

Attorney's Fees Under ERISA: When Is an Award Appropriate

Mark Howard Berlind

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Mark Howard Berlind, *Attorney's Fees Under ERISA: When Is an Award Appropriate*, 71 Cornell L. Rev. 1037 (1986)
Available at: <http://scholarship.law.cornell.edu/clr/vol71/iss5/5>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

ATTORNEY'S FEES UNDER ERISA: WHEN IS AN AWARD APPROPRIATE?

The Employee Retirement Income Security Act of 1974 (ERISA),¹ like many federal regulatory statutes,² permits courts to award attorney's fees to appropriate parties.³ These awards reimburse litigants for the cost of counsel, thus diminishing one of the major obstacles to filing a suit. Unlike other statutes which permit fee shifting, section 502(g)(1)⁴ of ERISA does not indicate when courts should make these awards.⁵ Section 502(g)(1) states only that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."⁶ Furthermore, "[t]he legislative history of the Act furnishes no guidelines."⁷

Presented with such unbridled discretion, the federal courts have formulated divergent standards for attorney's fees requests under ERISA. Most circuit courts have adopted a five-factor test to assess whether to award fees to prevailing plaintiffs. However, the courts have applied the standard with varying degrees of rigidity. Other courts have adopted the approach of the Civil Rights Attorney's Fees Awards Act of 1976 (Fees Act),⁸ analogizing it to section 502(g)(1). Courts also have applied separate and conflicting standards to requests for fees from prevailing defendants and non-prevailing plaintiffs.

This Note concludes that an analogy to the Fees Act is inappropriate for prevailing plaintiffs because ERISA plaintiffs, unlike civil rights plaintiffs, do not serve as private attorneys general. Courts should apply section 502(g)(1) only to facilitate lawsuits that plaintiffs would not bring without a fee-shifting provision. However, courts should apply the Fees Act approach for prevailing ERISA de-

¹ Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001-1461 and in scattered sections of the I.R.C. (1982)).

² See S. SPEISER, *ATTORNEYS' FEES* §§ 12.61-12.71 (1973) (listing statutes); Note, *Awards of Attorney's Fees in the Federal Courts*, 56 ST. JOHN'S L. REV. 277, 320-23 (1982) (same).

³ 29 U.S.C. § 1132(g)(1) (1982).

⁴ *Id.*

⁵ In contrast, many other fee-shifting statutes award fees only to prevailing parties, with some providing for mandatory rather than discretionary awards. See Note, *supra* note 2, at 287, 321. ERISA itself has a mandatory fee-shifting provision in cases where the plaintiff prevails under § 1145 of the statute. 29 U.S.C. § 1132(g)(2)(D) (1982).

⁶ 29 U.S.C. § 1132(g)(1) (1982).

⁷ *American Communications Ass'n v. Retirement Plan for Employees of RCA Corp.*, 507 F. Supp. 922, 923 (S.D.N.Y. 1981).

⁸ 42 U.S.C. § 1988 (1982).

defendants because both statutes seek to deter frivolous suits without discouraging meritorious ones. In addition, each element of the *Eaves* five-factor test⁹ is either inappropriate or superfluous in light of equitable doctrines which allow fee shifting, section 502(g)(1)'s function, and accepted rationales for fee shifting. Courts generally should not approve awards to nonprevailing plaintiffs, but should adopt a more flexible approach to allow awards when consistent with section 502(g)(1)'s function. Courts should also create a new standard for prevailing ERISA plaintiffs. Courts should first examine whether any equitable basis for awarding fees is applicable, and then, if necessary, award attorney's fees under section 502(g)(1) to plaintiffs who bring suit relying on the attorney's fees provision.

I

BACKGROUND

Several preliminary matters are important in understanding any discussion of fee shifting. First, three classes of litigants may receive awards of attorney's fees. Second, the American Rule of recovery prohibits awards absent a statutory provision, unless specific equitable considerations apply. The Fees Act¹⁰ contains a typical fee-shifting provision, the one most often compared to section 502(g)(1). Finally, although statutory and equitable doctrines permit courts to shift attorney's fees, courts should shift fees only under a standard that meets general fee-shifting rationales and ensures that awards either encourage meritorious suits or deter frivolous ones.

Prevailing plaintiffs, prevailing defendants, and nonprevailing plaintiffs¹¹ may request an award of attorney's fees. "Prevailing plaintiff," not without controversy, is most often broadly interpreted to mean a party who achieves success on any of the major issues of the suit, or even a favorable settlement.¹² A nonprevailing plaintiff is one who fails to achieve success on any of the major issues in the suit, and a prevailing defendant prevents the plaintiff from achieving such success. Section 502(g)(1) permits courts to grant attorney's fees to "a participant, beneficiary, or fiduciary."¹³

Ordinarily, litigants in American courts pay their own attorney's

⁹ The Tenth Circuit promulgated this test in *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978).

¹⁰ 42 U.S.C. § 1988 (1982).

¹¹ A nonprevailing defendant could never seriously hope courts would award him attorney's fees.

¹² See Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346, 353-55 (1980); Note, *The Scope of the Civil Rights Attorney's Fees Awards Act After Maine v. Thiboutot, Maher v. Gagne, and Supreme Court of Virginia v. Consumers Union*, 66 IOWA L. REV. 1301, 1315-18 (1981).

¹³ 29 U.S.C. § 1132(g)(1) (1982).

fees.¹⁴ This "American Rule" contrasts with the English practice, which generally allows prevailing parties to collect fees from their opponents.¹⁵ The Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*¹⁶ ensured the survival of the American Rule. The *Alyeska* Court held that lower federal courts cannot award attorney's fees absent specific statutory authorization, subject to limited equitable exceptions. The bad faith and common fund doctrines, described by the Court as "unquestionably assertions of inherent power in the courts to allow attorney's fees in particular situations, unless forbidden by Congress,"¹⁷ survived *Alyeska*. Courts have historically had the power to shift attorney's fees to the party that had conducted the litigation in bad faith. The bad faith exception includes three types of abuses of the judicial system: "obdurate or obstinate conduct that necessitates legal action; bad faith in propounding a frivolous claim, counterclaim, or defense; and vexatious conduct occurring during the course of litigation."¹⁸ Under the common fund doctrine courts have long had the power in equity to assess attorney's fees if a plaintiff's suit creates either a common fund or some other common benefit to a wider class.¹⁹ This power rests upon the principle of unjust enrichment—the benefiting class did not help finance the legal action that produced the benefit.²⁰

Statutory fee-shifting provisions authorize awards in the absence of equitable exceptions to the American Rule. The most well known statutory fee-shifting provision is the Fees Act. The Fees Act permits a court "in its discretion [to] allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs" in an action under the civil rights statutes.²¹ Courts apply

¹⁴ *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796) (refusing to award fees absent statutory authorization).

