No. 09-448

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Dated: December 29, 2009

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REPLY BRIEF FOR PETITIONER

This petition presents pure questions of law that significantly impact enforcement of ERISA rights. The issues are direct, straightforward and presented in a compelling case vehicle, as they exclusively determined the outcome below. This Court should grant certiorari on both questions presented.

First, the lower courts are deeply divided regarding whether ERISA Section 502(g)(1), which expressly allows an award of fees "to either party," nonetheless contains an implied prevailing party requirement. Respondent's brief in opposition (BIO) truncates a footnote from *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), to assert the Court has previously decided the issue. Yet, the issue presented here was not raised, briefed or decided in *Mullins*. Respondent's boilerplate "no circuit split" assertion also is misplaced, as courts and commentators have acknowledged the split.

In regard to the second question, Respondent urges this Court to deny review based on this Court's decision in *Buckhannon Bd. & Care Home, Inc. v. W. VA. Dep't of Health & Human Res.*, 532 U.S. 598 (2001), which addressed certain prevailing party fee statutes. Yet, Respondent's argument (and the Fourth Circuit decision under review) relies on the faulty premise that *Buckhannon* controls because Section 502(g)(1) is a prevailing party statute. It is not. It allows a court to award fees "to either party." It does not even require a judgment, as other fee shifting statutes do. Courts outside the Fourth

Circuit have ruled that *Buckhannon* does not apply to ERISA.

Moreover, even if some type of prevailing party standard exists within Section 502(g)(1), courts outside the Fourth Circuit would have deemed Petitioner a prevailing party based on the district court's finding of an ERISA violation and remand for a redetermination of benefits. *See, e.g., Colby v. Assurant Employee Benefits, et al.*, 635 F. Supp. 2d 88, 96 (D. Mass. 2009) (recognizing courts "have split almost evenly on the issue" and holding that a court-ordered remand satisfies a prevailing party standard, and cases cited therein); *see also* Pet. 29-33. Respondent does not address these cases.

The Court should grant certiorari to decide these important issues and provide needed clarity to the divided lower courts.

I. This Court Should Grant Certiorari To Confirm That Section 502(g)(1) Does Not Contain An Implied Prevailing Party Requirement.

Section 502(g)(1) is clear: "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). The petition explained why the Fourth Circuit decision under review was wrong on the merits, Pet. at 23-28, and why the other circuits are correct to conclude that Section 502(g)(1) does not contain a prevailing party requirement. *See id.* at 18-20.

Respondent does not address the merits, but instead urges this Court to deny certiorari on the grounds that the issue has been decided and that no actual circuit split exists. Both contentions lack merit.

A. Whether Section 502(g)(1) Requires Prevailing Party Status Is An Open Issue.

This Court has not held that Section 502(g)(1) requires prevailing party status for fees. Arguing otherwise, Respondent misreads and mischaracterizes *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982).

In *Mullins*, the plaintiffs sought to recover unpaid contributions to a multiemployer benefits plan, and Kaiser sought to raise the defense that the promised contributions were illegal. *See Mullins*, 455 U.S. at 76. The courts below determined that Kaiser could not interpose the illegality defense, thereby requiring the contributions. *See id.* 76, 78-9. The district court awarded fees, and the court of appeals affirmed, noting fees were available under either of the statutes at issue, Section 301 of the LMRA or Section 502 of ERISA, and holding the district court did not abuse its discretion in awarding fees under ERISA. *Mullins v. Kaiser Steel Corp.*, 642 F.2d 1302, 1320 (D.C. Cir. 1980).

Kaiser sought review in this Court regarding its illegality defense and the basis for the fee award. The fee analysis concerned whether ERISA applied to the suit at all, not whether Section 502(g)(1) mandates prevailing party status. *See* Petition for Writ of Certiorari (Corrected Copy) at (i), *Mullins*, 455 U.S. 72 (1982) (No. 80-1345). Kaiser contended that only

Section 301 of the LMRA applied without fee-shifting and that ERISA did not apply because the case was an action to enforce a collective bargaining agreement. *Id.* at 25-28; Brief for Petitioner Kaiser Steel Corporation at 47-49. The parties also disputed whether the new cause of action and fee provision in Section 306 of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, 94 Stat. 1208, affected the case.

