American Bar Association
www.supremecourtpreview.org

No. 09-448

In The
Supreme Court of the United States

BRIDGET HARDT,

Petitioner,

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

JOHN R. KOURIS
Executive Director
DRI – THE VOICE OF THE DEFENSE BAR
55 West Monroe
Suite 2000
Chicago, IL 60603
(312) 795-1101

MARK E. SCHMIDTKE*
*Counsel of Record
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
225 Aberdeen, Suite F
Valparaiso, IN 46385
(219) 242-8668
mark.schmidtke@ogletreedeakins.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Amicus will address the following question:

> Whether ERISA, 29 U.S.C. §1132(g)(1) provides a district court discretion to award attorney's fees to a party who has not achieved "some success on the merits."

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
A. CONGRESS' DECISION TO MAKE AWARDS OF ATTORNEY'S FEES AVAILABLE TO "EITHER PARTY" WAS PART OF ITS INTENT TO CREATE A BALANCED REGULATORY SCHEME FOR EMPLOYEE BENEFIT PROGRAMS	5
B. IN PRACTICE, BY APPLYING THE PREVAILING FIVE FACTOR TEST, THE LOWER COURTS HAVE NOT MADE ATTORNEY'S FEES AWARDS AVAILABLE TO "EITHER PARTY"	9
C. ELIMINATION OF A REQUIREMENT THAT A PARTY ACHIEVE SOME SUCCESS ON THE MERITS WOULD ONLY EXACERBATE THE UNBALANCED APPLICATION OF ERISA'S FEE-SHIFTING PROVISION, CONTRARY TO THE INTENT OF CONGRESS	13
D. THE FIVE FACTOR TEST SHOULD BE ELIMINATED AND REPLACED BY A MORE BALANCED TEST	17
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES

Aetna Health Ins. v. Davila, 542 U.S. 200 (2004) 7

Baker v. Kingsley, 387 F.3d 649 (7th Cir. 2004) 9

Barnhart v. Unum Life Insurance Company of America, 179 F.3d 583 (8th Cir. 1999) 15

Bittner v. Sadoff & Rudoy Industries, 728 F.2d 820 (7th Cir. 1984) 11, 12

Celardo v. Greater New York Automobile Dealers Health & Welfare Trust, 318 F.3d 142 (2d Cir. 2003) 12

Eaves v. Penn, 587 F.2d 453 (10th Cir. 1978) 9, 10, 17

Elliot v. Fortis Benefits Ins. Co., 337 F.3d 1138 (9th Cir. 2003) 12

Everhart v. Allmerica Financial Life Ins. Co., 275 F.3d 751 (9th Cir. 2001) 8

Hess v. Hartford Life & Acc. Ins. Co., 274 F.3d 456 (7th Cir. 2001) 12

Ingersoll-Rand v. McClendon, 498 U.S. 133 (1990) 7

LaRue v. DeWolff, Boberg & Assoc., 552 U.S. 248 (2008) 8

Marquardt v. North American Car Corp., 652 F.2d 715 (7th Cir. 1981) 10, 11, 12

Martin v. Arkansas Blue Cross and Blue Shield, 299 F.3d 966 (8th Cir. 2002) 13

TABLE OF AUTHORITIES – Continued

Page

Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 15

Moon v. UnumProvident Corp., 461 F.3d 639 (6th Cir. 2006) 12

Moore v. Lafayette Life Ins. Co., 458 F.3d 416 (6th Cir. 2006) 13

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 7

Stark v. PPM America, Inc., 354 F.3d 666 (7th Cir. 2004) 13

Varity Corporation v. Howe, 516 U.S. 489 (1996) 7

STATUTES AND RULES

28 U.S.C. §1927 13

Employee Retirement Income Security Act of 1974

29 U.S.C. §1001, *et seq*. ....*passim*

29 U.S.C. §1002(7) 8

29 U.S.C. §1104 15

29 U.S.C. §1132(a)(2) 8

29 U.S.C. §1132(d)(2) 8

29 U.S.C. §1132(g)(1) 3, 8

29 U.S.C. §1132(8) 8

29 U.S.C. §1132(21) 8

29 U.S.C. §1144(a) 7

TABLE OF AUTHORITIES – Continued

Page

Supreme Court Rule 37.3(a)..1

Supreme Court Rule 37.6..1

OTHER AUTHORITIES

National Compensation Survey: Employee Benefits in the United States, March 2009, available at http://www.bls.gov/ncs/ebs/benefits/2009/ebbl0044.pdf...5, 6

INTEREST OF THE *AMICUS CURIAE*[1]

DRI – The Voice of the Defense Bar respectfully submits this brief as *amicus curiae* in support of respondent.

