No. 09-448

In the Supreme Court of the United States

BRIDGET HARDT,

Petitioner,

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF UNITED POLICYHOLDERS, AS *AMICUS CURIAE,* IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE[1]

United Policyholders ("UPH") is a single-issue, non-profit organization founded in 1991. The organization's mission is to educate the public, legislators and courts on insurance issues and consumer rights and to help policyholders secure fair and prompt claim settlements, including policyholders who are participants in employee benefit plans governed by ERISA, 29 U.S.C. § 1001 *et seq*. UPH is a recognized charity with tax exempt status under Internal Revenue Code § 501(c)(3), funded by donations and grants from individuals, businesses and foundations. An average of 20,000 monthly visitors read articles and tips at UPH's website, www.unitedpolicyholders.org.

UPH protects the interests of and presents the positions of policyholders through participation as *amicus curiae* in insurance-related cases throughout the country.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no person or entity other than the *amici curiae,* and their undersigned counsel made a monetary contribution to the preparation or submission of this brief. No attorney for any party authored this brief in whole or in part. Written consent to the filing of this brief has been obtained from the parties in accordance with Supreme Court rule 37.3(a). Copies of the consent letters have been filed with the Clerk.

UPH's reputation as a reliable friend of the court was enhanced when its *amicus curiae* brief was cited in this Court's opinion in *Humana v. Forsyth,* 525 U.S. 299 (1999), and its arguments were adopted by the Texas Supreme Court in *Excess Underwriters at Lloyd's, London, et al. v. Frank's Casing Crew & Rental Tools Inc.,* 2008 Tex. LEXIS 92, 51 Tex. Sup. J. (Tex. Feb. 1, 2008), as well as by the California Supreme Court in *Vandenberg v. Superior Court*, 88 Cal. Rptr.2d 366 (Cal. 1999) and in *TRB Investments, Inc. v. Fireman's Fund Ins. Co.,* 145 P.3d 472 (Cal. 2006).

Other ERISA cases in which UPH has been granted leave by the Supreme Court to participate as *amicus curiae* include: *Metro. Life Ins. Co. v. Glenn,* 554 US __, 128 S. Ct. 2343, 171 L. Ed. 2d 299 (2008); *Aetna Health, Inc. v. Juan Davila,* 542 US 200 (2004); and *Rush Prudential HMO v. Moran*, 536 US 355 (2002).

The resolution of the issue in this case is of great importance to UPH because of its potential application to millions of employees enrolled in ERISA plans.

SUMMARY OF ARGUMENT

This matter presents the question of whether attorney's fees in ERISA cases may be awarded pursuant to 29 U.S.C. § 1132(g) upon the issuance of a ruling overturning the plan administrator's denial of benefits, even if the court remands the matter to the plan administrator rather than orders the outright payment of benefits. In addition to a split between the Circuits on this question, the ruling issued by the Fourth Circuit creates an unwarranted disparity between fee award standards in private benefits cases and public benefits cases. Fees are available in public benefit cases upon the achievement of any legal relief. *See, e.g., Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983); *Shalala v. Schaefer,* 509 U.S. 292 (1993). Since the availability of fee awards in private ERISA benefit claims serves the same purposes as fee awards in public benefits cases, fees should be awarded in ERISA cases under the same standards. The unwarranted disparity between public and private benefits cases is even more pronounced here because, unlike fee awards made pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, there is no "prevailing party" requirement in 29 U.S.C. § 1132(g). Further, even if there were a "prevailing party" standard in ERISA's fee-shifting statute, an order of remand is itself sufficient to justify a fee award based on how that concept is defined in the context of other fee shifting statutes; i.e., a prevailing party is one who achieves a judicially sanctioned and material change in the legal relationship between the parties. *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 604-05, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)(attorney's fee award would be proper under "prevailing party" standard where there is a court sanctioned alteration in the legal relationship of the parties). A remand order is therefore sufficient in and of itself to trigger to an award of fees pursuant to 29 U.S.C. § 1132(g).

ARGUMENT

THE ERISA FEE SHIFTING STATUTE, 29 U.S.C. § 1132(g), AUTHORIZES CONSIDERATION OF FEE AWARDS UPON THE ACHIEVEMENT OF A SIGNIFICANT CHANGE IN THE LEGAL RELATIONSHIP BETWEEN THE PARTIES EVEN IF AN OUTRIGHT AWARD OF BENEFITS HAS NOT BEEN ORDERED.

ERISA's attorney's fee provision, 29 U.S.C. § 1132(g), serves two purposes. First, it discourages frivolous claim denials by providing a disincentive or sanction that may be imposed when a court finds that a plan fiduciary unlawfully denied benefits or abused its discretion in denying a benefits claim. Second, the attorney's fee provision allows claimants to secure legal representation even when their claims are of low to moderate value, thereby helping to provide plan participants access to remedies as contemplated in ERISA's declaration of policy. *See* 29 U.S.C. § 1001(b)("It is hereby declared to be the policy of this Act to protect . . . the interests of participants in employee benefit plans and their beneficiaries, . . . by providing for appropriate remedies, sanctions, and ready access to the Federal courts.")