¹⁵ For background on and criticism of the opposing rules, see generally S. SPEISER, *supra* note 2, at 618 (collecting cases affirming American Rule); Ehrenzweig, *Shall Counsel Fees Be Allowed?*, 26 CAL. ST. B.J. 107 (1951); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984); Comment, *Financial Barriers to Litigation: Attorney Fees and the Problem of Legal Access*, 46 ALB. L. REV. 148 (1981).

¹⁶ 421 U.S. 240 (1975).

¹⁷ *Id.* at 259.

¹⁸ Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C.L. REV. 613, 632 (1983).

¹⁹ See generally Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. PA. L. REV. 281, 295-301 (1977); Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597 (1974).

For example, in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the plaintiffs successfully brought a derivative suit for misleading proxy statements. The court charged attorney's fees to the corporation, the lawsuit's actual beneficiary. *Id.* at 396-97.

²⁰ See Berger, *supra* note 19, at 296.

²¹ 42 U.S.C. § 1988 (1982).

a bifurcated standard that separates plaintiffs from defendants when assessing the appropriateness of an award under the Fees Act. The Act's legislative history states that prevailing plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."²² Congress thus adopted a presumption, first articulated by the Supreme Court in *Newman v. Piggie Park Enterprises, Inc.*,²³ in favor of fee awards for prevailing plaintiffs. The private attorney general theory, which permits fee awards to plaintiffs who bring suit to vindicate their own constitutional or statutory rights,²⁴ justifies the *Newman* presumption. Courts widely apply this congressionally intended presumption under the Fees Act.²⁵

It is more difficult for prevailing defendants to collect attorney's fees from plaintiffs under the Fees Act, although the extent of the difficulty varies. The legislative history states that in the case of a defeated plaintiff, "if the action is not brought in bad faith, such fees should not be allowed. . . . This standard will not deter plaintiffs from seeking relief under these statutes, and yet will prevent their being used for clearly unwarranted harassment purposes."²⁶ Congress thus intended that prevailing defendants should collect fees only if the plaintiff acted in bad faith. The Supreme Court expanded the strict bad faith standard in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*,²⁷ a title VII case not under the purview of the Fees Act. The *Christiansburg* Court announced a new standard which permitted a prevailing defendant to collect attorney's fees if the plaintiff's claim, despite being in good faith, "was

²² S. REP. NO. 1011, 94th Cong., 2d Sess. 4 [hereinafter cited as SENATE REPORT], reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5908, 5912 (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)). In *Newman*, the Court said a civil rights plaintiff acts "as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." 390 U.S. at 402.

²³ 390 U.S. 400 (1968).

²⁴ SENATE REPORT, *supra* note 22, at 2-4, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5910-12. See *infra* notes 107-12 and accompanying text for a more detailed discussion of the private attorney general theory.

²⁵ See Note, *supra* note 2, at 325. There is, however, considerable controversy as to what "special circumstances would render an award unjust." Note, *Judicial Discretion and the 1976 Civil Rights Attorney's Fees Awards Act: What Special Circumstances Render an Award Unjust?*, 51 FORDHAM L. REV. 320 (1982). For example, if a plaintiff is likely to recover substantial monetary damages when the litigation commences, his ability to attract competent counsel on a contingent fee basis renders an award of fees unnecessary. See *Zarcone v. Perry*, 581 F.2d 1039, 1044 (2d Cir. 1978) (discussing factors court should consider in deciding whether to shift attorney's fees), *cert. denied*, 439 U.S. 1072 (1979). Other courts have held that they may only award fees to private attorneys general under the *Newman* presumption. Thus, courts have denied attorney's fees in cases where the action did not involve national priorities or constitutional concerns. See *Martin v. Hancock*, 466 F. Supp. 454, 456 (D. Minn. 1979); *Naprstek v. City of Norwich*, 433 F. Supp. 1369, 1370 (N.D.N.Y. 1977).

²⁶ H.R. REP. NO. 1558, 94th Cong., 2d Sess. 7 (1976).

²⁷ 434 U.S. 412 (1978).

frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.”²⁸ In *Hughes v. Rowe*,²⁹ the Court applied the *Christiansburg* standard in a civil rights case to which the Fees Act applied, noting only that it could “perceive no reason for applying a less stringent standard” under the Fees Act.³⁰ Consequently, prevailing defendants must show that the plaintiff’s actions either were in bad faith or were frivolous to receive an award under the Fees Act.³¹

Once a court establishes that fee shifting is permissible according to statutory authority or established doctrine, the court should next inquire as to its desirability. According to this theory, any statute’s standard for determining the appropriateness of a fees award should, in addition to conforming to the intent of the legislature which enacted it, be supported by an applicable fee-shifting rationale. The five major rationales that justify fee shifting are (1) general indemnity, because prevailing parties should not have to bear the costs of proving that they are right; (2) compensation for legal injury, because prevailing parties’ damages awards should not, as a matter of principle, be reduced by the amount of their legal fees; (3) punitive, because culpable parties should pay a price for their malfeasance, and be deterred from so behaving in the future; (4) private attorney general doctrine, because plaintiffs may more easily enforce important constitutional rights; and (5) affecting relative financial strengths of the parties, because fees generally may be shifted when one side in a particular type of litigation regularly possesses greater financial resources than the other.³²

²⁸ *Id.* at 422.

²⁹ 449 U.S. 5 (1980).

³⁰ *Id.* at 14. In *Hughes* the Court found the plaintiff’s suit not frivolous. *Id.* The Court thus denied the defendant’s motion for fees without consideration of whether the plaintiff brought his suit in bad faith. If in some future case the plaintiff’s suit is frivolous but brought in good faith, the Court would then have to decide whether the bad faith standard is better suited to the Fees Act.

