

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 FOR RESPONDENT
—◆—

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QUESTIONS PRESENTED

1. Whether ERISA §502(g)(1) provides a district court discretion to award attorney's fees to a party who has not achieved "some success on the merits."

2. Whether a district court has discretion to award attorney's fees to a plaintiff under §502(g) when it "remanded" the claim to a private claims administrator to "fully and adequately assess the claim" and the administrator, in an exercise of the discretion granted it by the plan, and on consideration of the existing record, as well as new medical evidence submitted by the plaintiff, allows the claim on "remand."

RULE 29.6 STATEMENT

Respondent Reliance Standard Life Insurance Company hereby discloses that it is a subsidiary of Reliance Standard Life Insurance Company of Texas, which in turn is a subsidiary of Delphi Financial Group, Inc., which is a publicly held corporation.

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STATEMENT

Dan River, Inc., as part of its employee welfare plan under the Employment Retirement Investment Security Act, 29 U.S.C. §1001 *et seq.* (“ERISA”), chose to provide long-term disability coverage to its employees. Pet.App. 31a, 32a. Reliance Standard Life Insurance Company (“Reliance”) insured the long-term disability plan (the “Plan”) and was responsible for deciding claimants’ eligibility for benefits under the Plan. *Id.*, at 32a. The Plan provided that Reliance, as the claims-review fiduciary, “has the discretionary authority to interpret the Plan and the insurance policy and to determine eligibility for benefits.” JA 47a.

Bridget Hardt was employed by Dan River as an executive assistant. Pet.App. 32a. After complaining of pain in her neck and shoulders, Ms. Hardt was diagnosed with carpal-tunnel syndrome and underwent surgery on both wrists. *Ibid.* She stopped working on January 23, 2003. *Ibid.* Several months later, Ms. Hardt submitted a claim to Reliance for long-term disability benefits. *Ibid.* Ms. Hardt stated she was unable to work due to pain and numbness in her hands, arms, shoulders, and neck. *Ibid.* Under the plan, following a period of short-term disability, Ms. Hardt could initially obtain twenty-four months of total-disability if she was unable to perform the “material duties” of her “regular occupation.” *Ibid.* After those twenty-four months, the plan’s definition of “total disability” provided that, to continue receiving benefits, the claimant must be

totally disabled from “any occupation,” not just her own. JA 37a-38a.

Reliance provisionally approved the initial total-disability claim based on the medical records submitted by Ms. Hardt. *Ibid.* Reliance then asked her to undergo a functional capacity evaluation (“FCE”). Pet.App. 32a. Ms. Hardt told the therapist that, in addition to pain in her neck, left shoulder, and hands, she also suffered from lower-back pain, hypertension, and anxiety. *Id.*, at 32a-33a. The therapist concluded that Ms. Hardt was capable of performing sedentary work if she was limited to lifting four to five pounds on an occasional basis and two to three pounds on a frequent basis. *Id.*, at 33a. Based on these findings, Reliance denied the claim. Ms. Hardt appealed, contending that her job was more demanding than “sedentary occupations.” Fourth Circuit Joint Appendix (“CA4JA”) 166-68. Reliance granted the appeal, concluding based on her new explanation that she was totally disabled from her “regular occupation,” which entitled her to twenty-four months of benefits. Pet.App. 33a.

Near the end of the twenty-four month period, Reliance evaluated Ms. Hardt’s eligibility for benefits under the stricter “totally disabled from any occupation” standard. CA4JA 166-68. According to the earlier FCE, Ms. Hardt was capable of working at a sedentary job that did not require lifting substantial weight. Pet.App. 33a. Based on these qualifications, a vocational expert performed a residual employability

analysis and identified several alternative occupations that Ms. Hardt could do. CA4JA 167-68. Reliance notified Ms. Hardt on April 19, 2005, that, following the twenty-four month period, she would no longer be eligible for benefits. Pet.App. 36a.

Ms. Hardt appealed the denial to Reliance. Pet.App. 36a. Because the original evaluation of Ms. Hardt's functional capacity was two years old, Reliance, under the terms of the policy, asked Ms. Hardt to undergo a new FCE. Pet.App. 36a. After cancelling the first exam in October, Ms. Hardt eventually agreed to undergo the FCE on December 29, 2005. CA4JA 143-55. However, during the exam, Ms. Hardt refused to perform many of the tests. Pet.App. 36a. The examiner reported that Ms. Hardt had given a "very poor effort or voluntary submaximal effort which is not necessarily related to pain, impairment, or disability." Pet.App. 36a, 37a. On this basis, the examiner deemed the test results "invalid." *Ibid.*

Due to Ms. Hardt's failure to cooperate, Reliance scheduled another FCE. Pet.App. 37a. When this took place on January 26, 2006, the examiner reported that Ms. Hardt again failed to cooperate. Pet.App. 37a. As the examiner stated, Ms. Hardt "passed only 29/92 validity criteria * * * which suggests very poor effort or voluntary submaximal effort which is not necessarily related to pain, impairment, or disability," and that the testing indicated "a non-organic component" to her condition. CA4JA 459.

At Reliance's request, Ms. Hardt's medical records were reviewed by Michael Leibowitz, M.D., who is board-certified in Physical Medical and Rehabilitation. Pet.App. 37a. Dr. Leibowitz concluded that the carpal-tunnel surgery on Ms. Hardt's wrists had been successful, as documented by electrodiagnostic studies. *Ibid.* Dr. Leibowitz opined that the prognosis for Ms. Hardt's cervical symptoms was good and that she would continue to improve. *Ibid.* He acknowledged the diagnosis of hereditary small-fiber neuropathy from one of Ms. Hardt's doctors, but questioned whether it was correct. *Ibid.* Based on this review, Dr. Leibowitz concluded that Ms. Hardt was capable of working full-time at a sedentary job that did not require lifting substantial weight. CA4JA 447.

An independent vocational evaluation was also performed to determine whether "any occupations" were suitable for Ms. Hardt. Pet.App. 38a. A vocational specialist performed a labor-market survey and identified eight suitable positions near Ms. Hardt's home that were available. Pet.App. 38a. After reviewing the medical and vocational information, Reliance concluded again that Ms. Hardt was not totally disabled from "any occupation." *Ibid.*

Ms. Hardt filed this action in the District Court for the Eastern District of Virginia on March 5, 2007. JA 7a, 90a-112a. She sought long-term disability benefits under the plan, plus interest and attorney's fees. JA 108a-10a. The parties filed cross-motions for summary judgment, which the district court considered under the "modified abuse of discretion"

standard applicable under ERISA. JA 12a, 15a. Reliance contended that its denial of her claim was not an abuse of discretion because, among other things, her claim relied almost entirely on out-dated medical records, she had affirmatively failed to cooperate, and the decision was fully supported by the medical records and Dr. Leibowitz's report. Defendants' Combined Response to Plaintiff's Motion for Summary Judgment (Dist. Ct. Dkt. No. 34) 2.

The district court denied both parties' motions, declining to rule as a matter of law that Ms. Hardt was or was not entitled to benefits. As a procedural matter, however, the court concluded that the denial of the claim had been based on "incomplete information," and that "Ms. Hardt did not get the kind of review to which she was entitled." Pet.App. 48a. On its own motion, the court "remanded" the case to Reliance "to address the deficiencies in [its] approach" and "fully and adequately assess Ms. Hardt's claims." *Ibid.* Reliance, in turn, was foreclosed from obtaining further review of the decision because ERISA "remands" to private claims administrators are generally not considered final appealable orders. See, *Bowers v. Sheet Metal Workers' Nat'l Pension Fund*, 365 F.3d 535 (6th Cir. 2004).¹

¹ As Reliance later noted, although not subject to appeal, the district court's "remand" order was legally erroneous under ERISA. Appellant's Br. 22-25. Among other things, Reliance noted that the district court improperly criticized the FCEs for failing to assess the impact of neuropathic pain because FCEs

(Continued on following page)

Shortly after the ERISA “remand” to Reliance, Ms. Hardt’s counsel delivered a number of new medical records to Reliance. Appellee’s Br. 4.² In addition to considering the new evidence submitted by Ms. Hardt, Reliance also sent Ms. Hardt for an Independent Medical Examination (“IME”). See Plaintiff’s Rebuttal to Defendants’ Opposition to Plaintiff’s Motion for Attorneys’ Fees (Dist. Ct. Dkt. No. 54), at 9-10; Memorandum of Law in Support of Plaintiff’s Motion for Attorney’s Fees (Dist. Ct. Dkt. No. 52), Exhibit 3 (pp. 9-11). Relying in part on the new evidence, including a new Magnetic Resonance Imaging (“MRI”) test performed approximately a year after Reliance had denied Ms. Hardt’s appeal, the IME concluded that “Ms. Hardt’s condition will continue to deteriorate.” IME, at 2-3, 6-7 (“A repeat or follow-up lumbar MRI scan was done 3/24/07 which was compared by the radiologist showing progressive changes. When the scan was reviewed it did indeed

document an individual’s ability to work *regardless of the cause*; failed to address Reliance’s right to rely on the reports from two examiners that Ms. Hardt had given “very poor effort or voluntary submaximal effort”; improperly found that Reliance was required to credit subjective complaints of pain, even though Fourth Circuit precedents establish the contrary; and relied on inapplicable precedents under the Social Security Act. *Ibid.*

² Ms. Hardt’s counsel also spent considerable time “updat[ing]” her medical records to submit additional information to Reliance in support of her claim on remand. Memorandum of Law in Support of Plaintiff’s Motion for Attorney’s Fees (District Court Dkt. No. 52), Exhibit 3 (pp. 9-11).

show * * * marked changes * * * "). Appellant's Br. 11; Memorandum of Law in Opposition to Plaintiff's Motion for Attorney's Fees (Dist. Ct. Dkt. No. 53), at 3-4.³

On a review of the full record, including the new medical evidence and IME, Reliance concluded that Ms. Hardt's medical condition at the time of the "remand" constituted a total disability and awarded her benefits contingent on "periodic proof of * * * continuing "Total Disability.'" JA 120a-21a.

Ms. Hardt filed a motion for attorney's fees and costs under ERISA §502(g)(1), contending that she "has prevailed under ERISA in obtaining a remand of Reliance's prior decision to deny her disability benefits." JA 22a, 118a. In granting her motion and awarding fees, the district court recognized that its prior "remand" order had "not sanction[ed] a certain result on remand," and that, "[h]ad the defendant completed its review [on "remand"] in the manner

³ The IME is apparently not part of the district court record. Concurrent with filing this brief, Respondent is sending a letter to the Clerk pursuant to Supreme Court Rule 32.3 requesting permission to lodge the IME with the Court. The IME is also referenced in the invoices submitted by Petitioner in support of her fee petition. Memorandum of Law in Support of Plaintiff's Motion for Attorney's Fees (Dist. Ct. Dkt. No. 52), Exhibit 3 (p. 11) ("Correspondence * * * re: IME Report * * * "); Memorandum of Law in Opposition to Plaintiff's Motion for Attorney's Fees (Dist. Ct. Dkt. No. 53), at 4; Plaintiff's Rebuttal to Defendants' Opposition to Plaintiff's Motion for Attorney's Fees (Dist. Ct. Dkt. No. 54), at 9.

ordered by the court and in the prescribed time period, and again *determined that the plaintiff was not eligible for benefits, it is certainly possible that the court would have found the result satisfactory.*” Pet.App. 19a, 20a n.5 (emphasis added). Nevertheless, the district court found that Ms. Hardt was entitled to attorney’s fees because “[t]he 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.” Pet.App. 22a. The court disposed of the rest of the case with a dismissal: “It appearing to the court that no further legal issues remain to be resolved in this matter, the case is DISMISSED.” Pet.App. 30a.

Reliance appealed to the Fourth Circuit on the ground that, under Fourth Circuit precedent, Ms. Hardt could be eligible for attorney’s fees under §502(g)(1) only if she were a “prevailing party,” and here she was not a “prevailing party.” As Reliance framed it, “[t]here is only one question raised in this appeal. Is Ms. Hardt a ‘prevailing party?’” Appellant’s Br. 15; Reply Br. 1. Ms. Hardt did not deny this characterization of the lone issue on appeal, nor did she argue that §502(g)(1) includes no “prevailing party” requirement. Instead, Ms. Hardt limited her argument to urging that “[b]ecause *Ms. Hardt was the prevailing party* in this matter, she is entitled to an award of attorney’s fees * * * *” Appellee’s Br. 15, 17, 21, 23. She never argued there is no “prevailing party” requirement under §502(g)(1) nor invited the Fourth Circuit to reconsider its longstanding rule on

this point.⁴ See Appellee’s Br. 1-38. The Fourth Circuit agreed with Reliance that Ms. Hardt was not a prevailing party, Pet.App. 11a, and Ms. Hardt filed her petition for certiorari.



SUMMARY OF ARGUMENT

ERISA §502(g)(1) provides that “the court in its discretion may allow a reasonable attorney’s fee and costs of action to either party.” On its face, the statute contains no express “success” requirement. It does not expressly demand, like so many statutes, that a claimant be a “prevailing party” before receiving

⁴ Accordingly, Petitioner failed to raise below the first question presented on certiorari, see, *e.g.*, JA 118a; Mem. in Support of Motion for Attorney’s Fees and Costs (Dist. Ct. Dkt. No. 52), at 2, 3, 9; Appellee’s Br. 15-17, 21-28, 34, 38. For that reason, the Fourth Circuit did not address it. Pet.App. 7a-8a. And because Petitioner did not raise or preserve this issue below, this Court should decline to consider it. See, *e.g.*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (“Where issues are neither raised below nor considered by the Court of Appeals, this Court will not ordinarily consider them.”).

If the Court declines to address the first question, the second question alone does not merit the Court’s consideration. Question two, which occupied only five pages of the petition for certiorari, concerns the application of the relevant legal standard to Ms. Hardt’s facts. If the legal standard is not properly at issue, the Court should dismiss the writ. See *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) (dismissing writ as improvidently granted where record established that principal issue as to which certiorari was granted was not raised or decided below).

attorney's fees. Nor does it expressly provide that a non-prevailing party may be eligible for fees.

This Court has before addressed just such a statute. In *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), the Court considered the attorney's-fees provision of the Clean Air Act, which allowed fees "whenever [the court] determines that such an award is appropriate." This case is controlled by *Ruckelshaus*.

First, the *Ruckelshaus* Court established a clear statement rule: given the longstanding "American rule" that each party bears its own costs, if Congress wishes to allow non-prevailing parties to recover attorney's fees, it must do in unmistakably clear terms. Nothing in ERISA §502(g)(1) satisfies that clear statement rule.

Second, *Ruckelshaus* considered the import of Congress's decision not to include an express success requirement. The Court found that the omission of terms like "prevail" or "success" "modifies but does not completely reject the traditional rule that a fee claimant must 'prevail' before it may recover attorney's fees." *Id.*, at 686. As the Court explained, this "modified prevailing party" standard "expand[s] the class of parties eligible for fee awards from prevailing parties to *partially prevailing* parties." *Id.*, at 688 (emphasis added).

Applying that analysis, *Ruckelshaus* defined what constitutes a "partially prevailing party." The Court held that, absent a clear statement to the contrary, to be eligible for attorney's fees, a claimant

must demonstrate “some success on the merits.” And, the Court explained, “purely procedural victories” would not suffice.

Thus, under *Ruckelshaus*, the absence of words like “prevailing party” in a fee-shifting statute decreases the *quantum* of success required to be eligible for attorney’s fees, but it does not change the *nature* of the success required. One need not succeed on every claim in a case—partial success is enough—but one must necessarily succeed *on the merits*.

Petitioner cannot satisfy the *Ruckelshaus* requirement of “some success on the merits.” The only judicial relief Ms. Hardt obtained was a “remand” to a private ERISA claims administrator, and that relief was purely procedural. It did not resolve or purport to resolve any of the substantive claims she presented, and so it could not constitute success “on the merits.”

In *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980), the Court addressed a judicial remand for a new trial, and concluded that attorney’s fees were not allowed because, by merely securing a remand, claimants had “not prevailed on the merits of any of their claims.” The same is true here.

Nor does Petitioner’s “hybrid” theory save her claim. Petitioner suggests that an ERISA “remand” *plus* the subsequent award of benefits, together constitutes sufficient success for an award of attorney’s fees. However, the award of benefits by an ERISA claims administrator is a voluntary decision by a private party, pursuant to the terms of a voluntarily

adopted ERISA plan. It lacks the requisite “judicial imprimatur” to constitute success “on the merits.” See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 605 (2001).

And if the initial “remand” was procedural, then no subsequent action by a private party can retroactively render it substantive. This is especially so where, as here, the ultimate award of benefits came only after the introduction of substantial new evidence concerning Petitioner’s medical condition. Given that new evidence, it is entirely possible that *both* of Reliance’s disability determinations were substantively correct: that, at the time of the first determination, Ms. Hardt did not in fact substantively meet the plan criteria for disability, and, at the time of the second determination—following the introduction of new medical information and a new MRI—she did meet those criteria. Although she is now receiving benefits, she did not obtain judicial relief “on the merits.”

Even more fundamentally, success “on the merits,” by definition requires a judgment. Whether it is necessary to “prevail in part” (per a *Ruckelshaus*-type statute like §502(g)(1)) or “prevail in full” (per a *Buckhannon*-type statute), *Buckhannon* teaches that one measures “prevailing” by examining, not “judicial pronouncements” and not “nonjudicial alteration of actual circumstances,” but ultimate judicial judgments.

Here, the judgment was dismissal. And that, by no measure, constitutes “some success on the merits.”



ARGUMENT**I. UNDER THIS COURT'S PRECEDENT, A DISTRICT COURT MAY NOT AWARD ATTORNEY'S FEES UNDER ERISA SECTION 502(g)(1) UNLESS THE PARTY ACHIEVES "SOME SUCCESS ON THE MERITS"**

Petitioner's argument is straightforward. The text of §502(g)(1) does not contain the words "prevailing party," but instead grants the district court authority to award fees and costs "in its discretion * * * to either party." Accordingly, a litigant need not be a prevailing party to receive attorney's fees under that section, and a district court has wide "discretion" to award attorney's fees as it deems appropriate.

That simple argument, however, runs afoul of decades of this Court's precedents. In the context of attorney's fees, the Court has consistently declined to sanction unfettered discretion, as the Chief Justice recently explained for a unanimous Court:

Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike. See *Friendly, Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982). For these reasons, *we have often limited courts' discretion to award fees despite the absence of express legislative restrictions.*

Martin v. Franklin Capital Corp., 546 U.S. 132, 139 (2005) (emphasis added).

The fee provision in §502(g)(1) is no different.⁵ An examination of this Court’s precedent, the statutory text, and legislative context all demonstrate that, to be eligible for fees under that section, a party must achieve “some success on the merits.”

A. *Ruckelshaus v. Sierra Club* Established a Clear-Statement Rule Before Congress Will Be Deemed To Have Allowed Non-Prevailing Parties To Obtain Attorney’s Fees, and Established a Bright-Line Rule that, Absent a Clear Statement to the Contrary, a Party Must Achieve “Some Success on the Merits” To Receive Attorney’s Fees

Before turning to the specific text of §502(g)(1), one must first understand the background rules of construction that this Court mandated in *Ruckelshaus*, 463 U.S. 680 (1983). The question there, like here, was whether a party that had achieved no litigation success on the merits could nonetheless be eligible for attorney’s fees. The Court applied the fee-shifting provision of the Clean Air Act, 42 U.S.C. §7607(f), which provides:

In any judicial proceeding under this section, the court may award costs of litigation

⁵ Notably, the Court has twice in passing observed that under §502(g), attorney’s fees are “normally awarded only to prevailing parties.” *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 89 n.14 (1982); see also *Pegram v. Herdrich*, 530 U.S. 211, 236 (2000).

(including reasonable attorney and expert witness fees) *whenever it determines that such award is appropriate.*

463 U.S., at 700-01 (emphasis added). Like §502(g)(1), the fee-shifting provision of the Clean Air Act did not contain any express success requirement. And, like §502(g)(1), the statutory text could be simplistically read to sanction virtually unfettered discretion “when-ever appropriate”.

