No. _____.

In The
Supreme Court of the United States

BRIDGET HARDT,

Petitioner,

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Ann Sullivan
CRENSHAW, WARE & MARTIN, P.L.C.
1200 Bank of America Center
Norfolk, VA 23510
(757) 623-3000

Counsel for Petitioner

John R. Ates*
Counsel of Record
ATES LAW FIRM, P.C.
1800 Diagonal Road
Suite 600
Alexandria, VA 22314
(703) 647-7501

Dated: October 14, 2009

THE LEX GROUP^{DC} ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroupdc.com

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QUESTIONS PRESENTED

Section 502(g)(1) of the Employee Retirement Income Security Act of 1974 (ERISA) provides: "In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of the action to either party." 29 U.S.C. § 1132(g)(1).

The Fourth Circuit in the decision below held that "only a prevailing party is entitled to consideration for attorneys' fees in an ERISA action," while the Second, Fifth and Eleventh Circuits have declined to read a "prevailing party" requirement into § 502(g)(1) and other circuits have issued conflicting authority. The Fourth Circuit also held that the "prevailing party" standard was not met and vacated an award of attorneys' fees to petitioner, even where the district court found "compelling evidence that [petitioner] is totally disabled," ruled that petitioner "did not get the kind of review to which she was entitled under applicable law" and remanded for a redetermination of benefits with an instruction that respondents "act on [petitioner's] application by adequately considering all the evidence discussed within this Opinion within thirty (30) days of its date of issuance" or "judgment will be issued in favor of [petitioner]" and petitioner obtained the requested long-term disability benefits upon remand.

The questions presented are:

1. Whether the Fourth Circuit erred in holding that ERISA § 502(g)(1) provides a district court discretion to award reasonable attorney's fees only to a prevailing party?

2. Whether a party is entitled to attorney's fees pursuant to § 502(g)(1) when she persuades a district court that a violation of ERISA has occurred, successfully secures a judicially-ordered remand requiring a redetermination of entitlement to benefits and subsequently receives the benefits sought on remand?

RULE 14.1(b) STATEMENT

The parties are as stated in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bridget Hardt respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The district court opinion finding "compelling evidence that [petitioner] is totally disabled," ruling that petitioner "did not get the kind of review to which she was entitled under applicable law," and remanding for a redetermination of benefits with an instruction for the plan administrator to "adequately consider[] all the evidence discussed within this Opinion within thirty (30) days of its date of issuance" or "judgment will be issued in favor of [petitioner]" was reported at 540 F. Supp. 2d 656 (E.D. Va. 2008) and is reproduced in the Appendix (App. 31a-49a). The district court's subsequent order awarding attorneys' fees and costs and entering judgment in favor of petitioner is unreported (App. 12a-30a). The opinion of the court of appeals (App. 1a-11a) is unreported, but may be found at 2009 U.S. App. LEXIS 15478.

JURISDICTION

The court of appeals issued its opinion and entered judgment on July 14, 2009. It denied rehearing and rehearing en banc by order entered August 10, 2009. This petition is filed within ninety days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 502(g) of ERISA (29 U.S.C. § 1132(g)) is reproduced in the Appendix (App. 51a-52a).

STATEMENT OF THE CASE

1. In enacting ERISA, Congress determined "that the continued well-being and security of millions of employees and their dependents are directly affected by" employee benefit plans. § 2, as codified at 29 U.S.C. § 1001(a). ERISA governs employee welfare benefit plans that, "through the purchase of insurance or otherwise," provide medical, surgical, or hospital care, or benefits in the event of sickness, accident, disability, or death. § 3(1), 29 U.S.C. § 1002(1).

A fundamental policy of ERISA is "to protect . . . participants in employee benefit plans and their beneficiaries . . . 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, as codified at 29 U.S.C. § 1001(b). To further this policy, Congress specifically allowed for attorney's fees to encourage participants and others to bring suit when warranted: "In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of the action to either party." § 502(g), as currently codified at 29 U.S.C. § 1132(g)(1). (Congress in 1980 added a separate provision to Section 502(g) to

require an award of attorney's fees and costs in cases by fiduciaries to recover delinquent contributions in which judgment in favor of the plan is granted. *See* Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 306(b), 94 Stat. 1208, 1295 (1980), as codified at 29 U.S.C. § 1132(g)(2) ("In any action under this title by a fiduciary or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan" specified relief, including "reasonable attorney's fees and costs of the action, to be paid by the defendant")).

2. Dan River Inc. is a textile manufacturer that provides benefits to qualified participants in its Group Long-Term Disability Insurance Program Plan (the Plan). App. 31a. Dan River administers the Plan, and Reliance Standard Life Insurance Company (Reliance) both decides whether a claimant is entitled to benefits and pays for such benefits. *Id.* at 32a.

Petitioner Hardt served as an administrative assistant to the President of Dan River. *Id.* In 2000, Hardt began experiencing pain in her neck and shoulders. Physicians diagnosed her as suffering from carpal tunnel syndrome (CTS). *Id.* Despite surgery on both of her wrists, Hardt still experienced pain, and she stopped working on January 23, 2003. *Id.*

Hardt subsequently requested that Reliance pay her long-term disability (LTD) benefits pursuant to the Plan, explaining in her claim form that she suffered from numbness, tingling, loss of feeling, and extreme pain in her arms, hands, shoulders, and

neck. *Id.* Reliance provisionally approved Hardt's claim for LTD benefits and required her to submit to a functional capacities evaluation ("FCE"). *Id.*

Hardt participated in an FCE in October 2003, which was limited to assessing the impact of Hardt's CTS and neck pain on her ability to work. *Id.* The evaluator summarized Hardt's pertinent medical history and found that Hardt suffered from major limitations in several areas, but nonetheless concluded that Hardt could perform sedentary work and lift 4 to 5 pounds on occasion with her right hand, and 2 to 3 pounds on a frequent basis. *Id.* at 32a-33a.