³¹ The circuits are divided and inconsistent as to which standard applies. See E. LARSON, *FEDERAL COURT AWARDS OF ATTORNEY’S FEES* 94-97 (1981); Note, *supra* note 2, at 303 n.91.

³² Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 653-65; accord *Aero Corp. v. Department of the Navy*, 558 F. Supp. 404, 429 (D.D.C. 1983) (awarding attorney’s fees on the punitive rationale because of defendant’s bad faith); Breger, *Compensation Formulas for Court Awarded Attorney Fees*, 47 LAW & CONTEMP. PROBS. 249, 250-53 (1984) (espousing similar theory with four rationales of fee shifting); Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37, 65-67 (1984) (explaining wide acceptance of Rowe’s rationales in Europe). Professor Rowe’s sixth rationale employs an economic analysis to distinguish between one-way fee-shifting statutes and the two-way statutes. This rationale is inapplicable to this Note, which deals only with a two-way statute.

A. Interpretation of Section 502(g)(1) Under the *Eaves* Five-Factor Test

Neither the language of section 502(g)(1)³³ nor ERISA's legislative history³⁴ furnishes any guidance as to when courts should award attorney's fees. Soon after litigation over section 502(g)(1) reached the appellate level, the Tenth Circuit in *Eaves v. Penn*³⁵ enunciated a now widely accepted³⁶ five-factor test for deciding whether prevailing plaintiffs should receive attorney's fees awards. The district court in *Eaves*³⁷ awarded attorney's fees to plan participants based on the common fund doctrine.³⁸ The Tenth Circuit remanded, holding that to decide whether attorney's fees should be taken from the common fund or from the culpable defendant, the court should consider:

(1) the degree of the offending parties' culpability or bad faith; (2) the degree of the ability of the offending parties to personally satisfy an award of attorneys fees; (3) whether or not an award of attorneys fees against the offending parties would deter other persons acting under similar circumstances; (4) the amount of benefit conferred on members of the pension plan as a whole; and (5) the relative merits of the parties' position.³⁹

The *Eaves* court failed to explain why it would use or how it developed this test.

Nearly all circuits⁴⁰ have adopted the five-factor⁴¹ test or a similar approach. However, courts do not currently employ the test to determine whether the common fund doctrine applies, as in *Eaves*.

³³ See *supra* text accompanying note 6.

³⁴ See *infra* text accompanying note 90; *supra* text accompanying note 7.

³⁵ 587 F.2d 453 (10th Cir. 1978).

³⁶ See *infra* note 40 and accompanying text.

³⁷ *Eaves v. Penn*, 426 F. Supp. 830, 838 (W.D. Okla. 1976).

³⁸ See *supra* notes 19-20 and accompanying text.

³⁹ *Eaves*, 587 F.2d at 465.

⁴⁰ See *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251 (1st Cir. 1986); *Miles v. New York State Teamsters Conference Pension & Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983); *Ursic v. Bethlehem Mines*, 719 F.2d 670 (3d Cir. 1983); *Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); *Chicago Painters & Decorators Pension, Health & Welfare, & Deferred Sav. Plan Trust Funds v. Karr Bros.*, 755 F.2d 1285 (7th Cir. 1985); *Lawrence v. Westerhaus*, 749 F.2d 494 (8th Cir. 1984); *McConnell v. MEBA Medical & Benefits Plan*, 778 F.2d 521 (9th Cir. 1985); *Fine v. Semet*, 699 F.2d 1091 (11th Cir. 1983). See also *Davidson v. Cook*, 567 F. Supp. 225 (E.D. Va. 1983) (adopting five-factor test in district court of the Fourth Circuit, where no appellate case law on this point currently exists), *aff'd*, 734 F.2d 10 (4th Cir. 1984).

⁴¹ The five factors listed are not necessarily the only ones a court may consider, nor is any one of them dispositive. See, e.g., *Iron Workers Local 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980) (court should consider whether party would have violated fiduciary duty by not bringing suit). They are, however, a common set of criteria considered by all courts which have adopted the test.

Rather, courts apply the *Eaves* factors to every ERISA suit where parties request attorney's fees. Even the Tenth Circuit has expressly adopted this reading.⁴² Thus, the district courts in the circuits that have adopted the *Eaves* test apply it on a case-by-case basis,⁴³ with abuse of discretion providing the standard of review on appeal.⁴⁴

Only one court has directly rejected the use of the *Eaves* test.⁴⁵ In *Central States Southeast & Southwest Areas Pension Fund v. Hitchings Trucking, Inc.*,⁴⁶ the district court reasoned that "it is difficult to determine the relationship of ERISA to each of these factors. . . . [T]o attempt to make the general rule anymore [sic] specific . . . would add needless strictures to what should be an easily applied rule."⁴⁷ The court analogized ERISA to the Fees Act and announced that prevailing plaintiffs should always recover attorney's fees from the defendant unless special circumstances would render such an award unjust.⁴⁸ One circuit has neither expressly adopted nor rejected the *Eaves* test.⁴⁹ The District of Columbia Circuit has announced a simple standard of judicial discretion⁵⁰ without elaborating on the nature of the discretion it sanctioned.

B. Application of Section 502(g)(1) According to the Fees Act Analogy—Prevailing Parties

In addition to the *Eaves* test, some courts have attempted to develop a standard for fee shifting under section 502(g)(1) by analogizing it to the Fees Act. However, these courts have not uniformly applied the Fees Act standard to ERISA suits. Although rejection of

⁴² "The *Eaves* criteria is [sic] an effective means of providing the guidance needed by district courts to exercise their discretion under section 1132(g)(1)." *Gordon v. United States Steel Corp.*, 724 F.2d 106, 109 (10th Cir. 1983).

⁴³ See, e.g., *Porcellini v. Strassheim Printing Co.*, 578 F. Supp. 605, 615-16 (E.D. Pa. 1983).

⁴⁴ See, e.g., *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 452 (9th Cir. 1980).

