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Ann C. Bertino

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THE NEED FOR A MANDATORY AWARD OF ATTORNEY’S FEES FOR PREVAILING PLAINTIFFS IN ERISA BENEFITS CASES*

The Employee Retirement Income Security Act of 1974 (ERISA)\(^1\) was passed “to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries.”\(^2\) In particular, the intent to protect plan participants is evident from the statute’s explicit duties for fiduciaries of employee benefit plans and the requirement for “appropriate remedies, sanctions, and ready access to the Federal Courts.”\(^3\) The Department of Labor (DOL) and the Internal Revenue Service (IRS), as well as private litigants, share enforcement of the rights guaranteed under ERISA.\(^4\) Significantly, section 502(g)(1) of ERISA emphasizes the role of the private litigant because courts may award reasonable attorney’s fees to either party in benefits cases.\(^5\)

Fee-shifting, where one party bears the expense of the other party’s legal fees, arose out of the general American rule that each party should bear its own litigation costs.\(^6\) Today, parties pay their own fees unless a statute authorizes fee-shifting, a party litigates unfairly or, sometimes, where a plaintiff successfully brings a suit on behalf of a class.\(^7\) Such fee-shifting was provided in section 502(g)(1) of ERISA to make the federal courts accessible to

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* First Place, John H. Fanning Labor Law Writing Competition, Columbus School of Law, The Catholic University of America, 1992.
3. Eaves v. Penn, 587 F.2d 453, 457 (10th Cir. 1978) (citing ERISA § 2(b), 29 U.S.C. § 1001(b)).
5. 29 U.S.C. § 1132(g)(1). Specifically, this section states that “the court in its discretion may allow a reasonable attorney’s fee and costs of action to either party.” Id.
7. See infra notes 36-42 and accompanying text.
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participants of modest means.\(^8\) Ideally, when a plaintiff prevails in an ERISA action for denial of benefits, the plaintiff should be made whole for the injury caused by denial of benefits.\(^9\) However, in reality, the statute fails to address the plaintiff’s costs in enforcing his rights under ERISA.\(^10\) The award of attorney’s fees in ERISA cases is not mandatory.\(^11\) Rather than providing a truly “make whole” remedy, the statute gives the courts wide discretion to determine what amount of fees, if any, are reasonable.\(^12\)

Most courts have adopted a five-prong test developed by the United States Court of Appeals for the Tenth Circuit in \textit{Eaves v. Penn} \(^13\) to decide attorney’s fees awards.\(^14\) Alternatively, courts have employed standards for awarding attorney’s fees set forth in other federal statutes.\(^15\) By leaving the question of attorney’s fees up to the court’s discretion, Congress has fostered an unpredictable and inconsistent standard that produces difficulties for plaintiffs who are trying to vindicate rights created by ERISA.\(^16\) Specifically, the discretion to award reasonable fees in ERISA benefits cases fails to protect plaintiffs and additionally fails to provide sufficient incentive for att-

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\(^8\) See Smith v. CMTA-IAM Pension Trust, 746 F.2d 587, 589-90 (9th Cir. 1984) (appealing a court order denying attorney’s fees to a plaintiff who was entitled to such fees under a settlement agreement in an action under ERISA). Without such a provision, potential litigants of modest means would be unable to afford the costs to litigate their rights under ERISA.

\(^9\) Unlike benefits cases, in fiduciary violation cases the prevailing plaintiff is made whole. See, e.g., GIW Indus. v. Trevor, Stewart, Burton & Jacobsen, Inc., 10 Employee Benefits Cas. (BNA) 2290, 2305 (S.D. Ga. 1989) (holding that an investment management firm that breached its fiduciary duties under ERISA was required to restore trust beneficiaries to the position they would have occupied but for the breach), \textit{aff’d}, 895 F.2d 729 (11th Cir. 1990); Whitfield v. Tomasso, 682 F. Supp. 1287, 1305 (E.D.N.Y. 1988) (holding that the trustee of a fund who engaged in a prohibited transaction under ERISA was required to make the fund whole for losses sustained pursuant to § 409); Gilliam v. Edwards, 492 F. Supp. 1255, 1266 (D.N.J. 1980) (holding that the trustee of a pension fund who violated his duty of individual loyalty was required to make the plan whole).


\(^11\) \textit{Id.}

\(^12\) See supra note 5 and accompanying text.

\(^13\) 587 F.2d 453 (10th Cir. 1978).

\(^14\) See infra notes 61-66 and accompanying text.


\(^16\) See cases cited infra note 67.
torney's to take such cases. Given the modest means of most plan participants, the need for mandatory award of attorney's fees to prevailing plaintiffs is critical. In addition, the failure of the ERISA drafters to include a mandatory fee award for prevailing plaintiffs deters plaintiff's attorneys from becoming knowledgeable about ERISA law and taking on such cases. Therefore, the unpredictability of attorney's fees awards in the federal courts has essentially precluded most participants from bringing a benefits claim under section 502(g)(1). Moreover, ERISA's administrative procedures present a further impediment to benefits claims.

In order to bring an action under ERISA, a participant must first exhaust all administrative remedies available under the plan. After a participant or


Individuals often . . . face an insurmountable problem. Plaintiff's attorneys are reluctant to take such cases—the work is complex and there is little return for the effort. Those with small claims have little chance of finding professional assistance. Those with large claims, upon presenting a difficult case to an underdeveloped plaintiffs' bar, also often find a closed door. In essence, the individual is effectively denied access to a system that is intended to be largely self-enforcing.

Id.


Even the relatively small number of NELA member attorneys who take plaintiffs' ERISA cases are reluctant to take these individual benefit claims cases to court . . . .

[T]here is a good chance that no attorneys fees will be awarded by the court even if the case is won . . . .

Id.

NELA "is a nonprofit organization of over 850 lawyers in 40 chapters in 49 states." Id. at 1. The group acts as advocates for employee rights. "[M]embers concentrate on the representation of individual employees in employment, labor and discrimination matters. [A]lmost all [the] members encounter ERISA . . . in, their practices, and some . . . members specialize in representing employee benefit plan participants under ERISA." Id. As a result, Mr. Lewis, on behalf of NELA, is in a unique position to comment on the current status of both attorneys who take, and those who refuse to take, ERISA cases. Id.

19. See infra note 67 and accompanying text.

20. See Kross v. Western Elec. Co., 701 F.2d 1238, 1243-45 (7th Cir. 1983) (holding that because ERISA contains no statutorily defined administrative remedies, all administrative remedies specified within a plan must be exhausted before an action can be brought in federal court). There are, however, exceptions to this general rule. Remedies do not have to be exhausted where: 1) it would be futile to go through the administrative process, Amato v. Bernard, 618 F.2d 559, 568 (9th Cir. 1980) (recognizing the futility exception where a plaintiff brought suit against pension fund trustees for declaration of parties' rights and duties under the trust plan and for money damages for trustees' bad faith dealings with plaintiff); 2) a statutory right is involved, Lucas v. Warner & Swasey Co., 475 F. Supp. 1071, 1074 (E.D. Pa. 1979) (holding that where there is a showing of irreparable harm, which is either job-related or will affect the exercise of rights under the Labor Management Reporting and Disclosure Act,
beneficiary has exhausted the remedies available under the plan.\textsuperscript{21} ERISA provides the right to go directly to federal court.\textsuperscript{22} Once in federal court, the statute requires deference to the decision of the plan administrator unless benefits were denied arbitrarily or the plan administrator violated his fiduciary obligations under ERISA.\textsuperscript{23} Currently, although a prevailing plaintiff may be awarded attorney’s fees for representation during litigation, legal costs incurred during pre-trial exhaustion of plan administrative remedies are rarely included in these awards.\textsuperscript{24} Furthermore, ERISA’s legislative history is virtually silent concerning this fee-shifting provision.\textsuperscript{25} All of these factors mitigate against a participant enforcing his rights under ERISA.\textsuperscript{26} At present, there is no movement on the part of the DOL, the IRS, or Congress to clarify this uncertainty.\textsuperscript{27}
This Comment first discusses the history of fee-shifting in the United States. It then provides an overview of the sparse legislative history of ERISA and the subsequent tests used by the circuits when awarding attorney’s fees in ERISA cases. Next, this Comment analyzes the circuit courts’ interpretation of ERISA’s fee-shifting provision and the negative effects of the current state of the law. This Comment then discusses the reasons that the law continues to exist in its present state. Finally, this Comment concludes that in order to fulfill the purpose of ERISA, the statute must be amended to include a mandatory award of attorney’s fees to plaintiffs who prevail at trial. Only mandatory awards will protect plaintiffs’ rights to bring legitimate ERISA claims, encourage attorneys to accept these cases, and prompt the development of expertise in dealing with the intricacies of ERISA claims.

I. HISTORY

A. Legislative History of ERISA

The legislative history of ERISA fails to clarify the intent behind ERISA’s fee-shifting provision. Most likely a fee-shifting provision was included in ERISA to equalize the strengths of the parties and to provide plaintiffs of modest means with sufficient incentive to enforce their rights under the statute. Because of the Congressional silence regarding fee-shifting, the courts’ decisions in ERISA cases draw on a variety of sources, including other statutes, when justifying the award or denial of attorney’s fees.

Newman v. Piggie Park Enters., 390 U.S. 400 (1968) (per curiam). See S. REP. NO. 1011, 94th Cong., 2d Sess. 4-5 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5912. [hereinafter 1976 SENATE REPORT]. The Supreme Court in Newman held that the prevailing party should ordinarily recover attorney’s fees unless special circumstances would render such an award unjust. Under § 1988, a court, in its discretion, may award a prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.


29. See also Thomas D. Rowe, Jr., The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 DUKE L.J. 651, 664, 666.

30. See, e.g., Gray v. New England Tel. & Tel. Co., 792 F.2d 251, 258 (1st Cir. 1986) (rejecting the Seventh Circuit’s EAJA standard and instead using the five-factor test to deny fees to defendant); Bittner v. Sadoff & Rudoy Indus., 728 F.2d 820, 829 (7th Cir. 1984) (comparing the presumption in favor of a prevailing plaintiff under the Fees Awards Act to the five-factor test and reversing an award of attorney’s fees to prevailing defendants in an ERISA case).
B. Fee-Shifting Under the Common Law

Generally, litigants in American courts are expected to pay their own attorney's fees and costs of litigation. The leading Supreme Court case enforcing the "American Rule" is *Alyeska Pipeline Service Co. v. Wilderness Society*. In *Alyeska*, the Wilderness Society and other environmental groups brought an action to prevent the construction of the trans-Alaska pipeline. The Court of Appeals had awarded the groups' attorneys' fees based on the theory that the groups were "performing the service of a 'private attorney general.'" The Supreme Court reversed, holding that the American Rule requires each party to pay the cost of its own legal representation.

The *Alyeska* Court reasoned that because only Congress, and not the courts, can authorize such an exception to the American Rule, fees may no longer be predicated on the "private attorney general" doctrine. The Supreme Court refused to support the award of fees to prevailing parties based on public policy and held that the prevailing plaintiff could not recover fees from the respondent.

