Courts Are Right To Reject Insurer ERISA Atty Fee Awards

By **Elizabeth Hopkins** (February 9, 2022)

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As the U.S. Supreme Court has often recognized, the Employee Retirement Income Security Act is remedial legislation that is primarily intended to protect plan participants and beneficiaries, promote their interests and ensure that they receive the benefits they are promised.[1]

According to the U.S. Court of Appeals for the Ninth Circuit's 1984 ruling in Smith v. CMTA-IAM Pension Trust: "An important aspect of that protection is to afford [plan participants and beneficiaries] effective access to federal courts."[2]

And one of the ways that this access is promoted is through ERISA's fee-shifting provision, which grants courts in actions brought by plan participants and beneficiaries the discretionary authority to allow a reasonable attorney fee and cost of action to either party.[3]

Despite these protective statutory goals, individual ERISA claimants face uphill battles in attempting to reverse adverse benefit determinations.[4] They are not entitled to anything like a full trial in federal court, but are instead normally stuck with a trial on the record that was assembled by the decision-making fiduciary,[5] who is in many instances entitled to great deference.[6]

And the only recovery they can hope to achieve if they are successful is full payment of the benefits that they were always entitled to and perhaps some interest on this amount. Given all these hurdles and limitations to recovery, it shouldn't come as a surprise that it is not always easy for ERISA plaintiffs to obtain counsel, especially when there is only a small amount of benefits at stake.

For this reason, as the Ninth Circuit explained in Smith, "without counsel fees the grant of federal jurisdiction is but a gesture for few [plaintiffs] could avail themselves of it."[7]

Plan participants and beneficiaries who successfully challenge benefit denials or bring successful fiduciary breach suits against plan fiduciaries do invariably seek and almost always are awarded some attorney fees under this provision.

The Supreme Court made clear in 2010 in Hardt v. Reliance Standard Life Insurance Co., that participants need not even be prevailing parties in an ERISA action to qualify for fees, so long as they have had "some degree of success on the merits."[8]

Once the success threshold has been met, to determine whether a discretionary award of fees is warranted, courts apply a five-factor test first developed in 1993 by the U.S. Court of Appeals for the Fourth Circuit in Quesinberry v. Life Insurance Co. of North America[9] — factors that clearly and intentionally favor successful plaintiffs.[10]

But a potent new threat to the ability of plan participants and beneficiaries to bring suit is looming. Increasingly, insurance companies are seeking attorney fee awards against claimants who are partially or wholly unsuccessful in overcoming deference and other substantive and procedural advantages to the plan decision makers, and are thus unable to have a denial of benefits reversed.

For the most part, courts continue to reject attorney fee applications from insurance companies that successfully defeat lawsuits seeking plan benefits. A November 2021 decision in Martin v. Guardian Life Insurance Co. of America from the U.S. District Court for the Eastern District of Kentucky is instructive of both the heavy-handed tactics of insurance companies seeking fees from claimants and one court's reaction.

In Martin, the insurance company that insured disability benefits sought nearly $138,000 against the claimant, the father of a minor child whose only income was roughly $756 a month in veterans benefits and who had only $1,500 in his bank account.[11]

The court seemed especially put off by Guardian's argument that Martin declined to participate in an independent medical examination and that this indicated bad faith, finding, to the contrary, that his attested reasoning for hesitation about the examination was a concern with going to an unknown medical facility during the COVID-19 pandemic.[12]

And the court noted that granting Guardian's motion for attorney fees "would tend to create a chilling effect on other plaintiffs seeking redress under ERISA."[13]

Other courts have expressed similar concerns in denying fee applications asserted by insurance companies against disability plaintiffs. For instance, in December 2021, the U.S. District Court for the Western District of Washington in Amoroso v. Sun Life Assurance Co. of Canada, declined to order the plaintiff to pay $66,000 in attorney fees to the insurance company simply because it "completely prevailed on the merits."[14]

Noting that application of the five factors that courts apply in determining whether fees are warranted very frequently suggests that attorney fees should not be charged against ERISA plaintiffs,[15] the court concluded that was certainly true with respect to Sun Life's application for fees in that case.