The issue the Court ultimately decided in *Mullins* was "whether a coal producer, when it is sued on its promise to contribute to union welfare funds based on its purchases of coal from producers not under contract with the union, is entitled to plead and have adjudicated a defense that the promise is illegal under the antitrust and labor laws." *Mullins*, 455 U.S. at 74. In so ruling, the Court assumed that the 1980 ERISA Amendments applied and held that Kaiser was entitled to raise its illegality defense even under those amendments. 455 U.S. at 87.

The Court therefore reversed and remanded, adding this footnote:

> Because attorney's fees are normally awarded only to prevailing parties, the award of attorney's fees to respondents is also reversed. The Court of Appeals held that the District Court had jurisdiction over this action pursuant to § 502 of ERISA and did not abuse its discretion in awarding attorney's fees under § 502(g). That section permits a court to "allow a reasonable attorney's fee and

> costs of action to either party" in an action brought under § 502. Petitioners contend that this is not a suit to enforce ERISA, it cannot be brought under § 502, and therefore there is no authority for an award of attorney's fees. It is unnecessary to reach this issue.

Id., at 89, n.14.

A full reading of *Mullins* shows that the Court did not decide the issue here—whether Section 502(g)(1) *requires* prevailing party status for a fee award. The Court assumed a separate, distinct statutory provision applied. The *Mullins* footnote simply acknowledged the interlocutory nature of the suit given the remand. Indeed, the Court declined to address whether ERISA applied to the suit. Thus, the language Respondent relies on, even assuming it relates to Section 502(g)(1) despite the earlier assumption in the same section of the opinion that the 1980 ERISA Amendments applied instead, is *obiter dictum*.

B. The Lower Courts Have Split On This Important, Frequently Recurring Issue.

In the absence of clear authority from this Court, including in the 27 years since *Mullins*, the lower courts remain deeply divided on whether a prevailing party requirement exists within Section 502(g)(1). Pet. at 16-23 (describing the split between those circuits that do not impose a prevailing party requirement (Second, Fifth, Eleventh, and Sixth and

likely Eighth as well) with those that do impose such a requirement (First, Fourth, Seventh and Tenth). *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). Respondent's boilerplate assertion that the circuits are not split is incorrect.

Respondent contends the Second Circuit has imposed a "prevailing party requirement for an award of fees under ERISA," BIO at 4, but misreads the cases in attempting to downplay the split. For example, Respondent cites *Birmingham v. SoGen Swiss Int'l Corp. Ret. Plan*, 718 F.2d 515, 523 (2d Cir. 1983), but the Second Circuit stated that "attorney's fees may be awarded to the prevailing party under ERISA in the absence of some particular justification for not doing so." *Id.* (citing *Central States Southeast v. Hitchings Trucking, Inc.*, 492 F. Supp. 906 (E.D. Mich. 1980)).[1] That is an entirely different proposition than *only* prevailing parties may be awarded fees.[2]

The Second Circuit in *Miller v. United Welfare Fund*, held that "Section 501(g)(1) contains no

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[1] In *Hitchings Truck*, the court noted that Section 502(g)(1) "is unlike the attorney's fee provision of federal civil rights laws in that there is no requirement that the award go only to a 'prevailing party.'" *Ibid.*, 492 F. Supp. at 909.

[2] Respondent also misplaces reliance on *Chapman v. Choicecare Long Island Long Term Disability Plan*, No. 07-2518-CV, 2009 U.S. App. LEXIS 233 (2d Cir. 2009). *Chapman* quoted the above language from *Birmingham*. It did not hold that *only* prevailing parties are entitled to fees.

requirement that the party awarded attorney's fees be the prevailing party" and remanded for a determination of fees even though the court vacated the judgment in favor of plaintiffs. 72 F.3d 1066, 1074 (2d Cir. 1995). *See also, Salovaara v. Eckert*, 222 F.3d 19, 27-28 (2d Cir. 2000) (holding that pursuant to Section 502(g)(1) "a court has discretion to award attorney's fees 'to either party'" and that the test for awarding fees is "applicable regardless of which party seeks attorney's fees") (quoting Section 502(g)(1)); *Tourangeau v. Uniroyal, Inc.*, 101 F.3d 300, 308, n.6 (2d Cir. 1996) ("A party need not succeed on the merits in order for its counsel to receive fees under [Section 502(g)(1)].") (citing *Miller*).