31. The practice of litigants bearing the cost of their own legal representation is commonly called the American Rule. See Rochelle C. Dreyfuss, Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346, 347 (1980) (discussing the American Rule and its origins). The American Rule is distinguished from the English Rule, which generally requires the losing party to pay reasonable attorney's fees. See RICHARD M. JACKSON, THE MACHINERY OF JUSTICE IN ENGLAND 518 (7th ed. 1977). Other European countries employ a similar rule that at least part of the prevailing party's costs are to be paid by the litigant who lost at trial. See WERNER PFENNINGSTORF, LEGAL EXPENSE INSURANCE: THE EUROPEAN EXPERIENCE IN FINANCING LEGAL SERVICES 39 (1975).

33. *Id.* at 241.
34. *Id.*
35. *Id.* at 270. The Court rejected the "private attorney general doctrine." *Id.* at 270 n.46. *Alyeska* effectively ended a court's power "to award attorney's fees to a prevailing party whenever they 'deem the public policy furthered by a particular statute important enough to warrant the award.'" *Cubita et al., supra* note 6, at 285-86 (quoting *Alyeska*, 421 U.S. at 263). The private attorney general doctrine originated in *Newman v. Piggie Park Enters.*, 390 U.S; 400 (1968) (per curiam). There, the Court held "that one who succeeds in obtaining an injunction under . . . Title [II] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 402. The Court reasoned that the plaintiff, in bringing the law suit, does so not only for himself, but acts as a private attorney general. *Id.; see also Cubita, et al., supra* note 6, at 284-85 (explaining how the reasoning in *Newman* has been followed in numerous lower federal courts); Robert L. Weiner, Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in Public Interest*, 24 HASTINGS L.J. 733, 742-48 (1973) (same).
36. *Alyeska*, 421 U.S. at 262-63; *see also Cubita et al., supra* note 6, at 285.
37. *Alyeska*, 421 U.S. at 270-71 (citations omitted). The Court stated:

We do not purport to assess the merits or demerits of the "American Rule" with respect to the allowance of attorneys' fees. It has been criticized in recent years, and courts have been urged to find exceptions to it. It is also apparent from our national
After *Alyeska*, an exception to the general rule against fee-shifting is permitted only if there is a specific provision in a federal statute that provides for such fee-shifting, or in two narrow instances. First, under the “bad faith exception,” a court may order a party who has litigated unfairly to pay the attorney’s fees of the other party. Second, under the “common fund doctrine,” a court has the power to award fees to a plaintiff “where a plaintiff has successfully maintained his suit, usually on behalf of a class, that benefits a group of others in the same manner as himself.” The use of the common fund doctrine is generally limited to actions in which no statutory guidelines exist concerning the award of attorney’s fees. Most federal statutes, since *Alyeska*, have adopted a fee-shifting provision.

Statutes which authorize the award of attorney’s fees have been promulgated largely to address two concerns—equity and incentives. Statutory fee-shifting provisions both encourage plaintiffs to bring actions under the statutes to enforce their rights and provide the incentive necessary to encourage attorneys to learn and practice the applicable area of law.

### C. Fee-Shifting Statutes

Several statutes permit substantial judicial discretion for courts to award fees to either party, whether or not the party has prevailed. Still other experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances. But the rule followed in our courts with respect to attorneys’ fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature’s province by redistributing litigation costs in the manner suggested by the respondents and followed by the Court of Appeals. The decision below must therefore be reversed.

*Id.*

38. See *Cubita et al.*, *supra* note 6, at 286.

39. See *Dreyfuss*, *supra* note 31, at 349 n.22 (discussing *Fed. R. Civ. P.* 37(b), (c) and 41(d), where the bad faith exception has been partially codified, and *Fed. R. App. P.* 38, which awards fees against an appellant for frivolous appeals).


41. *Eaves v. Penn*, 587 F.2d 453, 464 (10th Cir. 1978) (holding that because of ERISA’s fee provision, application of the common fund doctrine is not usually necessary).

42. See *infra* notes 44-45 and accompanying text.

43. See *Rowe*, *supra* note 29, at 653-66. Rowe discusses several theories used to justify fee-shifting, including the following rationales: to assure fairness, to compensate legal injury, to act as a punitive measure, to equalize the strengths of the parties, and to provide economic incentives. *Id.*

44. See, *e.g.*, *Clean Air Act § 305(f), 42 U.S.C. § 7607(f) (1988)* (explaining that in any judicial proceeding under this section, the court may award costs of litigation—including reasonable attorney and expert witness fees); see also *Cubita et al.*, *supra* note 6, at 320 n.205 (listing several different statutes which use such a fee-shifting standard).
statutes remove all discretion and require a mandatory award of attorney's fees to the prevailing party.\textsuperscript{45} The most familiar fee-shifting statute is the Civil Rights Attorney's Fees Award Act of 1976 (Fees Award Act).\textsuperscript{46} The United States Supreme Court has construed the Fees Award Act in favor of both prevailing plaintiffs and prevailing defendants.

Under the Fees Award Act, the court has found that the prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."\textsuperscript{47} Therefore, fees are awarded based on Congressional desire to encourage harmed individuals to seek remedial relief, and are only denied if circumstances are present that would make an award unjust.\textsuperscript{48}

The Supreme Court's approach to prevailing defendants, on the other hand, has been more exacting. The Court enunciated the standard to be applied to cases involving a prevailing defendant in \textit{Christiansburg Garment Co. v. EEOC}.\textsuperscript{49} In \textit{Christiansburg}, the EEOC sued the Christiansburg Garment Company based on an individual's charge of racial discrimination.\textsuperscript{50} The Court granted the company summary judgment, but refused to award attorney's fees because the EEOC's action was not "unreasonable or meritless,"\textsuperscript{51} and the Commission's interpretation of the applicable law was not "frivolous."\textsuperscript{52} In this Title VII case, the Court expanded the traditional bad faith standard to include the requirement that a plaintiff's lawsuit must be "frivolous, unreasonable or without foundation, even if not brought in subjective bad faith."\textsuperscript{53} Writing for a unanimous court, Justice Stewart reasoned that awarding fees to a prevailing plaintiff guards them "against a

\textsuperscript{45} See, e.g., Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 626(b) (1976); see also Cubita et al., \textit{supra} note 6, at 321 n.206 (listing 17 such statutes).

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fees as part of the costs.

\textit{Id.} (citations omitted).


\textsuperscript{48} \textit{Id.}

\textsuperscript{49} 434 U.S. 412 (1978).

\textsuperscript{50} \textit{Id.} at 414.

\textsuperscript{51} \textit{Id.} at 423.

\textsuperscript{52} \textit{Id.} at 424.

\textsuperscript{53} \textit{Id.} at 421. This standard was adopted for civil rights cases in Hughes v. Rowe, 449 U.S. 5, 14 (1980). In \textit{Hughes}, petitioner filed an action against Illinois correction officers under 42 U.S.C. § 1983. \textit{Id.} at 8. The complaint was dismissed and the district court ordered the petitioners to pay counsel fees under 42 U.S.C. § 1988. \textit{Id.} The Court of Appeals for the Seventh Circuit affirmed. \textit{Id.} at 9. The Supreme Court reversed and adopted the "frivolous, unreasonable or without foundation" standard of \textit{Christiansburg}, for use in awarding attorney's fees against petitioners in civil rights cases. \textit{Id.} at 2; see also Cubita et al., \textit{supra} note 6, at 302 (discussing the application of the bad faith rule and the cases in which it was applied).
violator of federal law. . . . [T]hese policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant."54

As illustrated by the cases mentioned above, the bifurcated standard under the Fees Award Act favors the prevailing plaintiff.55 While the rule of the Fees Award Act is often applied to benefit claims cases under section 502(g)(1) of ERISA, courts rarely acknowledge application of the Fees Award Act standard.56 Rather, different standards are applied to interpret ERISA's fee-shifting statute, resulting in inconsistent fee awards from circuit to circuit.57

D. Case Law: How Courts Determine the Award of Fees

I. The Tenth Circuit: The Eaves Test

Under section 502(g)(1), courts have discretionary power to award fees to either party.58 Because there are no guidelines in the Act's legislative history or in the fee-shifting provision,59 courts look to many different sources when developing a test to determine fee awards.60

The United States Court of Appeals for the Tenth Circuit has developed the test most often adopted by the circuits. In Eaves v. Penn,61 a participant

54. Christiansburg, 434 U.S. at 418-19; see also Cubita et al., supra note 6, at 302 (discussing Justice Stewart's unanimous opinion and distinguishing different standards to be applied when awarding fees to a prevailing plaintiff).


56. The language of ERISA § 502(g)(1) allows the court to award attorney's fees to either party. However, as with the bifurcated standard under the Fees Award Act, the courts rarely award fees to a prevailing defendant unless there is evidence of bad faith on the part of the plaintiff, or the plaintiff has brought a frivolous or unmeritorious suit. See Madden v. ITT Long Term Disability Plan for Salaried Employees, 914 F.2d 1279, 1287 (9th Cir. 1990) (holding for defendant on the merits, but refusing to award fees to the defendant), cert. denied, 111 S. Ct. 964 (1991); Hope v. International Bd. of Elec. Workers Local Union 1245, 785 F.2d 826, 831 (9th Cir.) (granting partial summary judgment in favor of the defendant but refusing to reverse the denial of attorney's fees to the defendant), cert. dismissed, 478 U.S. 1039 (1986).

57. See infra note 67 and accompanying text.

58. 29 U.S.C. § 1132(g)(1) (1988); see supra note 5 (setting forth the specific language of the section).

59. See 1973 House Report, supra note 28, at 5107. The legislative history provides only that "[i]n any action brought by a participant or beneficiary, the court may allow reasonable attorney's fees or costs to either party." Id.

60. For example, the Seventh Circuit has adopted the EAJA, 28 U.S.C. § 2412 (d) (1988), standard for awarding fees to a prevailing defendant. Bittner v. Sadoff & Rudoy Indus., 728 F.2d 820, 830 (7th Cir. 1984) (applying the Eaves test in much the same way as EAJA when plaintiff appealed the award of attorney's fees to a prevailing defendant).

61. 587 F.2d 453 (10th Cir. 1978). Commonly known as the Eaves test, the majority's five-prong test is accepted by all circuits. See infra notes 62-92 and accompanying text, for a detailed explanation of the acceptance of the Eaves test by various circuits.
in an employee profit sharing plan, along with the Secretary of Labor, brought suit against the trustee of the plan for failure to act solely in the interest of the plan's participants and beneficiaries as required by ERISA.\textsuperscript{62} The trial court awarded attorney's fees to the plaintiff; however, the Secretary of Labor contested the award.\textsuperscript{63} On appeal, the Tenth Circuit determined that the trustee failed to fulfill his fiduciary duty to the plan and required him to make the appropriate restorations to the plan.\textsuperscript{64} Additionally, the \textit{Eaves} court remanded the case to the district court for a determination of whether or not attorney's fees should be awarded.\textsuperscript{65}

The Tenth Circuit instructed the district court to base the determination of an award of attorney's fees on five factors: (1) the degree of the offending parties' culpability or bad faith; (2) the ability of the offending parties to personally satisfy an award of attorney's fees; (3) whether or not an award of attorney's 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.\textsuperscript{66} Today, most courts use the five-prong \textit{Eaves} test, or a close approximation, although each court's interpretation of the test has produced varying results.