DRI – The Voice of the Defense Bar is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the availability, skills, and effectiveness of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, their clients, and the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. To promote these objectives, DRI participates as *amicus curiae* in cases, such as this one, that raise issues of fundamental import to its members, their clients, and the judicial system.

Issues arising under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001, *et seq.* ("ERISA") directly impact members of

---

[1] Pursuant to Supreme Court Rule 37.3(a), the parties have consented to the filing of this Brief *amicus curiae.* Respondent's letter of consent was filed with the Clerk of this Court on February 24, 2010. Petitioner's letter of consent was filed with the Clerk of this Court on February 25, 2010. Pursuant to Supreme Court Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amicus*, made a monetary contribution for the preparation or submission of this brief.

DRI and especially members of the DRI Life, Health & Disability Committee. This Committee sponsors an annual Life, Health, Disability, and ERISA seminar that regularly draws 450-500 house counsel and outside counsel who represent virtually all of the major life, health, and disability insurance carriers in hundreds of litigation matters pending in state and federal courts throughout the United States. Most of these cases are governed by ERISA. Disputes over attorney's fees are common in such cases. Thus, the standard by which courts may award such fees is a crucial issue not only to DRI members but also to their clients who are defendants in ERISA-governed cases.

The brief of respondent provides compelling reasons to affirm the Fourth Circuit judgment. The purpose of this brief is to provide additional background information to demonstrate that both the five factor test currently applied by the lower courts as well as the proposal to eliminate any requirement that a fee petitioner achieve some success on the merits, are inconsistent with congressional intent in enacting the fee-shifting provision of ERISA.

SUMMARY OF ARGUMENT

ERISA is a collection of compromises resulting in the type of balanced regulation that is necessary in a voluntary employee benefit system. This balance is reflected in ERISA's civil enforcement scheme.

ERISA's civil enforcement provisions limit certain remedies that might otherwise be available under state law to the relatively small group of plan participants who happen to be plaintiffs in lawsuits. The trade-off is that litigation and other administrative costs are reduced in order to benefit the larger class of participants whose employers are then able to offer benefit programs in the first place. One part of this balance is ERISA's fee-shifting provision, 29 U.S.C. §1132(g)(1) which makes attorney's fees awards available, not just to successful plaintiffs, but to "either party."

The balance intended by Congress has not been applied in practice. The factors that make up the five factor test commonly used by the lower courts to evaluate petitions for attorney's fees, is heavily skewed in favor of successful plaintiffs and against successful defendants. Some circuits have even gone so far as to apply a presumption in favor of successful plaintiffs or, conversely, to hold that successful defendants will not recover attorney's fees except in egregious circumstances. Thus, even before one considers whether ERISA's fee-shifting statute requires at least some success on the merits, there is already an imbalance in the application of that fee-shifting provision.

Elimination of a requirement for some success on the merits would only exacerbate this imbalance. Given the five factor test and its built-in bias in favor of plaintiffs, elimination of a standard that requires

some success on the merits would not result in more attorney's fees awards to defendants. At the same time, it would harm defendants because it would force them to incur substantial additional costs defending fee petitions even in cases where defendants are successful. Indeed, elimination of a requirement for some success on the merits would give plaintiffs nothing to lose by filing a fee petition, especially in cases where they are unsuccessful in recovering disputed benefits. This will lead to substantial "secondary litigation" over attorney's fees and increase litigation costs accordingly. This scenario is not what Congress intended when it provided for the award of attorney's fees to "either party."