The Court began its opinion by recognizing that, under the longstanding “American rule,” “the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser.” *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 263 (1975). Although “[t]he federal judiciary has recognized several exceptions to the general principle that each party should bear the costs of its own legal representation,” *F.D. Rich Co. v. United States*, 417 U.S. 116, 129 (1974), “[t]he rule here has long been that attorney’s fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.” *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967).

Given that *prevailing* parties generally do not obtain their attorney’s fees, absent an express statutory provision allowing such recovery, the Court concluded *a fortiori* that it would be “novel” and “radical” to allow fees to *losing* parties. *Ruckelshaus*, 463 U.S., at 693-94. Therefore, after analyzing the Court’s precedents, as well as the text and legislative history

of the attorney's-fee provision at issue, *Ruckelshaus* made two holdings—both critical here.

First, recognizing that Congress legislates with a full awareness of the underlying context of the American rule, the Court established a clear statement rule to depart from that norm:

Before we will conclude Congress abandoned this established principle that a successful party need not pay its unsuccessful adversary's fees—rooted as it is in intuitive notions of fairness and widely manifested in numerous different contexts—a *clear showing that this result was intended is required*.

Id., at 685 (emphasis added). And, the Court concluded, “if Congress intended such a novel result * * * it *would have said so in far plainer language* than that employed [in the Clean Air Act].” *Id.*, at 693-94 (emphasis added).

Second, the Court did accord some significance to the fact that the statutory language Congress had chosen in the Clean Air Act did not include an express “success” requirement. As a result, the Court determined that the statute “modifies but does not completely reject the traditional rule that a fee claimant must ‘prevail’ before it may recover attorney’s fees.” *Id.*, at 686. To wit, the fee provision “was meant to expand the class of parties eligible for fee awards from prevailing parties to *partially prevailing* parties—parties achieving *some success*, even if not major success.” *Id.*, at 688.

Then, the Court addressed what constitutes “some success”:

Of course, we *do not mean to suggest* that trivial success on the merits, or *purely procedural victories*, would justify an award of fees under statutes setting out the when “appropriate” standard.

Id., at 688 n.9 (emphases added).

Accordingly, the Court established a bright-line minimum before attorney’s fees could be awarded:

[W]e hold that, absent [1] *some degree of success* [2] *on the merits* by the claimant, it is not “appropriate” for a federal court to award attorney’s fees under §307(f).

Id., at 694.

In those 29 precisely chosen words, the Court stated its central holding. Yet when Petitioner and the Solicitor General characterize the case, both omit three—“on the merits.” See Pet. Br. 38 (“*Ruckelshaus* recognized that, under the analogous ‘whenever * * * appropriate’ fee-shifting statutes, a party need only achieve ‘some success.’”); U.S. Br. 20 (“Unlike in the application of the traditional ‘prevailing party’ requirement, a fee award could be ‘appropriate’ under the Clean Air Act provision as long as there was ‘some degree of success.’”).

Those three words, “on the merits,” control the outcome in this case. They are essential to the express holding in *Ruckelshaus*, and they appear

repeatedly throughout the opinion. See 463 U.S., at 681, 682, 688 n.9, 693, 694.

Accordingly, the twin holdings of *Ruckelshaus* were: (1) a clear statement is required before Congress will be deemed to have allowed attorney's fees to be awarded to non-prevailing parties; and (2) in the absence of such a clear statement, to be eligible for attorney's fees a claimant must demonstrate "some success on the merits." Both holdings, in turn, dictate the legal rule that applies here.

B. The Statutory Language and History of ERISA §502(g)(1) Accord Fully with the *Ruckelshaus* Rule That, To Recover Attorney's Fees, a Party Must Achieve "Some Success on the Merits"

The text of ERISA §502(g)(1) provides:

In any action under this subchapter (other than an action described in paragraph 2) 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) (emphases added).

1. Section 502(g)(1) Does Not Satisfy the Clear Statement Rule of *Ruckelshaus*

Like the Clean Air Act, §502(g)(1) does not contain any express "success" requirement, nor does

it explicitly authorize a losing party to obtain fees. Thus, as even Petitioner concedes, both provisions are “analogous,” Pet. Br. 38; indeed, there is no principled difference between “may award [fees] * * * whenever * * * appropriate” and “in its discretion may allow [fees] * * * to either party.”⁶

Therefore, on its face, §502(g)(1) fails to satisfy the clear statement rule.

Nevertheless, *without even acknowledging the Ruckelshaus clear statement rule*, both Petitioner and the Solicitor General at least obliquely suggest that §502(g)(1) would allow attorney’s fees to be awarded to a litigant who was altogether unsuccessful. See Pet. Br. 36 (“Applying these factors *generally* will mean that fees are limited to litigants who have achieved at least some degree of success * * * *”) (emphasis added); U.S. Br. 18 (“An award of fees would *almost never* be appropriate under §502(g)(1) when a party was wholly unsuccessful * * * *”) (emphasis added).

To say that to receive attorney’s fees, one “generally” must have some success or “almost never” will be “wholly unsuccessful,” is necessarily to imply that *sometimes*, fees can be awarded when a litigant

⁶ See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416 (1978) (analogizing statutory language in *Ruckelshaus* with statutory language in the Trust Indenture Act of 1939 and the Securities Exchange Act of 1934, both of which are virtually *identical* to the ERISA fee-shifting provision).

has been altogether unsuccessful. And that result—and the legal rule that generates it—is utterly inconsistent with this Court’s square holdings in *Ruckelshaus*.

2. ERISA’s Statutory History Is Altogether Consistent with the *Ruckelshaus* Requirement of “Some Success on the Merits”

Congress enacted ERISA in 1974 to replace the Welfare and Pension Plans Disclosure Act (“WPPDA”), which Congress had adopted in 1958 to deter pension plan abuses. 72 Stat. 997 (1958) (repealed as amended by ERISA, 88 Stat. 851 (1974)). The WPPDA contained a fee-shifting provision that, unlike §502(g)(1), permitted an award of fees, but only to “plaintiffs”:

The court * * * may in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.

29 U.S.C. §308(c) (repealed 1974).

Early versions of ERISA’s fee-shifting provision, including H.R. 6498 (1968) and S. 4327 (1970), contained similar language: “The court * * * may in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.” See ERISA Legis. History 64, 68 & 69 (A&P).

Congress, however, declined to adopt the WPPDA provision in ERISA. Instead, Congress adopted §502(g)(1), which, unlike the WPPDA, gave district courts “discretion” to award fees to “either party.”

Unfortunately, there is almost no legislative history explaining why Congress changed the attorney’s-fee provision. See *Armistead v. Venitron Corp.*, 944 F.2d 1287, 1303 (6th Cir. 1991) (“[n]o meaningful history exists to provide guidance to the courts” on the meaning of §502(g)(1)). Petitioner would have the Court focus exclusively on the omission of an express “success” requirement, but there are several other possible explanations for what Congress was trying to do—all of which can be derived from the differences in text between §502(g)(1) and the WPPDA.

Those textual differences—and what Congress was potentially trying to accomplish through the new statutory language—can be divided across three axes:

- (1) the degree of *certainty* with which fees will be awarded, *i.e.*, whether they are automatic or discretionary;
- (2) *to whom* fees can be awarded, *i.e.*, only to plaintiffs, or to both plaintiffs and defendants; and,
- (3) the degree of *success* required before a party can receive fees.

Petitioner’s narrative focuses exclusively on the third axis, to the exclusion of the first two. Instead, each axis should be examined in turn.

a. When ERISA Was Enacted “Prevailing Party” Statutes Had Been Read Expansively To Award Fees Almost Automatically in Any Case in Which the Plaintiff Had Prevailed

When Congress crafted the language of §502(g)(1), it chose not to include an express “prevailing party” requirement. To understand why, it is necessary to understand how “prevailing party” statutes had been interpreted at that time. See generally *Ruckelshaus*, 463 U.S., at 678 (“In determining the meaning of the Senate Report’s rejection of the ‘prevailing party’ standard it first is necessary to ascertain what this standard was understood to mean.”).

At the time of ERISA’s enactment, courts had interpreted “prevailing party” expansively, as requiring a near-automatic award of fees. For example, in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), the Court had broadly interpreted the fee-shifting provision in the Civil Rights Act of 1964, which provided, in relevant part, “the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee.” 42 U.S.C. §2000a-3(b). Although this provision appears, on its face, to allow the district court considerable leeway in deciding whether to award fees, this Court nevertheless held that “one who succeeds in obtaining an injunction under that Title *should ordinarily recover an attorney’s fee unless special circumstances*

would render such an award unjust.” *Piggie Park*, 390 U.S., at 966 (emphasis added).

Later, in 1973—the year before ERISA was passed—the Court extended *Piggie Park*’s automatic fee-shifting to §718 of the Emergency School Aid Act of 1972. See *Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973); see also *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975) (extending *Piggie Park* to Title VII).⁷

Given those recent decisions, Congress may have chosen to use a different attorney’s fees formulation in ERISA to avoid the “mandatory” judicial gloss that had been read into “prevailing party” statutes. Cf. *Ruckelshaus*, 463 U.S., at 688 (explaining that the predecessor statute to the Clean Air Act provided for mandatory attorney’s fees for prevailing parties, and “Congress almost certainly rejected [another proposed ‘prevailing party’ standard] because it *required* fee awards to ‘prevailing parties’”).

⁷ Some courts still interpret “prevailing party” this way. See, e.g., *Saint John’s Organic Farm v. Gem Cty. Mosquito Abatement Dist.*, 574 F.3d 1054, 1063-64 (9th Cir. 2009); *King v. Ill. State Bd. of Elections*, 410 F.3d 404, 424 (7th Cir. 2005).

b. The Express Terms of the WPPDA Limited Fees to “Plaintiffs,” and Congress Intended To Allow Both Plaintiffs and Defendants To Recover Fees

Under the WPPDA, only “plaintiffs” were eligible to receive attorney’s fees. The clearest difference between the WPPDA and §502(g)(1) is that the latter eliminated “plaintiffs” and allowed fee awards “to either party.” That was not the first time Congress adopted that precise formulation.

At the time of ERISA’s enactment, two other economic statutes likewise permitted courts to exercise “discretion” to award fees to “either party,” using language virtually identical to that adopted in ERISA. See Securities Exchange Act of 1934, 15 U.S.C.A. §§78i(e), 78r(a); Trust Indenture Act, 15 U.S.C.A. §77www(a) (“In any such suit the court may, *in its discretion*, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys’ fees, *against either party* litigant.”) (emphasis added).

Given their virtually identical language, there is a strong presumption that ERISA and these prior statutes should be interpreted the same way. See *Northcross*, 412 U.S., at 428 (“similarity of language” between statutes “is a strong indication that that the two statutes should be interpreted in *pari passu*”).

And, although ERISA’s legislative history is silent on why Congress chose to enact §502(g)(1), there

is considerable legislative history explaining Congress's decision to adopt the 1934 Act's nearly identical statutory text:

Protection against strike suits is provided by giving the court authority in its discretion to assess costs, including attorney's fees, against either party and even to require an undertaking for the payment thereof.

S. Rep. No. 73-792, at 21 (1934).⁸

Congress's use of the same language in §502(g)(1)—“discretion” to award fees to “either party”—suggests that Congress's intent was also similar. Both ERISA and the 1934 Act regulate “economic interests,” *Eddy v. Colonial Life Ins. Co. of N. Am.*, 59 F.3d 201, 204-05 (D.C. Cir. 1995), and the legislative history of the 1934 Act suggests that a significant purpose of Congress in adopting §502(g)(1), like the 1934 Act, was to prevent strike suits and ensure that defendants, as well as plaintiffs, could receive attorney's fees.

⁸ The Senate Report further provided, “to give protection against ‘strike’ suits, or litigation brought in bad faith, the court is authorized to assess reasonable costs, including attorney's fees against either party to the suit * * * *) *Id.*, at 18. Courts, in turn, have relied on this legislative intent in determining whether to award fees. See, e.g., *Nemeroff v. Abelson*, 620 F.2d 339, 349-50 (2d Cir. 1980); *S.E.C. v. Wilson*, Civil Action No. 04-cv-1331 (JCH), 2009 WL 2381954, at * 4 (D. Conn. July 31, 2009).

c. When ERISA Was Enacted, “Prevailing Party” Statutes Had Also Been Read Restrictively To Require Essentially Complete Success on the Merits

At the time of ERISA’s enactment in 1974, “the ‘prevailing party’ standard had been interpreted in a variety of rather narrow ways.” *Ruckelshaus*, 463 U.S., at 687-88. Some courts had interpreted “prevailing party” restrictively to allow a fee award only if the party had achieved complete success on essentially *all* the claims, and thus precluding any recovery of fees for even a significant partial success. *Ibid.*

As *Ruckelshaus* concluded, the “quite sensible” interpretation of Congress’s intent in not using the phrase “prevailing party” is that Congress wanted “to eliminate both the restrictive readings of ‘prevailing party’ * * * and the necessity for case-by-case scrutiny by federal courts into whether plaintiffs prevailed ‘essentially’ on ‘central issues.’” *Id.*, at 688. That is, the absence of an express “success” requirement “modifies but does not completely reject the traditional rule that a fee claimant must ‘prevail’ before it may recover attorney’s fees.” *Id.*, at 686. It “expand[s] the class of parties eligible for fee awards from prevailing parties to *partially prevailing* parties * * * * ” *Ibid.*

3. The Congressional Purpose Behind ERISA Is Altogether Consistent with the *Ruckelshaus* Requirement of “Some Success on the Merits”

Under the clear-statement requirement of *Ruckelshaus*, it is not certain that legislative history could ever constitute a sufficiently clear statement to adopt a more expansive rule than the modified prevailing party standard. The text of §502(g)(1), like the text of the Clean Air Act, has no such clear statement. In any event, there is nothing in ERISA’s legislative history that points in the direction of a more expansive rule.

Both Petitioner and the Solicitor General focus nearly exclusively on one of ERISA’s main purposes: “to protect * * * the interests of participants in employee benefit plans and their beneficiaries.” 29 U.S.C. §1001(b). However, this was not Congress’s sole purpose. Rather, “the detailed provisions of §502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures *against the public interest in encouraging the formation of employee benefit plans.*” *Pilot Life Ins. Co. v. Dedeux*, 481 U.S. 41, 54 (1987) (emphasis added). “The *limited remedies* available under ERISA are an inherent part of the ‘careful balancing’ between ensuring fair and prompt enforcement of rights under a plan *and the encouragement of the creation of such plans.*” *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004) (emphasis added); see also *Metro.*

Life Ins. Co. v. Glenn, 128 S. Ct. 2343, 2353 (2008) (Roberts, C.J., concurring in part and concurring in the judgment).

As the Court has observed, ERISA’s legislative history reflects that “Congress was concerned lest the cost of federal standards discourage the growth of private pension plans.” *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 n.17 (1985) (citing H.R. Rep. No. 93-533, at 9 (1973); 120 Cong. Rec. 29210-11 (1974); 120 Cong. Rec. 29949 (1974)). And nothing in that more general history of ERISA suggests that Congress intended to adopt a particularly expansive attorney’s fees provision. See, e.g., 120 Cong. Rec. 29949 (1974) (statement of Mr. Bentsen) (although “[t]he purpose of this legislation is * * * to set up minimum standards to prevent real abuses * * * [,] it is important to recognize that if minimum standards are set too high, we would discourage the creation of new plans.”).⁹

⁹ Petitioner cites statements from industry and public interest groups concerning suggested changes to the fee-shifting provision. See Pet. Br. 21 & n.3. That Congress did not adopt a particular suggestion does not reasonably suggest it rejected such suggestions, particularly where no legislative history exists to suggest why Congress might not have adopted a suggestion.

4. ERISA's 1980 Amendments Are Altogether Consistent with the *Ruckelshaus* Requirement of "Some Success on the Merits"

The final important piece of ERISA's structure and history is the 1980 amendments to §502(g), which created two separately numbered subparagraphs, §502(g)(1) and §502(g)(2). Pub. L. No. 96-364, §104(2), 94 Stat. 1208, 1263 (1980), as codified at 29 U.S.C. §1451(e). ERISA's original fee-shifting provision, which was recodified in 1980 as subparagraph (1) of §502(g), continued to govern all actions other than suits under subparagraph (2), which involve claims to recover delinquent contributions to multi-employer plans. Specifically, Congress added §502(g)(2) to address the concern that "[d]elinquencies of employers in making required contributions are a serious problem for most multiemployer plans." Senate Comm. on Labor & Human Resources, 96th Cong., 2d Sess., S. 1076, *The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 43* (Comm. Print 1980).

Unlike the original §502(g), the amendments in §502(g)(2) "include[] a *mandatory award* of prejudgment interest plus liquidated damages in an amount at least equal to that interest, *as well as attorney's fees* and costs." *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 547 (1988). Thus, §502(g)(2) provides that "[i]n any action under this title by a fiduciary for 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: * * * (D) reasonable attorney’s fees and costs of the action, to be paid by the defendant.” 29 U.S.C. §1132(g)(2) (emphasis added).

Petitioner contends that, because §502(g)(2) uses the word “judgment” and §502(g)(1) does not, attorney’s fees under §502(g)(1) must therefore not require a judgment reflecting any success on the merits. However, nothing in the amendment of §502(g) suggests any intent to alter the original content of §502(g)(1), and any such inference is directly contrary to the holding of *Ruckelshaus* that, in the absence of a clear statement to the contrary, a claimant must demonstrate “some success *on the merits*.” 463 U.S., at 693. Moreover, there is a far more reasonable explanation for including “judgment” in §502(g)(2)—it was necessary for the remainder of that section to make sense.

Section 502(g)(2), unlike its statutory sibling which addresses only a discretionary award of fees, addresses a range of matters beyond attorney’s fees. Consistent with its narrow purpose to ensure that employer contributions are properly made to multi-employer plans, it *requires* the district court, upon a determination that an employer owes money to the plan, to award the unpaid contributions *and also* interest, liquidated damages, and attorney’s fees and costs. 29 U.S.C. §1132(g)(2). Given these mandatory remedies, it would have been difficult, if not impossible, for Congress to have drafted the detailed provisions in §502(g)(2) without expressly requiring a

judgment in the plan’s favor.¹⁰ These “strict remedies” reflect Congress’s intent “to give employers a strong incentive to honor their contractual obligations to contribute and to facilitate the collection of delinquent accounts.” *Laborer’s*, 484 U.S., at 547. Section 502(g)(1), in contrast, contains no such mandatory “strict remedy.”¹¹

C. Reading Section 502(g)(1) To Allow a Non-Prevailing Party To Recover Fees Would Necessarily Affect Many Other Attorney’s Fees Statutes

Congress has enacted over 200 statutes providing for the award of attorney’s fees. See generally Appendix A (collecting federal statutes). The wording of

¹⁰ For example, interest on unpaid contributions can only be payable to the plan upon a determination that contributions have been unpaid. And it would be nonsensical to award liquidated damages without first rendering a judgment that an employer failed to properly make required contributions.

¹¹ There is likewise no merit in Petitioner’s arguments that Congress intended to allow fee awards under §502(g)(1) for non-prevailing parties because the 1986 amendments to ERISA added a fee-shifting provision for claims related to single-employer plans where a party “prevails or substantially prevails.” 29 U.S.C. §1370(e)(1); see also 29 U.S.C. §1451(e). These distinct provisions—in different parts of ERISA and enacted at different times—cannot constitute the required clear statement of Congress to abrogate the requirement that a party achieve at least some success on the merits. See *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 840 (1988) (“The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.”).

these fee-shifting provisions is far from uniform. Nonetheless, they can be broadly categorized into three groups. In some provisions, the award of counsel fees is mandatory. See, *e.g.*, Appendix A, at 1-47. Many other provisions allow courts or agencies discretion to award fees to “prevailing parties,” “substantially prevailing” parties, or “successful” parties.¹² See, *e.g.*, Appendix A, at 47-73.

Additionally, at least 40 fee-shifting provisions, like §502(g)(1), neither expressly require success nor expressly disclaim any requirement of success. See Appendix A, at 74-88; see also *Ruckelshaus*, 463 U.S., at 682-83 n.1 (noting sixteen statutes that fell within the “whenever appropriate category”). If the Court were to interpret §502(g)(1) to allow non-prevailing parties to recover fees, that would necessarily affect those other statutes—including the provision of the Clean Air Act at issue in *Ruckelshaus*.