Based on the results of this FCE, Reliance denied Hardt LTD benefits in December 2003, concluding that she did not meet the Plan's definition of total disability. *Id.* at 33a. Hardt filed an administrative appeal, and Reliance partially reversed its decision, agreeing to provide Hardt LTD benefits for twenty-four months based on her inability to perform her current position. *Id.*

Meanwhile, one of Hardt's treating physicians diagnosed her as suffering from a separate condition – hereditary small-fiber neuropathy, which is a disorder involving small sensory cutaneous nerves with symptoms including tingling, numbness, burning pain or extreme coldness, brief, painful sensations, and loss of temperature sensation. *Id.* The physician found, *inter alia*, that that Hardt's motor skills were limited by pain. *Id.* Despite increases in prescribed pain medication, Hardt "continued to have obvious pain," which became worse over the following months. *Id.* at 34a. The

neuropathy caused Hardt a "burning sensation in the feet all the way to the ankles[,] pain and cramping to the upper 1/3 of her calves," and swollen feet, making walking difficult. *Id.* at 34a-35a. (punctuation altered).

Hardt then applied to the Social Security Administration ("SSA") for disability insurance benefits and submitted questionnaires completed by two of her treating physicians. *Id.* at 35a. One concluded Hardt could not return to gainful employment in her prior position or other sedentary positions because of her neuropathy and other ailments. *Id.* The physician also observed that Hardt would experience "pain or other symptoms severe enough to interfere with attention and concentration . . . [c]onstantly," and that she had limitations on her ability to walk, sit, or stand due to her impairments. *Id.* The second treating physician concluded that Hardt would have difficulty working at a regular job on a sustained basis. *Id.* He noted, among other things, that Hardt's disability placed limitations on her ability to walk, sit, and stand and that she experienced "pain or other symptoms severe enough to interfere with attention and concentration . . . frequently." *Id.* Both doctors found that Hardt was not a malingerer. *Id.* The SSA determined that Hardt was "disabled" under the Social Security Act because it was "impossible for her to return to her former employment or make an adjustment to perform other work." *Id.* at 35a-36a.

A few months after Hardt received Social Security disability benefits, Reliance notified her that it would terminate her LTD benefits at the end of the twenty-four month period. *Id.* at 36a. The Plan

provided LTD benefits after twenty-four months only if she was totally disabled from all occupations. *Id.* Reliance found that Hardt was not totally disabled due to her CTS and noted that the FCE conducted in 2003 demonstrated that she had sedentary restrictions, but that she could perform a sedentary job. *Id.*

Hardt filed an administrative appeal regarding the termination of her LTD benefits. *Id.* In support of her claim, Hardt submitted all of her medical records, the SSA questionnaires completed by her treating physicians, and an updated questionnaire from one physician that again determined Hardt would be unable to maintain a job. *Id.*

Before ruling on the appeal, Reliance decided to obtain an updated FCE. *Id.* Although Reliance knew Hardt had been diagnosed with neuropathy, Reliance did not request that the testing company review Hardt for neuropathy or neuropathic pain; instead, the FCE was limited to determine whether Hardt had CTS or neck pain. *See id.* at 36a.

Hardt appeared for two separate FCEs, but the results of both were considered invalid because the examiners believed Hardt's effort was submaximal. *Id.* at 37a. One examiner noted that Hardt "refused multiple tests . . . for fear of nausea/illness/further pain complaints," but Reliance did not mention neuropathy or neuropathic pain in its referral request to the testing company. *Id.*

Rather than have a doctor personally examine Hardt, Reliance hired a doctor to review some, but not all, of her medical records. *Id.* The doctor

ultimately concluded in his peer review report that Hardt's health was expected to improve, yet the report failed to address any of the pain medications prescribed to Hardt, the effect her pain had on her ability to work, or the treating physicians' questionnaires finding that Hardt was completely disabled. *Id.* at 37a-38a. Reliance also retained a vocational rehabilitation counselor to determine what jobs, if any, Hardt could perform. *Id.* at 38a. The labor market study identified eight employment opportunities for Hardt, but the study was based on an evaluation of Hardt's health in 2003. *Id.*

On March 27, 2006, Reliance notified Hardt that it would not change its decision to terminate her LTD benefits, basing its decision on the FCEs, the peer review report, and the labor market study. *Id.*

3. Hardt exhausted her administrative appeals and then filed suit in the United States District Court for the Eastern District of Virginia, which had jurisdiction pursuant to ERISA § 502(e) (29 U.S.C. § 1132(e)) and 28 U.S.C. § 1331.

On March 27, 2008, the court issued an Opinion and Order based upon the parties' cross motions for summary judgment. App. 31a-49a. The court denied Reliance's motion for summary judgment, stating that "it is clear that Reliance's decision to deny [] Hardt long-term disability benefits was not based on substantial evidence." *Id.* at 47a.

With regard to Hardt's motion for summary judgment, the district court found "compelling evidence that [] Hardt is totally disabled due to her neuropathy" and that "the record indicates that []

Hardt did not get the kind of review to which she was entitled under applicable law." *Id.* at 48a. The district court remanded the case to Reliance "to fully and adequately assess [] Hardt's claim." *Id.* The district court clearly indicated that that Hardt would prevail if the Plan did not abide by the court's instruction to consider all the medical evidence. *Id.* at 49a. (specifically instructing Reliance to act on Hardt's application by "adequately considering all the evidence discussed within this Opinion within thirty (30) days of its date of issuance. Otherwise, judgment will be issued in favor of [] Hardt.").

Reliance found Hardt eligible for benefits after this judicially-ordered remand. *Id.* at 13a.

The district court then granted Hardt's motion for attorney's fees and costs pursuant to ERISA § 502(g)(1). *Id.* at 30a. Recognizing prior Fourth Circuit precedent requiring prevailing party status before fees and costs could issue under § 502(g)(1), the district court found that "the court sanctioned a material change in the legal relationship of the parties by ordering the defendant to conduct the type of review to which the plaintiff was entitled" and thus "[i]n light of the fact that, on remand, the plaintiff received precisely the benefits she had sought, she meets the definition of a 'prevailing party' and is eligible for an award of attorneys' fees." *Id.* at 22a.