It is also time to do away with the five factor test. By design and application, the test favors plaintiffs and disfavors defendants. It destroys the regulatory balance that Congress sought to achieve when it enacted ERISA. The standard proposed by respondent better reflects that balance and puts successful defendants at the same starting point as successful plaintiffs when applying for an award of attorney's fees under ERISA.

ARGUMENT

A. CONGRESS' DECISION TO MAKE AWARDS OF ATTORNEY'S FEES AVAILABLE TO "EITHER PARTY" WAS PART OF ITS INTENT TO CREATE A BALANCED REGULATORY SCHEME FOR EMPLOYEE BENEFIT PROGRAMS.

At least until the recent enactment of health care legislation, employee benefits have not been mandated by federal law. Non-health care benefits such as pension, disability, life insurance, and other benefits are still voluntary. That means the availability of these benefits is left largely to employers who deem it a good business practice or who with more altruistic motives, determine that it is appropriate to provide such benefits to their employees.

Non-health care benefits (i.e., "voluntary" benefits) are not insubstantial. For example, according to the U.S. Bureau of Labor Statistics, as of March 2009, 73% of private industry full-time workers had access to life insurance plans through their employers and 96% of those workers participated in their employer-sponsored plans. National Compensation Survey: Employee Benefits in the United States, March 2009, available at http://www.bls.gov/ncs/ebs/benefits/2009/ebbl0044.pdf (Table 16). During the same period, 41% of full-time workers had access to long term disability plans and 96% of those workers participated in their employer-sponsored long term disability plans. *Id.* Finally, 76% of full-time private industry workers had access to some type of retirement program (e.g., a

defined benefit program, defined contribution program, or both) and 80% of those workers participated in their employer-sponsored retirement plan. *Id.* at Table 2. The high percentages of employees who participate in these benefit programs is strong evidence of the substantial value that such benefits offer to American workers.

Balanced regulation is crucial to a voluntary benefit system. In the context of litigation disputes, while broad damages remedies may favor participants who happen to be plaintiffs in lawsuits, the availability of such damages would harm the large class of participants who seek to be covered under such plans because added litigation costs would discourage employers from offering benefit programs in the first place. The arguments of petitioner and her *amici* focus solely on the rights of individual participants who are plaintiffs in lawsuits. Petitioner and her *amici* ignore the interests of the larger class of participants who will lose coverage if increased litigation costs force employers not to offer benefit programs.

Unlike petitioner and her *amici,* Congress could not afford to ignore one side or the other when it enacted ERISA. This inevitably led to compromises as Congress sought to achieve the necessary balance of protecting individual plaintiffs and also protecting the larger class of covered participants. In interpreting and applying ERISA, this Court has cautioned that courts must be cognizant of this balance:

> [C]ourts may have to take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place.

Varity Corporation v. Howe, 516 U.S. 489, 497 (1996).

In the litigation context, Congress achieved this balance through several mechanisms. First, Congress enacted a broad preemption provision, establishing that all state laws that "relate to" employee benefit plans, including state law causes of action, are superseded by federal law, thereby establishing a uniform national regulatory system for employee benefit programs. 29 U.S.C. §1144(a); *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 45-46 (1987). Congress also established a detailed civil enforcement scheme that this Court has repeatedly held is the exclusive means by which participants may obtain relief under ERISA plans. *Pilot Life,* 481 U.S. at 52; *Ingersoll-Rand v. McClendon,* 498 U.S. 133, 143-44 (1990); *Aetna Health Ins. v. Davila,* 542 U.S. 200, 218 (2004). Finally, again with the purpose of achieving the necessary regulatory balance and as part of ERISA's civil enforcement scheme, Congress enacted a fee-shifting provision that departed from prior law (as well as from earlier versions of ERISA) that allowed attorney's fees to be awarded only to successful

participants and instead opted for language that permitted awards to "either party."