2. Application of the \textit{Eaves} Test by Other Circuits

Although every circuit has adopted the \textit{Eaves} test, the test has been inconsistently applied.\textsuperscript{67} In particular, the Seventh and Ninth Circuits have ex-

\begin{itemize}
  \item \textsuperscript{62} Id. at 454. Section 404(a)(1) of ERISA requires one to act solely in the interest of § 29 U.S.C. § 1104(a)(1).
  \item \textsuperscript{63} \textit{Eaves}, 587 F.2d at 462.
  \item \textsuperscript{64} Id.
  \item \textsuperscript{65} Id. at 464-65.
  \item \textsuperscript{66} Id. at 453.
  \item \textsuperscript{67} The \textit{Eaves} test has been adopted in some form by all circuits. See Gray v. New England Tel. & Tel. Co., 792 F.2d 251, 257 (1st Cir. 1986) (holding that a former employer may prevail in an action for former employee for alleged refusal to provide notice of pension benefits in violation of ERISA under the \textit{Eaves} five-factor test); Miles v. New York State Teamsters Conference Pension & Retirement Fund Employee Benefit Plan, 698 F.2d 593, 602 (2d. Cir.) (reversing an award of attorney's fees to employees in an action against the benefit plan's trustees for arbitrarily and capriciously denying the employees service credits, based on the \textit{Eaves} five-factor test), \textit{cert. denied}, 464 U.S. 829 (1983); Ursic v. Bethlehem Mines, 719 F.2d 670, 672-73 (3d Cir. 1983) (affirming award of attorney's fees, based on the \textit{Eaves} test, to plaintiff who prevailed in an action against employer by demonstrating continuous discharge of employees to deprive them of their pension rights); Davidson v. Cook, 567 F. Supp. 225, 242 n.33 (E.D. Va. 1983) (allowing reasonable attorney's fees to plaintiff who brought an ERISA action against the current and former trustees of a health and welfare benefit trust fund for breach of fiduciary duty pursuant to the \textit{Eaves} five-factor test), \textit{aff'd without opinion}, 734 F.2d 10 (4th Cir. 1984); Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1266 (5th Cir. 1980) (adopting the five-factor \textit{Eaves} test as a guideline to assist district courts in exercising their discretion in ERISA actions); Department of Labor v. King, 775 F.2d 666, 669 (6th Cir. 1985)
panded the factors beyond those of the *Eaves* test, in an effort to determine if and when attorney's fees should be awarded. The Sixth Circuit, which initially rejected the *Eaves* test, subsequently incorporated the factors in section 502(g)(1) attorney’s fee determinations. Relevant case law in the Ninth, Seventh and Sixth Circuits is discussed below to illustrate the disparate treatment applied by the circuits.

The United States Court of Appeals for the Ninth Circuit has held that no one factor of the *Eaves* test is dispositive, nor must all of the factors be met or even considered in every case. In *Carpenters Southern California Administration Corp. v. Russell*, the Court of Appeals for the Ninth Circuit vacated the district court’s award of attorney’s fees to the prevailing defendant and remanded the case for redetermination. The Ninth Circuit suggested that the five factors of the *Eaves* test should guide the court, but generally attorney's fees should not be charged against ERISA plaintiffs.

Even while adopting the *Eaves* test, the Ninth Circuit has held that the Fees Award Act approach should be applied to ERISA cases. In *Smith* (applying the *Eaves* test in an intervening action by trustee of employee benefits plan charging loans allowed by original trustee); *Leigh v. Engle*, 858 F.2d 361, 369-70 (7th Cir. 1988) (affirming use of the five-factor *Eaves* test as the standard when determining whether to award attorney's fees to a beneficiary of an employee's profit sharing trust who brought an action against a plan administrator for alleged violation of fiduciary duty under ERISA), *cert. denied*, 489 U.S. 1078 (1989); *Lawrence v. Westerhaus*, 749 F.2d 494, 496 (8th Cir. 1984) (holding a claimant is entitled to reapply for attorney's fees once case is reconsidered and adopting *Eaves* five-factor test as a guideline for district courts); *Hummel v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980) (adopting the *Eaves* five-factor test as a guideline to be used by the district courts when employer appealed decision that an anticompetitive clause in profit-sharing plan violated ERISA); *Fine v. Semet*, 699 F.2d 1091, 1095 (11th Cir. 1983) (affirming trial court's denial of attorney's fees based on *Eaves* test); *Lucas v. Teamsters Local 639 Pension Trust*, 2 E.B.C. 1998 (D.D.C. 1981) (adopting by reference the five-factor test in action by a plan).

68. Terpinas v. Seafarer's Int'l Union, 722 F.2d 1445, 1448 (9th Cir. 1984) (reversing and remanding decision denying attorney's fees to a union member who prevailed in an ERISA suit to recover a minimum disability pension).

69. See, e.g., *Carpenters S. Cal. Admin. Corp. v. Russell*, 726 F.2d 1410, 1416 (9th Cir. 1984) (remanding action of an administrator of a plan who brought action against an employer for failure to make benefit contributions and ordering court to consider the five-factor test, although cautioning that no one factor should be decisive).

70. 726 F.2d 1410 (9th Cir. 1984).

71. *Id.* at 1417.

72. *Id.* at 1416.

73. *Id.*

74. Under the Fees Award Act approach, the prevailing plaintiff should ordinarily recover attorney's fees. See *supra* notes 47-48 and accompanying text.

75. See *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984). In *Smith*, a prevailing plaintiff in an ERISA benefits denial case appealed the denial of attorney’s fees. The appellate court reversed and remanded for reconsideration of attorney's fees award under the Fee Awards Act approach. See also *McConnell v. MEBA Medical & Benefit Plan*, 759 F.2d 1401, 1406 (9th Cir. 1985) (reversing and remanding plaintiff's motion for attorney's fees).
v. CMTA-JAM Pension Trust,\textsuperscript{76} the court noted the remedial nature of ERISA and stated that prevailing employee plaintiffs should ordinarily recover attorney's fees from ERISA defendants.\textsuperscript{77} Such an award, the court reasoned, would deter trustees from opposing employee benefit claims where plaintiffs had a great chance of success.\textsuperscript{78} The \textit{Eaves} five-factor test continues to be cited as part of the court's rationale, but in fact is mentioned simply as a formality. What has resulted in the Ninth Circuit is a presumption in favor of a prevailing plaintiff.\textsuperscript{79}

The United States Court of Appeals for the Seventh Circuit, in contrast, provides a prevailing plaintiff and a prevailing defendant with the same opportunity to collect attorney's fees. In \textit{Bittner v. Sadoff & Rudoy Industries},\textsuperscript{80} a former employee appealed from summary judgment in favor of his former employer in a retaliatory termination action under ERISA. The circuit court affirmed the lower court's decision, but reversed the district court's award of attorney's fees to the defendants.

The Seventh Circuit, in \textit{Bittner}, adopted the standard of the Equal Access to Justice Act (EAJA) for determining whether prevailing defendants should collect attorney's fees.\textsuperscript{81} Under the EAJA standard, a court may award a prevailing defendant attorney's fees in an ERISA action unless the court finds the plaintiff's position to be "substantially justified or that special circumstances make an award unjust."\textsuperscript{82} The \textit{Bittner} court reversed the award of attorney's fees to the prevailing defendant and remanded the matter for further determination as to whether the facts justified such an award.\textsuperscript{83}

In contrast to other circuits, the Sixth Circuit initially maintained a pro-plaintiff position and expressly rejected the \textit{Eaves} test. Two years after the adoption of the five-factor test in \textit{Eaves v. Penn}, the United States District Court for the Eastern District of Michigan rejected that test in \textit{Central...
States Southwest Areas Pension v. Hitchings Truckings, Inc. The district court stated that the Eaves test would unnecessarily complicate the general rule that prevailing plaintiffs in an ERISA case should be awarded fees unless special circumstances existed that would make such an award unjust. The court reasoned that the key element to consider in an award of attorney's fees under section 502(g)(1) was the merit of the parties' position. Courts in the Sixth Circuit continued to award fees to prevailing plaintiffs, but refused to award fees to prevailing defendants in the absence of bad faith or a frivolous or unmeritorious suit.

In the past few years, however, the law in the Sixth Circuit has become inconsistent and confusing. Five years after Central States, the United States Court of Appeals for the Sixth Circuit, in Department of Labor v. King, suggested that the district court should look at the Eaves test as adopted by other circuits in similar section 502(g)(1) cases, to determine the appropriateness of attorney's fee awards. Subsequent cases interpreted King as adopting the Eaves five-factor test. Moreover, the adoption of the Eaves test destroyed the once strong presumption in the Sixth Circuit in favor of an award of attorney's fees to prevailing plaintiffs in benefits cases.

The inconsistent standards, as discussed above, are clearly inappropriate for a federal statute. Such inconsistencies deter potential plaintiffs and their attorneys from bringing ERISA actions. Further, substantial administrative and economic barriers also prevent plaintiffs from bringing ERISA benefit claims.

84. 492 F. Supp. 906, 910 (E.D. Mich. 1980) ( awarding fees to a pension fund that brought an action against an employer to recover past due contributions on behalf of employees).
85. Id. at 909.
86. Id.
87. See, e.g., Browning v. Gutches, 843 F.2d 1390 (6th Cir. 1988) (not recommended for publication) ( awarding prevailing plaintiff attorney's fees in an ERISA action involving retaliatory discharge); Martin v. General Motors Corp., 753 F. Supp. 1347, 1359 (E.D. Mich. 1991) ( denying employee attorney's fees based on lack of bad faith on part of employer when former employer prevailed in action by employee seeking benefits).
88. 775 F.2d 666, 670 (6th Cir. 1985).
89. Id. at 669.
90. See Sweet v. Consolidated Aluminum Corp., 913 F.2d 268 (6th Cir. 1990); Central States Pension Fund v. 888 Corp., 813 F.2d 760 (6th Cir. 1987).
II. ANALYSIS: THE NEGATIVE EFFECTS OF CURRENT LAW

A. Case Law: Disparity Among the Circuits

A recent trend of courts hearing ERISA cases has been to deny fees to a prevailing plaintiff based on a lack of evidence of the defendant's bad faith. The lack of a clearly enunciated standard with ERISA, in conjunction with ERISA's cloudy legislative history regarding section 502(g)(1), require courts to use their discretion when deciding whether or not to award attorney's fees. The result is the erratic, inconsistent, and conflicting interpretation of the Eaves test among the circuits.