With respect to the first factor, the Amoroso court concluded that there was nothing approaching bad faith in the record.[16] The court found the second factor weighed strongly against a fee award because Sun Life did not show that Amoroso had sufficient assets to pay an award, and the facts that his home was valued at over $1 million and that he had a medical practice was simply irrelevant with respect to his ability to pay.[17]

Addressing Sun Life's most revealing argument — that the third factor weighed in its favor because awarding fees would deter other participants from brining unsuccessful benefit suits — the court disagreed, reasoning that deterring disabled plan participants from suing for plan benefits was flatly inconsistent with ERISA's policy and with ERISA's fee-shifting provision.[18]

Likewise, the court rejected out of hand Sun Life's argument that awarding fees would benefit all other participants and beneficiaries of the plan by saving the insurance company money and perhaps leading to lower premiums. The court found instead that such an award "would deter insureds from seeking such benefits at all, and it would only embolden insurers in denying claims at the administrative level."[19]

Considering the relative merits of the parties' positions — the final factor — the court declined to "force a losing ERISA plaintiff to pay an insurer's attorneys' fees based solely on the fact that he lost," reasoning that to do so "would not be consistent with ERISA, the better-reasoned cases decided under it, equity, or common sense."

In the court's view, such a fee award in favor of an insurer would only be justified in unusual circumstances not presented by Amoroso's case.[20]

Numerous other recent decisions have had no trouble denying insurers' requests for attorney fee awards against unsuccessful benefit claimants.[21]

At this point, it appears that the recent and sharp uptick in fee applications from insurance companies seeking fees against plan participants and beneficiaries who are unsuccessful in reversing a denial of benefits is meeting with little or no success in the courts.

Application of the Quesinberry test, along with a healthy reluctance to punish disabled, sick or retired plan participants for seeking to obtain plan benefits, has quite correctly led courts in all but the most unusual circumstances to reject these fee applications.

Let's hope these kinds of decisions discourage insurance companies from engaging in this unfair tactic.

Elizabeth Hopkins is a partner at Kantor & Kantor LLP.

[1] Boggs v. Boggs , 520 U.S. 833, 845 (1997); Shaw v. Delta Air Lines, Inc. , 463 U.S. 85, 90 (1985); Central Laborers Pension Fund v. Heinz , 541 U.S. 739, 743 (2004).

[2] Smith v. CMTA-IAM Pension Trust , 746 F.2d 587, 589 (1984).

[3] 29 U.S.C. § 1132(g)(1).

[4] Barboza v. Calif. Ass'n of Professional Firefighters , No. 2:08-cv-0519, 2016 WL 3125996, *7 (E.D. Cal. June 3, 2016).

[5] Kearney v. Standard Ins. Co. ,175 F.3d 1084, 1095 (9th Cir.1999).

[6] E.g., Halo v. Yale Health Plan , 819 F.3d 42, 56 (2d Cir. 2016) (noting the "great deference afforded by the arbitrary and capricious standard").

[7] Smith, 476 F.2d at 590 (internal quotation marks and citation omitted).

[8] Hardt v. Reliance Standard Life Insurance Co., 560 U.S. 242, 245 (2009).

[9] Quesinberry v. Life Ins. Co. of North Am. , 987 F.2d 1017.1029 (4th Cir. 1993). The five factors are: "(1) the degree of opposing parties' culpability or bad faith; (2) ability of opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions."

[10] Toussaint v. JJ Weiser Inc. , 648 F.2d 108, 111 (2011).

[11] Martin v. The Guardian Life Insurance Co. of America , No. 5:20-507-DCR, 2021 WL 5410886, *2 (E.D. Ky. Nov. 18, 2021).

[12] Id.

[13] Id.

[14] Amoroso v. Sun Life Assurance Co. of Canada , No. C20-5887 BHS, 2021 WL 5761634, *1 (W.D. Wash. Dec. 3, 2021) (internal quotation marks omitted).

[15] Id. at *2 (citing Jackson v. Wilson, Sonsini, Goodrich & Rosati Long Term Disability Plan , 768 F. Supp. 2d 1015, 1021–22 (N.D. Cal. Feb. 11, 2011) and Tingey v. Pixley-Richards W., Inc. , 958 F.2d 908, 909 (9th Cir. 1992)) (internal quotation marks omitted).

[16] Id.

[17] Id.

[18] Id.

[19] Id.

[20] Id. at *3.

[21] E.g., Gray v. Minnesota Life Ins. Co. , No. CV H-19-4672, 2021 WL 1141171 (S.D. Tex. Mar. 25, 2021); Duncan v. Minn. Life Ins. Co. , No. 3:17-CV-00025, 2021 WL 1759634 (S.D. Ohio, May 4, 2021); Klancar v. The Hartford Life and Accident Ins. Co. , No. 1:20-cv-730, 2021 WL 5866907 (S.D. Ohio Dec. 12, 2021); Hennen v. Metropolitan Life Ins. Co. , No. 15 C 9452, 2021 WL 5769529 (N.D. Ill. Dec. 6, 2021).