Indeed, it would be difficult to adopt the broad rule urged by Petitioner without overruling *Ruckelshaus*, an outcome for which Petitioner and her *amici* have made no compelling case.

Moreover, since many of these statutes apply also to litigation against the government, any interpretation that allowed non-prevailing parties to recover

¹² Courts have generally deemed “inconsequential” the difference between “prevailing” and “substantially prevailing.” See *Loggerhead Turtle v. County Council of Volusia County, Fla.*, 307 F.3d 1318, 1322 n.4 (11th Cir. 2002); see also *Buckhannon*, 532 U.S., at 603.

their fees would have a significant impact on the public fisc. For that reason, the position urged by the Solicitor General is quite remarkable. Historically, the United States has vigorously defended the public fisc, and has fiercely resisted efforts to allow attorney's fees to be paid to those who have not first prevailed on the merits.¹³

With no explanation, the United States appears to have abandoned that long-held position. And, its new position is not consistent with this Court's precedent.

The legal rule that governs this case derives from the square holding of *Ruckelshaus*: Congress has not expressly provided that non-prevailing parties can recover fees. Therefore, under the clear statement rule, they cannot. Instead, a modified prevailing party standard obtains. Under this standard, to be eligible to recover fees under §502(g)(1), a litigant must achieve at least "some success on the merits." Absent success *on the merits*, there can be no award of attorney's fees.

¹³ See, e.g., *Sole v. Wyner*, 551 U.S. 74 (2007) (No. 06-531) Brief for the United States as *Amicus Curiae* Supporting Petitioners at 9-10; *Indep. Fed'n of Flight Attendants v. Zipes*, 109 S. Ct. 2732 (1989) (No. 88-608) Brief for the United States and the Equal Employment Opportunity Commission as *Amicus Curiae* Supporting Petitioner at 18.

II. PETITIONER’S PURELY PROCEDURAL VICTORY, A “REMAND” FOR A NEW DETERMINATION OF DISABILITY, IS NOT “SOME SUCCESS ON THE MERITS” AND CANNOT SUPPORT AN AWARD OF ATTORNEY’S FEES UNDER §502(g)(1)

Although Petitioner and the Solicitor General both agree that §502(g)(1) is “analogous” to the statute in *Ruckelshaus*, and concede that *Ruckelshaus* should govern this case, Pet. Br. 38-39; U.S. Br. 20, they both fail to confront the central holding of *Ruckelshaus*: that “some degree of success *on the merits*” is required before attorney’s fees can be awarded.

Parsing that holding requires analysis of both the *quantum* of success required (at least “some degree”) and the *nature* of the success required (“on the merits”). As to the former, *Ruckelshaus* concluded that the omission of words like “prevail” and “success” decreases the *quantum* of success required. Absent such words, “fees may be awarded to all parties who *prevail in part* as well as those who *prevail in full* * * * ” 463 U.S., at 689.

But with respect to the latter, *Ruckelshaus* concluded that the absence of “prevail” or “success” does not change the *nature* of the success required. The contrast above between “in full” and “in part” is a contrast in quantity. But the basic *type* of success required remains the same: to fall within the statute, it must be success “on the merits.”

Success “on the merits” connotes substantive judicial relief, which the *Ruckelshaus* Court explicitly contrasted with “purely procedural” victories:

Of course, we *do not mean to suggest* that trivial success on the merits, or *purely procedural victories*, would justify an award of fees under statutes setting out the when “appropriate” standard.

Id., at 688 n.9 (emphases added).

The legal distinction between substantive and procedural rulings is, of course, longstanding. And, by any measure, the district court’s “remand” to Reliance fell on the “procedural” side of the line.

A. An ERISA “Remand” to a Private Claims Administrator, Even When Followed by a Decision by the Administrator To Award Benefits, Is Procedural in Nature and So Does Not Permit an Award of Attorney’s Fees

If the judicial “remand” to Reliance constituted “some success on the merits,” then Ms. Hardt would be eligible for attorney’s fees under ERISA; if, on the other hand, it was a “purely procedural victory,” then she is not.

1. ERISA “Remands” Are Purely Procedural and Entail No Substantive Relief

In ordinary usage, the term “remand” is understood to mean that one judicial tribunal is sending a matter back to an inferior judicial tribunal. See BLACK’S LAW DICTIONARY 1319 (8th ed. 2004) (defining “remand” as: “[t]o send (a case or claim) *back to the court or tribunal from which it came* for some further action.”) (emphasis added); *Etape v. Chertoff*, 497 F.3d 379, 384 (4th Cir. 2007) (“When a court remands a case, it sends the case back to the place from which it came for purposes of having some further action taken in the tribunal of origin.” (internal citations omitted)). A secondary usage is that a judicial tribunal is sending a matter back to an executive agency for reconsideration. In both cases, the remand is to a governmental decisionmaker, and a remand for purely procedural reasons is by definition not substantive.

The Court addressed just such a scenario in *Hanrahan v. Hampton*, 446 U.S. 754 (1980). There, in civil-rights litigation, the district court had entered a directed verdict for the defendants. The court of appeals reversed and remanded, holding that plaintiffs were entitled to a jury trial. Finding that plaintiffs were therefore a “prevailing party,” the court of appeals awarded attorney’s fees. This Court reversed:

The respondents have of course *not prevailed on the merits of any of their claims*. The Court of Appeals held only that the respondents were entitled to a trial of their cause.

As a practical matter, they are in a position no different from that they would have occupied if they had simply defeated the defendants' motion for a directed verdict in the trial court. The jury may or may not decide some or all of the issues in favor of the respondents. If the jury should not do so on remand in these cases, it could not seriously be contended that the respondents had prevailed. Nor may they fairly be said to have "prevailed" by reason of the Court of Appeals' other interlocutory dispositions, which affected only the extent of discovery. *As is true of other procedural or evidentiary rulings*, these determinations may affect the disposition on the merits, but were themselves not matters on which a party could "prevail" for purposes of shifting his counsel fees to the opposing party under §1988.

Id., at 758-59 (emphasis added and citations omitted).

Thus, because the remand was procedural, rather than relief on the merits, the Court concluded that attorney's fees could not be awarded. To be sure, the statute at issue included an express "prevailing party" requirement, but, as the Court held in *Ruckelshaus*, that changed only the *quantum* of success required, not the *nature* of the success—regardless, it must be

on the merits, and a judicial remand for new trial (irrespective of the outcome of that trial) is not.¹⁴

And if that is true as to a judicial remand to another judicial tribunal, *a fortiori* it is true with respect to an ERISA “remand” to a private party who is under no obligation to reach a different substantive decision. Indeed, in the ERISA context, the word “remand” is a misnomer. (For that reason, presumably, the Solicitor General puts quotes around the word throughout her brief.) Here, the district court did not remand the case to any judicial tribunal, or even to any other governmental body. Instead, the court “remanded” the case back to a private party, to reconsider the matter and decide, in its discretion, whether Ms. Hardt’s condition satisfied the terms of the plan.

Although ERISA is a “highly reticulated” statute, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108 (1989), it contains no provision expressly allowing a district court to “remand” to a claims administrator. Nevertheless, and in recognition of the administrator’s broad discretion to make determinations of benefits under ERISA plans, the circuit

¹⁴ Likewise, in the agency context, the D.C. Circuit has held that a remand to an agency for a violation of the Administrative Procedures Act for failure to adequately respond to comments in a rulemaking is a “purely procedural victory” which does not permit an award of attorney’s fees under a provision allowing for fees “whenever [the court] determines that such award is appropriate.” *Appalachian Power Co. v. EPA*, 320 F.3d 280 (D.C. Cir. 2003).

courts have uniformly recognized the propriety of these quasi-“remands” for purely procedural violations. In this procedure, the district courts often retain jurisdiction, so the “remand” order itself is interlocutory and unappealable. See, *e.g.*, *Bowers*, 365 F.3d at 537. Such “remand” orders are intended to allow ERISA claims administrators to exercise their discretion in the first instance.¹⁵ As the Fourth Circuit explained,

[i]f the court believed the administrator lacked adequate evidence, the proper course was to “remand to the trustees for a new determination,” not to bring additional evidence before the district court. To review *de novo* all the evidence trustees *might* have considered is to transfer the administration of benefit and pension plans from their designated fiduciaries to the federal bench. Such substitution of authority is plainly what the formulated standards in this field are intended to prevent.

Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1007 (4th Cir. 1985) (emphasis added; citations omitted).

It is now a well-established “general principle” that “an employer’s or plan’s failure to comply with ERISA’s procedural requirements *does not entitle a*

¹⁵ See, *e.g.*, *LaFleur v. La. Health Serv. & Indem. Co.*, 563 F.3d 148, 157 (5th Cir. 2009); *Cooper v. Life Ins. Co. of N. Am.*, 486 F.3d 157, 171 (6th Cir. 2007); *Majeski v. Metro. Life Ins. Co.*, 590 F.3d 478, 484 (7th Cir. 2009).

claimant to a substantive remedy.” *Ashenbough v. Crucible, Inc.*, 854 F.2d 1516, 1532 (3d Cir. 1988) (emphasis added). Accordingly, the “remand” reflects the fact that “the validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue,” *Firestone*, 489 U.S., at 115. And that post-“remand” determination is generally reviewed under an abuse of discretion standard. *Metropolitan Life*, 128 S. Ct., at 2350.¹⁶

As the Chief Justice has noted, “[e]nsuring that reviewing courts respect the discretionary authority conferred on ERISA fiduciaries *encourages employers to provide medical and retirement benefits to their employees through ERISA-governed plans—something they are not required to do.*” *Id.*, at 2353 (Roberts, C.J., concurring in part and concurring in the judgment) (emphasis added); see also, *e.g.*, *Saffle v. Sierra Pac. Power Co. Bargaining Unit*, 85 F.3d 455, 461 (9th Cir. 1996) (“It is not the court’s function *ab initio* to apply the correct standard to [the participant’s]

¹⁶ The standard of review of an administrator’s decision whether to award benefits is based primarily on two factors. The first is whether the plan “grant[s] ‘the administrator or fiduciary *discretionary authority* to determine eligibility for benefits.’” *Metropolitan Life*, 128 S. Ct., at 2348 (quoting *Firestone*, 489 U.S., at 115). Following *Firestone*, virtually all plans provide such discretionary authority. *Id.*, at 2350. If so, an abuse of discretion standard is appropriate. *Ibid.* Second, if the administrator is operating under a conflict of interest—because, for example, it both funds the plan and evaluates claims—courts must apply a modified abuse of discretion review which takes the conflict into account. *Id.*, at 2350.

claim. That function, under the Plan, is reserved to the Plan administrator.”).

Here, the district court was clear that it was making a procedural, not a substantive decision. Thus, the court denied both parties’ cross-motions for summary judgment and made no substantive determination that petitioner was disabled.¹⁷ Instead, it held that “Ms. Hardt did not get the kind of review to which she was entitled” because certain evidence was “incomplete” or “outdated,” and other evidence had not been considered adequately. Pet.App. 47a. “For this reason,” the court “remanded” the case “to Reliance to fully and adequately assess Ms. Hardt’s claim.” Pet.App. 48a.

Thus, the district court left the ultimate determination in Reliance’s full discretion. Despite Petitioner’s suggestions to the contrary, the court did not “instruct” or “direct” Reliance to rule on her claim in any particular way; rather, it remanded for reconsideration. Pet. Br. 1, 15; Pet.App. 49a. Indeed, the district court observed: “[h]ad the defendant completed its review [on “remand”] in the manner ordered by the court and in the prescribed time period, and again

¹⁷ That is not to say that a district court may never grant substantive relief under ERISA. However, “[a] substantive remedy would be appropriate only if the procedural defects caused a substantive violation or themselves worked a substantive harm.” *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1096 (9th Cir. 1985). In such situations, a claimant has succeeded *on the merits* of her claim and could therefore be eligible for fees.

determined that the plaintiff was *not* eligible for benefits, it is certainly possible that the court would have found the result *satisfactory*.” Pet.App. 20a n.5 (emphases added).

In this respect, the district court’s decision was much like the court of appeals’ decision in *Hanrahan*. There, as here, the court expressly observed that it “was ‘not passing on the ultimate validity of [the respondents’] claims.’” 446 U.S., at 758 n.5. And there, as here, the remand for a new determination (whether by a jury or by Reliance), was therefore procedural, and not substantive.

B. The Ultimate Grant of Benefits by the Claims Administrator Cannot Transform a Purely Procedural Victory into Success on the Merits

It is beyond serious dispute that a “remand” followed by a complete denial of benefits could not fairly be characterized as a victory “on the merits.” No doubt recognizing that, Petitioner proposes a hybrid: although a remand alone might not be enough, the “remand” *plus* the administrator’s decision to award benefits, together constitute victory “on the merits.” Pet. Br. 45-50. That hybrid theory does not withstand scrutiny.

Judicial decisions are either procedural or substantive, and that characteristic is fixed. If a judicial “remand” *simpliciter* is purely procedural (and it is), then subsequent conduct by a private party

cannot somehow “transform” that procedural decision into a substantive decision. Put another way, if a “remand” followed by a denial is not substantive, than neither is a “remand” followed by a grant of benefits. In both cases, the *judicial* relief was purely procedural—an order for the private party to reconsider the matter. And it cannot be that subsequent conduct, by a private party interpreting a private contract, can alter the character of that prior judicial action.¹⁸

This is underscored by two critical aspects of this particular case. *First*, the initial decision of the district court, finding procedural violations of ERISA in the manner in which Reliance evaluated the evidence, has never been subject to appellate review, and never will be.¹⁹ Indeed, Reliance could have challenged that interlocutory, procedural decision only by denying benefits again on “remand”; had the district court then addressed the merits, and entered a substantive determination (either ordering benefits or agreeing with their denial), then the propriety of the remand could conceivably have been considered on appeal.

¹⁸ Nor can the administrator’s decision itself constitute the requisite “success on the merits.” Any decision to award benefits on “remand” is a voluntary decision by a private party, pursuant to the terms of an ERISA plan, not a grant of substantive relief from the court, and thus cannot constitute success “on the merits” to which a right to attorney’s fees could attach under *Ruckelshaus*.

¹⁹ See *supra*, at 5 & n.1.

Second, on “remand” Petitioner introduced substantial new evidence, see *supra* at 6-7, and based on the full record, including the new evidence, Reliance determined that she was disabled. Thus, it is entirely possible that *both of Reliance’s disability determinations were substantively correct*. To wit, it could well be that, based on the initial record (which was limited by Ms. Hardt’s repeated refusal to cooperate with the medical evaluations), the determination was entirely correct that she was not fully disabled at that time;²⁰ likewise, it could be that, based on the expanded record (which included a new medical evaluation and MRI), the determination on “remand” that she was then fully disabled was also correct.

By analogy to judicial remand, if, in *Hanrahan*, the plaintiffs on remand had introduced substantial new evidence in support of their claims, it is possible that the jury might have ultimately found in their favor, based on that new evidence. That then would have been a determination on the merits²¹—but it

²⁰ As the district court noted, “judicial review * * * is limited to the body of evidence before the administrator at the time it rejected [the] claim.” Pet.App. 40a (quoting *Donnell v. Metro. Life Ins. Co.*, 165 Fed. Appx. 288, 294 (4th Cir. 2006)).

²¹ And, as a *judicial* determination on the merits, it would have independently rendered plaintiffs eligible for attorney’s fees. Here, Reliance’s determination that benefits were due was not a judicial determination, and nothing in ERISA provides for attorney’s fees simply because the administrator determines that benefits should be awarded—especially given that “benefits under an ERISA plan [are] likely to turn on the interpretation of terms in the plan at issue,” *Firestone*, 489 U.S., at 115.

would not have retroactively transformed the prior, procedural remand into a decision on the merits. As this Court held, the remand was a procedural decision, and procedural decisions cannot give rise to an award of attorney's fees.

C. Success on the Merits Must Be Measured by the Content of the Judgment

An ERISA “remand” is not substantive for another, more fundamental reason. Success “on the merits” is, by definition, success reflected *in a judgment*. See BLACK’S LAW DICTIONARY (8th ed. 2004) (defining “on the merits” as “(*Of a judgment*) delivered after the court has heard and evaluated the evidence and the parties’ substantive arguments.”) (emphasis added).

This requirement of success reflected in the judgment was *Buckhannon*’s primary focus. In *Buckhannon*, the Court repeatedly emphasized that “[a] defendant’s voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary *judicial imprimatur* on the change.” 532 U.S., at 605; see also *id.*, at 605-06 (“We have not awarded attorney’s fees where the plaintiff has * * * acquired a judicial *pronouncement* that the defendant has violated the Constitution unaccompanied by judicial *relief*. Never have we awarded attorney’s fees for a *nonjudicial* alteration of actual circumstances.”) (emphasis added).

Admittedly, the statute at issue in *Buckhannon* included the words “prevailing party,” and §502(g)(1) does not. But again, *Ruckelshaus* explains that the absence of the words “prevailing party” changes the *quantum* of success required, but not the *nature* of the success required. Whether it is necessary to “prevail in part” (per a *Ruckelshaus*-type statute like §502(g)(1)) or “prevail in full” (per a *Buckhannon*-type statute), *Buckhannon* teaches that one measures “prevailing” by examining, not “judicial pronouncements,” *id.*, at 605, and not “nonjudicial ‘alteration of actual circumstances,’” *id.*, at 606, but ultimate judicial judgments.

Thus, *Buckhannon* emphasizes that “a settlement agreement enforced through a consent decree may serve as the basis of an award of attorney’s fees,” *id.*, at 604, but the identical settlement agreement without a consent decree cannot. *Id.*, at 604 n.7. The reason is straightforward: “Private settlements do not entail the judicial approval and oversight involved in a consent decree.” *Ibid.*

Likewise, Petitioner’s claim that the district court’s “remand” influenced the administrator’s decision through some intangible persuasion is the precise argument the Court rejected in *Buckhannon*—that fees can be awarded based on the “catalyst theory.” 532 U.S., at 605 (emphasis added) (“voluntary change in conduct” cannot support fees). Justice Scalia’s concurrence is even more to the point: “[a]t the time 42 U.S.C. §1988 was enacted [in 1976], I know of *no case*, state or federal, in which—either

under a statutory invocation of ‘prevailing party’ or under the common-law rule—the ‘catalyst theory’ was enunciated as the basis for awarding costs.” *Id.*, at 611 (emphasis added).

And if there were any doubt remaining that a judgment is required, it is dispelled by FED. R. CIV. P. 54(d)(2)(B). That Rule provides:

“Unless a statute or a court order provides otherwise, [a] motion [for attorneys fees] must: * * * (ii) *specify the judgment* and the statute, rule, or other grounds *entitling the movant to the award.*”

Rule 54(d)(2)(B) applies in ERISA cases, because §502(g)(1) does not “provide otherwise”; §502(g)(1) empowers “the court in its discretion” to allow attorney’s fees, but it does not provide rules governing the “timing and contents of the motion” for attorney’s fees that would preempt the rule of Rule 54(d)(2). See, e.g., *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 828 (7th Cir. 1984) (concluding that “an attorney’s fee award under section [502](g)(1) should be sought * * * by filing a motion under Rule 54(d)”). And under Rule 54(d), it is the *judgment*—not interlocutory orders, procedural victories, or extra-judicial developments—that can “entitle the movant to the award.” FED. R. CIV. P. 54(d)(2)(B)(ii).

**D. The Judgment in this Case Does Not
Constitute Success on the Merits and so
Cannot Support an Award of Attorney's
Fees**

In its final Opinion and Order of August 7, 2008, the District Court disposed of the case with these words: “[T]he court finds that the plaintiff is entitled to an award of attorneys’ fees and costs and therefore that her motion is GRANTED * * * * It appearing to the court that no further legal issues remain to be resolved in this matter, the case is DISMISSED.” Pet.App. 30a.