A recent study of ERISA benefits cases in each circuit revealed strikingly disparate application of the Eaves test. In all of the circuits, there are cases where the appellate courts have generally ruled for the plaintiffs on the ERISA claim but have nonetheless denied fees. Many of these cases denied plaintiffs attorney's fees without justification. Some opinions suggest that the court denied attorney's fees because of the lack of bad faith on the part of the opposing party. In other cases, the court's denial was based upon the plaintiff's failure to prevail on all issues in the case. The study concluded that prevailing plaintiffs are commonly denied attorney's fees in many of the circuits and, further, that the courts apply no uniform standard when determining such denials.

B. Lack of Attorney Participation

Beyond judicially and legislatively imposed barriers, economic barriers present a further impediment to ERISA actions. Most potential plaintiffs

92. See, e.g., Blanton v. Anzalone, 760 F.2d 989, 992 (9th Cir. 1985) (denying a beneficiary, who prevailed in action against trustees for breach of fiduciary duty, attorney's fees based on lack of evidence that defendants acted in bad faith), appeal after remand, 813 F.2d 1574 (9th Cir. 1987); Paris v. F. Korbel & Bros., 751 F. Supp. 834, 840 (N.D. Cal. 1990) (denying attorney's fees, based on lack of bad faith on part of employer, to an employee who prevailed in an action against the employer for failure to advise employee of her Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) rights under ERISA). COBRA requires employers operating ERISA plans to offer continuation coverage to employees after they leave their jobs with that employer.
93. See supra note 67 and accompanying text (explaining various interpretations of awards of attorney's fees in ERISA benefits cases).
94. Id.
95. Id.
96. Id.
97. Id.
98. Id.
99. Id.
100. Id. at 7, 9.
101. Id. at 3-7, 12-13.
102. Bertino, supra note 91.
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are low-income pensioners seeking to recover a pension benefit. The national average private pension amount for men is $5,700 and for women is $3,240. These same individuals generally retire with less than $10,000 in total savings, not including their home and car, and receive an average of only $7,200 a year from Social Security. Therefore, given that most retired persons have little income, it is almost impossible for them to retain an attorney willing and capable of litigating a complex ERISA case. Specifically, because the relief sought is usually a pension benefit of a minimum monthly amount, it is often impossible for a plaintiff to retain an attorney on a contingency fee basis.

In addition to the award of attorney's fees for a prevailing plaintiff, the options available to potential plaintiffs include the pro bono or public interest bar. While the pro bono bar has grown in recent years, it is still inadequate to meet the needs of those covered in over 900,000 private pension plans. There is over 1.6 trillion dollars in private pension plans and 4.5 million dollars in private health and welfare benefit plans that are subject to regulation under ERISA. Private enforcement is an essential element to the regulation of ERISA. It is not foreseeable that the public interest and pro bono bar will grow at an exponential rate. Thus, in reality, only the small private plaintiff attorney bar, currently in existence, is available to meet the needs of an increasingly older population.

103. See Park, supra note 24, at 26 n.6.
104. Id.
105. Id.
106. In addition, punitive damages are generally not available under ERISA. See Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985) (holding that § 409(a) of ERISA does not provide a cause of action for extra-contractual damages in beneficiary claims for injury sustained due to improper or untimely processing of benefit claims); Attorney's Fee Phone Survey (August 1990) (results on file at the Pension Rights Center, Washington, D.C.) [hereinafter Phone Survey] (reporting that an attorney in the Tenth Circuit was denied attorney's fees as a sanction for seeking punitive damages after the Russell decision).
107. The Pension Rights Center in Washington, D.C., coordinates a national network of lawyers (National Pension Assistance Project (NPAP)) who are willing to take pension cases on behalf of plaintiffs. Most will offer their services either pro bono or at a reduced rate. Currently there are 375 attorneys representing all fifty states in the network.
108. Letter from Elizabeth Dole, Secretary of Labor, U.S. Dept. of Labor to Bob Dole, Minority Leader, U.S. Senate (1991) (on file with author) [hereinafter Dole Letter] (listing DOL's most recent proposals). This letter outlines draft bill language that would amend ERISA to provide additional incentive for participants and beneficiaries to exercise their rights under ERISA in fiduciary violation cases.
110. Raising a Bigger Pension Umbrella, U.S. NEWS & WORLD REP., May 13, 1991, at 18 (reporting that by the year 2030, the number of Americans over the age of 65 will double to over 46,000,000).
Although many attorneys specialize in ERISA, most represent employers, pension plans, or plan administrators. Even if the plaintiff bar grew, most retirees still could not afford to retain the services of one of these attorneys. Low income legal services somewhat fill the gap, but many of these service groups lack the resources necessary to bring complex ERISA actions in federal court. In addition, the complexity, substantial time commitment, and high cost of litigation deter private attorneys from taking these cases on a pro bono basis.

C. Agency Enforcement

The limited enforcement capacity of the DOL and the IRS undermines the protection of the rights of participants and beneficiaries. As the law presently exists, the defense has a great advantage over the plaintiff. The drafters of ERISA anticipated “vigorous enforcement by the Department of Labor.” In reality, the DOL lacks the necessary resources to monitor the nearly one million private pension plans that exist today. The DOL’s recent admission that it does not have the resources for effective enforcement of ERISA has sparked increased interest to seek out viable incentives for plaintiffs’ attorneys. Problems remain, however, regarding the DOL’s protection of ERISA participants and beneficiaries. Such problems are a constant source of controversy for the DOL, plaintiffs’ advocates, and industry participants in ERISA plans.

Under ERISA, there are two types of action that participants or beneficiaries can bring under section 502: an action against fiduciaries of the plan for fiduciary violations and an action to recover benefits under the plan. In a set of recent proposals, the DOL suggested that attorney’s fees and expert witness fees should become mandatory for prevailing plaintiffs in actions where a plan administrator has violated ERISA’s fiduciary obligations. The DOL did not suggest, however, that the same standard should apply to prevailing plaintiffs in benefits cases. Moreover, the DOL’s pro-

111. Michael Gordon, a Washington attorney who participated in the drafting of ERISA, stated: “’at the present time, things are out of balance . . . [because] the defense in ERISA actions has many greater advantages.’” STRASSER, supra note 109, at 1 (quoting Michael Gordon).
112. Id.
113. Id.
114. Id.
115. AARP Statement, supra note 17.
116. Id.
118. 29 U.S.C. § 1332 (a)(1)(A) & (B).
120. One reason for the DOL’s position may be the “powerful political forces” such as the large labor unions and employers who enjoy the benefits of the current law. Strasser, supra
posal regarding attorney’s fees in fiduciary actions creates the illusion that the DOL is addressing a serious problem. In reality, the proposal draws few objections from those in the employment industry because it addresses a non-issue. The DOL itself has the power to and, indeed, does bring most fiduciary actions, while most needworthy plaintiffs are only involved in benefits actions.\footnote{121}

The more typical ERISA action involves the denial of pension or health benefits to a participant who believes that he or she is entitled to such benefits.\footnote{122} The statute’s failure to extend the prevailing plaintiff standard to benefit denial actions, in addition to DOL’s refusal to lobby for such extension, continues to make these actions subject to the five-factor \textit{Eaves} test to determine if fees should be awarded.\footnote{123} As discussed above, this test has been applied inconsistently.\footnote{124} Accordingly, because of inconsistent case law, lack of attorney participation, and lack of substantial agency enforcement, participants hesitate to bring ERISA actions.\footnote{125}

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\footnote{109, at 1 (quoting Karen Ferguson). The DOL’s proposal to award fees in fiduciary actions may sound like a major step forward in support of plaintiffs. However, it is little more than a token gesture. Abuse of fee awards to prevailing plaintiffs is more common than fiduciary violations, which may be why industry lobbies intensively against mandatory fees for prevailing plaintiffs in benefits cases. While fiduciary violations are often serious, they are few and far between. As one practitioner has put it, “[i]n 17 years, I have yet to find a case where the employer was indeed ripping off the pension fund, and I get about 700 calls a year.” \textit{Id.} at 27 (quoting Ronald Dean, sole practitioner in Pacific Palisades, Cal. and a leading ERISA plaintiff’s attorney). Such increased enforcement provisions, however, are a favorite topic of the DOL, in contrast to the DOL’s lack of support for prevailing plaintiffs in benefits cases.

121. The AARP stated:

The Department of Labor has proposed requiring the award of reasonable attorney’s fees and expert witness fees to prevailing plaintiffs in successful fiduciary breach cases. . . . However, the Department has not gone far enough in its proposal by limiting such fees to fiduciary breach cases. The Department itself is charged with investigating fiduciary breach cases. While empowering individuals, through attorneys fees, to supplement Labor’s fiduciary enforcement efforts is entirely consistent with the purpose of ERISA, the individual should not be left without recourse for benefit claim cases.


122. There are over 900,000 private plans. \textit{See supra} note 108 and accompanying text. Relatively few pension and health benefit cases are brought each year. \textit{See supra} note 91. The logical conclusion is not that these plans are perfectly administered, but that few participants and beneficiaries are enforcing their rights because they cannot afford to do so.

123. \textit{See supra} notes 58-90 and accompanying text.


D. Resistance to Change

As described above, the ambiguity of the fee provision, the DOL's failure to challenge such ambiguity, and the inconsistent application of the *Eaves* test, have led to erratic fee awards. As a result, aggrieved participants have little incentive or means to pursue their claims. These facts raise the issue of why ERISA has not been amended to give meaning to its promise to protect the rights of plan participants and beneficiaries. Industry's strong resistance to any change of the current standard applied to participant's benefits claims provides the strongest opposition to amendment.

1. Industry Speaks Out Against Attorney's Fees

On the whole, the pension and benefits industry is adamantly opposed to the mandatory award of attorney's fees to prevailing plaintiffs in benefit cases. Testimony given before the ERISA Enforcement Working Group of the Department of Labor's Pension and Welfare Benefits Administration (PWBA Working Group) and the Senate Subcommittee on Labor (SSOL) by the Association of Private Pension & Welfare Plans (APPWP), Western Conference of Teamsters Pension Fund (Western Fund), American Counsel of Life Insurance/Health Insurance Association of America (ACLI) and the ERISA Industry Committee (ERIC) outlines industry's collective opposition to such changes as well as the basis for such opposition. Many of the concerns these groups articulated revolved around the perceived cost of reforms.