Respondent likewise misinterprets Fifth Circuit cases in arguing there is no circuit split. BIO at 5-6. Recognizing that the question here has "created a split of authority among a number of our sister circuit courts of appeal," the Fifth Circuit held that "a party need not prevail in order to be eligible for an award of attorneys' fees under [Section 502(g)(1)] of ERISA." *Gibbs v. Gibbs*, 210 F.3d 491, 501, 503 (5th Cir. 2000). The Fifth Circuit's language was clear: "We decline to join the Fourth Circuit . . . imposing a prevailing party limitation on the availability of attorneys' fees under ERISA." *Id.* at 503.[3]

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[3] The Fifth Circuit does require prevailing party status for an award of costs under ERISA. Pet. at 19 and n.2, citing *Wade v. Hewlett-Packard Dev. Co. LP Short Term Disability Plan*, 493 F.3d 533, 543 (5th Cir. 2007). Respondent contends *Wade* imposes a prevailing party requirement, but *Wade* specifically noted that no such requirement exists for fees: "Absent is any requirement that the party under consideration for fee-shifting . . . be the prevailing one. *See Gibbs v. Gibbs*, 210 F.3d 491, 501 (5th Cir. 2000)." *Wade*, 493 F.3d at 542, n.6.

Respondent also misreads *Gaeth v. Hartford Life Ins. Co.*, 538 F.3d 524, 534 (6th Cir. 2008), in asserting that the Sixth Circuit may require prevailing party status. BIO at 7. In fact, the Sixth Circuit in *Gaeth* expressly contemplated that fees could be awarded to a losing party under Section 502(g)(1). The case involved an appeal of an interim award of fees after the district court remanded to the plan administrator for a redetermination of benefits. *Id.* at 528. The Sixth Circuit found that "the express language of 29 U.S.C. § 1132 does not limit an award of attorney fees to the prevailing party," but remanded for a more careful analysis given the "possibility that Gaeth could receive attorney fees . . . even if he ultimately loses." *Id.* at 534.

Though cited in the petition, Respondent also fails to address that the Sixth Circuit in *First Trust Corp. v. Bryant*, 410 F.3d 842, 849, 851-55 (6th Cir. 2005), held that a party–one who had "taken the losing position in virtually every significant issue involved in th[e] case"–was nonetheless entitled to fees.

Furthermore, even in the limited time since the filing of the petition, several circuits have reinforced their position within the split, though none of the decisions as cleanly and squarely presents the issues as this case.

For example, the Fifth Circuit recently reinforced that fees may be awarded to either party and examined whether an appellant was entitled to attorneys fees, even though she lost on summary judgment. *See Graham v. Metro. Life Ins. Co.*, 2009

U.S. App. LEXIS 23337, at *12-13 (5th Cir. Oct. 22, 2009).

In contrast, the Seventh Circuit reaffirmed that attorneys' fees should issue only to a prevailing party and against a "losing party." *See Bandak v. Eli Lilly & Co. Ret. Plan*, --- F.3d ---, 48 Employee Benefits Cas. (BNA) 1001, 2009 U.S. App. LEXIS 25369, at *11-12 (7th Cir. 2009).

The First Circuit recently declined to award fees to a non-prevailing party. *Medina v. Metro. Life Ins. Co.*, --- F.3d ---, 2009 U.S. App. LEXIS 25879, *16 (1st Cir. 2009) ("Because we conclude that Medina does not prevail on any of his substantive claims, we affirm the district court's denial of Medina's request for fee-shifting.").

The First Circuit thus stands in line with the Fourth, Tenth and Seventh Circuits requiring prevailing party status before fees may be awarded, in direct conflict with the Second, Fifth, Sixth and Eleventh Circuits,[4] as well as the Eighth Circuit's decision remanding for a determination of whether

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[4] Respondent argues that the Eleventh Circuit in *Freeman v. Continental Ins. Co.*, 996 F.2d 1116, 1119 (11th Cir. 1989), held not that fees may be awarded to either party under Section 501(g)(1), but that there should be no presumption for awarding fees to a prevailing claimant, an issue Respondent contends is not under review here. *See* BIO at 6-7. Yet, *Freeman* decided both issues independently. *Ibid.*, 996 F.2d at 1119. And, Respondent myopically construes the scope of the second question, though this Court likely will not need to reach the issue of whether a prevailing party presumption applies given the limited scope of the appeal by Respondent below. *See* Pet. at 11.

claimants, who were no longer prevailing parties, nonetheless were entitled to fees. *Antolik v. Saks, Inc.*, 463 F.3d 796, 803 (8th Cir. 2006).