The district court next evaluated whether attorneys' fees were justified under an established five-factor test used to guide the court's discretion. *Id.* at 22a-25a. These 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. *Id.* at 16a-17a.[1]

In regard to the degree of bad faith or culpability factor, the district court found that:

> the record is replete with instances of [Reliance's] staunch opposition to awarding any benefits to [Hardt]. . . . the totality of circumstances seems to

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[1] Nearly all courts of appeals, including the Fourth Circuit, have used this five-factor test to determine when fees should be awarded. *See Quesinberry v. Life Ins. Co. of N. America*, 987 F.2d 1017, 1028-29 (4th Cir. 1993) (en banc); *see also Eddy v. Colonial Life Ins. Co. of Am.*, 59 F.3d 201, 206-07 (D.C. Cir. 1995); *Gray v. New Eng. Tel. & Tel. Co.*, 792 F.2d 251, 257-258 (1st Cir. 1986), and cases cited therein from Second, Third, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits adopting test; *Sec. of Dept. of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985). The Seventh Circuit has used two tests to determine whether fee awards in ERISA actions are justified. *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 592-93 (7th Cir. 2000) (describing five-factor test and "substantially justified" test). The Seventh Circuit does not consider these different tests as having significant practical consequences. *See id.*

Regardless, the issues in this case are limited to whether an award of attorney's fees should issue only to a prevailing party and, if so, whether a remand for reconsideration of benefits in these circumstances meets a prevailing party test for purposes of § 502(g)(1).

> indicate that it was [Reliance's] goal from the beginning to deny [Hardt] the benefits she had claimed, and that, to further that goal, [Reliance] engaged in only the most cursory review of the medical evidence. With the (not insignificant) exception of actually awarding her benefits on remand, [Reliance] has opposed [Hardt's] position throughout the course of this litigation. And even when [Reliance] did award [Hardt] the benefits she sought, it was only after having been ordered by the court to provide the kind of meaningful review of the evidence to which [Hardt] was entitled by law. Thus, the bad faith and culpability of [Reliance] in ignoring the medical evidence of [Hardt's] disability weigh in favor of an award of attorneys' fees to [Hardt].

Id. at 22a-23a. In regard to the second and third factors, the district court found that Reliance could pay an award of attorneys' fees and that an award of fees in this case "would deter similarly-situated defendants from failing to consider the full breadth of medical evidence available to them when reviewing a claim for benefits." *Id.* at 23a-24a. The court found that the fourth factor (the amount of benefit the action conferred on members of the plan) weighed against awarding fees. *Id.* at 24a. It held as to the fifth factor (relative merits of the parties' positions) that Hardt's "position clearly has the higher relative merit, as demonstrated in the court's remand order and–more importantly–the ultimate

resolution of the case" and that this factor weighed in favor of granting fees to Hardt. *Id.* at 24a-25a (noting, in addition, that the court had found that "Reliance's decision to deny [] Hardt long-term disability benefits was not based on substantial evidence"). Based on the five-factor test and the totality of the circumstances of the case, the district court determined to exercise its discretion and award fees and costs to Hardt. *Id.* at 25a.

After reviewing the reasonableness of the fees and costs requested, the district court awarded Hardt reduced attorneys' fees and costs and issued judgment in her favor. *Id.* at 29a-30a.

4. Reliance appealed the award of attorneys' fees and costs to the Fourth Circuit. Reliance limited its appeal to a single question: "Is Ms. Hardt a 'prevailing party?'" Fourth Circuit Case No. 08-1896, Appeal Docket 15, p.18 (Brief of Appellant, at p.11). *See also, id.*, Appeal Docket 21, p.5 (Reply Brief of Appellant at p.1) ("The single question before this Court is whether Ms. Hardt can be considered a 'prevailing party' as required under the ERISA fee-shifting statute when there is no judgment on the merits in her favor and there is no consent decree."). Reliance did not appeal the district court's use or application of the five-factor test.

The Fourth Circuit, with jurisdiction pursuant to 28 U.S.C. § 1291, vacated the district court's judgment and award of attorneys' fees. App. 1a-11a. In so ruling, the Fourth Circuit first discussed its established requirement for awarding fees in ERISA cases:

> It is well settled that "only a prevailing party is entitled to consideration for attorneys' fees in an ERISA action." *Martin v. Blue Cross & Blue Shield of Va., Inc.*, 115 F.3d 1201, 1210 (4th Cir. 1997). To be a prevailing party, "a plaintiff [must] receive at least some relief on the merits of his [or her] claim." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001)). "[E]ven an award of nominal damages suffices under this test." *Id.* at 604. The Supreme Court has, however, established a bright-line boundary on what constitutes "relief on the merits" of a particular claim: only "enforceable judgments on the merits and court-ordered consent decrees create the material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees." *Buckhannon*, 532 U.S. at 604 (internal quotation marks omitted).

Id. at 7a-8a (brackets in original).

The Fourth Circuit then examined whether Petitioner met the Fourth Circuit's post-*Buckhannon* prevailing party test. The Fourth Circuit reviewed its decision in *Goldstein v. Moatz*, 445 F.3d 747, 751 (4th Cir. 2006), in which the court acknowledged it "clarified [the] *Buckhannon* standard by holding that there is no exception for 'tactical mooting' – the situation where a defendant chooses to settle rather

than risk an award of attorney's fees." *Id.* at 8a. The court then noted that *Goldstein* "left open the question of whether there is an exception to the *Buckhannon* rule where a defendant has agreed to provide the relief requested in response to an affirmative indication by the presiding court that the plaintiff is about to prevail." *Id.* at 8a-9a (internal punctuation omitted).

The Fourth Circuit ultimately concluded that petitioner's case was a "tactical mooting" case and that she did not meet the court's prevailing party test. As the Fourth Circuit saw it, the district court's findings that petitioner is totally disabled and that she did not get the kind of review to which she was entitled under applicable law, coupled with its remand order for the Plan to re-determine whether petitioner qualified for benefits under threat of judgment being entered in favor of petitioner were "simply insufficient to overcome the statutory requirement that a party applying for a fees and costs award must first have been accorded some relief in the district court." *Id.* at 10a (quoting *Goldstein*, 445 F.3d at 752). The Fourth Circuit held that because the district court remand "did not require Reliance to award benefits" the order does not "constitute an 'enforceable judgment[] on the merits' as *Buckhannon* requires. 532 U.S. at 604." *Id.*

Because petitioner did not qualify as a prevailing party in the Fourth Circuit's view, the court vacated the award of attorney's fees.