⁴⁵ *Central States S.E. & S.W. Areas Pension Fund v. Hitchings Trucking, Inc.*, 492 F. Supp. 906, 909 (E.D. Mich. 1980). The court rejected a four- rather than a five-factor test. *Id.* However, the court used a four-factor test on the authority of *Baeten v. Van Ess*, 474 F. Supp. 1324 (E.D. Wis. 1979), a decision which in turn cited *Eaves* as authority for its test. *Id.* at 1332. For an explanation of why that court adopted only four factors, see *infra* notes 144-48, 163-67 and accompanying text. The reasoning used by the *Central States* court, see *infra* text accompanying note 47, to reject the four-factor test is equally applicable to the original five-factor test.

⁴⁶ 492 F. Supp. 906 (E.D. Mich. 1980) (Sixth Circuit has not yet ruled on this issue).

⁴⁷ *Id.* at 909 (citation omitted).

⁴⁸ *Id.* For a description of the Fees Act and how it is analogized to § 502(g)(1), see *infra* notes 51-73 and accompanying text.

⁴⁹ On May 29, 1986, the First Circuit expressly adopted the *Eaves* test. *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 258 (1st Cir. 1986). Prior to the *Gray* decision, the First Circuit held only that an award under ERISA was "discretionary." *Lodge v. Shell Oil Co.*, 747 F.2d 16, 20 (1st Cir. 1984).

⁵⁰ *Mullins v. Kaiser Steel Corp.*, 642 F.2d 1302 (D.C. Cir. 1980), *rev'd on other grounds*, 455 U.S. 72 (1982).

the Fees Act analogy should presumably make it more difficult for prevailing plaintiffs to receive awards, the distinction between acceptance and rejection of the analogy may have no practical import. In circuits that reject the Fees Act analogy, every prevailing plaintiff's request for fees has been granted under the *Eaves* five-factor test. Nevertheless, the difference retains theoretical significance because jurisdictions which apply only the *Eaves* test have greater capacity to deny fee awards to prevailing plaintiffs. Courts also differ in their treatment of requests for awards by prevailing defendants.

1. *Prevailing Plaintiffs*

Three circuits have held that the Fees Act approach should apply to ERISA suits, and have thus followed the *Newman* presumption that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."⁵¹ If the jurisdiction has also adopted the *Eaves* test, the five factors are reduced to mere formalities recited to justify an almost automatic award for every prevailing plaintiff. In *McConnell v. MEBA Medical & Benefits Plan*,⁵² the Ninth Circuit recognized this phenomenon, stating that "proper consideration of the [five] factors will invariably lead to the conclusion that a prevailing plan participant or beneficiary should recover attorneys' fees."⁵³ The court held that the district court abused its discretion in denying the plaintiff's request for fees, because "no special circumstances exist[ed] warranting the denial."⁵⁴ Thus, the court held the district court's balancing of the *Eaves* factors in favor of the defendant irrelevant absent unusual circumstances demonstrating an improper award.

Two other circuits have adopted both the *Newman* presumption and the *Eaves* test without reaching the conclusion of the *McConnell* court.⁵⁵ Because *McConnell* demonstrates that a stringent application of the five-factor test is inconsistent with the *Newman* presumption favoring fee awards, courts in these jurisdictions must not accord substantial weight to the five factors in their analysis of fee award requests.⁵⁶

⁵¹ *Newman*, 390 U.S. at 402.

⁵² 759 F.2d 1401, *superseded*, 778 F.2d 521 (9th Cir. 1985).

⁵³ 759 F.2d at 1406. The Ninth Circuit deleted this language in *McConnell*, 778 F.2d 521. The holding, however, remained unchanged.

⁵⁴ 759 F.2d at 1406; 778 F.2d at 525.

⁵⁵ See *Birmingham v. Sogen-Swiss Int'l Corp. Retirement Plan*, 718 F.2d 515, 523 (2d Cir. 1983); *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980).

⁵⁶ This statement assumes that the courts seriously apply the *Newman* presumption. It is possible that the *Eaves* test can overcome the *Newman* presumption by considering any of the five factors that mitigate against the plaintiff as special circumstances rendering an award unjust. *Newman*, 390 U.S. at 402. Thus, if the district court balances the

One district court that applies the *Newman* presumption favoring fee awards has expressly rejected the five-factor test.⁵⁷ This approach has the virtue of consistency, as it allows an almost automatic fee award to prevailing plaintiffs without pretending to employ a multi-factored balancing test. In contrast, four circuits have expressly rejected the argument that section 502(g)(I) should be analogized to the Fees Act, and have thus declined to apply the *Newman* presumption favoring fee awards to prevailing plaintiffs.⁵⁸ These courts simply examine each of the *Eaves* factors and balance them in an attempt to achieve a just result. The factors are used as "guidelines to assist them in exercising their discretion."⁵⁹ The remaining jurisdiction which employs the *Eaves* test has not accepted or rejected the Fees Act analogy,⁶⁰ but its nonacceptance is nonetheless tantamount to rejection because the court applies the factors without any presumption, like the courts that reject the Fees Act standard.

The circuit that has not ruled on the applicability of the *Eaves* test has been similarly silent on the question of an analogy to the Fees Act. Its standard remains no more elaborate than one of discretion.⁶¹

2. Prevailing Defendants

Under the Fees Act, courts will not award attorney's fees to a prevailing defendant unless the plaintiff's suit was either frivolous or in bad faith.⁶² Although few courts have explicitly applied this standard to prevailing defendants under section 502(g)(1),⁶³ the

Eaves factors and determines that an award is unwarranted, it can deny the request using the machinery of the presumption. However, this approach would practically nullify the *Newman* presumption, just as a serious application of the presumption reduces the vitality of the five-factor analysis.

⁵⁷ See *supra* notes 45-48 and accompanying text.

⁵⁸ See *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 829 (7th Cir. 1984); *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir. 1983); *Iron Workers Local 272 v. Bowen*, 624 F.2d 1255, 1265-66 (5th Cir. 1980); *Gordon v. United States Steel Corp.*, 724 F.2d 106, 108 (10th Cir. 1983).

⁵⁹ *Iron Workers*, 624 F.2d at 1266.

⁶⁰ See *Davidson v. Cook*, 567 F. Supp. 225 (E.D. Va. 1983), *aff'd*, 734 F.2d 10 (4th Cir. 1984) (Fourth Circuit has not yet expressly ruled on this issue).