This widely-acknowledged split has festered long enough. The lower courts have solidified in their divergent positions. This Court should grant certiorari.

II. This Court Should Review the Circumstances Under Which Attorney's Fees May Be Awarded To ERISA Participants or Beneficiaries.

There is also significant inconsistency and conflict in the lower courts regarding whether *Buckhannon* applies to ERISA and under what circumstances a participant or beneficiary qualifies as a prevailing party for an award of fees.

Respondent errs in arguing that the second question presented was resolved in *Buckhannon*. BIO at 9-10. *Buckhannon* involved prevailing party fee-shifting statutes. Respondent contends, relying on *Mullins*, that Section 502(g)(1) is a prevailing party statute, too. BIO at 9. It is not. The clear language allowing fees "to either party" differentiates ERISA's fee-shifting provision, and as shown above, *Mullins* did not hold that Section 502(g)(1) requires prevailing party status.

Respondent also overlooks that other courts have declined to apply *Buckhannon*'s prevailing party test to ERISA. For example, in *Adams v. Bowater Inc.*, 313 F.3d 611, 615 (1st Cir. 2002), the First

Circuit noted in an ERISA case raising tactical mooting issues that "[w]hether the plaintiffs can recover attorney's fees does not necessarily depend on whether a formal judgment has been entered." The First Circuit distinguished *Buckhannon* because "the ERISA statute is differently phrased and conceivably the result could be different." *Id.* *See also, Becker v. Weinberg Group, Inc.*, 554 F. Supp. 2d 9, 16, n.6 (D.D.C. 2008) (declining to apply *Buckhannon* to Section 502(g)(1)).

Moreover, while the Fourth Circuit considers "only" enforceable judgments on the merits or court-ordered consent decrees as satisfying *Buckhannon*, Pet. at 8a, other courts disagree. *See, e.g., Carbonell v. INS*, 429 F.3d 894, 898 (9th Cir. 2005) (quoting *Buckhannon* to hold that enforceable judgments on the merits and court-ordered consent decrees are "examples" but not the only "examples" of judicial action sufficient to convey prevailing party status); *see also, Flom v. Holly Corp.*, 276 Fed. Appx. 615, 616 (9th Cir. 2008) (applying *Carbonell* to ERISA and holding that the "judicially-sanctioned change in the parties' relationship need not be a judgment on the merits, and a prevailing plaintiff need not achieve directly through the judicial order itself the ultimate benefit sought.").

Even where a prevailing party requirement is read into Section 502(g)(1), courts have diverged regarding whether, as here, a judicial finding of an ERISA violation, coupled with a remand for a redetermination of benefits, suffices to confer prevailing party status. The Fourth Circuit held below, in line with the Seventh Circuit, that this does

not confer prevailing party status, but other courts have reached the opposite conclusion. *See, e.g., Flom*, 276 Fed. Appx. at 616 ("The district court's remand provided the judicial imprimatur required by *Buckhannon* – it changed [the] legal relationship [] and ultimately led to [claimant's] success in securing a reinstatement of benefits."); *Mizzell v. Provident Life & Accident Ins. Co.*, 32 Fed. Appx. 352, 354 (9th Cir. 2002) (holding remand alone conferred prevailing party status); *Colby*, 635 F. Supp. 2d at 96 (same and citing additional cases); Pet. at 29-32.

This ongoing split is undermining legitimate enforcement of ERISA. This Court recognizes Congress sought to prevent underenforcement of ERISA rights via Section 502(g)(1). *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985). Yet, plan administrators in the Fourth Circuit are now incented to vigorously oppose claims in violation of ERISA, for if the claimant elects to pursue the matter in court and is able to secure a remand, the plan can simply pay the claim and tactically moot the case at that later point, thereby avoiding liability for attorney's fees. If this result is allowed to stand, most claimants, especially those with small claims or limited means, effectively will have been denied their rights in contravention of the clear purpose of ERISA.

CONCLUSION

This case presents a unique opportunity—perhaps not recurring in such a clean, straightforward manner for many years—for this Court to provide needed uniformity with respect to the standards for attorneys' fees in ERISA enforcement actions that

arise each year in thousands of federal district court cases. Petitioner urges the Court to grant a writ of certiorari to review the Fourth Circuit's misguided attorneys' fees standards in ERISA cases.

Respectfully Submitted,

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