REASONS FOR GRANTING THE WRIT

By granting certiorari, this Court will resolve a widely acknowledged, long-standing and frequently recurring circuit division on an important question of law – whether § 502(g)(1) requires prevailing party status for an award of attorneys' fees. The Fourth Circuit's decision that "only a prevailing party is entitled to consideration for attorneys' fees in an ERISA action" is incorrect and directly conflicts with other circuits (and the clear language and structure of the statute). This split has festered and the lower courts have not converged.

This case also presents a recurring question on which the circuits have split – whether a court-ordered remand for reconsideration of an ERISA benefits decision and subsequent grant of benefits permits an award of attorney's fees and costs.

Review by this Court plainly is warranted to provide needed uniformity on these issues that have profound implications for this comprehensive statute affecting millions of workers across the United States. ERISA was enacted to provide consistent rules across the United States to govern the administration and enforcement welfare and pension benefit plans, especially given that many ERISA plans are national in scope. Plan participants should not be treated differently in an action to enforce their statutory rights based on the circuit in which they live. Yet, that is precisely what is occurring due to the current unsettled state of the law.

This case is an ideal vehicle for the Court to settle these critical questions regarding the enforcement of ERISA. The Court should grant certiorari.

I. The Circuits Conflict On Whether Attorney's Fees May Be Awarded at the District Court's Discretion To Either Party or Only to a "Prevailing Party" Under § 502(g).

To assist participants, beneficiaries, or fiduciaries of ERISA-governed plans to enforce their rights, Congress provided in § 502(g)(1) that "[i]n any action . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (citing § 502(g)(1) and noting its purpose: "in answer to a possible concern that attorney's fees might present a barrier to maintenance of suits for small claims, thereby risking underenforcement of beneficiaries' statutory rights, it should be noted that ERISA authorizes the award of attorney's fees"). This Court has acknowledged that attorney's fees and costs may be awarded to either party under § 502(g). *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 53 (1987) ("In an action under these civil enforcement provisions, the court in its discretion may allow an award of attorney's fees to either party. § 502(g).")

Nonetheless, "[t]here is a significant split of authority between–and within–federal appeals courts on whether [§ 502(g)(1)] requires a party to prevail for a fee award." *McKay v. Reliance Std. Life Ins. Co.*, 46 Employee Benefits Cas. (BNA) 1272, 2009 U.S. Dist. LEXIS 16667 (E.D. Tenn. Mar. 3, 2009); *see also* Eric C. Surette, Annotation, *Requirement that Party Prevail to Obtain Attorney's Fees under § 502 (g) of ERISA*, 172 A.L.R. Fed. 571 (2001) (reviewing split of authority within and among the circuits on the issue). Indeed, even "[t]hose courts that have recognized the split of

authority do not interpret the conflicting decisions in a uniform manner." *Colby v. Assurant Employee Benefits, et al.*, Civil Action No. 07-11488-RCL, 2009 U.S. Dist. LEXIS 65340, *8, n.3 (D. Mass. July 22, 2009) (describing conflicting interpretations of whether particular circuits require a party to prevail in order to be eligible to recover fees and costs).

The Court should decide this important yet unresolved issue to bring clarity to the existing state of confusion in the lower courts regarding whether a prevailing party requirement exists within § 502(g)(1). *See* Rule 10(a), (c).

A. The Courts of Appeals Are Intractably Divided Over the Question Presented.

In interpreting § 502(g)(1), the lower courts are in disarray regarding whether a party must prevail to obtain attorney's fees. The Fourth Circuit clearly has imposed a prevailing party requirement, and the Tenth Circuit appears to as well; the Second, Fifth and Eleventh Circuits expressly have rejected this interpretation; and other circuits issued indeterminate or conflicting opinions on the issue.

The Fourth Circuit in this case held that it "is well settled 'that only a prevailing party is entitled to consideration of attorneys' fees in an ERISA action.'" App. 7a-8a (quoting *Martin v. Blue Cross & Blue Shield of Va., Inc.*, 115 F.3d 1201, 1210 (4th Cir. 1997)). In effect, the Fourth Circuit has read a "prevailing party" standard into § 502(g)(1) without grounding in the statutory language.

The Tenth Circuit has recognized that § 502(g)(1) contains no express requirement that a party prevail

to obtain an award of fees and costs, but nonetheless takes into account prevailing party status in determining whether to reverse, deny, or grant awards:

> Courts considering whether to award attorney's fees in ERISA actions consider five factors: a party's culpability or bad faith; its ability to satisfy an award of fees; the deterrence value of an award; the number of plan participants affected by the case or the significance of the impact of the legal question involved; and "the relative merits of the parties' positions." *Gordon*, [*v. U.S. Steel Corp.*, 724 F.2d 106, 109 (10th Cir. 1983)]. We also afford certain weight to prevailing party status, even though we acknowledge that the ERISA attorney's fees provision is not expressly directed at prevailing parties. *See, e.g., Deboard v. Sunshine Mining & Ref. Co.*, 208 F.3d 1228, 1245 (10th Cir. 2000) (reversing and remanding an attorney's fee award because appellate decision "alter[ed] the relative merits of the parties' positions"); *Morgan v. Indep. Drivers Ass'n Pension Plan*, 975 F.2d 1467, 1471 (10th Cir. 1992) ("Although the statute does not expressly require that a party prevail as a condition to receiving an award of attorneys' fees . . . we have remanded cases for denial of fees without explanation only when the party seeking fees had prevailed at least partially." (citations omitted)); *Arfsten v. Frontier Airlines, Inc. Ret. Plan for Pilots*,

> 967 F.2d 438, 442 n.3 (10th Cir. 1992) ("Because we reverse the district court's decision on the merits, plaintiff is not a prevailing party, and his arguments on attorney's fees are moot.").