⁶¹ See *Mullins v. Kaiser Steel Corp.*, 642 F.2d 1302 (D.C. Cir. 1980), *rev'd on other grounds*, 455 U.S. 72 (1982).

⁶² See *supra* notes 26-31 and accompanying text.

⁶³ *But see Central States S.E. & S.W. Areas Pension Fund v. Hitchings Trucking, Inc.*, 492 F. Supp. 906 (E.D. Mich. 1980). The *Central States* court held as "a general rule . . . a reasonable attorney's fee should be awarded to [defendants] who prevail in ERISA actions." *Id.* at 909. The court analogized § 502(g)(1) to the Fees Act to support this broad statement. Because under the Fees Act a prevailing defendant is not entitled to an award as a general rule, one can conclude that the *Central States* court erred in adopting its position. However, since the court also found the substance of the plaintiff's

Fees Act approach has influenced the reasoning of some courts. In *Marquardt v. North American Car Corp.*,⁶⁴ the Seventh Circuit upheld the district court's determination that the prevailing defendant should not receive an award of attorney's fees. Quoting *Christiansburg*⁶⁵ extensively, the court reasoned that in both civil rights and ERISA cases "the reason for awarding fees to defendants is to discourage frivolous suits, and in both instances it is important not to punish plaintiffs whose actions fail even though they seemed reasonable at the outset."⁶⁶ The court held that because courts award fees to prevailing defendants for the same reasons under ERISA and the Civil Rights Act, the same standard should apply under each act. The court also examined each *Eaves* factor, finding all of them "primarily relevant only to whether plaintiffs should be awarded attorneys' fees. . . . [A] court will seldom abuse its discretion by refusing to award attorneys' fees . . . to a defendant."⁶⁷ Thus, the *Eaves* test, although employed as a device to award fees to a prevailing plaintiff, can rarely be used to assess fees against a losing plaintiff. The court declined to name all the "specific circumstances [under which] fees may be properly awarded to defendants,"⁶⁸ but stated that the purpose of awarding fees to defendants is to discourage frivolous suits.⁶⁹ Although the *Marquardt* approach applies the *Eaves* test, the result resembles the outcome under the Fees Act approach.⁷⁰

main claim to be "totally without merit," *id.* at 908, it is possible that the court viewed the suit as frivolous or in bad faith, which would render an award to the defendant proper under a Fees Act analogy and may serve to limit the scope of the court's "general rule." *Cf.* *Staats v. Ohio River Co.*, 570 F. Supp. 22, 25 (W.D. Pa. 1983) (holding, without reference to Fees Act, that prevailing defendant is not entitled to award of attorney's fees absent bad faith on plaintiff's part), *aff'd*, 735 F.2d 1351 (3d Cir. 1984).

⁶⁴ 652 F.2d 715 (7th Cir. 1981).

⁶⁵ See *supra* notes 27-28 and accompanying text.

⁶⁶ *Marquardt*, 652 F.2d at 720 n.6.

⁶⁷ *Id.* at 720-21.

⁶⁸ *Id.* at 721 n.7.

⁶⁹ *Id.* at 720 n.6.

⁷⁰ The Ninth Circuit has also adopted the *Marquardt* rule. See *Operating Eng's Pension Trust v. Gilliam*, 737 F.2d 1501, 1506 (9th Cir. 1984) (awarding fees to prevailing defendant because "the prosecution of this suit was grossly unfair"). *Cf.* *Carpenters S. Cal. Admin. Corp. v. Russell*, 726 F.2d 1410, 1415-17 (9th Cir. 1984) (adopting *Marquardt* approach but rejecting *Christiansburg* standard as too narrow, thus leaving flexibility to back away from *Marquardt* rule in a given case and award fees to defendant absent bad faith or frivolousness).

In *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820 (7th Cir. 1984), the court reformulated the *Marquardt* approach, acknowledging that a court will not assess fees against a plaintiff absent frivolousness or bad faith on his part. It analogized § 502(g)(1) to the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A) (1982 & West 1986), and thereby adopted "a modest presumption . . . in favor of awarding reasonable attorney's fees to the winning . . . defendant, unless the loser's position, while rejected by the court, had a solid basis—more than merely not frivolous, but less than meritorious." *Bittner*, 728 F.2d at 830. The rule appears to require that a plaintiff's suit be more meritorious than not frivolous, but in *Chicago Painters & Decorators Pension, Health & Welfare, & De-*

The opposing view does not make use of the Fees Act approach, and assumes that applying the *Eaves* factors to a prevailing defendant is just as likely to dictate an award as applying the factors to a prevailing plaintiff. The Fifth Circuit briefly explained this position in dicta, stating that the *Newman/Christiansburg* bifurcated standard, which almost automatically awards fees to prevailing plaintiffs but only awards them to prevailing defendants if the plaintiff's suit was frivolous or in bad faith, is "inapposite to ERISA."⁷¹ One district court has gone even further, using neither a bifurcated standard nor the *Eaves* test to hold that "[w]henver one side is entitled to attorney's fees and costs in an action, the law is pretty clear that the other side is entitled to the same things if the other side is the prevailing party."⁷² Because the court is in the Ninth Circuit, which has adopted the *Newman* presumption for prevailing plaintiffs,⁷³ this position is tantamount to an automatic award of fees to prevailing defendants and has no other support in the case law.

Some courts automatically deny an award to the prevailing defendant if the defeated plaintiff is unable to pay it. In *American Communications Association v. Retirement Plan for Employees of RCA Corp.*,⁷⁴ the court focussed on the losing plaintiff's ability to pay an award. One plaintiff, an individual, was threatened with bankruptcy if assessed with the defendant's attorney's fees. On that basis, the court denied the defendant's motion for fees as to that plaintiff.⁷⁵ However, the court deemed the plaintiff union able to pay and to have known that a losing suit would entail this cost, and assessed fees against it.⁷⁶

C. Application of Section 502(g)(1) to Nonprevailing Plaintiffs

Unlike the Fees Act,⁷⁷ section 502(g)(1)'s language does not re-

ferred *Sav. Plan Trust Funds v. Karr Bros.*, 755 F.2d 1285, 1291-92 (7th Cir. 1985), the court employed both the *Marquardt* and *Bittner* rules in denying an award to the prevailing defendant because the plaintiff's suit was not frivolous. The *Christiansburg* test, see *supra* notes 27-28 and accompanying text, would provide the same result.

