Despite Winning on Summary Judgment, ERISA Fiduciaries Not Entitled to Attorneys Fees

By Jewell Lim Esposito on June 13, 2011

Last year, in Hardt v. Reliance Standard Life Ins. Co., 2010 WL 2025127 (2010, S. Ct.) (summary of case), the United States Supreme Court ruled that a court could award attorneys fees and costs under ERISA 502(g)(1) to a fee claimant if the claimant had "some degree of success on the merits" in an ERISA case, even if that party was not the "prevailing party." (The Hardt plaintiff had been someone receiving long-term disability who sued for wrongful denial of her claim). It seemed a success in an ERISA case meant that the recipient of that success could receive attorneys fees and costs.

Not so in Toussaint v. JJ Weiser, Inc., 2001 WL 2175987 (2011, 2d. Cir.). In that case, an association of former unionized worker retirees sued two former association directors alleging that they had breached their fiduciary duty to the association and members by buying and maintaining a health insurance policy with expensive premiums that outweighed benefits received. The district court granted summary judgment in favor of the directors in 2008, which the Second Circuit affirmed. In 2009, the district court denied a motion by the directors for attorneys fees.

The district court appiled the Second Circuit's 5-factor test for awarding attorneys fees under ERISA 502(g)(1):

1. the degree of the opposing party's culpability or bad faith;
2. the opposing party's ability to satisfy an award of attorney's fees;
3. the deterrent effect of an award on other persons under similar circumstances;
4. whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and
5. the relative merits of the parties' positions.

The district court in Toussaint found insufficient evidence on the part of the association of culpability or bad faith in bringing the litigation; the possibility of attorneys fees being awarded to prevailing defendants should not discourage plan beneficiaries -- whom ERISA protects -- from colorable claims pusued in good faith, *even if ultimately unsuccessful;* and the association's position was not so devoid of merit so as to tip the factors dispositively in the fiduciary directors' favor.

On appeal, the directors argued that the district court decision was inconsistent with the Supreme Court's Hardt ruling. The Second Circuit acknowledged that the district court had not had the benefit of Hardt in its decision, but the difference between "prevailing party" and "some degree of success on the merits" was irrelevant in its case, as the directors achieved both, given that the District Court granted summary judgment in their favor and the Court of Appeals affirmed.

The Second Circuit read Hardt to mean that courts do not need to apply the 5-factor test, but that does not mean (as the directors suggested) that the district court abused its discretion in determining whether to award attorneys fees using those factors. The Second Circuit emphasized the first factor (whether the association had brought the litigation in good faith), as it noted that there a slant towards ERISA plaintiffs is necessary to prevent the chilling of suits brought in good faith.

My observation: Courts are likely to follow the Supreme Court's Hardt decision regarding awarding of attorneys fees when the prevailing party with some degree of success on the merits is a plaintiff employee, participant, or beneficiary (the so called "little people"). Where the prevailing party with some degree of success is the defendant (in ERISA cases, often the employer, plan fiduciary, or sponsor of the plan), it seems courts like the Second Circuit may be willing to sidestep Hardt so as not to discourage participants and beneficiares from protecting their ERISA benefits by bringing suit.