Graham v. Hartford Life & Accident Ins. Co., 501 F.3d 1153, 1162 (10th Cir. 2007). *See also*, *Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 828 (10th Cir. 1996) (recognizing § 502(g)(1) permits a fee award to either party but declining to award fees or remand for the district court to determine the issue because the plaintiff did not prevail on any of his claims); *Anderson v. Emergency Medicine Assoc.*, 860 F.2d 987, 992 (10th Cir. 1988) (characterizing a request for attorney's fees and costs by a party that did not prevail as "unsupportable").

In contrast, three circuits have held explicitly that a party need not prevail to obtain attorney's fees under § 502(g)(1). For example, the Second Circuit, noting the distinction Congress drew in amending the ERISA fees provision in 1980, held that "Section 502(g)(1) contains no requirement that the party awarded attorneys' fees be the prevailing party. *Cf.* 29 U.S.C. § 1132(g)(2)." *Miller v. United Welfare Fund*, 72 F.3d 1066, 1074 (2d Cir. 1995). The Fourth Circuit in *Martin* cited this contrary decision in *Miller*, but declined to follow it without explanation. *Martin*, 115 F.3d at 1210.

The Eleventh Circuit, like the Second Circuit, has followed the plain language of § 502(g)(1) and held that it allows a court to award fees to either party, regardless of "prevailing party" status: "Unlike other fee-shifting provisions, which give the court discretion

to award fees to a prevailing party, § [502(g)(1)] allows a court to award fees to either party." *Freeman v. Continental Ins. Co.*, 996 F.2d 1116, 1119 (11th Cir. 1993). *See also, Sharron v. Amalgamated Ins. Agency Services, Inc.*, 704 F.2d 562, 569 (11th Cir. 1983) (noting "under ERISA, *see* 29 U.S.C.A. § 1132(g), the losing party may under certain circumstances be entitled to attorney's fees . . .").

The Fifth Circuit in *Gibbs v. Gibbs*, 210 F.3d 491, 503 (5th Cir. 2000), examined the Fourth Circuit's *Martin* decision in detail and expressly rejected it. Analyzing the language of § 502(g)(1), the Fifth Circuit remarked that the term "prevailing" is "[c]onspicuously absent," although Congress often uses the term in other fee-shifting statutes. *Id.* at 501. After surveying the conflicting opinions in other circuits, the Fifth Circuit concluded that "the greater weight of authority, from outside and within our own circuit, supports the notion that a party need not prevail in order to be eligible for an award of attorneys' fees under § 1132(g)(1) of ERISA." *Id.* at 501-503.[2]

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[2] The Fifth Circuit appears to have retreated from *Gibbs* for purposes of determining costs under § 502(g)(1), requiring a party to meet a "prevailing party" standard. *See Wade v. Hewlett-Packard Dev. Co. LP Short Term Disability Plan*, 493 F.3d 533, 543 (5th Cir. 2007) ("[W]e read [*Salley v. E.I. DuPont de Nemours & Co.*, 966 F.2d 1011, 1017 (5th Cir. 1992)] now as establishing, for ERISA's fee-shifting provision, a 'prevailing party' test, analogous to the test under Fed. R. Civ. P. 54(d), for the award of costs. As *Salley* is the first case to discuss the award of costs under ERISA, *Salley*'s application of the 'prevailing party' test controls this case."). *Wade* involved an award of costs only, not attorneys' fees. *Ibid.*, at 537. *Wade* sows further confusion in the lower courts as to whether prevailing party status is required for an award of attorney's fees and costs and provides further support for granting certiorari.

The Sixth Circuit likewise appears not to require a prevailing party status for an award of fees. For example, in *First Trust Corp. v. Bryant*, 410 F.3d 842, 851 (6th Cir. 2005), the Sixth Circuit emphasized that "the court, in its discretion, '*may* allow a reasonable attorney's fee and costs of action to *either* party." (emphasis in original). In *Bryant*, the court ultimately held that the district court erred in awarding attorney fees under § 502(g)(1) to the former trustee of an ERISA-governed pension plan because the equities favored the pension plan beneficiary and relevant factors weighed against such an award to the trustee in that interpleader action. *But see*, *McKay*, 2009 U.S. Dist. LEXIS 16667, at *10 (recognizing "lack of controlling Sixth Circuit law" on the issue and analyzing circuit and intra-circuit splits).

The First Circuit has issued conflicting authority on whether a party must prevail to obtain an award of fees and costs, which adds to the unsettled nature of the law on this important question. *Compare Doe v. Travelers Ins. Co.*, 167 F.3d 53, 61 (1st Cir. 1999) ("Naturally, [awards under Section 502] are normally for the prevailing party, if at all . . .") *and Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220, 225 (1st Cir. 1996) (stating "Congress declared that, in any ERISA claim advanced by a 'participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee to the prevailing party. 29 U.S.C. § 1132(g)(1)" and thereafter assuming only "prevailing plaintiffs and prevailing defendants" can recover fees and costs) *with Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 258 (1st Cir. 1986). (holding courts should use a five-factor balancing approach for determining whether a court should award fees and costs in an

ERISA action "regardless of which party prevails."). *But see, Colby*, 2009 U.S. Dist. LEXIS 65340, at *5 ("the First Circuit has consistently read [Section 502(g)] as limiting recovery of fees and costs to prevailing parties").

