prevailing plaintiff. One is to have all the circuits adopt the prevailing plaintiff

57. Alan P. Woodruff, *Attorney’s Fees Under ERISA*, Fla. B.J., Jul.-Aug. 1993, at 25.

58. See *Tingey v. Pixley-Richards West, Inc.*, 958 F.2d 908 (9th Cir. 1992) (finding that because the Tingey’s had the responsibility of providing costly care for their severely disabled son, it would be unjust to tax them the costs of the appeal); *Marquardt*, 652 F.2d at 720-21 (denying an award of attorney’s fees against the plaintiff who voluntarily dismissed suit under ERISA for full pension benefits based on a finding that the plaintiff was a retired man in his sixties who received an actuarially reduced pension with no other significant alternative sources of funds).

59. See *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1302 (6th Cir. 1991). Amicus briefs filed with this action urged the court to adopt the “private attorney general” theory of fee-shifting because employees have difficulty bringing cases for benefits because of the lack of attorneys willing to take ERISA cases. *Armistead*, 944 F.2d at 1302.

60. See *supra* note 55 and accompanying text.

presumption that is already the standard adopted by the Eighth and Ninth Circuits. The other is to amend the language of the statute to read that fees are mandatorily awarded to prevailing plaintiffs.

1. *Prevailing Plaintiff Proposal*

As mentioned previously, the Eighth and Ninth Circuits realize that to stay consistent with the intent of ERISA, section 1132(g) must be construed liberally, like the Fees Award Act, so that when plan participants prevail they recover attorney's fees.⁶¹ In *Rodriguez v. MEBA Pension Trust*,⁶² the Fourth Circuit in its dissent stated that "if Congress had intended to adopt the [Fees Award Act's] prevailing party presumption, it could have duplicated the 'prevailing party' language of [the Fees Award Act]. Instead, Congress chose to grant the trial court the 'discretion' to shift fees 'to either party.'"⁶³ This reasoning by the Fourth Circuit and the other courts for failing to adopt a prevailing party presumption is misplaced. It is true that unlike the Fees Act, section 1132(g) does not require that awards only be made to prevailing parties. But, courts have restricted awarding fees only to prevailing parties, thereby effectively adopting the "prevailing party" language of the Fees Act.⁶⁴ It is entirely possible that Congress did not include the word "prevailing" so that an award may be made to plaintiffs who are successful on some, though not all, issues.

Another favorite argument the circuit courts have for not analogizing section 1132(g) to the Fees Award Act is because litigants suing under ERISA are not vindicating important public rights.⁶⁵ These courts take the position that pension plan participants are not a vulnerable group whose members need special encouragement to exercise their legal right.⁶⁶ These courts believe participants are encouraged to bring an action because they may seek benefits that are due to them alone, leaving incentives in the form of attorney's fees less necessary to enforce the statute.⁶⁷ It is true that ERISA participants are not seeking to enforce a constitutional civil right, which is why section 1132(g) is be-

61. See *supra* notes 32-41 and accompanying text.

62. 956 F.2d 468, 476 (4th Cir. 1992).

63. *Id.* at 476 (Wilkinson, J., dissenting).

64. See *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820 (7th Cir. 1984) (holding that it would be an abuse of discretion to award attorney's fees to the losing party even though section 1132(g) does not expressly forbid it); *Fase v. Seafarers Welfare & Pension Plan*, 589 F.2d 112 (2d Cir. 1978) (holding that the court's decision not to award attorney's fees under ERISA is sufficiently supported by the plaintiff's failure to obtain relief under ERISA).

65. See, e.g., *Iron Workers Local 272 v. Bowen*, 624 F.2d 1255, 1265-66 (5th Cir. 1980) (finding that the policies section 1132(g) is designed to enforce are less compelling than other similarly worded statutory provisions designed to promote eradication of racial discrimination).

