

Supreme Court Rejects “Prevailing Party” Standard for ERISA Fee Awards

BY ROBIN SANDERS

On May 24, 2010, the U.S. Supreme Court issued its decision in *Hardt v. Reliance Standard Life Insurance Company*, which interpreted the parameters of ERISA’s discretionary fee-shifting provision, 29 U.S.C. § 1132(g)(1). In a unanimous decision (Justice Stevens concurring), the Court held that ERISA § 502(g)(1) permits lower courts the discretionary authority to award attorney’s fees to either party, so long as the party has “achieved ‘some success on the merits.’” [Quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983)]. The Court reached this decision by interpreting § 502(g)(1)’s “plain and unambiguous statutory language,” concluding that § 502(g)(1) does not limit the award of statutory attorney’s fees to prevailing parties, but instead, gives courts “‘discretion’ to award attorney’s fees ‘to either party.’” [Emphasis in original]. The Court commented that, based on the language contained in ERISA’s other fee-shifting provision (§ 502(g)(2)(D)), which permits the recovery of attorney’s fees for “plaintiffs who obtain ‘a judgment in favor of the plan,’” Congress clearly intended to give either party the ability to recover attorney’s fees pursuant to § 502(g)(1).

After concluding that either party may recover fees pursuant to § 502(g)(1), the Court then addressed the standard under which such fees may be recovered. Based on its prior precedent in *Ruckelshaus*, the Court held that, although a party need not be a “prevailing party” in the traditional sense of the phrase, a party must have had “some degree of success on the merits.” To satisfy the “some degree of success on the merits” standard, a claimant must have achieved more than “trivial success on the merits” or “a purely procedural victor[y].” [Quoting *Ruckelshaus*, alterations in original]. A district court may exercise its discretion to award attorney’s fees when it “can fairly call the outcome of the litigation some success on the merits” Because the outcome of the action was largely dependent on the specific facts of the *Hardt* case, the “some degree of success on the merits” standard enunciated by the Court will no doubt continue to be litigated and clarified through future decisions in the lower courts.



Scribner, Hall & Thompson, LLP

What Is an Annuity?

BY SUSAN J. HOTINE & JANEL C. FRANK

Last year, the IRS issued three rulings (PLRs 200949007 (Jul. 30, 2009), 200949036 (Jul. 30, 2009) and 201001016 (Sep. 14, 2009) that address whether contracts for stand-alone withdrawal benefits, referred to as “contingent annuity contracts,” will be treated as annuity contracts under I.R.C. § 72. In each ruling, an individual (“owner”) will purchase a certificate of a group contract, which qualifies as an annuity under state law. The certificates will be sold to the owner in conjunction with opening an investment account with a financial institution (“sponsor”). Investments for the account are prescribed by the insurance company and are limited to publicly-traded securities. The owner is permitted to withdraw a specified annual amount from his account and will receive that amount as periodic payments for life if/when the account is reduced to zero for any reason (other than the withdrawal of amounts in excess of the permitted annual withdrawal amount). The certificate has no cash surrender value.

Because “annuity” and “amounts received as an annuity” have not been defined, the IRS considered other sources to determine whether the certificates in these rulings would be considered annuities under I.R.C. § 72(a). Significantly, however, the IRS did not seem to consider I.R.C. § 72(s), which prohibits treatment as an annuity unless the contract provides certain death-of-the-owner distribution rules. Since its adoption, practitioners have questioned whether specific contract language is required under I.R.C. § 72(s) and whether death-of-the-owner distribution rules have any application to contracts with no cash value. One might conclude, by lack of its being mentioned, that I.R.C. § 72(s) is not relevant for the contracts in these rulings, perhaps because they have no cash value. We understand, however, that the IRS did require the I.R.C. § 72(s) language in at least one of the group contracts, even though there is no mention of this fact in any of these rulings.