In the context of ERISA's civil enforcement scheme, "either party" can mean several types of persons or entities. Potential plaintiffs include "a participant, beneficiary, or fiduciary." 29 U.S.C. §1132(g)(1). A participant is a covered employee. 29 U.S.C. §1002(7). A beneficiary is a person who is designated by a participant or by the terms of a plan to recover benefits under the plan. *Id.* at §1132(8). A fiduciary is a person or entity who has discretionary authority under a plan or who controls plan assets. *Id.* at §1132(21). A benefit plan may also be a plaintiff where a participant, beneficiary, or fiduciary brings an action under §1132(a)(2) on behalf of a plan. *See, e.g., LaRue v. DeWolff, Boberg & Assoc.,* 552 U.S. 248, 253 (2008) (suits for breach of fiduciary duty under §1132(a)(2) must be brought on behalf of a benefit plan).

Likewise, potential defendants can refer to several types of persons or entities. A benefit plan can be a defendant. *See, e.g.,* 29 U.S.C. §1132(d)(2) ("Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter."); *Everhart v. Allmerica Financial Life Ins. Co.,* 275 F.3d 751 (9th Cir. 2001) (a claim for ERISA benefits can only be brought against a plan).

Plan sponsors and administrators, or claim administrators (including insurers and non-insurer third party administrators) can also be defendants. This case is an example. Finally, in breach of fiduciary duty actions, a defendant must be a fiduciary, which can be an entity or a person, or both. *See, e.g., Baker v. Kingsley,* 387 F.3d 649 (7th Cir. 2004). Thus, when Congress specified that awards of attorney's fees could be made in favor of "either party," it was not just referring to individual plaintiffs and insurer defendants, but to multiple types of entities in multiple contexts.

B. IN PRACTICE, BY APPLYING THE PREVAILING FIVE FACTOR TEST, THE LOWER COURTS HAVE NOT MADE ATTORNEY'S FEES AWARDS AVAILABLE TO "EITHER PARTY."

Unfortunately, the balance intended by Congress when it made attorney's fee awards available to "either party" has not occurred in practice. This is largely due to the application of the five factor test that dominates consideration of attorney's fees petitions in the lower courts. The five factors, as created by the Tenth Circuit in *Eaves v. Penn,* 587 F.2d 453, 465 (10th Cir. 1978), are: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing party to satisfy a fee award; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting

fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions. *Id.* at 465.

The Seventh Circuit has long been the most vocal critic of the skewed application of the five factor test when applied to defendants. In *Marquardt v. North American Car Corp.,* 652 F.2d 715 (7th Cir. 1981), the court reviewed a denial of a defendant's application for attorney's fees and took the opportunity to explain why the five factor test was not designed for evaluation of defendants' fee claims:

- Factors 1 and 5 (success on the merits and "culpability"): These factors focus on violations of ERISA, which would only apply to defendants because while a plaintiff might be in error in bringing a case, a plaintiff would rarely be "culpable."
- Factor 2 (ability to pay): This factor would apply far more often to an individual plaintiff than to a defendant, particularly a defendant employer or insurer.
- Factor 3 (deterrence): This factor would rarely support a fee award against an individual plaintiff unless a plaintiff's claim was utterly frivolous.
- Factor 4 (benefitting all participants in an ERISA plan or resolution of a significant legal issue): This factor might support an award of attorney's fees to a defendant in some cases where the defendant establishes an interpretation that

> clarifies the law or benefits participants, but "in general, the fourth factor is significant in determining the benefits conferred in a suit brought by ERISA plaintiffs, rather than the benefits of dismissing a meritless ERISA suit."

Id. at 720-21. The Seventh Circuit summarized its conclusions about the five factor test as follows:

> We emphasize . . . that refusal to award attorney's fees and costs to ERISA defendants, even 'prevailing' defendants, would rarely constitute an abuse of discretion. Although the five factors used as guidelines above do not explicitly differentiate between plaintiffs and defendants, consideration of these factors will seldom dictate an assessment of attorneys' fees against ERISA plaintiffs.

Id. at 719-20.