66. See *Iron Workers Local 272*, 624 F.2d at 1265-66.

67. *Id.*

ing *analogized* to the Fees Act. An analogy is made between things that are similar in some respects but are otherwise unlike. Congress enacted both of these fee-shifting provisions to encourage people to enforce their rights by providing easier access to the federal courts. One happens to be enforcement of civil rights and the other of pension benefits. Both statutes also give courts "discretion" in the award of fees. So why should one statute's "discretion" create a presumption in favor of the prevailing party while the other does not?

One reason courts give is that plaintiffs should not have to incur a heavy financial burden to realize a constitutional right.⁶⁸ While this is definitely true, Congress must have also felt that way about plan participants having to incur a heavy financial burden to protect their rights under ERISA.

A second reason is that when participants are seeking benefits for themselves, they do not need the same incentive to bring the action as they would if they were bringing it to benefit many people. This is not true when the plan participant has limited resources and is unable to bring an action for benefits because he would be unable to bear the costs of the action if an award was denied. Most of these actions are to recover small but necessary benefits, and the costs of litigation could easily exceed the amount of the claim. The participant has no incentive to bring a claim in that situation because he would be in a worse position than he was without the benefits. Also, as mentioned above, effective reduction of benefits recovered by denying fees defeats the intent of ERISA by making the plaintiff less than whole.⁶⁹ And when a plan participant does bring an action that seeks injunctive relief for the benefit of all participants, will the prevailing party presumption apply in those cases?

A related reason for denying the prevailing plaintiff presumption in ERISA cases is that plaintiffs may have sufficient resources to bring ERISA actions without relying on the fee-shifting provision. This is not true of the majority of the cases. "The national average private pension amount for men is \$5,700 and for women is \$3,240. These same individuals generally retire with less than \$10,000 in total savings . . . and receive an average of only \$7,200 a year from Social Security."⁷⁰ And what about plaintiffs who have adequate resources to bring a civil rights claim? The prevailing plaintiff presumption would be unnecessary be-

68. See *Bittner*, 728 F.2d at 829; *Eddy v. Colonial Life Ins. Co. of Am.*, 59 F.3d 201, 205-06 (D.C. Cir. 1995) (holding that civil rights statutes protect constitutional rights and further disjunctive purposes reflecting the unique importance of enforcement of these statutes to the nation as a whole).

69. See *supra* note 58 and accompanying text.

70. Ann C. Bertino, *The Need for a Mandatory Award of Attorney's Fees for Prevailing Plaintiffs in ERISA Benefits Cases*, 41 CATH. U. L. REV. 871, 885 (1992).

cause the fee award would not give any extra incentive to bring an action. Protecting a constitutional right of the *highest order* would be incentive enough when expenses are not a consideration.

2. *Amending the Language of Section 1132(g)*

Adopting a prevailing plaintiff presumption would provide plaintiffs with access to the courts because they would be assured of an award if they prevailed. However, due to the controversy over why the presumption should or should not apply to ERISA actions, that is probably not the best course of action to provide protection to the plaintiffs. Congress should amend section 1132(g) so that fees are mandatorily awarded to prevailing plaintiffs, leaving no doubts as to whether this policy would be enforced. This could be accomplished by deleting the language in the statute that reads, "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party,"⁷¹ and replacing it with, "the court . . . shall award the prevailing plaintiff . . . a reasonable attorney's fee [and costs of action]."⁷² Courts would have to apply the statute according to its plain meaning, which would eliminate the past problems of disparate results.

B. What About the Prevailing Defendants?

Because section 1132(g) allows awards to either party, some standard must also be established, for the sake of consistency, when the defendant prevails. The purpose of ERISA prevents implementing a prevailing defendant presumption, even when the defendant acts in good faith, because it would discourage plaintiffs from bringing legitimate claims in close situations on who will ultimately prevail. Therefore, the language in the statute should be amended to read as follows: "A prevailing defendant shall be entitled to costs only upon a clear showing that the plaintiff's action was commenced in bad faith pursuant to Rule 11 of the Federal Rules of Civil Procedure."⁷³ This is consistent with the intent of Congress because plaintiffs are not prevented from bringing meritorious suits, but at the same time it promotes only the bringing of suits that have foundation because the defendant is entitled to fees if the suit is meritless.⁷⁴

71. 29 U.S.C. § 1132(g)(1) (1999).