⁷¹ *Iron Workers Local 272 v. Bowen*, 624 F.2d 1255, 1266 n.24 (5th Cir. 1980). For a recent discussion on the policy justifications for applying the *Eaves* factors to either prevailing party, see *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 258 (1st Cir. 1986).

⁷² *Wagoner v. Dallaire*, 570 F. Supp. 1168, 1177 (C.D. Cal. 1983), *rev'd on other grounds*, 767 F.2d 589 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1374 (1986).

⁷³ *McConnell v. MEBA Medical & Benefits Plan*, 778 F.2d 521 (9th Cir. 1985).

⁷⁴ 507 F. Supp. 922 (S.D.N.Y. 1981). See also *Wishner v. St. Luke's Hosp. Center*, 550 F. Supp. 1016, 1020-21 (S.D.N.Y. 1982) (holding that plaintiff's inability to pay award is sufficient ground for denying request for fees).

⁷⁵ *American Communications*, 507 F. Supp. at 923.

⁷⁶ *Id.* at 924.

⁷⁷ See *supra* text accompanying note 21.

quire that courts award attorney's fees only to prevailing parties.⁷⁸ Nonetheless, nearly all courts have restricted ERISA awards to prevailing parties. In the leading case, *Fase v. Seafarers Welfare & Pension Plan*,⁷⁹ the Second Circuit denied a plaintiff's request for fees because he had not obtained relief under ERISA. The court held that "[a]n altogether sufficient support for the court's decision not to award attorney's fees under ERISA is that the attorney obtained no relief under that statute."⁸⁰ Although courts are not required to deny a request for fees by wholly unsuccessful plaintiffs under this rule, such denial will never constitute an abuse of discretion that is reversible on appeal.⁸¹

In addition, the Supreme Court decision in *Ruckelshaus v. Sierra Club*⁸² makes it unlikely that nonprevailing plaintiffs⁸³ can recover attorney's fees in ERISA suits. *Ruckelshaus* arose under section 307(f) of the Clean Air Act,⁸⁴ which allows fee shifting "whenever [the court] determines that such award is appropriate." The Court held that a nonprevailing plaintiff was never entitled to an award. The Court stated that before it would "conclude Congress abandoned this established principle that a successful party need not pay its unsuccessful adversary's fees—rooted as it is in intuitive notions of fairness and widely manifested in numerous different contexts—a clear showing that this result was intended is required."⁸⁵ The five member majority decided that Congress had omitted the word "prevailing" to avoid debate over the precise meaning of the term and allow an award if the plaintiff had some degree of success in the litigation.⁸⁶ Thus, a wholly unsuccessful plaintiff was not meant to

⁷⁸ See *supra* text accompanying note 6.

⁷⁹ 589 F.2d 112 (2d Cir. 1978).

⁸⁰ *Id.* at 116.

⁸¹ Courts have widely accepted this approach in dealing with requests for attorney's fees by nonprevailing plaintiffs under ERISA. See *Lawrence v. Westerhaus*, 749 F.2d 494, 496 (8th Cir. 1984) (remanding request for fees until success on merits is shown); *Lodge v. Shell Oil Co.*, 747 F.2d 16, 21 (1st Cir. 1984) (holding that lack of success on merits "is sufficient support for the court's exercise of its discretion not to award . . . fees"); *Marquardt v. North Am. Car Corp.*, 652 F.2d 715, 718 n.2 (7th Cir. 1981) (finding no abuse of discretion in denying attorney's fees even if defendant had prevailed on merits). But see *Winpisinger v. Aurora Corp.*, 469 F. Supp. 782 (N.D. Ohio 1979). In *Winpisinger*, the court held that "[s]ince 'a reasonable attorneys' fee' may be allowed 'to either party,' it is concluded that fees may be allowed . . . for either the prevailing party or the unsuccessful party." *Id.* at 785. The court awarded fees to a nonprevailing plaintiff class. This result probably does not survive *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983). See *infra* notes 82-87 and accompanying text. But see *infra* notes 171-73 and accompanying text for an argument as to why it should.

⁸² 463 U.S. 680 (1983).

⁸³ It is obviously even less likely that a culpable defendant would ever be awarded fees, because of basic notions of fairness.

⁸⁴ 42 U.S.C. § 7607(f) (1982).

⁸⁵ *Ruckelshaus*, 463 U.S. at 685.

⁸⁶ *Id.* at 686-93.

receive an award under any circumstances. Since the *Ruckelshaus* decision, one court has stated in an ERISA case that "it would be an abuse of discretion for the district court to award attorney's fees to a losing party, even though section [502](g)(1) does not in so many words confine awards . . . to winners."⁸⁷

II

ANALYSIS

Section 502(g)(1)'s underlying function and the inapplicability of the private attorney general doctrine to ERISA make the Fees Act standard an inappropriate one for prevailing plaintiffs. However, to discourage frivolous suits courts should adopt the Fees Act standard for prevailing ERISA defendants. Furthermore, the *Eaves* five-factor test is a flawed method of analyzing requests for awards under section 502(g)(1). None of the *Eaves* factors comports with the function of the ERISA fee-shifting provision or accepted fee-shifting principles, and some of the factors are unnecessary in light of the judiciary's equitable fee-shifting powers. Finally, nonprevailing plaintiffs generally should not be granted awards, unless their cases created new law or were lost on procedural grounds.

