Pyrrhic victory for plaintiffs in Tibble v. Edison

By Marcia S. Wagner, Esq.

The so-called American Rule with respect to recovering attorneys' fees holds that litigants are responsible for their own expenses. In a departure from this norm, Section 502(g)(1) of ERISA provides that in actions brought by participants, beneficiaries, or fiduciaries, a court has the discretion to award attorneys' fees and costs of action to either party. In the past, many courts applied a five-factor test to determine whether such an award is appropriate, but the Circuit Courts were divided on whether the statute implied that fee recovery was restricted to the prevailing party.

In last year's Supreme Court decision of Hardt v. Reliance Standard Life Insurance Company, the Court overturned those circuits that had applied a prevailing party rule. *Hardt* was a case brought by an employee against a long-term disability insurance carrier that had denied the employee's claim for benefits on the basis of what the trial court found to be vague and conclusory evidence that ignored much of the employee's evidence. The trial court remanded the case to the insurer which shortly thereafter settled the case by awarding full benefits to the employee. However, the Fourth Circuit Court of Appeals ultimately denied the employee's claim for attorneys' fees because she had not obtained a judgment and, therefore, was not a prevailing party.

When the *Hardt* case reached the Supreme Court, it unanimously overturned the prevailing party rule. Nevertheless, in light of Supreme Court's holding that a successful applicant for fees needed "some degree of success on the merits," the applicable standard to be applied in awarding fees and costs in the future was less than clear. The new standard for recovering attorneys' fees has been criticized as leaving open the question of how much success on the merits is necessary for a successful claim.

Now, the proper resolution of the fee issue has been raised in Tibble v. Edison International. *Tibble* is famous for being one of the first 401(k) excess fee cases to go to trial, and it resulted in a 2010 judgment for the plaintiffs on their claims that ERISA's fiduciary duty of prudence had been violated when the plan offered more expensive retail mutual funds instead of less expensive institutional class funds. The trial court awarded plaintiffs $370,732 in damages relating to excessive fees and lost investment earnings on the three retail class funds selected for inclusion on the Edison plan's investment menu. This was a modest sum in view of the size of the Edison plan. In a decision issued in December 2010, the court made a limited award of attorneys' fees to plaintiffs' counsel after applying the *Hardt* analysis as to whether plaintiffs had achieved "some success on the merits."

In a decision issued on August 22, 2011, the trial court reconsidered the attorneys' fee issue and denied a request by plaintiffs' counsel for $407,277 in attorneys' fees. The court had two alternative bases for this decision, the first of which was its exercise of discretion. Having previously determined that the plaintiffs had achieved some success on the merits, it appears that the court implicitly applied a two-step analysis for determining when to award attorneys' fees. The second step was a fairness analysis which favored the defendants. Thus, the court noted that the defendants had prevailed in the substantial part of the litigation, because judgment for the plaintiffs had been limited to part of one claim involving three of several funds, whereas the defendants had prevailed on nine separate claims.

The second rationale, however, was the more interesting development in that it allowed the defendants to offset their prevailing party costs up to the amount of the plaintiffs' attorneys' fee request. The defendants applied for nearly $600,000 of costs but cleverly did not ask that this be paid from the plaintiffs' judgment but only as an offset against any award of attorneys' fees, thereby mooting the argument that the impact of their claim would fall on plan participants. Before it could determine that an offset was appropriate, the court found it necessary to decide which of the parties was entitled to costs—as distinguished from attorneys' fees—that under the Federal Rules of Civil Procedure are awarded to the prevailing party. The court determined that the prevailing party method of allocating costs required by these rules had not been overruled by the *Hardt* decision and relied on its prior determination that the defendants had prevailed in awarding them costs.

The plaintiffs' attorneys argued that such an offset would be inequitable and would also hinder access to the courts in future ERISA cases. As to the equities, the court noted that they sharply favored the defendants, because the costs they faced were the result of plaintiffs' "needless and protracted litigation on nonmeritorious claims" as well as their aggressive discovery requests. As to the chilling effect of the offset approach to future litigation, the court rejected the relevance of policy arguments but noted that, even if this was a relevant consideration, the potential financial return to class action lawyers would induce them to compete for representation of the class in other large ERISA cases. The court also made short work of the plaintiffs' contention that attorneys' fees are payable to counsel and so may not be reduced by costs for which the parties themselves are responsible. The court noted that Section 502(g)(1) of ERISA states that both fees and costs are awarded to the parties, not counsel.

The offset approach to attorneys' fees is a potentially significant development, because it penalizes the class action bar for pursuing frivolous claims and pursuing overly

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aggressive discovery without regard to the cost, even where some of the plaintiffs' claims may be viable. The new *Tibble* decision went out of its way to disapprovingly note that the defendants had been required to produce 537,955 pages of electronic documents in response to plaintiffs' requests. The plaintiffs' bar will be less likely to pursue such all-out tactics if it knows that it may be required to pay for them. Thus, the new *Tibble* decision could be a significant influence on reducing future 401(k) fee litigation and moderating the tactics employed in existing cases. ❖

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