Although the Seventh Circuit recently appears in line with the Fourth Circuit, requiring prevailing party status before awarding fees, its prior contrary decision has not been overruled. *See Janowski v. International Broth. of Teamsters Local No. 710 Pension Fund*, 812 F.2d 295, 297 (7th Cir. 1987) (reversing award of attorney's fees where party did not meet "prevailing party" test). *See also, Tate v. Long Term Disability Plan For Salaried Employees of Champion Int'l Corp. #506*, 545 F.3d 555, 564 (7th Cir. 2008) (refusing to award fees without prevailing party status); *Trustmark Life Ins. Co. v. University of Chicago Hosps.*, 207 F.3d 876, 884 (7th Cir. 2000) ("Our decision to reverse the district court's judgment means that Trustmark is no longer a prevailing party, and, therefore, is no longer entitled to an award of attorney's fees."). The Seventh Circuit previously held that "[t]here is no requirement that a party must 'prevail' in order to receive an award pursuant to § 1132(g). But, as a practical matter, we recognize that a court is more likely to find appropriate an award to a prevailing party than an award to a non-prevailing party." *Marquardt v. N. Am. Car Corp.*, 652 F.2d 715, 718 n.2 (7th Cir. 1981). This has led some courts and commentators to find that the Seventh Circuit has conflicting authority on the issue. *See Colby*, 2009 U.S. Dist. LEXIS 65340, *8-9, n.3 (noting different conclusions courts and commentators have drawn from the Seventh

Circuit's cases). Of course, this confusion simply highlights the need for clarity.

Finally, the Eighth Circuit in *Antolik v. Saks, Inc.*, 463 F.3d 796 (8th Cir. 2006), stated the question is open in its circuit, but allowed fees potentially to be awarded to a non-prevailing party, which is in direct conflict with the Fourth Circuit:

> The district court's award of substantial attorneys' fees must also be reversed because plaintiffs are no longer prevailing parties. However, it is an open issue in this circuit whether attorneys' fees may be awarded under 29 U.S.C. § 1132(g)(1) to an ERISA plan claimant who does not prevail. . . . But Saks's deceptive behavior and flagrant disregard of its ERISA disclosure duties may make this the rare case where some modest award is appropriate. That is an issue we leave in the first instance to the district court's discretion. Accordingly, the judgment of the district court is reversed and the case is remanded for entry of judgment on the merits in favor of Saks and for further consideration of the attorneys' fee issue

Ibid., at 803. It also conflicts with the Tenth Circuit's refusal to remand for an award of attorney's fees to a non-prevailing party. *See Arfsten*, 967 F.2d at 442 n.3 (reversing decision on merits and holding "plaintiff is not a prevailing party [so] his arguments on attorney's fees are moot.")

Clearly, the Court's intervention is needed to resolve this intolerable conflict within the lower courts. Rule 10(a).

B. Petitioner's Case Is an Ideal Vehicle for Resolving the Question.

This case cleanly and squarely presents this important issue for resolution. As noted, Reliance challenged on appeal only whether Hardt was a "prevailing party," not whether she was entitled to fees and costs under the five-factor approach. *See* supra, 9-11. Thus, this case is a uniquely appropriate vehicle to determine whether § 502(g)(1) requires prevailing party status for fees to be awarded, as the issue directly determined the outcome below.

C. Certiorari Is Further Warranted Because This Issue Is Both Frequently Recurring and Important.

This Court has acknowledged "Congress's intent to establish the regulation of employee welfare benefit plans 'as exclusively a federal concern'" and to create uniformity in benefit administration and enforcement of ERISA plans. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656-57 (1995). The Court also has recognized that a fundamental purpose of the attorney's fees provision in ERISA is to prevent underenforcement of these exclusively federal statutory rights. *See Russell*, 473 U.S. at 147 ("in answer to a possible concern that attorney's fees might present a barrier to maintenance of suits for small claims, thereby risking underenforcement of beneficiaries' statutory rights, it should be noted that ERISA authorizes the award of attorney's fees").

This statutory enforcement provision is essential, particularly as our aging workforce retires and relies more heavily on ERISA pension and welfare plans in even greater numbers.

The reach of ERISA is staggering. As noted by the United States Department of Labor's Employee Benefits Security Administration, their oversight authority "extends to nearly 700,000 retirement plans, approximately 2.5 million health plans, and a similar number of other welfare benefit plans, such as those providing life or disability insurance," which cover about 150 million workers and their dependents." *Fact Sheet: EBSA Achieves $1.2 Billion in Total Monetary Results in Fiscal Year 2008*, available at http://www.dol.gov/ebsa/newsroom/fsFY08results.html (last visited October 13, 2009). Ensuring an effective private enforcement provision for ERISA therefore is critical.

According to the Administrative Office of the United States Courts, approximately 9,000 to 11,000 ERISA cases were filed in federal court each year from 2004 through 2008. *See* 2008 Annual Report of the Director: Judicial Business of the United States Courts, Appendix Table C-2A, Cases Commenced, by Nature of Suit, 2004 Through 2008, available at http://www.uscourts.gov/judbus2008/appendices/C02ASep08.pdf (last visited October 13, 2009). Excepting prisoner petitions, ERISA cases comprise the third highest statutory-based civil claims filed in the federal courts, behind employment and other civil rights claims. *See id.* Whether attorney's fees should be awarded therefore arises in a significant number of cases and is frequently recurring in the lower courts.

Given ERISA's far-reaching impact, its goal for uniformity across the United States and the enforcement mechanisms embodied in the statute to ensure rights are protected, it is especially important that workers within the Fourth Circuit not be treated differently in actions to enforce their statutory rights when compared to workers in other parts of the country. This is particularly critical given that many ERISA plans are national in scope. A worker in Maryland or Virginia should have the same right to receive attorney's fees in bringing suit under ERISA as a worker in Florida, Texas or New York. Yet, under the current unsettled state of the law, that is not occurring.

The Court should step in to resolve the untenable split in the lower courts on this vital ERISA enforcement issue, and this case is a fitting vehicle directly presenting the question.

D. The Fourth Circuit's Decision Conflicts with This Court's Prior Reasoning and Is Incorrect on the Merits.

This Court has repeatedly emphasized that ERISA in particular is a "comprehensive and reticulated statute" with "carefully integrated civil enforcement provisions," *Russell*, 473 U.S. at 146 (quoting *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980)). The Act is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests -- not all in favor of potential plaintiffs." *Mertens v. Hewitt Associates*, 508 U.S. 248, 262 (1993) Given the "evident care" with which ERISA was crafted, this Court has been

"reluctant to tamper with [the] enforcement scheme" embodied in the statute. *Russell*, 473 U.S. at 147 (declining to create an implied private cause of action for extracontractual damages); *see also Mertens*, 508 U.S. at 262 (rejecting claim that ERISA allows cause of action against a nonfiduciary who knowingly participates in a fiduciary breach); *Dedeaux*, 481 U.S. 41, 56, (holding that civil enforcement scheme codified at § 502(a) is not to be supplemented by state-law remedies). Contrary to this inclination not to upset the carefully crafted civil enforcement provisions of ERISA, the Fourth Circuit erroneously has read a "prevailing party" requirement into § 502(g)(1), despite such language being "conspicuously absent" from that section. *See Gibbs*, 210 F.3d at 501.