A. Inappropriateness of the Fees Act Analogy for Determining Attorney's Fees Awards to Prevailing Plaintiffs Under Section 502(g)(1)

Courts should not apply the *Newman* presumption⁸⁸ to prevailing plaintiffs because it is improper to draw an analogy between the Fees Act and section 502(g)(1). This view is supported both by a fair approximation of section 502(g)(1)'s underlying purpose and the inapplicability to that section of the private attorney general theory, which is the primary justification for the *Newman* presumption.⁸⁹

1. *The Function of ERISA's Fee-Shifting Provision*

The lack of legislative history makes it impossible to determine the actual "intent" Congress had when it enacted section 502(g)(1). Using the statutory language and the few judicial opinions commenting upon it as a starting point, however, this Note develops a theory of what the function of the provision *should* be. The Note concludes that, based on the language of section 502(g)(1), the fee-

⁸⁷ *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 829 (7th Cir. 1984); see also Phillips, *Civil Litigation Under the Employee Retirement Income Security Act of 1974*, 49 Miss. L.J. 241, 269 (1978) (arguing that § 502(g)(1) did not permit awards to unsuccessful plaintiffs even before *Ruckelshaus*).

⁸⁸ See *supra* text accompanying note 22.

⁸⁹ See *supra* notes 22-25 and accompanying text.

shifting rationale that supports it, and the existing standards for other statutes which protect financial interests, the section is a relatively weak fee-shifting provision. Thus the Fees Act standard, which usually grants awards to prevailing plaintiffs, is inappropriate under ERISA. Courts should award fees only under section 502(g)(1) to prevailing plaintiffs who would not otherwise bring suit.

Congress enacted ERISA's enforcement provisions "to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement . . . for recovery of benefits due to participants."⁹⁰ No other useful legislative history exists.⁹¹ Courts have speculated that the section seeks "to enable pension claimants to obtain competent counsel and to distribute the economic burden of litigation in a fair manner"⁹² and to "secure effective access to federal courts."⁹³ Taken literally, these brief statements of purpose indicate that courts should award fees under section 502(g)(1) only when a potential plaintiff would not otherwise bring an ERISA claim. Each statement demonstrates a desire to ensure that the prohibitive costs of litigation will not bar potential plaintiffs from filing ERISA suits.

Similar provisions in securities, trademark, and patent statutes⁹⁴ support the proposition that section 502(g)(1) is a relatively weak fee-shifting provision compared to the Fees Act. Like these areas of regulation, ERISA protects the financial interests of a targeted, albeit large, group of investors.⁹⁵ In securities regulation, courts award fees to the plaintiff only if the defendant's position on the merits is frivolous or in bad faith.⁹⁶ Prevailing plaintiffs in patent and trademark cases must show fraud or malice by the defend-

⁹⁰ H.R. REP. NO. 533, 93d Cong., 1st Sess. 17 (1973), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4639, 4655.

⁹¹ *See supra* text accompanying note 7.

⁹² *Ford v. New York Cent. Teamsters Pension Fund*, 506 F. Supp. 180, 182 (W.D.N.Y. 1980), *aff'd*, 642 F.2d 664 (2d Cir. 1981). *Accord* *Carter v. Montgomery Ward & Co.*, 76 F.R.D. 565, 568 (E.D. Tenn. 1977).

⁹³ *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984). *See also* *Berger*, *supra* note 19, at 310 ("statutory attorneys' fee provisions are intended to achieve the fullest possible enforcement of the congressional policy embodied in the underlying statutory scheme").

⁹⁴ *See* Plant Variety Protection Act § 125, 7 U.S.C. § 2565 (1982) (allowing awards of attorney's fees in "exceptional cases"); Trademark Act § 35, 15 U.S.C. § 1117 (1982) (same; but only for prevailing parties); Patent Infringement Act § 1, 35 U.S.C. § 285 (1982) (same); Securities Act of 1933 § 11(e), 15 U.S.C. § 77k(e) (1982) (allowing for fees to prevailing party "if the court believes the suit or the defense to have been without merit"); Trust Indenture Act § 315(e), 15 U.S.C. § 7700o(e) (1982) (allowing award of fees "having due regard to the merits and good faith of the claims or defenses made by such party litigant").

⁹⁵ *See infra* notes 113-16 and accompanying text.

⁹⁶ *See* Note, *supra* note 2, at 330-31.

ant to receive a fee award.⁹⁷ Although the language of section 502(g)(1)⁹⁸ allows courts more discretion than similar statutes, courts should recognize that statutes protecting economic interests typically contain weak fee-shifting provisions.⁹⁹

The language of section 502(g)(1) supports the rationale that the section seeks to equalize the parties' financial strength.¹⁰⁰ This rationale indicates that the provision functions merely to aid potential plaintiffs who otherwise could not bring suit—a weak class compared to their employers, plans, or unions. Awarding fees to individual plaintiffs strengthens their position relative to ERISA defendants. Therefore, potential plaintiffs who are able to pay their own attorney's fees should not receive awards under section 502(g)(1) because by definition the cost of counsel does not deter them from bringing suit. Consequently, the class affected by section 502(g)(1) should not be the entire range of ERISA plaintiffs, but only those whose financial position is so weak that they cannot bring suit unless they receive an award of attorney's fees.

In contrast, the other four fee-shifting rationales do not justify an award under section 502(g)(1). The "compensation rationale," which urges that a plaintiff should not have his damage award reduced by the amount of his attorney's fees,¹⁰¹ is inconsistent with a discretionary statute.¹⁰² If Congress had intended that plaintiffs as a matter of principle be fully compensated for the wrongs they suffer, it would have made an award mandatory, as it has done in other statutes.¹⁰³ The "indemnity rationale," which states that prevailing parties should not have to bear the cost of vindicating their position,¹⁰⁴ is partially applicable to ERISA. Congress, by making the awards discretionary, clearly intended that some prevailing plaintiffs not pay to vindicate their positions. This rationale, however, does not give any guidance as to who should be the fortunate plaintiffs. All prevailing plaintiffs by definition are victorious on the merits, yet section 502(g)(1) allows fee awards to only a portion of them. Stand-

⁹⁷ *Id.*

⁹⁸ *See supra* text accompanying note 6.

⁹⁹ *See supra* note 94.

¹⁰⁰ Professor Rowe has explained this "relative financial strength" rationale. Rowe, *supra* note 32, at 663-65. When one class of litigants is in a weak financial position vis-à-vis its adversary class, courts can shift fees to help the weaker class litigate, and to prevent the stronger class from using the judicial process to exhaust its opponent's resources. *Id.*

¹⁰¹ *Id.* at 657-59.

¹⁰² *Id.* at 658.

¹⁰³ *See supra* note 5. Under the language of § 502(g)(1), some plaintiffs should receive awards while others should not.