Based on the language of ERISA's fee-shifting statute, 29 U.S.C. § 1132(g), which provides that the "court in its discretion may allow a reasonable attorney's fee and costs of action to either party," fees may be sought upon the issuance of a court order overturning a benefit denial, even if the court orders the plan administrator to reevaluate the claim instead of awarding benefits outright. Nonetheless, the principal rationale given for disallowing a fee application upon the issuance of a remand order is that an award of fees would be premature at that juncture since no award of benefits has been made. Cf. *Quinn v. Blue Cross and Blue Shield Ass'n,* 161 F.3d 472, 478-79 (7th Cir. 1998). The ramifications of that approach are troubling since the "premature" reasoning provides no incentive for plan administrators to approve benefits following a remand. If the worst that could happen to a plan administrator when it denies a claim for benefits is a remand for a "do-over" without the risk of incurring attorney's fees, there is no motivation to encourage the plan fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." ERISA § 404(a), 29 U.S.C. § 1104(a). Indeed, fee awards are the only deterrent to prevent a breach of fiduciary duty since plan administrators face no risk of being subject to other penalties or awards of damages under ERISA.[2]

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[2] *See, e.g., Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 105 S. Ct. 3085 87 L. Ed. 2d 96 (1985).

A district court remand to the plan administrator in cases where courts apply a deferential review standard necessarily means the district court has found the plan fiduciary guilty of abusing its discretion in denying a benefits claim. It also means the claimant has met the almost insurmountable burden of proving unlawful behavior on the part of the administrator. Fee denials following such "abuse of discretion" remands create a perverse incentive for plan insurers to once again deny the claim. It also effectively places the entire financial burden of a wrongfully-denied benefit claim on the claimant. If fees are not awarded where a claimant has proven unlawful behavior, it will result in a chilling effect upon claimants pursuing meritorious claim and the attorneys who seek to help them.

The claimants who will feel the most profound effect of fee denials are those whose disability or health insurance benefit amounts are minimal in comparison to the cost of litigating their claims. As the Seventh Circuit recently noted in *Anderson v. AB Painting & Sandblasting Inc.,* 578 F.3d 542 (7th Cir. 2009), ERISA fees may be disproportionate to the recovery achieved. There, the court explained:

> Because Congress wants even small violations of certain laws to be checked through private litigation and because litigation is expensive, it is no surprise that the cost to pursue a contested claim will often exceed the amount in controversy. Tuf Racing Products, Inc. v. American Suzuki Motor Corp., 223

> F.3d 585, 592 (7th Cir. 2000). That is the whole point of fee-shifting--it allows plaintiffs to bring those types of cases because it makes no difference to an attorney whether she receives $ 20,000 for pursuing a $ 10,000 claim or $ 20,000 for pursuing a $ 100,000 claim. See id. Fee-shifting would not "discourage petty tyranny" if attorney's fees were capped or measured by the amount in controversy.

578 F.3d at 545 (citations omitted). The case before the Court is illustrative since it involved an award of a modest amount of past due benefits while future benefits remain subject to Hardt's continuing qualification for benefits under the terms of the benefit plan. Under such circumstances, an insurer such as Reliance is encouraged by a fee denial to refuse to pay benefits following a remand because the fees at issue are potentially larger than the benefits themselves. If plans were on notice that they could be required to pay fees for their unlawful behavior even if benefits were not awarded outright, it would create the incentive to decide the claim properly in the first instance. Thus, a fee award is justifiable for the identical rationale cited in *Anderson*; i.e., to "discourage petty tyranny."

After finding a plan administrator's claim determination arbitrary and capricious, outright attorney fee denials not only encourage more claim denials, they also hinder claimants' ability to secure legal counsel to litigate their claims. Few benefit claimants who are unable to work can afford to hire an attorney on an hourly fee basis and contingency fee representation is uneconomical when the benefits claimed are modest in value. And without the potential for fee awards immediately upon a district court's conclusion that a plan insurer has acted unlawfully, an attorney in private practice would lack any incentive to represent an ERISA plan participant in a relatively modest benefits claim. Subjecting a plan fiduciary to a fee award upon a district court's finding of an abuse of discretion will incentivize lawyers to represent ERISA plan participants.[3] It will also encourage plan fiduciaries to resolve claims that should be paid and to do so prior to the filing of a complaint. Hence, this Court should reject the Fourth Circuit's approach to awarding attorney's fees in ERISA benefit claims.