Such a reading not only is contrary to prior decisions of this Court, but it also is wrong on the merits. Section 502(g)(1) unambiguously states that "the court in its discretion may allow a reasonable attorney's fee and costs of action *to either party*." 29 U.S.C. § 1132(g)(1) (emphasis added). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what is says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Had Congress intended a prevailing party restriction in § 502(g)(1), it would have included it, as Congress did in numerous other fee-shifting statutes. *See* Samuel R. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 305 nn.109-10 (1977) (collecting statutes with express prevailing party requirements in existence around time ERISA was enacted in 1974). This conclusion is reinforced when one considers that, in most cases, only one party prevails. It thus is

an unwarranted interpretation to jump from the clear Congressionally-enacted language that a court may award fees and cost "to either party" to read the statute as stating that "only a prevailing party is entitled to consideration for attorneys' fees."

Moreover, when Congress subsequently amended ERISA, it left what is now § 502(g)(1) alone, but added a provision (what is now § 502(g)(2)) requiring attorney's fees and other relief where "judgment in favor of the plan is awarded." *See* Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 306(b), 94 Stat. 1208, 1295 (1980), as codified at 29 U.S.C. § 1132(g)(2). The clear inference from this amendment and the resulting language and structure of § 502(g) is that Congress did not intend to require a prevailing party requirement in § 502(g)(1). *See Gross v. FBL Fin. Servs.*, --- U.S. ---, 129 S. Ct. 2343, 2349 (2009). That is, when Congress chooses to amend one statutory provision but not another, it is presumed to have acted intentionally, and the resulting differences generally compel an inference that the provision not amended does not contain the newly-inserted requirement. *See id.* ("negative implications raised by disparate provisions are strongest" where the provisions were "considered simultaneously when the language raising the implication was inserted") (citing *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256 (1991) and quoting *Lindh v. Murphy*, 521 U.S. 320, 330 (1997))). *See also, Miller*, 72 F.3d at 1074 (noting difference in language between §§ 502(g)(1) and 502(g)(2) in concluding no prevailing party requirement exists within § 502(g)(1)).

The Fourth Circuit's decision below on this important federal question conflicts with the reasoning of prior decisions of this Court and is wrong on the merits. The Court should grant certiorari to resolve the issue. *See* Rule 10(c).

II. The Courts of Appeal Are Divided On Whether a Remand For a Redetermination of Benefits Is Sufficient To Support an Award of Attorney's Fees and Costs Under § 502(g).

This case also squarely presents a second important issue – whether a claimant is entitled to attorney's fees under § 502(g)(1) where she secures a remand to her plan administrator for reconsideration of her benefits claim after persuading the district court that the plan administrator violated ERISA. There is an acknowledged split in the lower courts on this issue. *See Colby*, 2009 U.S. Dist. LEXIS 65340, *11 (stating First Circuit had not decided issue and recognizing "[c]ourts in other circuits have split almost evenly on the issue."). The Court should grant certiorari to consider fully the circumstances under which attorney's fees may be granted pursuant to ERISA § 502(g)(1).

In the case below, the Fourth Circuit held that petitioner was not a prevailing party entitled to attorney's fees. App. 10a-11a. The Fourth Circuit reached that conclusion by relying on its prior decision applying this Court's *Buckhannon* decision to ERISA claims. App. 7a (citing *Griggs v. E.I. Dupont de Nemours & Co.*, 385 F.3d 440, 454 (4th Cir. 2004)). It also relied on an Equal Access to Justice Act (EAJA) attorney's fees case, *Goldstein v. Moatz*, 445 F.3d 747 (4th Cir. 2006), which held that

this Court's *Buckhannon* standard applies to the EAJA and that *Buckhannon* does not allow for a "tactical mooting" exception to permit an award of fees where a defendant has agreed to the plaintiff's requested relief in order to avoid the prospect of an adverse fees and costs award. *See* App. 8a (citing *Goldstein*, 445 F.3d at 752). The Fourth Circuit in the case below determined that the district court's finding of an ERISA violation and remanding (under threat of judgment being entered in favor of petitioner) for a redetermination of whether petitioner qualified for benefits were "simply insufficient to overcome the statutory requirement that a party applying for a fees and costs award must first have been accorded some relief in the district court." App. 10a (quoting *Goldstein*, 445 F.3d at 752). The Fourth Circuit concluded petitioner was not a prevailing party entitled to attorneys' fees because the district court remand "did not require Reliance to award benefits" and, as such, was not an enforceable judgment on the merits. *Id.*

Cases in the Second and Ninths Circuits directly conflict with the Fourth Circuit's holding in this case. For example, in *Peterson v. Continental Casualty Co.*, 282 F.3d 112, 122 (2d Cir. 2002), the Second Circuit held that plaintiffs were prevailing parties when they succeeded after a court-ordered remand to an ERISA plan administrator with retention of jurisdiction. This directly conflicts with the Fourth Circuit's ruling below. *See also, Miller*, 72 F.3d at 1074 (ordering district court to remand the case to the plan administrator for a redetermination of benefits and ordering that the district court reconsider the grant of attorney's fees, insinuating that plaintiff may not be a prevailing party, but also

stating that "[t]he district court may in fact determine that Miller is the prevailing party to the extent that her motion for summary judgment claimed that the Fund's denial was arbitrary and capricious").