By definition, such a dismissal cannot constitute success on the merits for the plaintiff. This logical proposition is confirmed by Rule 41 of the Federal Rules of Civil Procedure, which provides:

Unless the dismissal order states otherwise, a dismissal under this subdivision (b) *and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.*

FED. R. CIV. P. 41(b) (emphasis added). Although the district court did not specify the type of dismissal, it was presumably a dismissal on mootness grounds, which is jurisdictional and therefore under Rule 41(b) does *not* “operat[e] as an adjudication on the merits.” See *A.P. Boyd, Inc. v. Newark Pub. Schs.*, 44 Fed. Appx. 569, 573 (3d Cir. 2002) (“For Appellants to be prevailing parties and thus entitled to attorneys’ fees

under 42 U.S.C. §1988(b), they must have either obtained a judgment on the merits or be a party to a settlement agreement that is expressly enforced by the court through a consent decree. Neither has occurred here. First, as previously discussed, they have not prevailed on the merits because their claims were dismissed as moot.”); *Fla. Pub. Interest Research Group Citizen Lobby, Inc. v. EPA*, 386 F.3d 1070, 1086 (11th Cir. 2004) (“mootness is jurisdictional”). Moreover, even if the district court’s order dismissing the case was not jurisdictional, such that dismissal would “operate[] as an adjudication on the merits,” that would not help Petitioner. If a dismissal “operates as an adjudication on the merits,” then it “operates as an adjudication on the merits” *in favor of the defendant*. See, e.g., *District of Columbia v. Straus*, 590 F.3d 898 (D.C. Cir. 2010).

Likewise, Petitioner lacks the necessary predicate for attorney’s fees under Rule 54(d)(2)(B): a “*judgment* * * * entitling [Petitioner] to the award.” And this is no mere technical failing; it underscores the central flaw in Petitioner’s theory of the case. The Court’s cases require—and Rule 54(d)(2)(B) underscores—that success on the merits is measured by examining, not “judicial pronouncements” and not

“nonjudicial alteration of actual circumstances,” but ultimate judicial judgments.²²

In short, the final judgment, “DISMISSED,” cannot constitute “success on the merits” for Ms. Hardt.

E. The Rule Petitioner Advocates Runs Afoul of the Court’s Determination That Fee Shifting Should Not Lead to “a Second Major Litigation” and Would Have Serious Negative Implications For ERISA

Not only is Petitioner’s claim contrary to the holdings in both *Ruckelshaus* and *Buckhannon*, its focus on the administrator’s subjective rationale for awarding benefits on “remand” would predictably create, as it did here, “a second major litigation”:

We have also stated that “[a] request for attorney’s fees should not result in a second major litigation,” and have accordingly avoided an interpretation of the fee-shifting statutes that would have “spawn[ed] a second litigation of significant dimension.” Among other things, a “catalyst theory” hearing would require analysis of the defendant’s subjective motivations in changing its conduct, an analysis that “will likely depend on a highly factbound inquiry and may turn on

²² Courts frequently deny fee requests for failure to comply with Rule 54(d). See, e.g., *Bender v. Freed*, 436 F.3d 747, 750 (7th Cir. 2006).

reasonable inferences from the nature and timing of the defendant's change in conduct."

Buckhannon, 532 U.S., at 609-10; see also, *e.g.*, *Ruckelshaus*, 463 U.S., at 688 n.9, 694.

Moreover, Petitioner's theory would have additional policy implications. Given the broad discretion of claims administrators, a decision by this Court that awarding benefits upon "remand" triggers attorney's fees could make administrators think twice before awarding benefits in a close case. Such a rule would also be contrary to both purposes of ERISA. First, it would make plans more costly to administer, thus discouraging the creation of generous plans and increasing the costs of plans to plan participants. See, *e.g.*, *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). Second, it could create an incentive for administrators to *deny* the awarding of benefits on "remand," a decision the district court might be powerless to change given the deferential standard of review the court must apply. See, *e.g.*, *Buckhannon*, 532 U.S., at 608 (noting "the disincentive that the 'catalyst theory' may have upon a defendant's decision to voluntarily change its conduct, conduct that may not be illegal"); see also *Evans v. Jeff D.*, 475 U.S. 717, 734 n.23 (1986).²³

²³ Indeed, under the most aggressive rule advocated by both the Petitioner and the Solicitor General, that a claimant is entitled to fees regardless of the outcome of an ERISA "remand," Pet. Br. 41, U.S. Br. 27, the claimant could receive no additional

(Continued on following page)

Petitioner and the Solicitor General complain that denying a claimant the opportunity to seek fees where benefits are awarded on “remand” will allow claims administrators to deny meritorious claims, oppose the claim in a federal action, and “yet insulate themselves from any award of attorney’s fees,” thus giving plan administrators “an incentive” to deny claims. U.S. Br. 31. The short answer to this concern is that had Congress intended to tilt the scale so far in favor of the claimant, it easily could have done so expressly.²⁴ But Congress did not, which suggests an intent to retain the traditional balance in ERISA.

benefits but her attorney, as a result of a purely “procedural” victory, could receive a substantial award.

²⁴ As Justice Scalia observed in his concurrence in *Buckhannon*, 532 U.S., at 619:

Since the fee-shifting statutes at issue here allow defendants as well as plaintiffs to receive a fee award, we know that Congress did not intend to maximize the quantity of ‘the enforcement of federal law by private attorneys general,’ * * * * Rather, Congress desired an appropriate level of enforcement—which is more likely to be produced by limiting fee awards to plaintiffs who prevail ‘on the merits,’ or at least to those who achieve an enforceable ‘alteration of the legal relationship of the parties,’ than by permitting the open-ended inquiry [allowed by the catalyst theory].

F. Fee Awards in Social Security Act Remands to a Federal Administrative Agency Are Not an Appropriate Analogy for ERISA “Remands” to a Private Claims Administrator

Petitioner and the Solicitor General urge the Court to “analogize” to the Court’s cases involving fee awards for remands under the Social Security Act (“SSA”). Pet. Br. 41. Petitioner claims these cases “held that a remand to an administrative agency confers ‘prevailing party’ status in analogous situations arising under the [SSA], which uses the ‘prevailing party’ standard for determining fees under the Equal Access to Judgment Act,” 28 U.S.C. §2412 (“EAJA”). *Ibid.* Petitioner argues that these holdings should be adopted here to establish that “Hardt is a ‘prevailing party’ * * * based solely on the remand order,” and that “in ERISA cases, the remand alone provides the judicial imprimatur required by *Buckhannon* for fee awards under ‘prevailing party’ statutes.” *Id.*, at 44. Petitioner’s efforts to analogize to the SSA remands fail for several reasons.

First, the Court has repeatedly cautioned against using the SSA program as a model for ERISA. See, e.g., *Metropolitan Life*, 128 S. Ct., at 2353-54 (Roberts, C.J., concurring) (the Court has “rejected this analogy” between judicial review of “agency determinations” and “ERISA benefits decisions”). As the Court held in *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 832-33 (2003), in rejecting application of the SSA’s treating-physician rule to ERISA plans, there

are “critical differences between the Social Security disability program and ERISA benefit plans” that “caution against” importing a rule from one system into the other.

Under the SSA’s statute and regulatory scheme, to determine eligibility for Social Security benefits, a federal ALJ measures the claimant’s condition against a “uniform set of federal criteria” that have been adopted “to foster uniformity and regularity in Social Security benefits determinations.” *Ibid.*; see also 42 U.S.C. §§401-433; 20 C.F.R. §§404.1-.2127, 416.101-.2227. The “detailed regulations” governing this federal program include a five-step procedure the ALJ must follow to evaluate whether a claimant is “disabled,” see 20 C.F.R. §404.1520, 416.920, as well as “grids” that provide specific guidance about how the ALJ must weigh certain factors in determining whether a claimant is disabled. See 20 C.F.R. §404, Subpart P, Appendix 1-2; 42 U.S.C. §423(d)(3)(A).

In contrast, virtually every aspect of ERISA reflects the absence of statutory, regulatory, or judicial controls of disability determinations. Unlike the SSA’s mandatory disability program, nothing in ERISA “mandate[s] what kind of benefits employers must provide if they choose to have such a plan”; instead, “employers have large leeway to design disability and other welfare plans as they see fit.” *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 803 (1999) (quoting *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996)). Unlike the SSA, whose decisionmakers are

federal administrative agencies, ERISA provides that disability determinations are made by private entities administering voluntarily adopted plans. Thus, unlike the SSA's closely circumscribed control over ALJs' disability determinations, ERISA imposes virtually no legislative or regulatory guidelines for a claims administrator's discretionary determination of disability.

Second, SSA remands produce judgments. The SSA provides two statutory provisions for remand. Under what is known as a "sentence-four" remand, "a district court shall have the power * * * to enter *judgment* * * * with or without *remanding* the cause for a hearing." 42 U.S.C. §405(g) (emphasis added). As the Court made clear in *Shalala v. Schaefer*, 509 U.S. 292, 297-98 (1993), the "principal feature" of a sentence-four remand is the "[i]mmediate entry of *judgment*." (Emphasis added). Thus, unlike the ERISA "remand," a remand under sentence four complies with both *Buckhannon* and *Ruckelshaus* because it involves a "judgment" in favor of the claimant. Indeed, failure to file within the statutorily prescribed 30 days after entry of the judgment remanding the case to the SSA ALJ, will forfeit a claimant's right to seek attorney's fees. See *Melkonyan v. Sullivan*, 501 U.S. 89, 102 (1991). "[E]ach final decision of the Secretary [is] reviewable by a *separate* piece of litigation,' and a sentence-four remand order '*terminate[s]* the civil action.'" *Schaefer*, 509 U.S., at 299 (quoting *Sullivan v. Finkelstein*, 496 U.S. 617, 624-25 (1990) (emphasis in original)).

Under a “sentence-six” remand, the district court retains jurisdiction during the remand and does not enter a final judgment until the post-remand proceedings before an SSA are complete. See 42 U.S.C. §405(g); *Schaefer*, 509 U.S., at 297. Under the SSA, a claimant can qualify for attorney’s fees only if the ALJ or the district court awards benefits. Thus, if a claimant obtains a sentence-six remand but does not obtain benefits, he will not be eligible for attorney’s fees.

Petitioner and the Solicitor General argue that an award of benefits on an ERISA “remand” is analogous to an award of benefits by an SSA ALJ on a sentence-six remand. However, the critical differences that this Court has “cautioned” make the SSA an inappropriate model for ERISA are particularly pronounced in this instance. The Court has recognized that the SSA remand procedure reflects the reviewing court’s particularly close and unusual involvement in disability determinations made by ALJs. *Sullivan v. Hudson*, 490 U.S. 877, 885 (1989).

The SSA’s “detailed provisions for the transfer of proceedings from the courts to the Secretary and for the filing of the Secretary’s subsequent findings with the court * * * suggest[] *a degree of direct interaction between a federal court and an administrative agency alien to traditional review of agency action* under the Administrative Procedure Act.” *Ibid.* (emphasis added). Moreover, “the district court’s [SSA] remand order will often include detailed instructions concerning the

scope of the remand, the evidence to be adduced, and the legal or factual issues to be addressed.” *Ibid.*

In contrast, due to the broad discretion ERISA gives private claims administrators in making benefit determinations, it is error for a reviewing court to tell the administrator how much weight to give certain evidence. *Nord*, 538 U.S., at 834.²⁵ The reviewing court has “*no warrant to require administrators automatically to accord special weight to the opinions of a claimant’s physician,*” “nor may courts impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician’s evaluation.” *Id.*, at 834. “A rule that requires plan administrators to consider certain types of evidence and to weigh that evidence in a compulsory manner would effectively undermine [the] discretion” that should be accorded to an administrator’s decisions under a plan that gives it broad discretion over eligibility standards (as the plan here gave Reliance). *Firestone*, 489 U.S., at 115. The district court’s circumscribed and distant role in ERISA “remands” makes the sentence-six remand cases inapposite.

²⁵ The Secretary of Labor (in an opinion which the Court held must be given “deference”) expressed her “view that ERISA is best served by ‘*preserv[ing] the greatest flexibility possible for * * * operating claims processing systems consistent with the prudent administration of a plan.*’” *Id.*, at 833-34 (citing Dep’t of Labor, Employee Benefits Security Admin., *available at* http://www.dol.gov/ebsa/faqs/faq_claims_proc_reg.html, Question B-4 (as visited May 6, 2003)) (emphasis added).

Third, the analogy to the SSA fails because the fee-shifting provision at issue in the SSA cases, the EAJA, has a markedly different purpose than §502(g). The EAJA is a remedial statute that provides for mandatory fee awards to encourage challenges to unreasonable governmental action. “Congress passed the EAJA in response to its concern that persons ‘may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights,’” and “to rectify this situation.” *Hudson*, 490 U.S., at 883. In the particular context of SSA proceedings, the SSA also reflects Congress’s intent to encourage legal representation of individuals who seek review of SSA disability determinations. See 42 U.S.C. §1383(d)(1)(D).²⁶

In contrast, ERISA’s fee-shifting statute is an integral part of a statutory scheme that seeks to advance multiple substantive purposes and to balance different interests. See *Pilot Life*, 481 U.S., at 54. The statutes’ fundamentally different purposes (and different language) caution against applying to one statute conclusions derived from an application of the other.

²⁶ Claimants in SSA cases seek attorney’s fees under Section (d)(1)(A) of the EAJA, a fee-shifting statute that provides for mandatory awards against the United States unless “the position of the United States was substantially justified or that special circumstances make an award unjust.” 28 U.S.C. §2412(d)(1)(A) (emphasis added).

Finally, and critically, as Petitioner concedes, Pet. Br. 42 n.9, the EAJA requires a *judgment* in favor of the claimant before attorney’s fees can be awarded. 28 U.S.C. §2412. And it is the absence of a judgment here that vitiates the essential precondition to an award of attorney’s fees: “some success on the merits.”

III. EVEN IF A DISCRETIONARY AWARD OF BENEFITS FOLLOWING A PROCEDURAL “REMAND” PERMITTED A COURT TO AWARD ATTORNEY’S FEES IN SOME INSTANCES, SUCH AWARDS SHOULD NOT BE BASED ON THE “FIVE-FACTOR TEST” THE TENTH CIRCUIT INVENTED, BUT ON THIS COURT’S CONSISTENT INTERPRETATION OF THE EXERCISE OF A COURT’S EQUITABLE POWERS

Even if the Court were to determine, contrary to *Ruckelshaus*, that claimants seeking attorney’s fees under ERISA §502(g)(1) are eligible for attorney’s fees despite not having achieved “some success on the merits,” the Court should nonetheless reject the five-factor test—which was invented by the Tenth Circuit and is inconsistent with *Ruckelshaus* and ERISA—in favor of the common-law standards repeatedly cited in the Court’s jurisprudence. A guide for the exercise of the district court’s discretion consistent with ERISA, is the common-law trust principles as repeatedly articulated by the Court for over one hundred years.

A. The “Five-Factor” Test Invented by the Tenth Circuit Is Inconsistent with the Text, Purpose, and History of ERISA

Today, every Circuit, regardless of whether it has adopted a prevailing party requirement for §502(g)(1), applies some version of a five-factor test to determine if a district court should exercise its discretion to award fees. This test, which was invented by the Tenth Circuit in *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978), examines:

(1) the degree of the offending parties’ culpability or bad faith; (2) the degree of the ability of the offending parties to personally satisfy an award of attorneys fees; (3) whether or not an award of attorneys fees against the offending parties would deter other persons acting under similar circumstances; (4) the amount of benefit conferred on members of the pension plan as a whole; and (5) the relative merits of the parties’ position.

The Court should reject Petitioner’s invitation to endorse this test.²⁷ First, the *Eaves* decision has rightly been criticized for failing to explain how it developed the factors, and the factors themselves have been criticized as having no connection with the

²⁷ There is no merit in Petitioner’s claim that Reliance has waived the right to object to the use of the five-factor test. Because petitioner did not raise her argument below, Reliance had no occasion to address it, and cannot be deemed to have waived its objection.

purposes of ERISA. See Mark Berlind, *Attorneys' Fees Under ERISA: When Is An Award Appropriate?*, 71 CORNELL L. REV. 1037, 1058-62 (1986) (calling the five-factor test “an unhelpful method for determining the appropriateness of awards to prevailing plaintiffs in ERISA action.”); see also, e.g., *Cent. States S.E. & S.W. Areas Pension Fund v. Hitchings Trucking, Inc.*, 492 F. Supp. 906, 909 (E.D. Mich. 1980).

Second, the Tenth Circuit in *Eaves* appeared to indicate that it believed that the award of fees should be routine in ERISA cases, explaining that “[b]y enacting a statutory authorization for award of attorney’s fees, we believe Congress intended that the offending party bear the costs of the award, rather than non-culpable, non-party plan participants.” 587 F.2d, at 464. However, any test that assumes that fee awards under §502(g)(1) are mandatory or that even presumes such awards should be routinely made would contradict Congress’s careful balance in ERISA. Indeed, some circuits applying the *Eaves* five-factor test have held that there exists a presumption in favor of fees. See, e.g., *Elliott v. Fortis Benefits Ins. Co.*, 337 F.3d 1138, 1148 (9th Cir. 2003). Most courts of appeal have properly rejected such a presumption; however, some have done so because “a presumption in favor of prevailing plaintiffs also would be overkill; because the five basic factors have a built-in bias in favor of prevailing plaintiffs.” *Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220, 226 (1st Cir.

1996); see also *Martin v. Ark. Blue Cross & Blue Shield*, 299 F.3d 966, 972 (8th Cir. 2002).

Even as some courts erroneously apply the five-factor test with its built-in “bias,” they have recognized that in enacting §502(g)(1), Congress did not intend any presumption that fees must be awarded to plaintiffs who prevail in an ERISA action. See, e.g., *Eddy*, 59 F.3d, at 205; *Iron Workers Local #272 v. Bowen*, 624 F.2d 1255, 1265 (5th Cir. 1980).

To the extent Petitioner relies on trust-law principles to support fee awards under ERISA, she is wrong in insisting that the test’s five factors “closely and appropriately track” trust law concepts. Pet. Br. 37. Indeed, nothing in the five-factor test purports to limit fee awards to situations in which they might be justified under common-law trust concepts.

B. The Best Guide for the Exercise of the District Court’s Discretion Is Based on Common-Law Trust Principles as Articulated in This Court’s Precedents

In view of ERISA’s trust-law roots, if the Court decides to address what standards govern beyond *Ruckelshaus*’s “some success on the merits” minima, this Court should turn to the same common-law principles it has long recognized as governing attorney’s fee awards in equity cases. See *Harris Trust & Savs. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250 (2000) (“The common law of trusts * * * offers a ‘starting point for analysis [of ERISA] * * * [unless] it is inconsistent with the language of the statute, its

structure, or its purposes * * * * ’” (internal quotations omitted) (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999)); *Firestone*, 489 U.S., at 110.

This Court has long noted the power of courts in equity to award attorney’s fees in appropriate situations. As Justice Frankfurter observed, “[a]llowance of [counsel fees] in appropriate situations is part of the historic equity jurisdiction of the federal courts.” *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 164 (1939); see also *Trustees v. Greenough*, 105 U.S. 527, 536 (1881).

However, this discretion was not, as the Petitioner and the Solicitor General imply, without bounds. Rather, “such allowances [for attorney’s fees] are appropriate only in exceptional cases and for dominating reasons of justice.” *Sprague*, 307 U.S., at 167 (emphasis added).

This Court has recognized two basic equitable exceptions to the “American rule”: (1) the *common fund*, or common-benefit doctrine, which allows fee awards when the plaintiff’s success in a lawsuit has created a common fund for the benefit of others and from which the fees may be paid, *Alyeska*, 421 U.S., at 257 (common benefit doctrine applies when a person preserves or recovers a fund “for the benefit of others in addition to himself”); *Fleischmann*, 386 U.S., at 719; and (2) the *bad-faith* exception, which applies when the defendant has acted in bad faith or vexatiously, *Alyeska*, 421 U.S. at 258-59; *F.D. Rich*,

417 U.S., at 129 (noting that this Court has “long recognized that attorneys’ fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons * * *”).²⁸ Although nothing prohibits a court in equity from awarding fees outside these recognized exceptions, courts in equity award fees only “when *overriding considerations of justice seemed to compel such a result.*” *Fleischmann*, 386 U.S., at 718-19 (emphasis added).