Congress provided no specific guidance on fee awards in ERISA's legislative history. Nonetheless, the standards generally accepted by all circuits after the Ninth Circuit's ruling in *Hummell v. S.E. Rykoff & Co.,* 634 F.2d 446 (9th Cir. 1980), which cabin a lower court's discretion to set fees, are relevant and should be utilized in determining whether fee awards should be made when a benefit denial is overturned. A key factor among the five,[4] and one

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[3] *See, Hooper v. Demco, Inc.*, 37 F.3d 287, 291 (7th Cir. 1994) (Congress gave courts discretion to award fees "to encourage aggrieved parties to seek redress under ERISA.").

[4] (1) the losing party's culpability or bad faith; (2) the losing party's ability to satisfy a fee award; (3) the

that is consistent with the argument made above, is the availability of fee awards as a deterrent against unlawful claim denials. That factor serves ERISA's broad purpose to protect the interests of plan participants and their beneficiaries (29 U.S.C. § 1001(b)), "even when small amounts are involved." *Chambless v. Masters, Mates & Pilots Pension Plan,* 815 F.2d 869, 872 (2d Cir. 1987). Cases recognizing the importance of fee awards as a deterrent include *National Cos. Health Benefit Plan v. St. Joseph's Hosp.,* 929 F.2d 1558, 1575 (11th Cir. 1991) ("With nothing to lose but their own litigation costs, other ERISA-plan sponsors might find it worthwhile to force underfinanced beneficiaries to sue them to gain their benefits or accept undervalued settlements.") and *Rivera v. Benefit Trust Life Ins. Co.,* 921 F.2d 692, 698 (7th Cir. 1991) (award of attorneys' fees warranted by deterrent effect on plan administrators and further justified by payment out of defendant's assets rather than from a funded benefit plan). Sound policy reasons therefore offer good reason to allow fee awards even if an outright award of benefits has not been made.

The circuits that have allowed fee awards when benefit denials are overturned and the claim remanded to the plan administrator have furnished a convincing rationale for doing so. For example, in *Miller v. United Welfare Fund,* 72 F.3d 1066, 1074

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deterrent effect of such an award; (4) the value of the victory to plan participants and beneficiaries, and the significance of the legal issue involved; and (5) the relative merits of the parties' positions. 634 F.2d at 453.

(2d Cir. 1995), the Second Circuit explained:

> Notwithstanding that we decline to grant benefits to Miller but rather remand the district court's determination for further consideration, an award of attorneys' fees to plaintiff is not precluded. 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). The district court may award attorneys' fees to either party "in its discretion." Moreover, the 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. See Sansevera v. E.I. DuPont de Nemours & Co., 859 F. Supp. 106, 117 (S.D.N.Y. 1994) (granting attorneys' fees to plaintiff whose summary judgment motion was partially granted as to claim that Plan Board acted arbitrarily and capriciously in denying benefits).

The explanation offered by the Ninth Circuit reaches the same conclusion but suggests a somewhat different rationale. *Flom v. Holly Corp.,* 276 Fed. Appx. 615 (9th Cir. 2008)(non-precedential), explains that although there is no prevailing party requirement in Section 502(g), even if such a requirement were implied before fees are shifted under ERISA, "a prevailing party is one who achieves a judicially sanctioned and material change in the legal relationship between the parties." 276 Fed.Appx. at 616 (citing *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 604-05, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). Thus, one can be a prevailing party even if the ultimate remedy sought is not necessarily achieved. The court added that a remand to a plan administrator is analogous to a remand to an administrative agency, and that such a "remand can provide the judicial imprimatur necessary for a party to become a prevailing party" for the purposes of a fee award. *Id.* Referencing the rationale behind fee awards for remands afforded by the Equal Access to Justice Act, 28 U.S.C. § 2412 (d)(1)(A), the court added:

> For example, an alien may be a prevailing party under the Equal Access to Justice Act when the court remands his case to the Board of Immigration Appeals, regardless of the fact that the court does not decide the merits of the underlying claim. Rueda-Menicucci v. I.N.S., 132 F.3d 493, 495 (9th Cir. 1997); *see also* Li v. Keisler, 505 F.3d 913, 917-18 (9th Cir. 2007); *and* Johnson v. Gonzales, 416 F.3d 205, 208-10 (3rd Cir. 2005) (joining the Ninth and Seventh Circuits in concluding that an alien who prevails on a petition for review and whose case is remanded to the BIA is a "prevailing

> party"). Similarly, when a court remands a claimant's case seeking Social Security benefits to the agency pursuant to "sentence four," the claimant is a prevailing party even though the court's only action is to remand the case. *See* Shalala v. Schaefer, 509 U.S. 292, 300-02, 113 S. Ct. 2625, 125 L. Ed. 2d 239 (1993).