Likewise, the Ninth Circuit has allowed an award of attorneys' fees to a claimant when a case is remanded for a determination of benefits. *See White v. Jacobs Engineering Group Long Term Disability Ben. Plan*, 896 F.2d 344, 352 (9th Cir. 1990). In *White*, the district court had granted summary judgment to defendants on an employee's claim for benefits on the ground that he failed to exhaust his administrative remedies and also granted summary judgment to the defendants on their counterclaim for benefits paid while the employee allegedly was not totally disabled. *Id.* at 346. The Ninth Circuit reversed the grants of summary judgment "and remand[ed] to the district court with instructions to remand to the plan appeals board for adjudication on the merits." *Id.* at 352. Based on the remand for a determination of benefits, the Ninth Circuit held that the plaintiff-employee "is entitled to attorney fees in an amount to be determined by the district court." *Id.*

The Ninth Circuit in post-*Buckhannon* cases continues to hold that a district court's remand to a plan administrator confers "prevailing party" status upon an ERISA claimant. For example, in *Flom v. Holly Corp.*, 276 Fed. Appx. 615, 617 (9th Cir. 2008), the court concluded that the district court erred in denying a disability benefit claimant's motion for attorney's fees against the plan administrator under § 502(g)(1). It held that the district court's remand to

the administrator provided the "judicial imprimatur required by *Buckhannon*" for the claimant to be a prevailing party because it created "a judicially-sanctioned change" in claimant's "legal relationship with [the administrator] and ultimately led to [claimant's] success in securing a reinstatement of benefits." *Id.* Similarly, *Mizzell v. Provident Life and Accident Insurance Co.*, 32 Fed. Appx. 352, 353 (9th Cir. 2002), involved an ERISA action for recovery of long-term disability insurance benefits, and the district court concluded that the plan administrator abused its discretion, remanded the case to the plan administrator for a new determination of benefits eligibility, and awarded attorney's fees and costs to the plaintiff. The plan administrator appealed. The Ninth Circuit concluded that the award of fees was proper because plaintiff "succeeded on a significant issue in litigation, *i.e.*, whether [the plan administrator] abused its discretion in denying [plaintiff's] claim, which achieve[d] some of the benefit [plaintiff] sought in bringing suit, *i.e.*, to obtain a full and fair review of his claim." *Id.* at 354 (some internal punctuation omitted).

The Ninth Circuit also has found prevailing party status under ERISA when an employee-plaintiff secures the requested benefits via settlement on remand. In *Smith*, the district court dismissed the plaintiff's ERISA claims. On appeal, the Ninth Circuit found the employee stated a potential violation of ERISA and remanded. *See Smith v. CMTA-IAM Pension Trust*, 654 F.2d 650, 653-54, 656-60 (9th Cir. 1981) (*Smith I*). "Upon remand, the parties settled," with a provision allowing the parties to attempt agree on attorney's fees for the plaintiff

or, failing that, for the plaintiff to file a motion for fees. *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984) (*Smith II*). "The parties could not agree on the payment of plaintiff's attorney's fees, and [plaintiff-employee] moved for fees pursuant to 29 U.S.C. § 1132(g)(1)." *Id.* The district court denied the motion. On appeal, the Ninth Circuit found the plaintiff to be "a prevailing employee participant." *Smith II*, 746 F.2d at 590. Holding that "absent special circumstances, a prevailing ERISA employee plaintiff should ordinarily receive attorney's fees from the defendant," the Ninth Circuit directed the district court to reconsider its denial of fees. *Smith II*, 746 F.2d at 591.

In contrast, the Seventh Circuit in *Tate* held that a claimant who is awarded a remand in an ERISA case "generally is not a 'prevailing party' in the 'truest sense of the term.'" 545 F.3d at 564 (quoting *Quinn v. Blue Cross & Blue Shield Ass'n*, 161 F.3d 472, 478-79 (7th Cir. 1998)). Though the claimant in *Tate* urged the Seventh Circuit to reconsider *Quinn* in light of the Second and Ninth Circuit decisions in *Miller* and *White*, it refused to do so and ruled the claimant was not entitled to fees based on the remand. 545 F.3d at 564.

The circuits clearly have hardened in their positions, and this Court's intervention is needed to resolve the split on this issue of profound importance to the proper functioning of ERISA. Applying the *Buckhannon* test and allowing for tactical mooting in ERISA cases "would facilitate–rather than discourage–[a defendant's] bullying" and incent

defendants to "litigat[e] mischievously." *See Kholyavskiy v. Schlecht*, 479 F. Supp. 2d 897, 906 (E.D. Wis. 2007) (declining to apply *Buckhannon* to EAJA claims). Many ERISA claimants can seek only equitable relief via 29 U.S.C. § 1132(a)(3). In such circumstances, "the [defendant] can litigate vigorously to wear down the plaintiff and then 'tactically moot' the case prior to judicial action." *Id.*

Many participants or beneficiaries who bring suit to enforce their rights under ERISA are of limited means. *See, e.g.*, *Smith II*, 746 F.2d at 590 ("when an employee participant brings suit under ERISA, whether it is against the trustees or the employer, the resources available to the pensioner are limited."); *Marquardt*, 652 F.2d at 718 ("Lavern Marquardt is a retired man in his sixties. He receives an actuarily reduced pension from the Company, and the record does not show that he has any significant alternative source of funds."). Allowing plan administrators to "tactically moot" a case after vigorously opposing benefits at every step of the process until a judicially-ordered remand would lead to underenforcement of rights in contravention of one of the primary goals of ERISA. This is because, under the Fourth Circuit's holding, fee shifting would never apply in such a circumstance and the costs of securing an attorney could deprive a worker of her entire award (or more). Plan administrators therefore are incented to engage in such "you sue, you lose" tactics.

The Court should grant certiorari to resolve the circuit split on this important issue.

CONCLUSION

For the foregoing reasons, petitioner urges the Court to grant a writ of certiorari in this case.

Respectfully submitted,

Ann K. Sullivan
CRENSHAW, WARE & MARTIN, P.L.C.
1200 Bank of America Center
Norfolk, VA 23510
(757) 623-3000

John R. Ates
(Counsel of Record)
ATES LAW FIRM, P.C.
1800 Diagonal Road
Suite 600
Alexandria, VA 22314
(703) 647-7501

October 14, 2009