The statutes and cases that the Solicitor General and Petitioner cite do not suggest that the Court’s cases have inaccurately described the generally limited award of fees at equity. There is nothing in the Uniform Trust Code §1004, or the Massachusetts probate statute on which it is based, which suggests their broad language is intended to allow equity courts to award fees to parties who do not “in some sense” prevail on the merits. Pet. Br. 33-34. The materials themselves do not reflect any intent to depart from accepted trust law principles. To the contrary, the comment to §1004 asserts the same basic principles of trust law that this Court and leading treatises have recognized as supporting fee awards. See Uniform Trust Code §1004 (litigation expenses are “chargeable” “only in the case of egregious

²⁸ Some courts also recognize a third exception to the “American rule,” known as the “private attorney general” doctrine. This Court has rejected that exception, which does not apply here in any event. See *Alyeska*, 421 U.S., at 269-71.

conduct such as bad faith or fraud,” or when litigation “is deemed beneficial to the trust.”).

Although Petitioner relies on *Dardovitch v. Halzman*, 190 F.3d 125, 146-47 (3d Cir. 1999), that case awarded fees based on the same two exceptions that are recognized under the common law, namely, because the trustee acted in bad faith and the litigation “resulted in the return of funds to the Trust” such that “a substantial amount of funds will be preserved for the beneficiaries.”²⁹ *Sprague*, which the Solicitor General cites, involved litigation that, unlike the suit here, benefited others, and thus rests on the common-benefit exception. 307 U.S., at 166 (“the petitioner by establishing her claim necessarily established the claims of *fourteen other trusts* pertaining to the same bonds”). And all the other cases the Solicitor General cites likewise involve either the common-fund exception or a plaintiff who achieved at least some success on the merits.³⁰ Moreover, to the extent

²⁹ The only case petitioner cites in which a court of equity actually awarded fees to a party who did not obtain the requested relief is an isolated probate decision of the Delaware Chancery Court. *In re Catell's Estate*, 38 A.2d 466 (1944). The court awarded attorney’s fees without further comment and therefore the decision should be accorded very little weight. *Ibid.*

³⁰ See U.S. Br. 15-18 (citing *In re Bitton's Trust*, 244 N.Y.S.2d 926, 931-33 (Sup. Ct. 1963) (Plaintiff prevailed in part and suit was beneficial to others); *Crutcher v. Joyce*, 146 F.2d 518, 520-21 (10th Cir. 1945) (attorney’s fees not awarded “as a matter of course” to the successful party in an equity proceeding); *Daniel v. White*, 252 S.E.2d 912, 915 (S.C. 1979) (endorsing the common-fund doctrine); *Marshall v. Babson Inst.*,

(Continued on following page)

the cases and statutes cited by the Solicitor General seemingly allow a losing party to obtain fees under ERISA, they are incompatible with *Ruckelshaus*.

Trust law as consistently interpreted by the Court, is a far more appropriate (and consistent) guide than the “five-factor” test for discretionary fee awards under §502(g)(1). If the Court reaches the second question, it should adopt the common-law test as previously articulated by the Court and remand to the lower court for appropriate consideration of the test in the first instance.



254 N.E.2d 886 (Mass. 1970) (apparently cited by the Solicitor General in error; does not address attorney’s fees); *Hurley v. Noone*, 196 N.E.2d 905, 910 (Mass. 1964) (awarding fees to estate administrator for lawsuit that resolved confusion about the ownership of a fund held by estate).

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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**FEDERAL STATUTES THAT
AUTHORIZE AWARDS OF ATTORNEY'S FEES**

I. STATUTORY PROVISIONS WITH MANDATORY FEE SHIFTING

Equal Access to Justice Act

5 U.S.C. §504(a)(1) (see also, 28 U.S.C. §2412)

An agency that conducts an adversary adjudication shall award, to the prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

Privacy Act

5 U.S.C. §552a(g)(4)

In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of * * * the costs of the action together with reasonable attorney fees as determined by the court.

Whistleblower Protection Act of 1989

5 U.S.C. §1221(g)(1)(B)

Corrective action shall include attorney's fees and costs * * * *

5 U.S.C. §1221(g)(2)

If an employee, former employee, or applicant for employment is the prevailing party before the Merit Systems Protection Board, and the decision is based on a finding of a prohibited personnel practice, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred.

5 U.S.C. §1221(g)(3)

If an employee, former employee, or applicant for employment is the prevailing party in an appeal from the Merit Systems Protection Board, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred, regardless of the basis of the decision.

***Implementing Recommendations of the
9/11 Commission Act of 2007***

6 U.S.C. §1104(c)

Any person or authorized official found to be immune from civil liability under this section shall be entitled to recover from the plaintiff all reasonable costs and attorney fees.

Commodity Exchange Act

7 U.S.C. §18(c)

In case a complaint is made by a nonresident of the United States, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail * * * *

7 U.S.C. §18(d)

If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

7 U.S.C. §18(e)

If the appellee prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs.

Packers and Stockyards Act

7 U.S.C. §210(f)

If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

Perishable Agricultural Commodities Act

7 U.S.C. §499f(e)

In case a complaint is made by a nonresident of the United States * * * the complainant shall be required * * * to furnish a bond * * * conditioned upon the payment of costs, including a reasonable attorney's fee for respondent if the respondent shall prevail * * * *

7 U.S.C. §499g(b)

If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

7 U.S.C. §499g(c)

Either party adversely affected by the entry of a reparation order by the Secretary may * * * appeal therefrom * * * * Such appeal shall not be effective unless * * * the appellant also files with the clerk a bond * * * conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail * * * * [I]f appellee prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs.

Federal Crop Insurance Act

7 U.S.C. §1507(c)

The Board shall provide such agents and brokers with indemnification, including costs and reasonable attorney fees, from the Corporation for errors or omissions on the part of the Corporation or its contractors for which the agent or broker is sued or held liable, except to the extent the agent or broker has caused the error or omission.

7 U.S.C. §1508(j)(3)

The Corporation shall provide approved insurance providers with indemnification, including costs and reasonable attorney fees incurred by the approved insurance provider, due to errors or omissions on the part of the Corporation.

Bankruptcy Act (as amended by P.L. 109-8 (2005))

11 U.S.C. §110(i)(1)

[I]f a bankruptcy petition preparer [“a person, other than an attorney”] violates this section or commits any act that the court finds to be fraudulent, unfair, or deceptive * * *, the court shall order the bankruptcy petition preparer to pay to the debtor * * * (C) reasonable attorneys’ fees and costs in moving for damages under this subsection.

11 U.S.C. §110(i)(2)

If the trustee or creditor moves for damages on behalf of the debtor under this subsection, the bankruptcy petition preparer shall be ordered to pay the movant the additional amount of \$1,000 plus reasonable attorneys' fees and costs incurred.

11 U.S.C. §110(j)(4)

The court shall award to a debtor, trustee, or creditor that brings a successful action under this subsection reasonable attorneys fees and costs of the action, to be paid by the bankruptcy petition preparer.

11 U.S.C. §111(g)(2)

A nonprofit budget and credit counseling agency that willfully or negligently fails to comply with any requirement under this title with respect to a debtor shall be liable for * * * any court costs or reasonable attorneys' fees * * * *

11 U.S.C. §362(h)

[A]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, punitive damages.

11 U.S.C. §503(b)

After notice and a hearing, there shall be allowed administrative expenses * * * including—(4) reasonable compensation for professional services rendered by an attorney * * * *

11 U.S.C. §506(b)

To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest upon such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

11 U.S.C. §526(c)(2)

Any debt relief agency shall be liable to an assisted person * * * for reasonable attorneys' fees and costs * * * *

11 U.S.C. §526(c)(3)(C)

[I]n the case of any successful action under subparagraphs (A) or (B), [the State] shall be awarded the costs of the action and reasonable attorneys' fees as determined by the court.

Federal Home Loan Bank Act

12 U.S.C. §1441a(c)(11)(B)

The parties specified in the preceding sentence shall be entitled to reasonable attorney fees upon prevailing in any such judicial action.

Home Owners' Loan Act

12 U.S.C. §1464(q)(3)

Any person injured by a violation of paragraph (1) may bring an action * * * and shall be entitled to recover three times the amount of the damages sustained, and the cost of the suit, including a reasonable attorney's fee.

Bank Tying Act

12 U.S.C. §1975

Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title * * * shall be entitled to recover * * * a reasonable attorney's fee.

Real Estate Settlement Procedures Act

12 U.S.C. §2605(f)

Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts: * * * (3) Costs.—In addition to the amounts under paragraph (1) or (2), in the case of any successful action under this section,

the costs of the action, together with any attorneys fees incurred in connection with such action as the court may determine to be reasonable under the circumstances.

Right to Financial Privacy Act of 1978

12 U.S.C. §3417(a)

Any agency or department of the United States or financial institution obtaining or disclosing financial records or information obtained therein in violation of this chapter is liable to the customer to whom such records relate * * * (4) in the case of any successful action to enforce liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

12 U.S.C. §3418

In the event of any successful action [for injunctive relief], costs together with reasonable attorney's fees as determined by the court may be recovered.

Expedited Funds Availability Act

12 U.S.C. §4010(a)

[A]ny depository institution which fails to comply with any requirement imposed under this title * * * is liable * * * (3) in the case of any successful action to enforce the foregoing liability, [for] the costs of the

action, together with a reasonable attorney's fee as determined by the court.

Truth in Savings Act

12 U.S.C. §4310(a)(3)

[A]ny depository institution which fails to comply with any requirement imposed under this subtitle * * * is liable * * * in an amount equal to the sum of * * * (3) in the case of any successful action to enforce any liability under paragraph (1) or (2), the costs of the action, together with a reasonable attorney's fee as determined by the court.

Homeowners Protection Act of 1998

12 U.S.C. §4907

Any servicer, mortgagee, or mortgage insurer that violates a provision of this Act shall be liable to each mortgagor to whom the violation relates for * * * (4) reasonable attorney fees, as determined by the court.

***Check Clearing for the 21st Century Act
or Check 21 Act***

12 U.S.C. §5005(b)

The amount of the indemnity under subsection (a) shall be the amount of any loss (including costs and reasonable attorney's fees and other expenses of representation) proximately caused by a breach of a warranty provided under section 5 * * * * In the

absence of a breach of warranty provided under section 5, the amount of the indemnity under subsection (a) shall be * * * interest and expenses (including costs and reasonable attorney's fees and other expenses of representation).

12 U.S.C. §5009(a)(1)

[A]ny person who, in connection with a substitute check, breaches any warranty under this Act or fails to comply with any requirement imposed by, or regulation prescribed pursuant to, this Act * * * shall be liable [for] * * * interest and expenses (including costs and reasonable attorney's fees and other expenses of representation) related to the substitute check.

Clayton Act

15 U.S.C. §15(a)

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor * * * and shall recover threefold the damages sustained by him, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. §15c(a)(2)

The court shall award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. §26

In any action under this section in which the plaintiff substantially prevails the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

Unfair Competition Act

15 U.S.C. §72

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor * * * and shall recover * * * a reasonable attorney's fee.

Securities Exchange Act of 1934

15 U.S.C. §78u(h)(8)

In the case of an unsuccessful action under paragraph (7), the court shall award the costs of the action and attorney's fees to the Commission if the presiding judge or magistrate finds that the customer's claims were made in bad faith.

Securities Investor Protection Act

15 U.S.C. §78eee(b)(5)(A)

The court shall grant reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred * * * by a trustee, and by the

attorney for such trustee, in connection with a liquidation proceeding.

Jewelers' Liability Act

15 U.S.C. §298(b)

Any competitor, customer, or competitor of a customer * * * may sue * * * and shall recover * * * a reasonable attorney's fee.

15 U.S.C. §298(c)

Any duly organized and existing jewelry trade association shall be entitled to injunctive relief * * * and if successful shall recover the cost of suit, including a reasonable attorney's fee.

15 U.S.C. §298(d)

Any defendant against whom a civil action is brought under the provisions of sections 294 to 300 of this title shall be entitled to recover the cost of defending the suit, including a reasonable attorney's fee, in the event such action is terminated without a finding by the court that such defendant is or has been in violation of sections 294 to 300 of this title.

Lanham (Trademark) Act

15 U.S.C. §1116(d)(11)

Any person who suffers damage by reason of a wrongful seizure under this subsection has a cause of action against the applicant for the order under which the seizure was made, and shall be entitled * * * unless the court finds extenuating circumstances, to recover a reasonable attorney's fee.

15 U.S.C. §1117(b)

In assessing damages under subsection (a) of this section, the court shall, unless the court finds extenuating circumstances, enter judgment for three times such profits or damages, whichever is greater, together with a reasonable attorney's fee * * * *

Truth in Lending Act

15 U.S.C. §1640(a)

[A]ny creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter [the Fair Credit Billing Act or the Consumer Leasing Act] with respect to any person is liable [for] * * * the costs of the action, together with a reasonable attorney's fee as determined by the court.

Consumer Leasing Act

15 U.S.C. §1667b(a) (see also, 15 U.S.C. §1640(a))

In all actions, the lessor shall pay the lessee's reasonable attorney's fees.

Credit Repair Organization Act

15 U.S.C. §1679g(a)

Any person who fails to comply with any provision of this title with respect to any other person shall be liable in an amount equal to * * * (3) * * * [i]n the case of any successful action to enforce any liability under paragraph (1) or (2), the costs of the action, together with a reasonable attorneys' fee.

Fair Credit Reporting Act

15 U.S.C. §1681n(c)

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

15 U.S.C. §1681o(b)

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for

purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

15 U.S.C. §1681s(c)(1)

In addition to such other remedies as are provided under State law, if the chief law enforcement officer of a State, or an official or agency designated by the State, has reason to believe that any person has violated or is violating this title, the State * * * (C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorney fees as determined by the court.

15 U.S.C. §1681u(i)

Any agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer to whom such consumer reports, records, or information relate in an amount equal to the sum of * * * (4) in the case of any successful action to enforce liability under this subsection, the costs of the action, together with reasonable attorney fees, as determined by the court.

Equal Credit Opportunity Act

15 U.S.C. §1691e(d)

In the case of any successful action under subsection (a), (b), or (c), the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection.

Fair Debt Collection Practices Act

15 U.S.C. §1692k(a)

[A]ny debt collector who fails to comply with any provision of this title with respect to any person is liable [for] * * * a reasonable attorney's fee as determined by the court.

On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

Electronic Fund Transfer Act

15 U.S.C. §1693m(a)

[A]ny person who fails to comply with any provision of this title with respect to any consumer * * * is liable [for] * * * a reasonable attorney's fee as determined by the court.

15 U.S.C. §1693m(f)

On a finding by the court that an unsuccessful action under this section was brought in bad faith or for purposes of harassment, the court shall award the defendant attorney's fees reasonable in relation to the work expended and costs.

Toxic Substances Control Act

15 U.S.C. §2622(b)(2)(B)

If such an order issued, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) reasonably incurred, as determined by the Secretary * * * *

Petroleum Marketing Practices Act

15 U.S.C. §2805(d)(1)

If the franchisee prevails in any action under subsection (a), such franchisee shall be entitled * * * to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

Export Trading Company Act of 1982

15 U.S.C. §4016(b)(4)

In any action brought under paragraph (1), if the court finds that the conduct does comply with the standards of section 303(a) [15 U.S.C. §4013(a)], the court shall award to the person against whom the claim is brought the cost of suit attributable to defending the claim (including a reasonable attorney's fee).

National Cooperative Research Act of 1984

15 U.S.C. §4303(a)

Notwithstanding section 4 of the Clayton Act (15 U.S.C. 15) and in lieu of the relief specified in such section, any person who is entitled to recovery on a claim under such section shall recover * * * the cost of suit attributable to such claim, including a reasonable attorney's fee pursuant to section 5 of this Act [15 U.S.C. §4304] * * * *

15 U.S.C. §4303(b)

Notwithstanding section 4C of the Clayton Act (15 U.S.C. 15c), and in lieu of the relief specified in such section, any State that is entitled to monetary relief on a claim under such section shall recover * * * the cost of suit attributable to such claim, including a reasonable attorney's fee pursuant to section 4C of the Clayton Act * * * *

15 U.S.C. §4303(c)

Notwithstanding any provision of any State law providing damages for conduct similar to that forbidden by the antitrust laws, any person who is entitled to recover on a claim under such provision shall not recover in excess of * * * the cost of suit attributable to such claim, including a reasonable attorney's fee pursuant to section 5 of this Act [15 U.S.C. §4304] * * * *

15 U.S.C. §4304(a)

Notwithstanding sections 4 and 16 of the Clayton Act [15 U.S.C. §§15 and 26], in any claim under the antitrust laws, or any State law similar to the antitrust laws, based on the conducting of a joint venture, the court shall, at the conclusion of the action—(1) award to a substantially prevailing claimant the cost of suit attributable to such claim, including a reasonable attorney's fee, or (2) award to a substantially prevailing party defending against any such claim the cost of suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith.

Public Utility Regulatory Policies Act of 1978

16 U.S.C. §2632(a)

[S]uch utility shall be liable to compensate such consumer (pursuant to paragraph (2)) for reasonable

attorneys' fees, expert witness fees, and other reasonable costs incurred.

Alaska National Interest Lands Conservation Act
16 U.S.C. §3117(a) (see also, 43 U.S.C. §1631(c)(3))

Local residents and other persons and organizations who are prevailing parties in an action filed pursuant to this section shall be awarded their costs and attorney's fees.

Federal Cave Resources Protection Act of 1988
16 U.S.C. §4307(c)

If any person fails to pay an assessment of a civil penalty * * * the Attorney General shall bring a civil action in an appropriate United States district court to recover the amount of the penalty assessed (plus costs, attorney's fees, and interest * * * *).

Gun Control Act of 1968

18 U.S.C. §922 note (as amended by P.L. 110-180, §101(c)(2)(A)(iii))

If the denial of a petition for relief has been reversed after such judicial review, the court shall award the prevailing party, other than the United States, a reasonable attorney's fee for any and all proceedings in relation to attaining such relief, and the United States shall be liable for such fee. Such fee shall be based upon the prevailing rates awarded to public

interest legal aid organizations in the relevant community.

18 U.S.C. §924(d)(2)(A)

In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

18 U.S.C. §924(d)(2)(B)

In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

18 U.S.C. §924(d)(2)(D)

The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

Civil Asset Forfeiture Reform Act of 2000

18 U.S.C. §983(b)(2)(B)(ii)

The court shall enter a judgment in favor of the Legal Services Corporation for reasonable attorney fees and costs submitted pursuant to clause (i) and treat such judgment as payable under section 2465 of title 28, United States Code, regardless of the outcome of the case.

Major Fraud Act of 1988

18 U.S.C. §1031(h)

Any individual who * * * is * * * discriminated against in the terms or conditions of employment by an employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of a prosecution under this section * * * may, in a civil action, obtain all relief necessary to make such individual whole. Such relief shall include * * * compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees.

Organized Crime Control Act of 1970

18 U.S.C. §1964(c)

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may * * * sue and shall recover * * * a reasonable attorney's fee * * * *

Child Abuse Victims' Rights Act of 1986

18 U.S.C. §2255(a)

Any minor who is a victim of a violation of section 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation may sue in any appropriate United States District Court and shall recover the actual damages such minor sustains and the cost of the suit, including a reasonable attorney's fee.

Safe Streets for Women Act of 1994

18 U.S.C. §2259(b)

The order of restitution under this section shall direct the defendant pay to the victim * * * the full amount of the victim's losses as determined by the court * * * [including] attorneys' fees, as well as other costs incurred * * * *

Safe Homes for Women Act of 1994

18 U.S.C. §2264(b)

The order of restitution under this section shall direct the defendant pay to the victim * * * the full amount of the victim's losses as determined by the court * * * [including] attorneys' fees plus any costs incurred in obtaining a civil protection order * * * *

Antiterrorism Act of 1990

18 U.S.C. §2333(a)

Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

Financial Institutions Anti-Fraud Enforcement Act of 1990

18 U.S.C. §3059A(e)(2) (see also, 12 U.S.C. §4246)

(1) A person who * * * is * * * discriminated against in the terms or conditions of employment by an employer because of lawful acts done by the person on behalf of the person or others in furtherance of a prosecution under any of the sections referred to in subsection (a) * * * may, in a civil action, obtain all relief necessary to make the person whole. (2) Relief under paragraph (1) shall include * * * compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees.