The APPWP stated that it preferred that the DOL not pursue its entire enforcement package, including attorney's fees awards, because there was no evidence that the DOL was not fulfilling its obligations under ERISA and because such a change could fuel additional amendments of ERISA beyond those intended by the DOL. Regarding the mandatory award of attorney

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126. *See supra* note 67 and accompanying text.
128. *Id.*
129. *Id.* at 19 (testimony of Western Conference of Teamsters Pension Trust Fund). The Western Fund's concern is that the attorney's fees proposals (for fiduciary cases) would result in costly litigation to the fund.
130. *Id.* at 8. This position is based on two assumptions: 1) the belief that there is no evidence that the DOL's enforcement of ERISA is lacking, and 2) the fear that the proposals may be seen by Congress as merely a first step that would need to be expanded, perhaps beyond what the DOL had originally intended.
131. *Id.* APPWP testified:

First, we do not believe that persuasive evidence has been presented that DOL is not doing its job as the enforcer of ERISA. . . . Second, we believe that no matter how
and expert witness fees to a prevailing plaintiff in fiduciary cases, the APPWP testified that it believed the current law furthered the purposes of ERISA without inviting unmeritorious suits and that the DOL’s suggested proposals went too far.132

The testimony given by the Western Fund opined that the changes proposed by the DOL will be costly to the plan and detrimental to plan participants.133 Western Fund stated: “[t]he costs of government regulation and of litigation are paid out of the fund, and reduce the assets available to pay benefits to participants.”134 Western Plan testified that it believed that the mandatory award of attorney’s fees would be used “as [a] lever to force the fund into settling cases.”135 It concluded that this would be harmful to plan participants because funds originally earmarked for benefits would be redirected to pay litigation expenses.136

The ACLI has also opposed the DOL’s mandatory attorney’s fee proposal.137 In its testimony, ACLI argued that “there is no evidence that the current discretionary attorney fee system is not working.” 138 The ACLI, like Western Fund, indicated that “[m]andatory fee awards would increase the cost of litigation for plans and [would] stimulate additional litigation over fee issues.”139 Therefore, the ACLI argued, the mandatory attorney’s fee proposal was not necessary and changing the current system to add such a provision would prove too costly.140

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well-intentioned or carefully crafted the DOL proposal may be, it will be seized upon by some in Congress as merely a modest first step which needs to be expanded well beyond what the DOL envisions or could even support.

Id. at 8 (alteration in original).

132. Id.

133. Id. at 19. The Western Fund’s concern is a valid one: Theoretically, the more money spent on litigation, the less money there is to spend on participant benefits.

134. Id.

135. Id. At first glance, fund depletion seems like a valid concern. However, because a plaintiff would first have to prevail to be awarded fees under the DOL’s proposals, the fund need not feel pressured into settling where it feels it is correct. Further, a participant who pursues a frivolous or unmeritorious claim, or who proceeds in bad faith, runs the risk of being sanctioned for attorney’s fees. See Fed. R. Civ. P. 11. Further, it is patently unfair that participants who have already paid, through their work and salary deductions, to have these benefits afforded them should have to pay additional costs to get them when they are unfairly denied.

136. DOL Report, supra note 127.

137. Id. at 29.

138. Id. The ACLI expressed concern about the perceived increases in cost should fees be mandatorily awarded to prevailing plaintiffs in fiduciary cases.

139. Id.

140. Id.
Finally, the ERIC testified not only in regard to the DOL proposals, but also to the problem with the pension benefit system as a whole. The ERIC stated that "[i]f there is anything fundamentally wrong with the employee benefit system today, it is the complex and constantly changing regulatory regime that has been imposed on employee benefit plans." The ERIC asserted that the current system used to award attorney's fees is adequate, and that inclusion of punitive damages was unnecessary without a showing of problems that warrant such a measure.

2. Plaintiffs Advocates’ Response: In Favor of Mandatory Fee Awards

Not surprisingly, public interest groups and plaintiffs' attorneys strongly support the adoption of a mandatory award of attorney's fees to prevailing plaintiffs in benefit cases. Groups such as The National Senior Citizens Law Center (NSCLC), the American Association of Retired Persons (AARP), and the Pension Rights Center (PRC) interact daily with retirees working to enforce pensioner's rights under ERISA. In testimony before Congress and agency working groups, these groups repeatedly advocated awarding attorney's fees to prevailing plaintiffs.

For example, the NSCLC testified before the SSOL that the mandatory award of attorney's fees to prevailing plaintiffs in benefits cases would provide the assurances necessary for plaintiffs to enforce their rights under ERISA. The AARP echoed these sentiments in statements to the PWBA.

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141. *Id.* at 30. ERIC stated that numerous studies have indicated that the government's enforcement efforts have been deficient. It believed that the problems with government enforcement should be the focus of attention, rather than encouraging private enforcement.

142. *Id.* Because of the potential cost involved, punitive damages are unpopular with industry groups such as ERIC.

143. The ERIC representative testified that:

[The DOL's] proposed incentives for new private litigation are unnecessary and will severely damage employee benefit plans. The courts are already authorized to award attorneys' fees and costs in appropriate cases. ... Although the [the DOL] has not included a punitive damages provision in its proposal, others are making punitive damage proposals. No showing has been made of any problems or abuses that justify draconian legislation of this kind.

*Id.*

144. *Id.* at 17; see also infra notes 145-66.

145. **1990 ERISA Hearings,** supra note 18, at 1 (statement of Vicki Gottlich for the National Senior Citizens Law Center (NSCLC)). Vicki Gottlich, the NSCLC representative, testified that:

The Department of [Labor] recognizes that participants need financial incentives in order to engage in litigation to enforce their rights under ERISA and their benefit plans. ... ERISA litigation is costly and time consuming; the final benefit received by many successful participants and beneficiaries is often less than the cost of the litigation. ... The assurance that [low income client's] costs would be compensated if they prevail would encourage them to pursue their rights, and encourage more attorneys to represent them.
AARP stated that most individuals face several barriers to bringing an ERISA action and are thus denied the opportunity to enforce their rights under that body of law. AARP opined that the lack of mandatory attorney's fees to prevailing plaintiffs in benefits cases effectively denied such individuals access to the system. AARP firmly believes that the complexity of ERISA, coupled with the high cost of litigation in federal court and the uncertainty of attorney's fees, preclude participants from finding an attorney to assist in bringing a benefits claim.

Herbert Eisenberg, a plaintiffs' attorney from New York, in his statement to the PWBA Working Group, suggested that the DOL's proposals failed to fulfill ERISA's legislative purpose. He reminded the committee that the award of fees to plaintiffs in benefit cases would occur only if the plaintiff prevailed. Mr. Eisenberg, a small firm practitioner who regularly deals with ERISA cases, stressed that the potential to receive attorney's fees would in no way lead him to litigate an unmeritorious complaint.

Id. at 7.

Id. at 1.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.
emphasized the awareness among the bar of the sanctions that are often imposed against an attorney who files a frivolous case.\footnote{153} Mr. Eisenberg additionally stated he firmly believed that the ability of plan participants to enforce their rights was directly related to their access to the courts.\footnote{154}

The National Employment Lawyers Association (NELA) has framed the problem as one of many barriers precluding participants' private enforcement of their rights under ERISA.\footnote{155} These barriers include: ERISA's broad preemption provisions;\footnote{156} the limited remedies available under ERISA—in particular the unavailability of punitive damages;\footnote{157} the standard of review in disputes over benefits;\footnote{158} the lack of a right to a jury trial;\footnote{159} and the lack of consistent awards of attorney's fees to a prevailing plaintiff.\footnote{160} Also, the NELA asserted that drawing a distinction between fiduciary duty and benefit claim cases was improper and worked against plaintiffs enforcing their rights under ERISA.\footnote{161} Finally, they concluded that "the absence of a

\begin{footnotes}
153. \textit{Id.} \\
154. \textit{Id.} at 4. \\
155. \textit{See 1990 ERISA Hearings, supra} note 18, at 8 (statement of Jeffrey Lewis) (summarizing all barriers to plaintiffs bringing an action). All groups that have testified on behalf of plaintiffs agree that these factors are significant barriers to a plaintiff bringing an action under ERISA. \\
156. 29 U.S.C. § 1144(a) (1988); \textit{see Pilot Life Ins. Co. v. Dedaux}, 481 U.S. 41, 46 (1987) (characterizing ERISA's legislative history and finding that ERISA's preemption provision is broad in scope and preempts most state laws). \\
157. \textit{Massachusetts Mut. Life Ins. Co. v. Russell}, 473 U.S. 134, 146-48 (1985) (holding that there is no express, or implied, authority under ERISA for the award of punitive damages or damages for emotional distress). \\
159. \textit{In re Vorpaeh}, 695 F.2d 318 (8th Cir. 1982) (holding that present and former employees were not entitled to a jury trial in an ERISA action). The court in \textit{Vorpaeh} stated that ERISA's silence on the issue of jury trials has been interpreted to mean that suits for pension benefits are equitable and are thus triable by a court. \textit{Id.; see also Calamia v. Spivey}, 632 F.2d 1235, 1237 (5th Cir. 1980) (ERISA remedies are equitable and, therefore, do not entitle a plaintiff to a jury trial); \textit{Wardle v. Central States Pension Fund}, 627 F.2d 820, 830 (7th Cir. 1980) (ERISA does not give right to jury trial), \textit{cert. denied}, 449 U.S. 1112 (1981). But cf. \textit{Ovitz v. Jeffries & Co.}, 553 F. Supp. 300 (N.D. Ill. 1982) (holding that an employee was entitled to a jury trial in an ERISA, state fiduciary law, and breach of contract action against his former employer). \textit{In Jefferies,} the court reasoned that the claims were legal and not equitable because they were based on the employer's alleged obligation to pay the employee "certain amounts both 'unconditionally and immediately' on his resignation. . . ." \textit{Id.} at 301. \\
160. \textit{See supra} notes 92-102 and accompanying text. \\
161. Mr. Lewis testified that: \\
We disagree with this distinction between fiduciary duty and benefit claims cases. If anything, mandatory attorney fees for prevailing plaintiffs are more necessary in benefits claims cases. . . . Even the relatively small number of NELA member attorneys who take plaintiffs' ERISA cases are reluctant to take these individual benefit claims cases to court. On the one hand, ERISA's limitations on damages preclude the possibility of any significant contingent fee recovery, while on the other hand, there is a good chance that no attorney fees will be awarded by the court if the case is won. . . .
provision for mandatory attorney's fees to prevailing plaintiffs has resulted in a situation where it is virtually impossible for plaintiffs in ERISA plans . . . to enforce their rights under the terms of the plan."162 Jeffrey Lewis, testifying on behalf of the NELA, stated that in his experience as a practicing attorney his "office turns down three to five such cases a week in the San Francisco Bay Area alone, and there is only one other attorney in the area who regularly considers taking such cases."163 Clearly, Mr. Lewis believes that one reason attorneys turn down ERISA cases is the low incidence of attorney's fees awards, as well as other barriers to success on the merits.164

Both the public interest groups and plaintiffs' attorneys recognize that because of the tremendous disincentive to participants bringing ERISA actions, many benefit claim denials go largely unchallenged.165 Without such challenges, plan administrators are not being monitored as ERISA intended. With the growing number of private pension and benefits plans in existence today, and the limited resources of the DOL and the IRS, without private enforcement, ERISA is in effect a statute that "has no teeth."166

E. Comparing Section 502(g)(1) to Other Fee-Shifting Provisions

Under current law, there are numerous fee-shifting statutes,167 several of which are particularly relevant in determining whether or not section 502(g)(1) is a properly operating fee-shifting provision.168 Two of these, a permissive fee shifting provision under § 1988 of the Civil Rights Act of 1964 [hereinafter § 1988]169 and the mandatory fee-shifting provision of § 626(b) of the Age Discrimination in Employment Act (ADEA),170 are particularly relevant. Courts have used these statutes to interpret fee awards in benefit cases.171 Comparison of each provision with section 502(g)(1) supports the proposition that section 502(g)(1) has failed to fully serve its purpose. Further, these statutes provide insight into how section 502(g)(1) can be improved.