Three years later, the Seventh Circuit again addressed a defendant's petition for attorney's fees under ERISA in *Bittner v. Sadoff & Rudoy Industries,* 728 F.2d 820 (7th Cir. 1984). The court again observed that the five factor test "is oriented toward the case where the plaintiff rather than the defendant prevails and seeks an award of attorney's fees." *Id.* at 829. The court applied a "substantially justified" test to the defendant's request for fees whereby a court measures whether the losing party's position was "substantially justified" to determine whether to award attorney's fees. *Id.* However, even though the five factor test is admittedly a test biased toward

plaintiffs, the court still applied the five factor test to determine if "special circumstances" existed to deny the defendant's petition for attorney's fees. *Id.* at 830. *See also Elliot v. Fortis Benefits Ins. Co.,* 337 F.3d 1138, 1148 (9th Cir. 2003) (the five factor test should be "liberally construed" in favor of successful plaintiffs).

This is not to say that defendants, whomever they may be, have never obtained attorney's fees under ERISA. However, with the prevailing five factor test already working against them, defendants' fee awards are so rare that most defendants will not even bother to incur the expense of a fee petition even when they win on every substantive issue. To make matters worse, some circuits apply at least a "modest presumption" in favor of awarding attorney's fees to prevailing plaintiffs. *See, e.g., Elliot v. Fortis Benefits Ins. Co., supra* (plaintiffs are typically awarded attorney's fees if successful, absent special circumstances); *Hess v. Hartford Life & Acc. Ins. Co.,* 274 F.3d 456, 463 (7th Cir. 2001) (modest presumption in favor of successful plaintiff). Other circuits have held that as a general rule, attorney's fees will not be awarded in favor of a successful defendant. *See, e.g., Celardo v. Greater New York Automobile Dealers Health & Welfare Trust,* 318 F.3d 142, 147 (2d Cir. 2003); *Marquardt v. North American Car Corp., supra*. Still others have held that there is no presumption in favor of a prevailing plaintiff, although these circuits still apply the five factor test. *See, e.g., Moon v. UnumProvident Corp.,* 461 F.3d 639, 642 (6th

Cir. 2006); *Martin v. Arkansas Blue Cross and Blue Shield,* 299 F.3d 966, 971-72 (8th Cir. 2002). In practice, and in spite of Congress' requirement that attorney's fees be available to "either party," defendants' chances of recovering attorney's fees are very low and are generally limited to situations where the plaintiff's claim is deemed frivolous and/or the conduct of plaintiff's counsel is egregious. *See, e.g., Moore v. Lafayette Life Ins. Co.,* 458 F.3d 416, 445-47 (6th Cir. 2006) (award of 50% of defendant's attorney's fees is affirmed where plaintiff and his attorney submitted "unreliable" briefs and pursued frivolous claims; sanctions also awarded due to actions of counsel under 28 U.S.C. §1927); *Stark v. PPM America, Inc.,* 354 F.3d 666, 674 (7th Cir. 2004) (fees awarded to defendant where plaintiff's position was not "substantially justified").

C. ELIMINATION OF A REQUIREMENT THAT A PARTY ACHIEVE SOME SUCCESS ON THE MERITS WOULD ONLY EXACERBATE THE UNBALANCED APPLICATION OF ERISA'S FEE-SHIFTING PROVISION, CONTRARY TO THE INTENT OF CONGRESS.

The point of this background information is twofold. First, it demonstrates that the balanced regulation that Congress sought to achieve in ERISA generally, and in the fee-shifting provision specifically, has not been carried out by the courts. The five factor test is most to blame for this failing because, as the Seventh Circuit pointed out nearly thirty years

ago, that test is geared toward awarding fees to plaintiffs, not defendants. There is no generally accepted standard applicable to defendants' fee claims except for those jurisdictions where courts have expressed that defendants simply will not be awarded fees absent extreme circumstances. Second, when applied to this Court's consideration of a prevailing party standard for attorney's fees awards under ERISA, it should be understood that elimination of such a requirement that there be some success on the merits will only increase the chances for plaintiffs to recover fees, will result in greater exposure for defendants even when they prevail on the substantive issues in a case, and will not provide defendants with any greater opportunity to recover fees because, as a practical matter, the deck is already stacked against defendants despite Congress' intent that fees should be awarded to "either party."

When petitioner and her *amici* advocate for elimination of a prevailing party standard, they are really saying that *plaintiffs* should not have to prevail in order to recover attorney's fees under ERISA. Defendants, whether or not they are successful, are already subjected to a much higher hurdle for recovering attorney's fees. Any ruling that eliminates a prevailing party standard will not restore the balance intended by Congress nor would it help defendants one bit.