Witness Security Reform Act of 1984

18 U.S.C. §3524(d)(6)

The United States shall be required by the court to pay litigation costs, including reasonable attorneys'

fees, incurred by a parent who prevails in enforcing a custody or visitation order; but shall retain the right to recover such costs from the protected person.

Higher Education Act of 1965
20 U.S.C. §1095a(8)

The court shall award attorneys' fees to a prevailing employee * * * *

***Cuban Liberty and Democratic Solidarity
(LIBERTAD) Act of 1996***
22 U.S.C. §6082(a)(1)(A)(ii)

[A]ny person that * * * traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim of such property for * * * court costs and reasonable attorneys' fees.

***Indian Self-Determination and
Education Assistance Act***
25 U.S.C. §450m-1(c)

The Equal Access to Justice Act [5 U.S.C. §504, 28 U.S.C. §2412] shall apply to administrative appeals * * * by tribal organizations regarding self-determination contracts.

***Navajo and Hopi Indian Relocation
Amendments Act of 1980***

25 U.S.C. §640d-27(a)

In any litigation or court action between or among the Hopi Tribe, the Navajo Tribe and the United States or any of its officials, departments, agencies, or instrumentalities, arising out of the interpretation or implementation of this subchapter, as amended, the Secretary shall pay, subject to the availability of appropriations, attorney's fees, costs and expenses as determined by the Secretary to be reasonable.

25 U.S.C. §640d-27(b)

Upon the entry of a final judgment in any such litigation or court action, the court shall award reasonable attorney's fees, costs and expenses to the party, other than the United States or its officials, departments, agencies, or instrumentalities, which prevails or substantially prevails, where it finds that any opposing party has unreasonably initiated or contested such litigation. Any party to whom such an award has been made shall reimburse the United States out of such award to the extent that it has received payments pursuant to subsection (a) of this section.

Internal Revenue Code

26 U.S.C. §6110(i)(2)

In any suit brought under the provisions of paragraph (1)(A) * * * or in any suit brought under subparagraph

(1)(B) * * * the United States shall be liable [for] the costs of the action together with reasonable attorney's fees as determined by the Court.

26 U.S.C. §7434(b)

In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to greater of \$5,000 or the sum of—(1) any actual damages * * * (2) the costs of the action, and (3) in the court's discretion, reasonable attorneys' fees.

Equal Access to Justice Act

28 U.S.C. §2412 (see also, 5 U.S.C. §504)

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States * * * unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(d)(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United

States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized under subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

Civil Asset Forfeiture Reform Act of 2000

28 U.S.C. §2465(b)(1)

Except as provided in paragraph (2), under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for—
(A) reasonable attorney fees and other litigation costs reasonably incurred by the claimant.

Civil Asset Forfeiture Reform Act of 2000

28 U.S.C. §2465(b)(1)

Except as provided in paragraph (2), in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for—(A) reasonable attorney fees and other litigation costs reasonably incurred by the claimant.

Fair Labor Standards Act

29 U.S.C. §216(b)

The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Age Discrimination in Employment Act of 1967

29 U.S.C. §626(b)

This section incorporates the attorneys' fees provision of the Fair Labor Standards Act, 29 U.S.C. §216(b).

Employee Retirement Income Security Act

29 U.S.C. §1132(g)(2)

In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—(D) reasonable attorney's fees and costs of the action, to be paid by the defendant. . . .

Family and Medical Leave Act of 1993

29 U.S.C. §2617(a)(3)

The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

Federal Coal Mine Health and Safety Act of 1969
30 U.S.C. §815(c)(3)

Whenever any order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) * * * shall be assessed against the person committing such violation.

Black Lung Benefits Act
30 U.S.C. §938(c)

Whenever an order is issued under this subsection granting relief to a miner at the request of such miner, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) * * * shall be assessed against the person committing the violation.

Surface Mining Control and Reclamation Act
30 U.S.C. §1293(c)

Whenever an order is issued under this section to abate any violation, at the request of the applicant a sum equal to the aggregate amount of all costs and expenses (including attorneys' fees) * * * shall be assessed against the persons committing the violation.

Debt Collection Improvement Act of 1996

31 U.S.C. §3720D(e)(2)

The court shall award attorneys' fees to a prevailing employee * * * *

31 U.S.C. §3720D(f)(1)(B)

The employer of an individual * * * shall be liable for any amount that the employer fails to withhold from wages due an employee following receipt by such employer of notice of the withholding order, plus attorneys' fees, costs, and, in the court's discretion, punitive damages.

False Claims Act

31 U.S.C. §3730(d)(1)

Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

31 U.S.C. §3730(d)(2)

Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

31 U.S.C. §3730(g)

In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

31 U.S.C. §3730(h)

Such relief shall include * * * litigation costs and reasonable attorneys' fees.

Longshore and Harbor Workers' Compensation Act

33 U.S.C. §928(a)

[T]here shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, the Board, or court, as the case may be * * * *

33 U.S.C. §928(b)

[A] reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation * * * * If the claimant is successful in review proceedings before the Board or court in any such case an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel * * * *

33 U.S.C. §933(e)(1)

The employer shall retain an amount equal to—(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee) as determined by the deputy commissioner or Board * * * *

Water Pollution Prevention and Control Act

33 U.S.C. §1319(g)(9)

Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in the first sentence of this paragraph shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings * * * *

33 U.S.C. §1321(b)(6)(H)

Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in the first sentence of this subparagraph shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings * * * *

33 U.S.C. §1367(c)

[A] sum equal to the aggregate amount of all costs and expenses (including the attorney's fees), as determined by the Secretary of Labor * * * shall be

assessed against the person committing such violation.

Safe Drinking Water Act
42 U.S.C. §300j-9(i)(2)(B)(ii)

If such an order is issued, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' fees) reasonably incurred * * * *

National Childhood Vaccine Injury Act of 1986
42 U.S.C. §300aa-15(e)

(1) In awarding compensation on a petition filed under section 300aa-11 of this title the special master or court shall also award as part of such compensation an amount to cover—(A) reasonable attorneys' fees, and (B) other costs, incurred in any proceeding on such petition. If the judgment of the United States Court of Federal Claims on such a petition does not award compensation, the special master or court may award an amount of compensation to cover petitioner's reasonable attorneys' fees and other costs incurred in any proceeding on such petition if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought.

Contract Disputes Act of 1978

41 U.S.C. §§601 *et seq.*

See, 28 U.S.C. §2412(d)(3)

Social Security Act

42 U.S.C. §669a(c)

In any action brought under paragraph (1), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of * * * (B) the costs (including attorney's fees) of the action.

Homeownership and Opportunity

Through HOPE Act

42 U.S.C. §1437aaa-4(h)

(see also, 42 U.S.C. §§12875, 12895)

The parties specified in the preceding sentence shall be entitled to reasonable attorney fees upon prevailing in any such judicial action.

Legal Services Corporation Act

42 U.S.C. §2996e(f)

If an action is commenced by the Corporation or by a recipient and a final order is entered in favor of the defendant and against the Corporation or a recipient's plaintiff, the court shall, upon motion by the defendant and upon a finding by the court that the action was commenced or pursued for the sole

purpose of harassment of the defendant or that the Corporation or a recipient's plaintiff maliciously abused legal process, enter an order (which shall be appealable before being made final) awarding reasonable costs and legal fees incurred by the defendant in defense of the action, except when in contravention of a State law, a rule or court, or a statute of general applicability. Any such costs and fees shall be directly paid by the Corporation.

National Flood Insurance Act of 1968
42 U.S.C. §4081(c)

The Director of the Federal Emergency Management Agency * * * shall provide any such agent or broker with indemnification, including court costs and reasonable attorney fees, arising out of and caused by an error or omission on the part of the Federal Emergency Management Agency and its contractors.

***Uniform Relocation Assistance and
Real Property Acquisition Policies Act***
42 U.S.C. §4654

(a) The Federal court * * * shall award * * * such a sum as will in the opinion of the court reimburse such owner for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if * * * *

(c) The court rendering a judgment for the plaintiff in a proceeding brought under section 1346(a)(2) or 1491 of Title 28, awarding compensation for the taking of property by a Federal agency, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff * * * reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

***Robert T. Stafford Disaster Relief
and Emergency Assistance Act***
42 U.S.C. §5207

In any action or proceeding to enforce this section, the court shall award the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

***National Manufactured Housing
Construction and Safety Standards Act***
42 U.S.C. §5412(b)

[T]he person bringing the action shall also be entitled to recover any damage sustained by him, as well as all court costs plus reasonable attorneys' fees.

Energy Reorganization Act of 1974

42 U.S.C. §5851(b)(2)(B)

If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred * * * *

Age Discrimination Act of 1975

42 U.S.C. §6104(e)(1)

Such interested person may elect, by a demand for relief in his complaint, to recover reasonable attorney's fees, in which case the court shall award the costs of the suit, including a reasonable attorney's fee, to the prevailing plaintiff.

National Oil Heat Research Alliance Act of 2000

42 U.S.C. §6201 note

(1) Meritorious Case—In a case in Federal court in which the court grants a public utility injunctive relief under subsection (d), the public utility shall be entitled to recover an attorney's fee from the Alliance and any qualified State association undertaking the consumer education activity with respect to which a complaint under this section is made.

(2) Nonmeritorious Case—In any case under subsection (d) in which the court determines a complaint

under subsection (b) to be frivolous and without merit, the prevailing party shall be entitled to recover an attorney's fee.

Solid Waste Disposal Act

42 U.S.C. §6971(c)

[A] sum equal to the aggregate amount of all costs and expenses (including attorney's fees) * * * shall be assessed against the person committing such violation.

Clean Air Act

42 U.S.C. §7524(c)(6)

Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in the first sentence of this paragraph shall be required to pay, in addition to that amount and interest, the United States' enforcement expenses, including attorneys fees and costs for collection proceedings * * * *

42 U.S.C. §7622(b)(2)(B)

If an order is issued under this paragraph, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of costs and expenses (including attorneys' and expert witness fees) reasonably incurred * * * *

***Comprehensive Environmental Response,
Compensation, and Liability Act***
42 U.S.C. §9610(c)

Whenever an order is issued under this section to abate such violation, at the request of the applicant a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) * * * shall be assessed against the person committing such violation.

Health Care Quality Improvement Act of 1986
42 U.S.C. §11113

[T]he court shall award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith * * * *

International Child Abduction Remedies Act
42 U.S.C. §11607(b)(3)

Any court ordering the return of a child pursuant to an action brought under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees * * * unless the respondent establishes that such order would be clearly inappropriate.

National and Community Service Act of 1990
42 U.S.C. §12636(f)(4)(D)(ii)

If a participant, labor organization, or other interested individual described in paragraph (1) prevails under a binding arbitration proceeding, the State or local applicant described in paragraph (1) that is a party to such grievance shall pay the total cost of such proceeding and the attorneys' fees of such participant, labor organization, or individual, as the case may be.

Homeownership and Opportunity
Through HOPE Act

42 U.S.C. §12875(e) (see also, 42 U.S.C. §1437aaa-4(h))

The parties specified in the preceding sentence shall be entitled to reasonable attorney fees upon prevailing in any such judicial action.

42 U.S.C. §12895(d)

The parties specified in the preceding sentence shall be entitled to reasonable attorney fees upon prevailing in any such judicial action.

Alaska National Interest Lands Conservation Act
43 U.S.C. §1631(c)(3) (see also, 16 U.S.C. §3117(a))

If title to land conveyed to a Native Corporation pursuant to the Alaska Native Claims Settlement Act or this Act which underlies a lake, river, or stream is challenged in a court of competent jurisdiction and

such court determines that such land is owned by the Native Corporation, the Native Corporation shall be awarded a money judgment against the plaintiffs in an amount equal to its costs and attorney's fees, including costs and attorney's fees incurred on appeal.

Outer Continental Shelf Lands Act

43 U.S.C. §1845(e) (see also, 43 U.S.C. §1349)

If the decision of the Secretary under subsection (d) of this section is in favor of the commercial fisherman filing the claim, the Secretary, as a part of the amount awarded, shall include reasonable claim preparation fees and reasonable attorney's fees, if any, incurred by the claimant in pursuing the claim.

Railway Labor Act

45 U.S.C. §153(p)

If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as part of the costs of the suit.

Shipping Code (as codified by P.L. 109-304 (2006))

46 U.S.C. §58106(c)

A person whose business or property is injured by a violation of subsection (a) may bring a civil action in the district court of the United States for the district in which the defendant resides, is found, or has an

agent. If the person prevails, the person shall be awarded—(1) 3 times the damages; and (2) costs, including reasonable attorney fees.

Communications Act of 1934
47 U.S.C. §206

[S]uch common carrier shall be liable to the person or persons injured thereby for * * * a reasonable counsel or attorney's fee * * * *

Satellite Home Viewer Improvement Act of 1999
47 U.S.C. §325(e)(8)(B)(iii)

If the Commission determines that a satellite carrier has retransmitted the television broadcast station to at least one person in the local market of such station and has failed to meet its burden of proving one of the defenses under paragraph (4) with respect to such retransmission, the Commission shall be required to * * * issue an order, within 45 days after the filing of the complaint, containing * * * an award to the complainant of that complainant's costs and reasonable attorney's fees.

47 U.S.C. §407

If the petitioner shall finally prevail, he shall be allowed a reasonable attorney fee to be fixed by the court.

Alien Owners of Land

48 U.S.C. §1506

[S]uch suit shall be dismissed on payment of costs and a reasonable attorney fee to be fixed by the court.

ICC Termination Act of 1995

49 U.S.C. §11704(d)(3)

The district court shall award a reasonable attorney's fee as a part of the damages for which a rail carrier if found liable under this subsection. The district court shall tax and collect that fee as a part of the costs of the action.

49 U.S.C. §11707(b)

The court shall award a reasonable attorney's fee to the plaintiff in a judgment against the defendant rail carrier under subsection (a) of this section. The court shall tax and collect that fee as a part of the costs of the action.

49 U.S.C. §14704(e)

The district court shall award a reasonable attorney's fee under this section. The district court shall tax and collect that fee as a part of the costs of the action.

49 U.S.C. §14708(d)

In any court action to resolve a dispute between a shipper of household goods and a carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 concerning the transportation of household goods by such carrier, the shipper shall be awarded reasonable attorney's fees if * * * *

49 U.S.C. §15904(d)(2)

The district court shall award a reasonable attorney's fee as part of the damages for which a carrier is found liable under this subsection. The district court shall tax and collect that fee as a part of the costs of the action.

Transportation

49 U.S.C. §32508 (bumper standards)

The court shall award costs and a reasonable attorney's fee to the owner when a judgment is entered for the owner.

49 U.S.C. §32710(b) (odometers)

The court shall award costs and a reasonable attorney's fee to the person when a judgment is entered for that person.

Foreign Intelligence Surveillance Act of 1978

50 U.S.C. §1810

An aggrieved person * * * shall be entitled to recover * * * reasonable attorney's fees * * * *

50 U.S.C. §1828

An aggrieved person * * * whose premises, property, information, or material has been subjected to a physical search within the United States, or about whom information obtained by such a physical search has been disclosed or used in violation of section 307 shall have a cause of action against any person who committed such violation and shall be entitled to recover—(1) actual damages * * *; (2) punitive damages; and (3) reasonable attorney's fees and other investigative and litigation costs reasonably incurred.

II. STATUTORY PROVISIONS THAT EXPLICITLY GIVE COURTS DISCRETION TO AWARD FEES TO A PREVAILING PARTY

Government Employee Rights Act of 1991

2 U.S.C. §1220(e)

If the individual referred to in subsection (a) is the prevailing party in a proceeding under this section, attorney's fees maybe allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

Congressional Accountability Act of 1995

2 U.S.C. §1361(a)

If a covered employee, with respect to any claim under this chapter, or a qualified person with a disability, with respect to any claim under section 1331 of this title, is a prevailing party in any proceeding under section 1405, 1406, 1407, or 1408 of this title, the hearing officer, Board, or court, as the case may be, may award attorney's fees, expert fees, and any other costs as would be appropriate if awarded under section 2005e-5(k) of Title 42.

Presidential and Executive Office

Accountability Act

3 U.S.C. §435(a) (see also, 28 U.S.C. §3905(a))

If a covered employee, with respect to any claim under this chapter, or a qualified person with a disability, with respect to any claim under section 421 [making sections of the Americans with Disabilities Act of 1990 applicable to the White House and specified other executive facilities], is a prevailing party in any proceeding under section 453(1), the administrative agency may award attorney's fees, expert fees, and other costs as would be appropriate if awarded under section 706(k) of the Civil Rights Act of 1964.

Freedom of Information Act

5 U.S.C. §552(a)(4)(E)(i)

The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

5 U.S.C. §552(a)(4)(E)(ii)

(added by P.L. 110-175 (2007))

For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained judicial relief through either—(I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

Privacy Act

5 U.S.C. §552a(g)(2)(B)

The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

5 U.S.C. §552a(g)(3)(B)

The court may assess against the United States reasonable attorney fees and other litigation costs

reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

Government in the Sunshine Act

5 U.S.C. §552b(i)

The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

Whistleblower Protection Act of 1989

5 U.S.C. §1204(m)(1)

[T]he Board, or an administrative law judge or other employee of the Board designated to hear a case arising under section 1215, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel

practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

5 U.S.C. §1204(m)(2)

If an employee or applicant for employment is the prevailing party of a case arising under section 1215 and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

Civil Service Reform Act of 1978

5 U.S.C. §5596(b)(1)

An employee of an agency who * * * is found * * * to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—(A) is entitled, on correction of the personnel action, to receive * * * (ii) reasonable attorney fees related to the personnel action which * * * shall be awarded in accordance with standards established under section 7701(g) of this title.

5 U.S.C. §7701(g)

(1) Except as provided in paragraph (2) of this subsection, the Board * * * may require payment by the agency involved of reasonable attorney fees incurred

by the employee or applicant for employment if the employee or applicant for employment is the prevailing party and the Board * * * determines that payment by the agency is warranted in the interest of justice * * * *

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706k of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

Agricultural Unfair Trade Practices

7 U.S.C. §2305(a)

In any action commenced pursuant hereto, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

7 U.S.C. §2305(c)

In any action commenced pursuant to this subsection, the court may allow the prevailing party a reasonable attorney's fee as a part of the costs.

Plant Variety Act

7 U.S.C. §2565

The court in exceptional cases may award reasonable attorney fees to the prevailing party.

7 U.S.C. §2570(b)

Such remedies include * * * attorney fees under section 2565 of this title.

Immigration and Nationality Act

8 U.S.C. §1324b(h)

In any complaint respecting an unfair immigration-related employment practice, an administrative law judge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact.

8 U.S.C. §1324b(j)(4)

In any judicial proceeding under subsection (i) of this section or this subsection, the court, in its discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee as part of the costs but only if the losing party's argument is without reasonable foundation in law and fact.

Real Estate Settlement Procedures Act

12 U.S.C. §2607(d)(5)

In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees.

Financial Institutions Anti-Fraud

Enforcement Act of 1990

12 U.S.C. §4246 (see also, 18 U.S.C. §3059A(e)(2))

When the United States, through private counsel retained under this subchapter, prevails in any civil action, the court, in its discretion, may allow the United States reasonable attorney's fees and other expenses of litigation as part of the costs.

Clayton Act

15 U.S.C. §15c(d)(2)

[T]he court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

Lanham (Trademark) Act

15 U.S.C. §1117(a)

The court in exceptional cases may award reasonable attorney fees to the prevailing party.

Magnuson-Moss Warranty Act

15 U.S.C. §2310(d)(2)

If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) * * * unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

Telemarketing and Consumer

Fraud Abuse and Prevention Act

15 U.S.C. §6104(d)

The court, in issuing any final order in any action brought under subsection (a), may award costs of suit and reasonable fees for attorneys and expert witnesses to the prevailing party.

CAN-SPAM Act of 2003 (P.L. 108-187)

15 U.S.C. §7706(f)(4)

In the case of any successful action under paragraph (1), the court, in its discretion, may award the costs of the action and reasonable attorney fees to the State.