72. *Bertino*, *supra* note 70, at 902 (emphasis added).

73. *Id.*

74. *See* *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

C. Calculating a Reasonable Fee

After deciding that fees are to be awarded, the next issue is determining what the appropriate amount of that award should be. Most courts use the twelve-factor test set forth in *Johnson v. Georgia Highway Express, Inc.* for making the award calculation.⁷⁵ The calculations under this test should be made at the current market rates and include any compensation for the costs of paralegals and law clerks, as well as any other "out-of-pocket" expenses incurred by the attorney.⁷⁶

To provide the prevailing plaintiff relief for all expenses related to litigation, section 1132(g) should be amended to allow for expert witness fees. ERISA cases are complex and experts are often necessary to determine the actuarial value of the benefits in question. At this point in time, the expert's fees cannot be recovered under 1132(g), despite the attempts by plaintiffs to recast expert fees as "costs" within the terms of the statute.⁷⁷ Expecting plaintiffs to bear the burden of these expensive fees could prevent the plaintiff from bringing his action given the small amount of the claim to be litigated. The entire purpose for awarding fees to prevailing plaintiffs so that they have access to the courts could be defeated by this one expense, therefore, ERISA should expressly allow for expert fees.

In addition to amending the statute to allow for expert witness fees, complete effectiveness of section 1132(g) will not occur unless it also provides an award of fees to the plaintiff for the costs of preliminary internal proceedings. Because ERISA claimants must first exhaust all internal administrative procedures for benefit denials before bringing their claim to court, it may become necessary for the participant to hire a lawyer for these internal proceedings. Section 1132(g) should expressly include the amount of these fees in the award to the plaintiff in addition to the fees incurred at trial. If the conflict is resolved at the administrative level through the help of an attorney, the statute should also provide an award for the fees incurred during the internal resolution.

75. 488 F.2d 714 (5th Cir. 1974), *overruled on other grounds by* *Blanchard v. Bergeron*, 489 U.S. 87 (1989). This twelve-factor test takes into account the: (1) time and labor involved; (2) novelty and difficulty; (3) skill required; (4) preclusion of other employment; (5) customary fee; (6) fixed or contingent fee; (7) time limitations; (8) amount involved and results obtained; (9) experience, reputation and ability of attorneys; (10) undesirability of the case; (11) nature and length of relationship with clients; and (12) awards in similar cases. *Johnson*, 489 U.S. at 717-19.

76. *Id.* at 717-18.

77. See *Agredano v. Mutual of Omaha Cos.*, 75 F.3d 541 (9th Cir. 1996).

V. CONCLUSION

For section 1132(g) to have its intended effect of protecting plan participants and their beneficiaries, attorney's fees must be awarded to prevailing plaintiffs. This can be accomplished either through a "prevailing party presumption" similar to that of the Fees Act or by amending the statute to mandatorily provide fees to prevailing plaintiffs. Prevailing defendants on the other hand should only be awarded fees when the plaintiff files a suit that is either frivolous or for harassment. This is the best approach to take for several reasons. It will encourage trustees to settle more claims knowing that fees will be assessed against them when they lose, saving participants and the courts the trouble of litigation. Similarly, the court will not be tied up with cases to determine whether the plaintiff is entitled to fees. More attorneys will be encouraged to familiarize themselves with the complexity of ERISA because they will be entitled to awards as a matter of course. While this approach will encourage legitimate claims, it will also discourage unmeritorious ones by making a losing plaintiff pay his own fees and maybe the defendant's as well.

Jessica Michelle Westbrook