1990 ERISA Hearings, supra note 18, at 8 (statement of Jeffrey Lewis).
162. Id.
163. Id.
164. Id. at 9.
165. AARP Statement, supra note 17, at 5. "Without a corresponding financial disincentive to deter benefits claim denials, or a financial incentive for individuals to pursue claims, benefits claim denials go largely unchallenged." Id.
166. See Strasser, supra note 109, at 1.
167. See generally Cubita, et al., supra note 6, at 320 nn.205-07 (listing numerous statutes in which there are fee-shifting provisions).
170. 29 U.S.C. § 626(b).
171. See supra note 30.
1. Section 1988

Section 1988\textsuperscript{172} was enacted in response to the Supreme Court's decision in \textit{Alyeska Pipeline Service Co. v. Wilderness Society}.\textsuperscript{173} In essence, this section adopts the private attorney general doctrine referred to in \textit{Alyeska}.\textsuperscript{174} The purpose of § 1988 is to achieve consistency in fee awards among civil rights cases.\textsuperscript{175} The provision was "designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866."\textsuperscript{176} Further, the legislative history of § 1988 suggests that fee awards are necessary if private citizens are to enforce their statutorily-granted rights.\textsuperscript{177} Congress recognized the need for private enforcement of civil rights on behalf of the public as a whole, and consequently enacted § 1988 as an "integral part of the remedy necessary to achieve compliance with its statutory policies."\textsuperscript{178} Under § 1988, there is a presumption that a prevailing plaintiff should be awarded attorney's fees, but the final determination is within the court's discretion.\textsuperscript{179}

While the language of § 1988 is permissive, Congress' clear intent was to award fees to a prevailing plaintiff.\textsuperscript{180} For example, Congress provided that fees could be awarded \textit{pendente lite}, especially where a party prevailed on an important matter without prevailing on all issues.\textsuperscript{181} In addition, a party can be considered to have prevailed "when they vindicate rights through a

\begin{itemize}
\item \textsuperscript{172} 42 U.S.C. § 1988.
\item \textsuperscript{173} 421 U.S. 240 (1975); see also supra notes 32-42 and accompanying text.
\item \textsuperscript{174} See supra notes 32-42 and accompanying text.
\item \textsuperscript{175} 1976 \textsc{Senate Report}, supra note 27, at 5910.
\item \textsuperscript{176} \textit{Id.} at 5909-10.
\item \textsuperscript{177} The legislative history of § 1988 states: "[C]ivil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain. In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court."
\item \textit{Id.} at 5910.
\item \textsuperscript{178} \textit{Id.}
\item \textsuperscript{179} See City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974), \textit{appeal after remand}, 560 F.2d 1093 (2d Cir. 1977).
\item \textsuperscript{180} The legislative history specifically states that: "[i]t is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce [its] rights . . . , if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" \textit{Id.} at 5912 (quoting \textit{Newman v. Piggie Park Enters.}, 390 U.S. 400, 402 (1968)).
\item \textsuperscript{181} \textit{Id.}
\end{itemize}
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consent judgment or without formally obtaining relief." 182 Nevertheless, this presumption is mitigated by a provision that "deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in 'bad faith' under the guise of attempting to enforce [their] federal rights." 183 The courts have developed two tests to determine the amount of fees to be awarded under § 1988.

The original test to calculate attorney's fees under § 1988 was set forth in Johnson v. Georgia Highway Express, Inc. 184 In Johnson, the plaintiff brought an action for damages and a class action for injunctive relief for his allegations of racially motivated discharge from employment. 185 The court, in reviewing the attorney's fees award to the prevailing plaintiff, imposed an elaborate twelve-part test to determine whether or not fees will be awarded. 186 The court concluded that it would be an abuse of discretion for a district court not to consider the twelve factors set out in this case, and that the record must reflect such consideration. 187

Other courts have rejected the test set forth in Johnson and instead, apply the more reliable "lodestar test" developed by the Second Circuit in City of Detroit v. Grinnell Corp. 188 Under this test, the court first determines the number of hours spent on the case by the attorney. 189 Next, the court fixes a reasonable hourly rate based on the attorney's legal reputation and his status in the firm. 190 These hours are then multiplied by the rate to calculate the total fee award. 191 The Grinnell test more closely embodies the spirit of the law and encourages more attorneys to become involved in the area of civil

182. Id.
183. 1976 Senate Report, supra note 27, at 5912. According to the legislative history, awarding fees to a prevailing defendant is appropriate where the plaintiff's suit is shown to be "clearly frivolous, vexatious, or brought for harassment purposes." Id. (citing United States Steel Corp. v. United States, 385 F. Supp. 346 (W.D. Pa. 1974), aff'd, 519 F.2d 359 (3d Cir. 1975)). This is the standard laid out in Fed. R. Civ. P. 11.
184. 488 F.2d 714 (5th Cir. 1974).
185. Id. at 714.
186. Id. at 717-19. The twelve criteria, based on the Model Code of Professional Responsibility, are: (1) time and labor expended by counsel; (2) novelty and difficulty of the case; (3) attorney's skills; (4) preclusive effect that this case had on the counsel's ability to take other work; (5) attorney's customary fee; (6) contingent nature of the litigation; (7) unusual time limitation imposed by the litigants; (8) amount of money involved in the claim; (9) experience, ability, and reputation of counsel; (10) undesirability of being associated with the cause; (11) length of the litigant's and counsel's professional relationship; and (12) awards in similar cases. Id.; see also Model Code of Professional Responsibility, Rule 2-106 (1980); Dreyfuss, supra note 31, at 373, n.168.
187. 488 F.2d at 717, 720.
188. 495 F.2d 448, 473 (2d Cir. 1974).
189. Id. at 470.
190. Id. at 471.
191. Id.
rights litigation. Further, this test is far less cumbersome than the *Johnson* test. Also, it permits the court to pay the attorney the amount he would have earned litigating a case in the private sector, as opposed to the court determining what the attorney's services are worth. Thus the *Grinnell* test successfully respects Congress' intent that attorney's fees be "adequate to attract competent counsel [while not] produc[ing] windfalls to attorneys." 

Despite the strong legislative history accompanying § 1988, its discretionary nature is a constant source of difficulty. Courts have exercised wide discretion to undercompensate, overcompensate, or deny relief entirely to civil rights litigants where an attorney's fee award is viewed as unnecessary or somehow inappropriate. In particular, judicial discretion allows courts to deny relief despite the plaintiff's meeting of all the requirements justifying recovery under § 1988. Further, courts have developed several common grounds for denying relief. It has been suggested that such denials deter attorneys from accepting cases for fear that they will not be adequately compensated. Thus, the courts do not adhere to any strictly defined parameters, although these factors are clearly enunciated in the legislative history accompanying § 1988. This erratic awarding of attorney's fees has in effect worked against the purpose of § 1988 by discouraging attorneys from taking such cases and leaving plaintiff's rights unvindicated.

2. *Section 626(b)*

The ADEA was enacted to "prohibit job discrimination against workers between the ages of 40 and 70 years." Section 626(b) of the ADEA,

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193. *Id.*
194. 1976 *Senate Report, supra* note 27, at 5913.
195. Dreyfuss, *supra* note 31, at 351. Courts have used their discretion in a manner that sometimes undercompensates litigants or denies them relief altogether. The result is often an immediate appeal. As with ERISA cases, attorneys are likely to be more reluctant to take the case because they are not assured of fee awards. *Id.* at 351-52.
196. *Id.* at 352.
197. *Id.* at 365-66 (suggesting that courts have created a variety of "special circumstances" under which a fee award can be denied to a prevailing litigant event when the other requirements have been met).
198. *Id.* (suggesting that all of the grounds cited are unfounded given the broad legislative intent behind the statute).
199. *Id.*
201. JOSEPH E. KALET, *AGE DISCRIMINATION IN EMPLOYMENT LAW* 7 (1986). ADEA's purpose is to "promote the employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find
which requires a mandatory award of attorney's fees to a prevailing plain-
tiff, generally follows the remedial scheme of the Fair Labor Standards
Act (FLSA). Under § 626(b), a prevailing plaintiff in a suit for age dis-
crimination is entitled to "a reasonable attorney's fee to be paid by the de-
fendant and the cost of [the] action." The ADEA does not provide for
fees to a prevailing defendant. Further, because the ADEA language
states that attorney's fees are available for the cost "of the action," it has
been held that compensation for services performed before commencement
of the action are disallowed.

As with § 1988, the definition of "reasonable" under § 626(b) is the source
of some confusion. The Supreme Court has interpreted "reasonable" to
mean the approximate prevailing market rate in the relevant community. Beyond this, the courts apply the lodestar test originally set forth in Grin-
nell. Once the lodestar amount is determined, some courts apply the
twelve-factor test set forth in Johnson to increase or decrease the award of
attorney's fees in light of all circumstances. Because § 626(b) mandates


202. The statute reads in pertinent part: "[T]he court shall have jurisdiction to grant such
legal equitable relief as may be appropriate to effectuate the purpose of this chapter." 29 U.S.C.
§ 626(b) (emphasis added).

203. See generally 29 U.S.C. §§ 211, 216 and 217. Section 216(a) covers the right of the
Administrator or his designated representative to investigate and gather data involving wages,
hours and other conditions and practices of employment subject to the FLSA. See Kalet,
supra note 201, at 89. Section 626(b) incorporates § 11(b) and parts of § 16 of the FLSA. Id.
In pertinent part § 216(b) of FLSA states: "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 action." 29 U.S.C. § 216(b).

204. 29 U.S.C. § 626(b).

205. See Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 962 (8th Cir. 1978) (denying attor-
ney's fees to an employer who prevailed in an ADEA action). When fees are awarded to a
prevailing defendant, they are awarded under the bad faith exception to the American Rule as
notes 31-41 and accompanying text. There is reluctance by courts to award fees to the defend-
ant under the bad faith exception. See Hoover v. Armco, Inc., 915 F.2d 355, 358 (8th Cir.
1990) (McMillian, J., dissenting) (warning that the "courts should be particularly reluctant to
award attorney's fees under the bad faith exception ... [it can have an] undesirable chilling
effect on an attorney's legitimate ethical obligation to represent his [or her] client zealously"
(second alteration in original)).

(holding that a prevailing plaintiff is entitled to attorney's fees when a former employee
brought an action against his employer alleging a violation of the ADEA).

ADEA); see also Kossman v. Calumet County, 849 F.2d 1027 (7th Cir. 1988).

208. 495 F.2d 448 (2d Cir. 1974).

209. Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974); see supra notes
184-86 and accompanying text.

the award of a fee to a prevailing plaintiff, these factors relate solely to the amount of fees to be awarded. Consequently, the predictability of attorney's fees awards under ADEA has promoted the statute's intent of providing those discriminated against with a meaningful mechanism to enforce their rights under the statute.

3. Comparing Section 502(g)(1) to Sections 1988 and 626(b)

While § 1988 and § 502(g)(1) each use a discretionary standard for awarding attorney's fees, the courts interpret the awards differently under each statute. Pursuant to § 1988, fees are awarded only if the party prevails. Under section 502(g)(1), however, fees may be awarded to either party, whether or not the party prevails, according to the discretion of the court. The legislative history of § 1988 and subsequent interpretation by the courts create the presumption of awarding fees to a prevailing plaintiff. This presumption does not apply to a prevailing defendant. While § 1988 is at times imperfectly applied, most courts do correctly apply the presumption as intended by Congress. Unfortunately, the same predictability has not developed with regard to section 502(g)(1) under the Eaves test.

Courts have applied some form of the Johnson twelve-factor test to § 1988, section 502(g)(1) and § 626(b) to determine the "reasonable" amount of attorney's fees to be awarded. In most cases, courts apply a

211. Courts have consistently held that a prevailing plaintiff is entitled to attorney's fees. See, e.g., Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (awarding attorney's fees under § 1988, for work on all claims to plaintiff who prevailed on some but not all claims); Jardien v. Winston Network, Inc., 888 F.2d 1151, 1159 (7th Cir. 1989) (awarding prevailing discharged employee costs and fees in ADEA action); Rogers v. Exxon Research & Eng'g Co., 550 F.2d 834, 842 (3d Cir. 1977) (awarding attorney's fees where prevailing plaintiff charged age discrimination by employer), cert. denied, 434 U.S. 1022 (1978); Brennan v. Ace Hardware Corp., 495 F.2d 368, 374 (8th Cir. 1974) (awarding fees even where employer prevailed under ADEA because Secretary filed action before properly attempting to achieve voluntary compliance by employer as required by the statute). Attorneys who litigate under ADEA are assured of fees if they prevail. Further, courts routinely include expert witness fees in the attorney's fee award. The twelve factors are used to estimate how much the award will be, and to make and support an argument before the court as to why the actual fee awarded should be what the attorney has requested.

212. See generally KALET, supra note 201, at 111-16.


216. 42 U.S.C. § 1988; see also supra note 180 and accompanying text.

217. See 1976 SENATE REPORT, supra note 27, at 5912.

218. Id. at 5910.

219. See supra note 67 and accompanying text.

220. See supra notes 184-86 and accompanying text. The test applied to § 502(g)(1) awards is very similar and can be found in Kerr v. Screen Extras Guild, 526 F.2d 67, 70 (9th
lodestar test\textsuperscript{221} and then use the twelve-factor test to determine if the lodestar should be adjusted.\textsuperscript{222} While courts have made inconsistent awards under § 1988 and section 502(g)(1), these same inconsistencies do not appear to exist in ADEA cases.\textsuperscript{223}

III. COMMENT: WHY PLAINTIFFS' ADVOCATES ARE CORRECT

The overwhelming weight of evidence suggests that the availability of competent counsel depends on the regularity of fee awards to prevailing plaintiffs. Though each of the circuits use virtually the same test, applying some version of the \textit{Eaves} test, there are often disparate results.\textsuperscript{224} Consequently, plaintiffs' counsel are reluctant to bring ERISA actions, thus preventing rather than encouraging plaintiffs of modest means to bring such actions.

Industry participants argue that the current discretionary standard for award of attorney's fees furthers the purpose of ERISA without inviting unmeritorious lawsuits.\textsuperscript{225} Given the expense and time involved in litigating an ERISA action, this concern has some validity. In particular, where such litigation is funded by the plan, all participants and beneficiaries of the plan are potential losers. Nonetheless, under the \textit{Eaves} test courts may award

\begin{footnotesize}
\textsuperscript{221} See McDaniel v. National Shopmen Pension Fund, 6 Employee Benefits Cas. (BNA) 2700 (W.D. Wash. 1985) (employing the lodestar test in a § 502(g)(1) case), \textit{rev'd}, 817 F.2d 1370 (9th Cir. 1987); Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977) (applying the lodestar test in a § 626(b) case), \textit{cert. denied}, 436 U.S. 913 (1978); City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) (applying the lodestar test in a § 1988 case), \textit{appeal after remand}, 560 F.2d 1093 (2d Cir. 1977); \textit{see also supra} notes 188-194 and accompanying text.

\textsuperscript{222} See \textit{e.g.}, Lawson v. Lapeka, Inc., 55 Fair Empl. Prac. Cas. (BNA) 987 (D. Kan. 1991) (awarding attorney's fees, in an ADEA case, to the prevailing plaintiff using the \textit{Johnson} twelve-factor test); Van Fossan v. International Bhd. of Teamsters, Local 710 Pension Fund, 649 F.2d 1243, 1249 (7th Cir. 1981) (approving the use, in an ERISA case, of the \textit{Johnson} twelve-factor test by the district court to determine the amount of attorney's fees to be awarded to the prevailing plaintiff).

\textsuperscript{223} This clarity can be attributed to automatic awards of fees to a prevailing plaintiff and the use of a general lodestar calculation. See Rogers v. Exxon Research & Eng'g Co., 550 F.2d 834, 842 (3d Cir. 1977) (awarding attorney's fees in ADEA suits where the employee prevails against former employer for age discrimination), \textit{cert. denied}, 434 U.S. 1022 (1978); Brennan v. Ace Hardware Corp., 495 F.2d 368, 374 (8th Cir. 1974) (holding that if a judgment is entered for a plaintiff in an ADEA case, attorney's fees and costs are recoverable). The twelve factors are generally only considered to determine whether or not to adjust the lodestar amount. See \textit{e.g.}, Drez v. E.R. Squibb & Sons, Inc., 674 F. Supp. 1432, 1446 (D. Kan. 1987) (holding that an employee who was a prevailing party in an ADEA action against his employer is entitled to costs and attorney's fees based on the twelve factors). It appears that under § 1988, these factors are sometimes considered concurrently with the consideration of whether fees are to be awarded at all.

\textsuperscript{224} \textit{See supra} note 67.

\textsuperscript{225} \textit{See supra} notes 127-43 and accompanying text.
\end{footnotesize}
fees to either party. Therefore, the plan is afforded some protection by judicial flexibility to award fees to a prevailing defendant, mitigating a plaintiff's unmeritorious or frivolous claims.

As industry points out, in reality, most circuits rarely award attorney's fees to a prevailing defendant. In cases where courts award such fees, the reasons most often cited are bad faith and frivolous claims. Industry ignores, however, that attorney's fee awards are also available through Rule 11 of the Federal Rules of Civil Procedure. Rule 11 sanctions protect parties in any litigation from incurring expenses defending unmeritorious or frivolous claims. Moreover, Rule 11 sanctions are quite common. Thus the application of Rule 11 in ERISA cases should limit unmeritorious or frivolous claims and render similar standards repetitious and unnecessary. Similarly, mandatory fee awards may also effectively control unwarranted claims.

If ERISA were rewritten to include a provision that mandatorily awards attorney's fees to a prevailing plaintiff, the plaintiff would be forced to win the case in order to collect attorney's fees from the defendant. This re-

227. See, e.g., Vintilla v. United States Steel Corp. Plan for Employee Pension Benefits, 642 F. Supp. 295, 297 (W.D. Pa. 1986) (prevailing defendant-employer entitled to attorney's fees in an ERISA action where controlling precedent was clearly against plaintiff's claim and action was an attempt to receive the same benefits twice), aff'd, 815 F.2d 693 (3d Cir.), cert. denied, 484 U.S. 847 (1987). The theory behind such an award is that it will discourage other potential plaintiffs from bringing such a claim.
228. Bertino, supra note 91.
230. FED. R. CIV. P. 11. In pertinent part the Rule states:
   If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.
Id.
231. See FEDERAL PROCEDURE COMMITTEE, AMERICAN BAR ASS'N, Rule 11 and Other Power (ABA 1986) (discussing Rule 11 sanctions by Circuit and showing that Rule 11 sanctions against trial lawyers and their clients are being ordered with increasing frequency).
232. Rule 11 is already being used with increasing frequency in ERISA cases. Courts also use FED. R. APP. P. 38 to impose sanctions for frivolous appeals. See, e.g., Tomczyk v. Blue Cross & Blue Shield United, No. 91-1018, 1991 U.S. App LEXIS 30199, at *22, *25 (7th Cir. Dec. 30, 1991) (sanctioning plaintiff's attorney for pursuing a frivolous appeal and misleading the court); Baxter v. C.A. Muer Corp., 941 F.2d 451, 456 (6th Cir. 1991) (imposing double costs against the plaintiff on the finding that plaintiff's appeal of Rule 11 sanctions was frivolous).
233. See infra notes 244-45 and accompanying text (suggesting possible language for requiring the mandatory award of attorney's fees in benefit cases).
quirement would sufficiently deter a plaintiff from bringing an unmeritorious or frivolous claim. Because most plaintiffs cannot pay such fee awards, the attorney would have to absorb the loss if sanctions were imposed. The discretion of legal practitioners would act as a safety net for the interests of plans and industry. Rather than increasing the amount of litigation, the mandatory award of attorneys' fees to prevailing plaintiffs in benefit cases may well decrease the amount of litigation over such claims.

While the adoption of a prevailing plaintiff standard would strengthen the enforcement rights of participants and beneficiaries, a mandatory standard similar to § 626(b) would more efficiently ensure that the statute would be self-enforced. Such a standard provides clear incentive for attorneys to develop an expertise in the area of law covered by the ADEA and to take plaintiffs' cases. Finally, discretion concerning the amount of fees to be awarded should be left to the trial judge, who can best determine the expertise of counsel, the appropriate hourly rate, and other mitigating factors.

The inconsistently applied Eaves test, advocated by industry, is not the proper standard to be applied by the courts. Rather, the experiences of those representing the participants and beneficiaries of plans covered under ERISA demonstrate the need for change. Specifically, groups such as the NSCLC, AARP, and the PRC can provide much-needed guidance in reshaping ERISA to fulfill its legislative purpose. Further, the barriers to


235. See Eisenberg Testimony, supra note 150, at 1.

236. If a plan administrator knows that a plaintiff who prevails in a benefit denial case will receive fees, he or she would no doubt be extremely careful in reviewing the claim for benefits. Further, because a mandatory fee standard would require that a participant prevail in order to recover such fees, a participant would not likely bring an action under section 502 unless the participant was relatively sure that the benefit was incorrect.

237. See supra notes 202-12 and accompanying text.


239. See, e.g., Lightfoot v. Walker, 826 F.2d 516, 519-20, 523-24 (7th Cir. 1987) (awarding fees to attorneys who prevailed in 42 U.S.C. § 1983 case under § 1988, where awards were based on both the current market rate for attorneys with counsel's expertise and the general lodestar test); Lynch v. Milwaukee, 747 F.2d 423, 426 (7th Cir. 1984) (awarding attorney who prevailed in 42 U.S.C. § 1983 cases fees based on general lodestar test, and explaining that the twelve factors may be considered when determining a § 1988 award of attorney's fees).