National Historic Preservation Act

16 U.S.C. §470w-4

In any civil action brought in any United States district court by any interested person to enforce the provisions of sections 470 to 470a, 470b, and 470c to 470w-6 of this title, if such person substantially prevails in such action, the court may award attorneys' fees, expert witness fees, and other costs of participating in such action, as the court deems reasonable.

Copyright Act

17 U.S.C. §505

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. §911(f)

In any civil action arising under this chapter, the court in its discretion may allow the recovery of full costs, including reasonable attorneys' fees, to the prevailing party.

17 U.S.C. §1009(c)

In an action under subsection (a), the court * * * (4) in its discretion may award a reasonable attorney's fee to the prevailing party.

17 U.S.C. §1203(b)(5)

In an action brought under subsection (a), the court * * * in its discretion may award reasonable attorney's fees to the prevailing party.

17 U.S.C. §1323(d)

In an action for infringement under this chapter, the court may award reasonable attorney's fees to the prevailing party.

Gun Control Act of 1968

18 U.S.C. §925A

In any action under this section, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

Electronic Communications Privacy Act of 1986

18 U.S.C. §2707(c)

In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney fees determined by the court.

Criminal Justice Act
18 U.S.C. §3006A note

[T]he [federal] court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) * * * may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code * * * *

Mexican-American Chamizal
Convention Act of 1964
22 U.S.C. §227d-2

The Commissioner, in rendering an award in favor of any claimant under section 277d-19 of this title, may, as part of such award, determine and allow reasonable attorneys' fees which shall not exceed 10 per centum of the amount awarded, to be paid out of but not in addition to the amount of award, to the attorneys representing the claimant.

Foreign Service Act of 1980

22 U.S.C. §4137(b)

If the Board finds that the grievance is meritorious, the Board shall have the authority to direct the Department—(5) to pay reasonable attorney fees to the grievant to the same extent and in the same manner as such fees may be required by the Merit Systems Protection Board under section 7701(g) of Title 5.

Internal Revenue Code

26 U.S.C. §6110(f)(4)(A)

Any person who has exhausted the administrative remedies prescribed pursuant to paragraph (2) with respect to a request for disclosure may file a petition in the United States Tax Court or a complaint in the United States District Court for the District of Columbia * * * * [T]he provisions of subparagraphs (C), (D), (E), (F), and (G) of section 552(a)(4) of title 5, United States Code, shall apply to any proceeding under this paragraph.

26 U.S.C. §7431(c)(3)

[I]n the case of a plaintiff which is described in section 7430(c)(4)(A)(ii), reasonable attorneys fees, except that if the defendant is the United States, reasonable attorneys fees may be awarded only if the plaintiff is the prevailing party * * * *

Jury System Improvements Act of 1978

28 U.S.C. §1875(d)(2)

In any action or proceeding under this section, the court may award a prevailing employee who brings such action by retained counsel a reasonable attorney's fee as part of the costs. The court may tax a defendant employer, as costs payable to the court, the attorney fees and expenses incurred on behalf of a prevailing employee, where such costs were expended pursuant to paragraph (1) of this subsection. The court may award a prevailing employer a reasonable attorney's fee as part of the costs only if the court determines that the action is frivolous, vexatious, or brought in bad faith.

Fees and Costs

28 U.S.C. §1912 (see, 50 ALR Fed 652, 67 ALR Fed 319)

Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

Equal Access to Justice Act

28 U.S.C. §2412 (see also, 5 U.S.C. §504)

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded

pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States * * * * The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

Presidential and Executive Office Accountability Act (see also, 3 U.S.C. §435)

28 U.S.C. §3905(a)

If a covered employee, with respect to any claim under chapter 5 of title 3, or a qualified person with a disability, with respect to any claim under section 421 of title 3, is a prevailing party in any proceeding under section 1296 or section 1346(g), the court may award attorney's fees, expert fees, and other costs as would be appropriate if awarded under section 706(k) of the Civil Rights Act of 1964.

Assumption of Contractual Obligations Related to Transfers of Rights in Motion Pictures

28 U.S.C. §4001(g)

[T]he court in its discretion may allow recovery of full costs by or against any party and may also award a reasonable attorney's fees to the prevailing party as part of the costs.

***Labor-Management Reporting
and Disclosure Act of 1959***

29 U.S.C. §431(c)

The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Rehabilitation Act of 1973

29 U.S.C. §794a(b)

In any action or proceeding to enforce or charge a violation of a provision of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Employee Retirement Income Security Act

29 U.S.C. §1370(e)

(1) General Rule.—In any action brought under this section, the court in its discretion may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to any party who prevails or substantially prevails in such action.

(2) Exemption for Plans.—Notwithstanding the preceding provisions of this subsection, no plan shall be required in any action to pay any costs and expenses (including attorney's fees).

29 U.S.C. §1451(e)

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

Employee Polygraph Protection Act of 1988

29 U.S.C. §2005(c)(3)

The court, in its discretion, may allow the prevailing party (other than the United States) reasonable costs, including attorney's fees.

Worker Adjustment and Retaining Notification Act

29 U.S.C. §2104(a)(6)

In any such suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

General Accounting Office Act of 1980

31 U.S.C. §755(b)

If an officer, employee, applicant for employment, or employee of the Architect of the Capitol, the Botanic Garden, or the Senate Restaurants is the prevailing party in a proceeding under this section, and the decision is based on a finding of discrimination prohibited under section 732(f) of this title or section 312(e)(2) of the Architect of the Capitol Human

Resources Act, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 [42 U.S.C. §2000e-5(k)].

Debt Collection Improvement Act of 1996

31 U.S.C. §3730(d)(4)

[T]he court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

Local Partnership Act

31 U.S.C. §6716(c)

In an action under this section, the court * * * to enforce compliance with section 6711(a) or (b), may allow a prevailing party (except the United States Government) a reasonable attorney's fee.

Water Pollution Prevention and Control Act

33 U.S.C. §1365(d)

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.

33 U.S.C. §1369(b)(3)

In any judicial proceeding under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party whenever it determines that such award is appropriate.

Patent Infringement

35 U.S.C. §285

The court in exceptional cases may award reasonable attorney fees to the prevailing party.

35 U.S.C. §271(e)(4)

The remedies prescribed by subparagraphs (A), (B), and (C) are the only remedies which may be granted by a court for an act of infringement described in paragraph (2), except that a court may award attorney fees under section 285.

35 U.S.C. §296(b)

Such remedies include * * * attorney fees under [35 U.S.C.] section 285 * * * *

***Uniformed Services Employment
and Reemployment Rights Act of 1994***

38 U.S.C. §4323(c)(2)(B)

In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who

obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.

National Childhood Vaccine Injury Act of 1986
42 U.S.C. §300aa-31(c)

The court, in issuing any final order in any action under this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any plaintiff who substantially prevails on one or more significant issues in the action.

Social Security Act Amendments of 1965
42 U.S.C §406(b)(1)

Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may, notwithstanding the provisions of section 405(i) of this title, but subject to subsection (d) of this section, certify the amount of such fee for payment to such

attorney out of, and not in addition to, the amount of such past-due benefits.

Voting Rights Act of 1965

42 U.S.C. §1973l(e)

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, reasonable expert fees, and other reasonable litigation expenses, as part of the costs.

National Voter Registration Act of 1993

42 U.S.C. §1973gg-9(c)

In a civil action under this section, the court may allow the prevailing party (other than the United States) reasonable attorney fees, including litigation expenses, and costs.

Civil Rights Attorney's Fees Awards Act of 1976

42 U.S.C. §1988(b)

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of P.L. 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 40302 of the Violence Against Women Act of 1994, the court, in its discretion, may allow the prevailing party, other than

the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

Civil Rights of Institutionalized Persons Act
42 U.S.C. §1997a(b)

In any action commenced under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs.

42 U.S.C. §1997c(d)

In any action in which the United States joins as an intervenor under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs * * * *

Civil Rights Act of 1964, Title II
42 U.S.C. §2000a-3(b)

In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the

United States shall be liable for costs the same as a private party.

Civil Rights Act of 1964, Title III

42 U.S.C. §2000b-1

In any action or proceeding under this subchapter the United States shall be liable for costs, including a reasonable attorney's fee, the same as a private party.

Civil Rights Act of 1964, Title VII

42 U.S.C. §2000e-5(k)

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Fair Housing Act

42 U.S.C. §3612(p)

In any administrative proceeding brought under this section, or any court proceeding arising therefrom, or any civil action under section 812 [42 U.S.C. §3612], the administrative law judge or the court, as the case may be, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be

liable for such fees and costs to the extent provided by section 504 of title 5, United States Code, or by section 2412 of title 28, United States Code.

42 U.S.C. §3613(c)(2)

In a civil action under subsection (a), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

42 U.S.C. §3614(d)(2)

In a civil action [by the Attorney General] under this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the extent provided by section 2412 of title 28, United States Code.

***Omnibus Crime Control and
Safe Streets Act of 1968***

42 U.S.C. §3789d(c)(4)(B)

In any civil action brought by a private person to enforce compliance with any provision of this subsection, the court may grant to a prevailing plaintiff reasonable attorney fees, unless the court determines that the lawsuit is frivolous, vexatious, brought for

harassment purposes, or brought principally for the purpose of gaining attorney fees.

Solid Waste Disposal Act

42 U.S.C. §6972(e)

The court, in issuing any final order in any action brought pursuant to this section or section 7006 [42 U.S.C. §6976], may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines that such award is appropriate.

***Comprehensive Environmental Response,
Compensation, and Liability Act***

42 U.S.C. §9659(f)

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate.

42 U.S.C. §11046(f)

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially

prevailing party whenever the court determines such an award is appropriate.

Americans with Disabilities Act
42 U.S.C. §12205

In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

Cable Communications Policy Act of 1984
47 U.S.C. §553(c)(2)

The court may * * * direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails.

47 U.S.C. §605(e)(3)(B)

The court may * * * direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails.

ICC Termination Act of 1995

49 U.S.C. §14707(c)

In a civil action under subsection (a), the court may determine the amount of and award a reasonable attorney's fee to the prevailing party. That fee is in addition to costs allowable under the Federal Rules of Civil Procedure.

Transportation

49 U.S.C. §42121(b)(3)(C)

(whistleblower protection)

If the Secretary of Labor finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorney's fee not exceeding \$ 1,000.

49 U.S.C. §60121(b) (pipelines)

The court may award costs, reasonable expert witness fees, and a reasonable attorney's fee to a prevailing plaintiff in an action under this section. The court may award costs to a prevailing defendant when the action is unreasonable, frivolous, or meritless.

III. STATUTORY PROVISIONS THAT ALLOW FOR FEE SHIFTING AT THE COURT'S OR AGENCY'S DISCRETION WITHOUT MENTION OF A REQUIREMENT OF SUCCESS.

Ethics in Government Act of 1978

2 U.S.C. §288i(d)

The Senate may by resolution authorize the reimbursement of any Member, officer, or employee of the Senate who is not represented by the [Senate Legal] Counsel for fees and costs, including attorneys' fees, reasonably incurred in obtaining representation. Such reimbursement shall be from funds appropriated to the contingent fund of the Senate.

Federal Contested Elections Act

2 U.S.C. §396

The committee [on House Administration of the House of Representatives] may allow any party reimbursement from the contingent fund of the House of Representatives of his reasonable expenses of the contested election case, including reasonable attorneys fees * * * *

Home Owners' Loan Act

12 U.S.C. §1464(d)(1)(B)(vii)

Any court having jurisdiction of any proceeding instituted under this section by a savings association, or a director or officer thereof, may allow to any such

party reasonable expenses and attorneys' fees. Such expenses and fees shall be paid by the savings association.

Housing Act of 1959
12 U.S.C. §1701q-1(f)

The monetary judgment may, in the court's discretion, include the attorneys fees and other expenses incurred by the United States in connection with the action.

National Housing Act
12 U.S.C. §1723i(e)
(action to collect civil money penalty)

The monetary judgment may, in the discretion of the court, include any attorneys fees and other expenses incurred by the United States in connection with the action.

12 U.S.C. §1735f-14(e)
(action to collect civil money penalty)

The monetary judgment may, in the court's discretion, include the attorneys fees and other expenses incurred by the United States in connection with the action.

12 U.S.C. §1735f-15(f)
(action to collect civil money penalty)

The monetary judgment may, in the court's discretion, include the attorneys fees and other expenses incurred by the United States in connection with the action.

Federal Credit Union Act
12 U.S.C. §1786(p)

Any court having jurisdiction of any proceeding instituted under this section by any credit union or a director, officer, or committee member thereof, may allow to any party such reasonable expenses and attorneys' fees as it deems just and proper, and such expenses and fees shall be paid by the credit union or from its assets.

Federal Deposit Insurance Act
12 U.S.C. §1818(n)

Any court having jurisdiction of any proceeding instituted under this section by an insured bank or director or officer thereof, may allow to any such party such reasonable expenses and attorneys' fees as it deems just and proper; and such expenses and fees shall be paid by the bank or from its assets.

Bank Holding Company Act

12 U.S.C. §1844(f)

Any court having jurisdiction of any proceeding instituted under this subsection may allow to any such party such reasonable expenses and attorneys' fees as it deems just and proper.

Farm Credit Amendments Act of 1985

12 U.S.C. §2273

Any court having jurisdiction of any proceeding instituted under this part by a System institution or a director or officer thereof, may allow to any such party such reasonable expenses and attorneys' fees as it deems just and proper; and such expenses and fees shall be paid by the System institution or from its assets.

International Banking Act of 1978

12 U.S.C. §3108(b)(5)

Any court having jurisdiction of any proceeding instituted under this subsection may allow any party to such proceeding such reasonable expenses and attorneys' fees as the court deems just and proper.

Securities Act of 1933

15 U.S.C. §77k(e)

In any suit under this or any other section of this subchapter the court may, in its discretion, require an

undertaking for the payment of the costs of such suit,
including reasonable attorney's fees * * * *

Trust Indenture Act

15 U.S.C. §77o(e)

The indenture to be qualified may contain provisions to the effect that all parties thereto, including the indenture security holders, agree that the court may in its discretion * * * assess reasonable costs, including reasonable attorneys' fees, against any party litigant * * * *

15 U.S.C. §77www(a)

[T]he court may, in its discretion * * * assess reasonable costs, including reasonable attorneys' fees, against either party litigant * * * *

Securities Exchange Act of 1934

15 U.S.C. §78i(e)

In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

15 U.S.C. §78r(a)

In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

Consumer Product Safety Act

15 U.S.C. §2060(c)

A court may in the interest of justice include in such relief an award of the costs of the suit, including reasonable attorneys' fees (determined in accordance with subsection (f) of this section) and reasonable expert witnesses' fees. Attorneys' fees may be awarded against the United States (or any agency or official of the United States) without regard to section 2412 of title 28 or any other provision of law.

15 U.S.C. §2073

In any action under this section the court may in the interest of justice award the costs of suit, including reasonable attorneys' fees (determined in accordance with section 2060(f) of this title) and reasonable expert witnesses' fees.

Hobby Protection Act

15 U.S.C. §2102

In any such action, the court may award the costs of the suit, including reasonable attorneys' fees.

Toxic Substances Control Act

15 U.S.C. §2618(d)

The decision of the court in an action commenced under subsection (a), or of the Supreme Court of the United States on review of such a decision, may include an award of costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate.

15 U.S.C. §2619(c)(2)

The court in issuing any final order in any action brought pursuant to subparagraph (a) may award costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate. Any court, in issuing its decision in an action brought to review such an order, may award costs of suit and reasonable fees for attorneys if the court determines that such an award is appropriate.

15 U.S.C. §2620(b)(4)(C)

The court in issuing any final order in any action brought pursuant to subparagraph (A) may award

costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate. Any court, in issuing its decision in an action brought to review such an order, may award costs of suit and reasonable fees for attorneys if the court determines that such an award is appropriate.

CAN-SPAM Act of 2003

15 U.S.C. §7706(g)(4)

In any action brought pursuant to paragraph (1), the court may, in its discretion, requiring an undertaking for the payment of the costs of such action, and assess reasonable costs, including reasonable attorneys' fees, against any party.

Endangered Species Act

16 U.S.C. §1540(g)(4)

The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

Video Privacy Protection Act of 1988

18 U.S.C. §2710(c)(2)(C)

The court may award * * * reasonable attorneys' fees and other litigation costs reasonably incurred.

Driver's Privacy Protection Act of 1994

18 U.S.C. §2724(b)(3)

The court may award * * * reasonable attorneys' fees and other litigation costs reasonably incurred.

Individuals with Disabilities Education Act

20 U.S.C. §1415(i)(3)

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs * * * *

Employee Retirement Income Security Act

29 U.S.C. §1132(g)(1)

In any action under this subchapter (other than an action described in paragraph (2)) 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.

Surface Mining Control and Reclamation Act
30 U.S.C. §1270(d)

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

30 U.S.C. §1275(e)

Whenever an order is issued under this section, or as a result of any administrative proceeding under this chapter, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) * * * may be assessed against either party * * * *

Deep Seabed Hard Mineral Resources Act
30 U.S.C. §1427(c)

The court, in issuing any final order in any action brought under subsection (a) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party whenever the court determines that such an award is appropriate.

***Marine Protection, Research,
and Sanctuaries Act***

33 U.S.C. §1415(g)(4)

The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

Deepwater Ports Act

33 U.S.C. §1515(d)

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

Act to Prevent Pollution from Ships

33 U.S.C. §1910(d)

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party including the Federal Government.

Safe Drinking Water Act

42 U.S.C. §300j-8(d)

The court, in issuing any final order in any action brought under subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such an award is appropriate.

United States Housing Act of 1937

42 U.S.C. §1437d(q)(7)

Appropriate relief that may be awarded by such district courts shall include reasonable attorney's fees and other litigation costs.

Privacy Protection Act of 1980

42 U.S.C. §2000aa-6(f)

A person having a cause of action under this section shall be entitled to recover * * * such reasonable attorneys' fees and other litigation costs reasonably incurred as the court, in its discretion, may award * * * *

Noise Control Act of 1972

42 U.S.C. §4911(d)

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable

attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate.

Energy Reorganization Act of 1974

42 U.S.C. §5851(e)(2)

The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

Energy Policy and Conservation Act

42 U.S.C. §6305(d)

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

Clean Air Act

42 U.S.C. §7604(d)

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

42 U.S.C. §7607(f)

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

42 U.S.C. §7622(e)(2)

The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

Power Plant and Industrial Fuel Use Act

42 U.S.C. §8435(d)

The court, in issuing any final order in any action brought under subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

Ocean Thermal Energy Conservation Act of 1980

42 U.S.C. §9124(d)

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable

attorney and expert witness fees) to any party whenever the court determines that such an award is appropriate.

Outer Continental Shelf Lands Act

43 U.S.C. §1349(a)(5) (see also, 43 U.S.C. §1845(e))

A court, in issuing any final order in any action brought pursuant to subsection (a)(1) or subsection (c) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party, whenever such court determines such award is appropriate.

Transportation

49 U.S.C. §42121(b)(6)(B)

The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

IV. MISCELLANEOUS FEE SHIFTING PROVISIONS

Whistleblower Protection Act of 1989

5 U.S.C. §1214(g)

If the Board orders corrective action under this section, such corrective action may include * * * (2) reimbursement for attorney's fees * * * *

Federal Employment Compensation for Work Injuries

5 U.S.C. §8127

(b) A claim for legal or other services furnished in respect to a case, claim, or award for compensation under this subchapter is valid only if approved by the Secretary.

Animal Welfare Act

7 U.S.C. §2157(d)

It shall be unlawful for any member of an Institutional Animal Committee to release any confidential information of the research facility * * * * Any person, including any research facility, injured in its business or property by reason of a violation of this section may recover all actual and consequential damages sustained by such person and the cost of the suit including a reasonable attorney's fee.

***Federal Erroneous Retirement
Coverage Corrections Act***
5 U.S.C. §8331 note

The Director of the Office of Personnel Management may * * * (2) provide for the reimbursement of necessary and reasonable expenses incurred by an individual with respect to settlement of a claim for losses resulting from a retirement coverage error, including attorney's fees, court costs, and other actual expenses * * * *

Gonzales Act
10 U.S.C. §1089(f)(2)

With respect to the Secretary of Defense and the Armed Forces Retirement Home Board, the authority provided by paragraph (1) also includes the authority to provide for reasonable attorney's fees for persons described in subsection (a), as determined necessary pursuant to regulations prescribed by the head of the agency concerned.