Petitioner's *amici* are wrong when they suggest that a prevailing party requirement gives defendants a "green light" to deny benefits with no consequences.

Given the current status of attorney's fees awards under ERISA, a successful plaintiff has a much higher likelihood of recovering attorney's fees than a successful defendant. Defendants who are evaluating the merits of a claim for benefits are well aware of this fact. In other words, defendants who deny claims know that if the claimant brings an action in court and is successful, it is more likely that the plaintiff will recover her fees than that the defendant will recover its fees if it is successful. Elimination of a standard that requires some success on the merits will not change this fact or make it more likely that defendants will pay claims for fear of facing a fee petition, unless petitioner and her *amici* are suggesting that defendants should pay claims that are not payable under the terms of the ERISA plan simply to avoid a fee petition by a losing plaintiff, for that would require defendants to violate their fiduciary duties to pay claims only when the terms of the plan require payment. 29 U.S.C. §1104 ("a fiduciary shall discharge his duties . . . in accordance with the documents and instruments governing the plan"). *See also Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 142 (1985) (ERISA fiduciary duties are primarily concerned with protecting the integrity of the plan); *Barnhart v. Unum Life Insurance Company of America,* 179 F.3d 583, 589 (8th Cir. 1999) ("A company failing to conduct proper inquiries into claims for benefits breaches its duty to all claimants as a fiduciary of the benefit funds when it grants claims to unqualified claimants.").

Petitioner's *amici* also ignore the impact on defendants of the elimination of a requirement for some success on the merits. Petitioner and her *amici* concede that the absence of such a requirement means that a plaintiff who loses can still recover fees, although they suggest that this is not likely to happen very often. That is beside the point. The point is that under petitioner's theory, even if a defendant incurs substantial attorney's fees and costs to successfully defend an ERISA dispute, it must still face the prospect of incurring even more attorney's fees and costs to defend against a fee petition filed by the losing plaintiff even though, under the current application of ERISA's fee-shifting provision, the defendant has little hope of recovering its own fees and costs. Indeed, in many cases, particularly where attorney's fees exceed the amount of benefits at issue, a losing plaintiff will have little or nothing to lose by filing such a petition. There is no risk or deterrent because the plaintiff will know that even if her petition for attorney's fees is denied, it is unlikely that she will be required to pay the defendant's attorney's fees and costs.

This unbalanced system – where plaintiffs and defendants are subjected to different standards such that plaintiffs can routinely recover attorney's fees and defendants can only rarely recover fees, at least absent proof of egregious conduct – was not what Congress intended when it provided that attorney's fees and costs should be available to "either party." This system also works against Congress' broader

goal of establishing a balanced regulatory regime to encourage the establishment of employee benefit programs because the added costs of defending against these fee petitions (and the possibility of having to pay fees even in cases where a plaintiff loses) ultimately falls back on the sponsoring employers and provides yet another obstacle for employers who seek to establish such plans.

D. THE FIVE FACTOR TEST SHOULD BE ELIMINATED AND REPLACED BY A MORE BALANCED TEST.

This case also presents a prime opportunity to discard the five factor test. As discussed in respondent's brief, this test was created by the Tenth Circuit out of whole cloth in *Eaves v. Penn, supra.* By design and application, it is contrary to the balance that Congress sought by making attorney's fee awards available to "either party." Maybe the test proposed by respondent will still result in practice with plaintiffs recovering their fees more often than defendants, but at least the test proposed by respondent starts plaintiffs and defendants on the same footing. It is certainly a better reflection of congressional intent under ERISA.

CONCLUSION

For the reasons stated herein and in respondent's brief, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

MARK E. SCHMIDTKE*
Counsel of Record
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
225 Aberdeen, Suite F
Valparaiso, IN 46385
(219) 242-8668
mark.schmidtke@ogletreedeakins.com

JOHN R. KOURIS
Executive Director
DRI – THE VOICE OF THE DEFENSE BAR
55 West Monroe
Suite 2000
Chicago, IL 60603
(312) 795-1101

March 31, 2010