240. See supra notes 144-66 and accompanying text. The disparity in circuit court decisions shows the need for a clear standard to determine the award of attorney's fees in ERISA benefits cases.

241. AARP, the NSCLC and the PRC are all non-profit groups that serve the public. Specifically, AARP represents over thirty-three million members over the age of 55; the NSCLC, since its inception in the early 1970s, has helped workers and retirees obtain their
effective ERISA practice, identified by attorneys who are currently representing ERISA participants and beneficiaries, reflect the magnitude of the problem. The result should lead to a mandatory award of attorney’s fees to prevailing plaintiffs as intended by ERISA.

In order to adequately protect plan participants under ERISA, Congress should amend section 502(g)(1) so that attorney’s fees are mandatorily awarded to a prevailing plaintiff. This will enable participants to bring legitimate actions under ERISA, while discouraging frivolous or unmeritorious suits. Also, courts will then be able to apply section 502(g)(1) consistently, eliminating the vast inconsistencies that currently exist. Finally, mandatory fee awards will encourage attorneys to develop expertise in this complex and sparsely represented area. Through adoption of this provision, Congress would provide the means by which the ultimate policy of ERISA, that of protecting participants, could be served.

Presuming that section 502(g)(1) needs to be amended by Congress, such an amendment should be clear on its face—reflecting the explicit legislative history. A workable provision that would fulfill ERISA’s intent, enabling participants to enforce their rights under the Act, could read as follows:

In any action or administrative proceeding commenced pursuant to section 502(g)(2), the court or agency shall award the prevailing plaintiff or plaintiffs, other than the United States, a reasonable attorney’s fee, including expert witness fees and litigation expenses and costs to be paid by the defendant. A prevailing defendant shall be entitled to costs where the court finds a clear showing that the action was commenced by the plaintiff or plaintiffs in bad faith pursuant to Rule 11 of the Federal Rule of Civil Procedure.

The legislative history to such an amendment should specifically articulate the meaning of a “reasonable” attorney’s fee. The lodestar test adopted by

pension benefits through both litigation and technical support; the PRC assists the public through a technical assistance hotline and through its national network of pension attorneys. Each of these groups has regular contact with the people that ERISA was designed to protect—the participants and beneficiaries. Due to the unique individual interaction that each of these groups has with participants and beneficiaries, their observations and experiences deserve close attention and consideration. See supra notes 144-66 and accompanying text.

242. See supra note 67.

243. Section 2(b) of Title I of ERISA states:

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for the appropriate remedies, sanctions, and ready access to the Federal courts. 29 U.S.C. § 1001(b) (1988).
the Supreme Court244 and a modified twelve-factor test245 should be sufficient to define the term "reasonable." As stated above, the trial judge's discretionary standard should alleviate any inconsistent application, assuming the factors to be considered are fully explained in the legislative history.

ERISA, similar to the ADEA standard, should also allow for expert witness fees.246 The 1990 DOL proposal to change ERISA included a provision to clarify that expert witness fees may be awarded under ERISA in fiduciary cases, but did not provide for recapturing witness fees in benefits cases.247 In a study of over 600 ERISA cases conducted by the Pension Rights Center during the summer of 1990, not a single case specified that an award of expert witness fees had been made.248 NPAP lawyers who practice in the ERISA area have indicated that the costs of expert witness fees are ordinarily not included in attorney's fee awards, however, they often can persuade the opposing party to agree to such fees when settling an ERISA case.249 Because ERISA benefit denial cases are complex, an expert is frequently needed to determine the actuarial value of the benefits that have been denied. Given that the plaintiff is usually litigating a small pension benefit or health claim, expecting the plaintiff to pay for expensive expert witness fees from their own settlement is equivalent to denying the plaintiff access to the courts.

To ensure fairness to prevailing plaintiffs, the legislative history of an amended section 502 should provide for the awarding of attorney's fees to a plaintiff who prevails on some, but not all, issues. Even though, under both § 1988 and § 626(b), it is unnecessary to prevail on all issues in order to be awarded attorney's fees,250 partial success is often grounds for denial of all

244. Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983); see also supra notes 188-94 and accompanying text.
245. See supra notes 184-87 and accompanying text.
246. Although there is no specific language in ADEA requiring the award of expert witness fees, they are routinely included in an attorney's fees award. See Heiar v. Crawford County, 746 F.2d 1190, 1203 (7th Cir. 1984) (holding that policemen prevailing in action under ADEA, charging that mandatory retirement at fifty-five violated statute, must be awarded attorney's fees and expert witness fees), cert. denied, 472 U.S. 1027 (1985); McNeil v. Economics Lab., Inc., 800 F.2d 111, 113 (7th Cir. 1986) (awarding an employee who prevailed in an ADEA suit against his employer attorney's fees and costs), cert. denied, 481 U.S. 1041 (1987).
248. Ann Bertino, Fiduciary Case Study (Summer 1990) (on file at Pension Rights Center). If the courts were including such fees, they were not elaborating on this fact in their opinions.
249. See Phone Survey, supra note 106.
250. Canellassi v. Federated Dept Stores, 672 F.2d 1312, 1320 (9th Cir.) (awarding fees although plaintiff did not prevail on reinstatement action for age discrimination, based on the successful defense of the verdict below), cert. denied, 459 U.S. 859 (1982). However, the Supreme Court has ruled that degree of success is a critical factor in determining the amount of an attorney's fee award. See Hensley v. Eckerhart, 461 U.S. 424, 440 (1983) (awarding plaintiff attorney's fees when the plaintiff prevails on some claims in a § 1983 action).
attorney’s fees in section 502(g)(1) ERISA actions. The amended legislation should award attorney’s fees for all time spent pursuing ERISA claims, as long as a participant prevails on at least one major issue covered under ERISA and all other issues were litigated in good faith. Rule 11 sanctions would protect defendants and assure that frivolous and unmeritorious claims are not rewarded.

For the mandatory award statute to be completely effective, amended section 502(g)(1) should provide for the award of attorney’s fees for administrative proceedings commenced on behalf of the plaintiff. Currently, it is often necessary to elicit the assistance of a lawyer simply to exhaust the internal plan remedies. Moreover, where the attorney and participant successfully resolve the conflict at this stage, the attorney cannot go to court to seek fees for his services. The Pension Rights Center, as well as several government agencies including the DOL, the Pension Benefit Guaranty Corporation (PBGC), and the IRS, are attempting to develop an administrative proceeding for benefit denials that follow internal plan proceedings and precede federal court actions. If such an alternative dispute mechanism becomes a reality, language in section 502(g)(1) must provide for attorney’s fees at the administrative level.

In the recent Supreme Court decision of Evan v. Jeff D., the Court held that defendants may request a waiver of attorney’s fees as part of a settlement. This waiver of attorney’s fees is another pressing problem that needs to be addressed by an amended section 502(g)(1). The Supreme Court in Evan, held that a benefit claims case defendant could settle with the plain-

251. See Voliva v. Seafarer’s Pension Plan, 858 F.2d 195, 197 (4th Cir. 1988) (holding that employee who brought an ERISA action for denial of benefits and who prevailed on one but not all issues at trial was not entitled to attorney’s fees); see also Phone Survey, supra note 106 (noting that an attorney from the Third Circuit stated that this issue was his foremost barrier to recovery of attorney’s fees).

252. See supra notes 234-36 and accompanying text.

253. See supra note 148. ERISA is so complex that many attorney’s hesitate to learn the statute. It is unrealistic to expect that the average lay person could enforce his or her rights under ERISA without assistance.

254. Section 502(a) states that an action may be brought by a participant or beneficiary, a fiduciary, or the Secretary. 29 U.S.C. § 1132(a) (1988). No provision of ERISA allows an attorney to bring an action to recover fees incurred for action at the administrative level.

255. Meeting held at the Pension Rights Center, Fall 1990, attended by representatives from the IRS, DOL, PBGC and several plaintiffs’ advocates, including the Pension Rights Center, the National Senior Citizens Law Center and the Older Womens Network. The parties in attendance discussed creating an interagency program to aid participants and beneficiaries who need assistance.


257. Id.
tiff for full benefits conditioned on a waiver of all attorney's fees. Thus, the defendant "for all intents and purposes [admits to] liability with no consequences." Such an offer is nearly impossible for the participant to turn down, leaving the attorney without payment as most "client[s] [cannot] afford to pay and the pension cannot be attached." This is a dangerous loophole ripe for abuse. Such waivers deny benefits at no cost to the plan. For this reason, the legislative history should specifically state that a plaintiff who prevails at any level will be entitled to attorney's fees and that waivers are improper because they fail to protect the attorney's interest in the case.

All of the above suggested amendments encompass the stated purpose of ERISA. Such changes are both timely and necessary in order to assure that ERISA will operate as a protective statute that can readily enforce the very rights it was designed to protect. Without such changes, participants remain almost powerless to enforce their rights. The suggested amendment may have the incidental effect of causing plan administrators to be more careful in reviewing benefits claims, which could in turn reduce the need for attorney intervention.

IV. CONCLUSION

To improve the system of attorney's fee awards for prevailing plaintiffs in ERISA benefits actions, the application of section 502(g)(1) must be reconciled with the sparse legislative history of the statute. Failure to unify the disparate standards which currently exist contravenes ERISA's intent.

The omission by ERISA's drafters of a provision requiring the mandatory award of attorney's fees to a prevailing plaintiff has worked to the detriment of those the statute was intended to protect. The ambiguities of section 502(g)(1) and the silence of the legislative history have fostered inconsistent awards of attorney's fees. Not only is such inconsistency inappropriate for a federal statute, but it also discourages attorneys from litigating ERISA benefit claims. Without representation, participants are often powerless to enforce their ERISA rights. Industry concerns are easily allayed through Rule

258. Id. at 730 (holding that under 42 U.S.C. § 1988, neither the statute nor the legislative history suggests that Congress intended to forbid all fee waivers).
260. Id.
261. The Fund is in a position to force the plaintiff's hand. If the plaintiff does not take the settlement with the waiver, he or she may not receive any benefits at all. This discourages attorneys from getting involved, because rarely is the settlement award such that the plaintiff can pay the attorney's fee.
262. Id.
263. See supra note 2 and accompanying text.
11 protective sanctions and the requirement that the participant must prevail, at some level, in order to recover attorney's fees.

It was never intended that the DOL be the sole enforcer of ERISA. Rather, the DOL hoped that those whose rights were protected under the statute would enforce it. In order to make this vision a reality, section 502(g)(1) must be amended to require a mandatory award of attorney's fees for prevailing plaintiffs, attorney's fees for administrative proceedings, expert witness fees, and costs. Otherwise, section 502(g)(1) is but a token gesture to the millions of participants who are rendered powerless to enforce its protection.

Ann C. Bertino