***Whistleblower Protections for Contractor
Employees of Department of Defense,
Coast Guard, and National Aeronautics
and Space Administration***
10 U.S.C. §2409(c)(1)

[T]he head of the agency * * * shall take one or more of the following actions: * * * (C) Order the contractor to pay the complainant an amount equal to the aggregate of all costs and expenses (including attorneys'

fees and expert witnesses' fees) that were reasonably incurred * * * *

Bankruptcy Act (as amended by P.L. 109-8 (2005))

11 U.S.C. §303(i)

[T]he court may grant judgment—(1) against the petitioners and in favor of the debtor for—(B) a reasonable attorney's fee * * * *

11 U.S.C. §330(a)(1)

[T]he court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by such person.

11 U.S.C. §363(n)

The trustee may * * * recover any costs, attorneys' fees or expenses incurred in avoiding such sale or recovering such amount.

11 U.S.C. §523(d)

[T]he court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for,

the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

11 U.S.C. §707(b)(4)(A)

The court * * * may order the attorney for the debtor to reimburse the trustee for all reasonable costs in prosecuting a motion filed under section 707(b), including reasonable attorneys' fees * * * *

11 U.S.C. §707(b)(5)(A)

[T]he court * * * may award a debtor all reasonable costs (including reasonable attorneys' fees) in contesting a motion filed by a party in interest * * * *

National Housing Act

12 U.S.C. §1715k(h)(6)

In cases of defaults on loans insured under this subsection * * * the Secretary * * * may acquire the loan and any security therefor upon * * * reimbursement for such collection costs, court costs, and attorney fees as may be approved by the Secretary.

Clayton Act

15 U.S.C. §15(b)(1)

[A]ny person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. §35(a)

No damages, interest on damages, costs, or attorney's fees may be recovered under section 15, 15a, or 15c of this title from any local government, or official or employee thereof acting in an official capacity.

15 U.S.C. §36(a)

No damages, interest on damages, costs or attorney's fees may be recovered under section 15, 15a, or 15c of this title in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.

Securities Act of 1933

15 U.S.C. §77z-1(a)(6) (see also, §77z-1(a)(7)(C), (c)(3))

Total attorney's fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.

Interstate Land Sales Full Disclosure Act

15 U.S.C. §1709(c)

The amount recoverable in a suit authorized by this section may include * * * reasonable amounts for attorneys' fees.

15 U.S.C. §1717a(d)

The monetary judgment may, in the discretion of the court, include any attorneys fees and other expenses incurred by the United States in connection with the action.

Consumer Product Safety Act

15 U.S.C. §2072(a)

Any person who shall sustain injury by reason of any knowing (including willful) violation of a consumer product safety rule * * * may, if the court determines it to be in the interest of justice, recover the costs of suit, including reasonable attorneys' fees (determined in accordance with section 2060(f) of this title) and reasonable expert witnesses' fees * * * *

Magnuson-Moss Warranty Act

15 U.S.C. §2805(d)(3)

If any action under subsection (a), the court may, in its discretion, direct that reasonable attorney and

expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

National Cooperative Research Act of 1984

15 U.S.C. §4304(b)

The award made under subsection (a) may be offset in whole or in part by an award in favor of any other party for any part of the cost of suit, including a reasonable attorney's fee, attributable to conduct during the litigation by any prevailing party that the court finds to be frivolous, unreasonable, without foundation, or in bad faith.

Condominium and Cooperative Abuse Relief Act of 1980

15 U.S.C. §3608(d)

Such relief may include, but shall not be limited to rescission, reformation, restitution, the award of damages and reasonable attorney fees and court costs. A defendant may recover reasonable attorneys' fees if the court determines that the cause of action filed by the plaintiff is frivolous, malicious, or lacking in substantial merit.

15 U.S.C. §3611(d)

The amount recoverable under this section may include interest paid, reasonable attorneys' fees, independent engineer and appraisers' fees, and court

costs. A defendant may recover reasonable attorneys' fees if the court determines that the cause of action filed by the plaintiff is frivolous, malicious, or lacking in substantial merit.

Export Trading Company Act of 1982

15 U.S.C. §4016(b)(1)

Any person who has been injured as a result of conduct engaged in under a certificate of review may bring a civil action for injunctive relief, actual damages, the loss of interest on actual damages, and the cost of suit (including a reasonable attorney's fee) for failure to comply with the standards of section 303(a) [15 U.S.C. §4013(a)].

Federal Power Act

16 U.S.C. §825q-1(b)(2)

The Commission may, under rules promulgated by it, provide compensation for reasonable attorney's fees, expert witness fees, and other costs of intervening or participating in any proceeding before the Commission to any person whose intervention or participation substantially contributed to the approval, in whole or in part, of a position advocated by such person.

Copyright Act

17 U.S.C. §511(b)

Such remedies include * * * costs and attorney's fees under section 505 * * * *

17 U.S.C. §512(k)

As used in this section, the term 'monetary relief' means damages, costs, attorneys' fees, and any other form of monetary payment.

17 U.S.C. §911(g)(2)

Such remedies include * * * costs and attorney's fees under subsection (f).

17 U.S.C. §1322(b)

A seller or distributor who suffers damage * * * may recover such relief as may be appropriate, including * * * reasonable attorney's fees.

17 U.S.C. §1325

That amount shall be to compensate the defendant and shall be charged against the plaintiff and paid to the defendant, in addition to such costs and attorney's fees of the defendant as may be assessed by the court.

PROTECT Act
18 U.S.C. §2252A(f)

Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) [of 18 U.S.C. §2252A] or section 1466A may commence a civil action for * * * (A) temporary, preliminary, or permanent injunctive relief; (B) compensatory and punitive damages; and (C) the costs of the civil action and reasonable fees for attorneys and expert witnesses.

Anti-counterfeiting Amendments Act of 2004
18 U.S.C. §2318(f)

(1) * * * Any copyright owner who is injured, or is threatened with injury, by a violation of subsection (a) may bring a civil action in an appropriate United States district court * * * * In any action brought under paragraph (1), the court * * * may award to the injured party—(i) reasonable attorney fees and costs.

Wire Interception Act
18 U.S.C. §2520(b)(3)

In any action under this section, appropriate relief includes * * * a reasonable attorney's fee and other litigation costs reasonably incurred.

Electronic Communications Privacy Act of 1986
18 U.S.C. §2707(b)(3)

In a civil action under this section, appropriate relief includes * * * a reasonable attorney's fee and other litigation costs reasonably incurred.

Juvenile Delinquency
18 U.S.C. §5034

In cases where the juvenile and his parents, guardian, or custodian are financially able to obtain adequate representation but have not retained counsel, the magistrate may assign counsel and order the payment of reasonable attorney's fees or may direct the juvenile, his parents, guardian, or custodian to retain private counsel within a specified period of time.

Indian Arts and Crafts Act of 1990
25 U.S.C. §305e(b)

In addition to the relief specified in subsection (a), the court may award punitive damages and the costs of suit and a reasonable attorney's fee.

***American Indian Agricultural
Resource Management Act***
25 U.S.C. §3713(a)(1)(C)

[T]he Secretary [of the Interior] shall issue regulations that * * * establish civil penalties for the commission

of trespass on Indian agricultural lands, which provide for * * * court costs, and attorney fees.

Internal Revenue Code

26 U.S.C. §6673(a)(2)

Whenever it appears to the Tax Court that any attorney or other person admitted to practice before the Tax Court has multiplied the proceedings in any case unreasonably and vexatiously, the Tax Court may require—(A) that such attorney or other person pay personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct, or (B) if such attorney is appearing on behalf of the Commissioner of Internal Revenue, that the United States pay such excess costs, expenses, and attorneys' fees in the same manner as such an award by a district court.

***Judicial Discipline and
Removal Reform Act of 1990***

28 U.S.C. §372(c)(16)

Upon the request of a judge or magistrate whose conduct is the subject of a complaint under this subsection, the judicial council may, if the complaint has been finally dismissed under paragraph 6(C), recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the Federal judiciary, for those reasonable expenses, including attorneys' fees, incurred

by that judge or magistrate during the investigation which would not have been incurred but for the requirements of this subsection.

Independent Counsel Reauthorization Act of 1987
28 U.S.C. §593(f)(1) (see also, 5 U.S.C. §288i(d))

Upon the request of an individual who is the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court may, if no indictment is brought against such individual pursuant to that investigation, award reimbursement for those reasonable attorney's fees incurred by that individual * * * *

Judicial Improvements and Access to Justice Act
28 U.S.C. §655(e)

In any trial de novo demanded under subsection (a) in which arbitration was done by consent of the parties, a district court may assess costs, as provided in section 1920 of this title, and reasonable attorney fees against the party demanding the trial de novo if—(1) such party fails to obtain a judgment, exclusive of interest and costs, in the court which is substantially more favorable to such party than the arbitration award, and (2) the court determines that the party's conduct in seeking a trial de novo was in bad faith.

Removal of Cases from State Court

28 U.S.C. §1447(c)

An order remanding the case [back to state court, if the federal court lacks jurisdiction] may require payment of just costs and actual expenses, including attorney fees, incurred as a result of the removal.

U.S. Court of Federal Claims—Patent and Copyright Cases

28 U.S.C. §1498(a)

Reasonable and entire compensation shall include the owner's reasonable costs, including reasonable fees for expert witnesses and attorneys, in pursuing the action if the owner is an independent inventor, a nonprofit organization, or an entity that had no more than 500 employees at any time during the 5-year period preceding the use or manufacture of the patented invention by or for the United States. Notwithstanding the preceding sentences, unless the action has been pending for more than 10 years from the time of filing to the time that the owner applies for such costs and fees, reasonable and entire compensation shall not include such costs and fees if the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Parental Kidnaping Prevention Act of 1980

28 U.S.C. §1738A note

In furtherance of the purposes of section 1738A of title 28 * * * State courts are encouraged to * * * award to the person entitled to custody or visitation * * * attorneys' fees * * * *

28 U.S.C. §1927

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Federal Debt Collection Procedures Act of 1990

28 U.S.C. §3205(c)(6)

The court may award a reasonable attorney's fee to the United States and against the garnishee if the writ is not answered within the time specified therein * * * *

Civil Asset Forfeiture Reform Act of 2000

28 U.S.C. §2465(b)(2)(C)

If there are multiple claims to the same property, the United States shall not be liable for costs and attorneys fees associated with any such claim if the

United States * * * (iii) does not cause the claimant to incur additional, reasonable costs or fees * * * *

28 U.S.C. §2465(b)(2)(D)

If the court enters judgment in part for the claimant and in part for the Government, the court shall reduce the award of costs and attorney fees accordingly.

Federal Rules of Civil Procedure

28 U.S.C. App. Rule 11(c)(2)

[T]he sanction may consist of, or include * * * an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

28 U.S.C. App. Rule 16(f)

[T]he judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

28 U.S.C. App. Rule 23(h)

In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.

28 U.S.C. App. Rule 26(g)(3)

If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

28 U.S.C. App. Rule 30(g)(1)

If the party giving notice of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

28 U.S.C. App. Rule 30(g)(2)

If the party giving the notice of the taking of the deposition of a witness fails to serve a subpoena on him and the witness because of such failure does not

attend, and if another party attends in person or by attorney because that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

28 U.S.C. App. Rule 37(a)(4)

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds * * * *

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds * * * *

28 U.S.C. App. Rule 37(b)(2)

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds * * * *

28 U.S.C. App. Rule 37(c)(1)

In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include * * * *

28 U.S.C. App. Rule 37(c)(2)

If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making the proof, including reasonable attorney's fees * * * *

28 U.S.C. App. Rule 37(d)

In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the

failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

28 U.S.C. App. Rule 37(g)

If a party or a party's attorney fails to participate in good faith in the development and submission of a discovery plan by agreement as required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

28 U.S.C. App. Rule 38

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

28 U.S.C. App. Rule 56(g)

[T]he court shall forthwith order the party * * * to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees * * * *

28 U.S.C. App. Rule 68

If, more than ten days before trial begins, a party defending a claim makes a settlement offer which is rejected by the offeree, and, [i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

Norris-LaGuardia Act

29 U.S.C. §107(e)

No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) * * * *

***Labor-Management Reporting
and Disclosure Act of 1959***

29 U.S.C. §501(b)

The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit * * * *

Employee Retirement Income Security Act

29 U.S.C. §1305(b)(1)

Each fund established under this section shall be credited with the appropriate portion of * * * (F) attorney's fees awarded to the corporation * * * *

29 U.S.C. §1401(a)(2)

The arbitrator may also award reasonable attorney's fees.

Surface Mining Control and Reclamation Act

30 U.S.C. §1270(f)

Any person who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to this chapter may bring an action for damages (including reasonable attorney and expert witness fees) * * * *

Federal Acquisition Streamlining Act of 1994

31 U.S.C. §3554(c)(1)

If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may recommend that the Federal agency conducting the procurement pay to an appropriate interested party the costs of —(A) filing and pursuing the protest, including

reasonable attorneys' fees and consultant and expert witness fees * * * *

31 U.S.C. §3554(c)(2)

No party * * * may be paid, pursuant to a recommendation made under the authority of paragraph (1)— (A) costs for consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Federal Government; or (B) costs for attorneys' fees that exceed \$150 per hour unless the agency determines, based on the recommendation of the Comptroller General on a case by case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

Oil Pollution Act of 1990

33 U.S.C. §2715(c)

At the request of the Secretary, the Attorney General shall commence an action on behalf of the Fund to recover any compensation paid by the Fund to any claimant pursuant to this chapter, and all costs incurred by the Fund by reason of the claim, including * * * attorney's fees.

Federal Acquisition Streamlining Act of 1994
41 U.S.C. §265(c)(1)

If the head of an executive agency determines that a contractor has subjected a person to a reprisal prohibited by subsection (a), the head of the executive agency may * * * (C) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred * * * *

Public Readiness and Emergency
Preparedness Act, Division C
(limits on liability for pandemic flu and
medical biodefense countermeasures)
42 U.S.C. §247d-6d

Whenever a district court of the United States determines that there has been a violation of Rule 11 of the Federal Rules of Civil Procedure in an action under subsection (d), the court shall impose upon the attorney, law firm, or parties that have violated Rule 11 or are responsible for the violation, an appropriate sanction, which may include an order to pay the other party or parties for the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper that is the subject of the violation, including a reasonable attorney's fee. Such sanction shall be sufficient to deter repetition of such conduct or comparable conduct by others similarly situated,

and to compensate the party or parties injured by such conduct.

Safe Drinking Water Act

42 U.S.C. §300h-2(c)(7)

If any person fails to pay an assessment of a civil penalty * * * the Administrator may request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed (plus costs, attorneys' fees, and interest * * *).

National Childhood Vaccine Injury Act of 1986

42 U.S.C. §300aa-15(b)

Compensation awarded under the [National Vaccine Injury Compensation] Program * * * may also include an amount, not to exceed a combined total of \$30,000, for—(1) lost earnings * * * (2) pain and suffering * * * , and (3) reasonable attorneys' fees and costs (as provided in subsection (e) of this section).

Social Security Act

42 U.S.C. §1320a-8(b)(4)(G)

The official conducting a hearing under this section may sanction a person, including any party or attorney * * * * Such sanction may include * * * ordering the party or attorney to pay the attorneys' fees and other costs caused by the failure or misconduct * * * *

Civil Money Penalties Against Section 8 Owners
42 U.S.C. §1437z-1(e)(1)(B)

Any monetary judgment awarded in an action brought under this paragraph may, in the discretion of the court, include the attorney's fees and other expenses incurred by the United States in connection with the action.

Housing Act of 1949
42 U.S.C. §1490s(b)(5)(A)

The monetary judgment may, in the court's discretion, include the attorney's fees and other expenses incurred by the United States in connection with the action.

***Voting Accessibility for the Elderly
and Handicapped Act***
42 U.S.C. §1973ee-4(c)

Notwithstanding any other provision of law, no award of attorney fees may be made with respect to an action under this section, except in any action brought to enforce the original judgment of the court.

Civil Rights Act of 1991
42 U.S.C. §1988(c)

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the

court, in its discretion, may include expert fees as part of the attorney's fee.

Civil Rights of Institutionalized Persons Act
42 U.S.C. §1997e(d)

In an action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that * * * *

Civil Rights Act of 1964, Title VII
42 U.S.C. §2000e-5(g)(2)(B)

On a claim in which an individual proves a violation under section 703(m) [42 U.S.C. §2000e-2(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of the claim under section 703(m) * * * *

Atomic Energy Act of 1954
42 U.S.C. §2184

If, in any action against such patent licensee, the court shall determine that the defendant is exercising such license, the measure of damages shall be the

royalty fee determined pursuant to section 2187(c) of this title, together with such costs, interest and reasonable attorney's fees as may be fixed by the court * * * If any such patent licensee shall fail to pay such royalty fee, the patentee may bring an action in any court of competent jurisdiction for such royalty fee, together with such costs, interest and reasonable attorney's fees as may be fixed by the court.

***Department of Housing and
Urban Development Act***
42 U.S.C. §3537a(c)(5)

The monetary judgment may, in the court's discretion, include the attorneys' fees and other expenses incurred by the United States in connection with the action.

42 U.S.C. §3544(c)(3)

Appropriate relief that may be ordered by such district courts shall include reasonable attorney's fees and other litigation costs.

42 U.S.C. §3545(i)

The monetary judgment may, in the court's discretion, include the attorneys' fees and other expenses incurred by the United States in connection with the action.

Outer Continental Shelf Lands Act

43 U.S.C. §1349(b)(2)

Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this Act may bring an action for damages (including reasonable attorney fee and expert witness fees) * * * *

Alaska Native Claims Settlement Act

43 U.S.C. §1619(b)

A claim for attorney and consultant fees and out-of-pocket expenses may be submitted to the Chief Commissioner of the United States Court of Claims for services rendered before December 18, 1971 to any Native tribe * * * *

Shipping Code (as codified by P.L. 109-304 (2006))

46 U.S.C. §51509(e)(2)

If the Secretary of Defense is unable or unwilling to order an individual to serve on active duty under paragraph (1), or if the Secretary of Transportation determines that reimbursement of the cost of education provided would better serve the interests of the United States, the Secretary of Transportation may recover from the individual the amount of student incentive payments, plus interest and attorney fees.

46 U.S.C. §51509(f)(2)

If the Secretary of Defense is unable or unwilling to order an individual to serve on active duty under paragraph (1), or if the Secretary of Transportation determines that reimbursement of the cost of education provided would better serve the interests of the United States, the Secretary of Transportation may recover from the individual the amount of student incentive payments, plus interest and attorney fees.

Guam Organic Act

48 U.S.C. §1424c(f)

Attorney's fees paid by claimants to counsel representing them may not exceed 5 per centum of any additional award. Any agreement to the contrary shall be unlawful and void. Whoever, in the United States or elsewhere, demands or receives any remuneration in excess of the maximum permitted by this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$5,000 or imprisoned not more than twelve months, or both. A reasonable attorney's fee may be awarded in appropriate cases.

ICC Termination Act of 1995

49 U.S.C. §14708(e)

In any court action to resolve a dispute between a shipper of household goods and a carrier providing transportation, or service subject to jurisdiction under subchapter I or III of chapter 135 concerning the

transportation of household goods by such carrier, such carrier may be awarded reasonable attorney's fees by the court only if the shipper brought such action in bad faith * * * *

Transportation

49 U.S.C. §30116(c) (motor vehicle safety)

The action may be brought * * * to recover damages, court costs, and a reasonable attorney's fee.

49 U.S.C. §31105(b)(3)(B)

(commercial motor vehicle safety)

[T]he Secretary may assess against the person against whom the order is issued the costs (including attorney's fees) reasonably incurred by the complainant in bringing the complaint.

49 U.S.C. §80114(a) (lost, stolen, and destroyed negotiable bills)

The court may order payment of reasonable costs and attorney's fees to the carrier.