276 Fed.Appx. at 616-17.

Flom is consistent with an unbroken string of Supreme Court rulings involving both public benefits and civil rights. For example, in *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983), the Court explained, "[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." The same rationale was expressed in *Farrar v. Hobby,* 506 U.S. 103, 111-12 (1992), which held a party prevails when "actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying defendant's behavior in a way that directly benefits the plaintiff." Thus, a court ruling that overturns a benefit denial and gives the claimant a renewed opportunity to secure benefits plainly transforms the plaintiff into a prevailing party.

The example of the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) ("EAJA") is particularly instructive. Under EAJA, a Social

Security disability benefit claimant who receives a remand pursuant to Sentence 4 of 42 U.S.C. § 405(g)[5] is eligible to apply for fees immediately upon the issuance of an order of remand. Although there is no provision in ERISA comparable to Sentences 4 and 6 of 42 U.S.C. § 405(g) which specifically authorize remands as a remedy,[6] a court ruling

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[5] See, *Melkonyan v. Sullivan,* 501 U.S. 89 (1991) (discussing Sentence 4 and Sentence 6 remands, the former involving a remand in conjunction with a judgment affirming, modifying, or reversing the Commissioner's decision and the latter involving a remand for consideration of new evidence without any substantive ruling as to the correctness of the Secretary's decision). An ERISA remand, as occurred in this case, resembles a Sentence 4 remand since the court overturned a benefit denial. Also see, *Perlman v. Swiss Bank Corp.,* 195 F.3d 975 (7th Cir. 1999)(explaining the finality of an ERISA remand for the purpose of appellate jurisdiction).

[6] The fact that ERISA does not contain a comparable provision authorizing federal trial courts to remand benefits cases to ERISA plan administrators is undoubtedly due to significant differences between ERISA and the Social Security Act. A remand of a Social Security disability benefit case is allowable because it connotes the outcome of a judicial review proceeding much like an appellate court review of a final judgment entered by a trial court. That is, in a Social Security benefits claim, Congress relegated adjudicatory powers to a neutral administrative law judge (ALJ), and designated the federal district court as the body to hear appeals from ALJ rulings. However, in ERISA cases, again, unlike Social

decisively determining the plan administrator has abused its discretion is comparable in nature. However, it remains important to keep in mind the profound differences between ERISA and public benefit claims,[7] and that an administrative law

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Security disability benefit claims, there is no pre-litigation hearing, nor is there an administrative law judge to whom an ERISA case can be remanded. Rather than interpreting ERISA to make the plan administrator an adjudicator and thereby raise serious constitutional issues as to whether a private party can adjudicate statutory rights (See, *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California,* 508 U.S. 602 (1993)(potential due process violation when private party adjudicates pension withdrawal liability cured by arbitral review)), this Court should recognize that 29 U.S.C. § 1132(a)(1)(B) creates a *de novo* action that must be adjudicated to final judgment by an Article III judge under the Federal Rules of Civil Procedure as applicable to all civil actions (Fed.R.Civ.P. 1 and 2) in order to achieve an "immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged." *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 241 (1937).

[7] Cf. *Luby v. Teamsters Health, Welfare, & Pension Trust Funds,* 944 F.2d 1176, 1183 (3d Cir. 1991):

> Plan administrators are not governmental agencies who are frequently granted deferential review because of their acknowledged

paradigm is inapplicable to ERISA claim adjudications. *See, e.g.,* Langbein, "Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA," 101 Nw.U L.Rev. 1315, 1331-33 (2007).

Nevertheless, the rationale behind the ruling in *Shalala v. Schaefer,* 509 U.S. 292, 113 S. Ct. 2625 (1993) is instructive here. *Schaefer* ruled that fee applications under EAJA are available following a remand without the need to await an outright award of benefits, finding, "No holding of this Court has ever denied prevailing party status (under 28 U.S.C. § 2412(d)(1)(B)) to a plaintiff who won a remand order pursuant to sentence four of § 405(g)." *Shalala,* 509 U.S. at 302. Thus, based on long-standing Supreme Court precedent relating to prevailing party status under fee-shifting statutes, Social Security disability benefit claimants who win remands are entitled to seek fees regardless of whether they ultimately prevail in securing an award of benefits. Given the similarity in nature of

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expertise. Administrators may be laypersons appointed under the plan, sometimes without any legal, accounting, or other training preparing them for their responsible position, often without any experience in or understanding of the complex problems arising under ERISA, and, as this case demonstrates, little knowledge of the rules of evidence or legal procedures to assist them in factfinding.

ERISA remands, no logical ground exists to distinguish the availability of fee awards under ERISA from the well-established law relating to EAJA. Accordingly, the Fourth Circuit's finding is erroneous and must be overruled.

CONCLUSION

The determination of the Fourth Circuit must be overturned and the district court's award of fees pursuant to 29 U.S.C. § 1132(g) should be reinstated.

Respectfully submitted,

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