¹⁰⁴ *See supra* text accompanying note 32.

ing alone, the indemnity rationale does not substantially contribute to the search for a proper standard under section 502(g)(1).

Section 502(g)(1)'s legislative history does not indicate that Congress provided for awards of attorney's fees as a punitive measure. The legislative intent and judicial interpretations merely indicate that the section seeks to assist parties who would not otherwise bring suit.¹⁰⁵ One commentator has accurately concluded in this context that "[n]o blame attaches to such litigation, and it does not call for strong deterrence. Any fee shifting against an unsuccessful party in such a situation should rest on grounds other than punishment or deterrence."¹⁰⁶

2. *The Private Attorney General Doctrine*

The private attorney general doctrine allows courts to award attorney's fees to plaintiffs who take on the burden of conducting public interest litigation. The doctrine evolved as an exception to the American Rule¹⁰⁷ of fee shifting and aims to "encourage private parties to bring actions that would advance the public interest"¹⁰⁸ and to effect equity between the parties.¹⁰⁹ After *Alyeska Pipeline Service Co. v. Wilderness Society*,¹¹⁰ the courts could no longer apply the private attorney general doctrine absent statutory authorization.

¹⁰⁵ "[N]othing in the language of section 1132(g)(1) suggests that an award of attorney's fees . . . serves the same purpose as awarding punitive damages . . . [and] the courts have not interpreted section 1132(g)(1) as if its intent were punitive." *Bitner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 828 (7th Cir. 1984). *Cf.* *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir. 1983) ("Where . . . the award is statutory, the assessment of a counsel fee is to some extent a penalty for violating the law."). This statement is not supported by the legislative history, and is inconsistent with the generally accepted view of § 502(g)(1)'s purpose. It also ignores the fact that ERISA contains several punitive measures, both civil and criminal, in its other sections. *See infra* notes 155-62 and accompanying text.

¹⁰⁶ *Rowe*, *supra* note 32, at 661. This theory does not apply to plaintiffs, who may have fees assessed against them as a punitive measure if their suits are frivolous or in bad faith. *See supra* notes 26-31 and accompanying text. Courts should allow every good faith defendant to make the plaintiff prove his case, but deter potential plaintiffs from initiating vexatious litigation.

¹⁰⁷ *See supra* notes 14-16 and accompanying text.

¹⁰⁸ Note, *Implementing the Incentive Purpose of the Private Attorney General Exception*, 60 WASH. L. REV. 489, 491 (1985) [hereinafter cited as Note, *Implementing the Incentive Purpose*]. The Supreme Court has explained that a plaintiff bringing a suit under a civil rights statute acts "not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest . . ." *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (footnote omitted) (granting attorney's fees to plaintiff who enjoined defendants from funding discriminatory restaurants). *See also* Note, *supra* note 2, at 284-86 (summarizing private attorney general doctrine); Note, *Awards of Attorneys' Fees to Unsuccessful Environmental Litigants*, 96 HARV. L. REV. 677, 679-81 (1983) (same).

¹⁰⁹ *See* Note, *Implementing the Incentive Purpose*, *supra* note 108, at 494-95.

¹¹⁰ 421 U.S. 240 (1975). *See supra* text accompanying note 16.

Congress passed the Fees Act so that courts could continue to implement the private attorney general doctrine in civil rights cases.¹¹¹ The *Newman* presumption favoring fee awards is thus applied under the Fees Act to permit implementation of the doctrine.¹¹²

An ERISA plaintiff does not act as a private attorney general. The statute "was enacted to protect individuals who failed to receive an anticipated pension because terms of the pension plan denied benefits to workers . . . or because the company ended operations with inadequate funds set aside to pay promised benefits."¹¹³ Before ERISA,

[e]mployees were often denied benefits because of unreasonably stringent rules governing participation and vesting in the plan or, in certain cases, because of the arbitrary application of otherwise equitable rules. At times, plans imposed conditions on benefits that bore no reasonable relationship to the plans' purposes. In some cases, eligibility requirements were changed without notice to employees or a grace period, or such changes were applied retroactively to previously-filed applications for benefits.¹¹⁴

The interest protected by ERISA is purely economic. In contrast, civil rights laws, the source of the private attorney general doctrine, protect constitutional rights of the highest order.¹¹⁵ Economic well-being, though clearly important, is not considered a constitutional right.¹¹⁶ The private attorney general doctrine was not conceived as a vehicle for awarding fees to litigants who enforce nonconstitutional rights, and it has not often been so employed.¹¹⁷ The doc-

¹¹¹ "[I]n *Alyeska*, the United States Supreme Court . . . ruled that only Congress, and not the courts, could specify which laws were important enough to merit fee shifting under the 'private attorney general' theory. . . . This bill . . . is an appropriate response to the *Alyeska* decision. *It is limited to cases arising under our civil rights laws . . .*" SENATE REPORT, *supra* note 22, at 4 (emphasis added), reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5911-12. See also *Francia v. White*, 594 F.2d 778, 781 (10th Cir. 1979) (explaining that Congress enacted Fees Act to assist private attorneys general in recovering fees).

¹¹² SENATE REPORT, *supra* note 22, at 4, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5912.

¹¹³ Sickles, *Introduction: The Significance and Complexity of ERISA*, 17 WM. & MARY L. REV. 205, 206 (1975).

¹¹⁴ Hutchinson, *The Employee Retirement Income Security Act: Origins and Objectives*, 14 FORUM 611, 614 (1979) (footnotes omitted).

¹¹⁵ The fourteenth amendment's prohibitions against discrimination on the basis of race, sex, and religion are the most obvious examples. U.S. CONST. amend. XIV.

¹¹⁶ See *Nebbia v. New York*, 291 U.S. 502 (1934) (holding that due process clause of fourteenth amendment does not protect right to charge whatever market would bear for product); see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (indicating that fourteenth amendment primarily protects political process rather than commercial transactions).

¹¹⁷ The major exception to this rule is in the antitrust field, where a few courts have equated the plaintiffs with private attorneys general. "The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his

trine exists "to alleviate the patent unfairness in making a citizen incur a heavy financial burden in order to realize a clearly defined constitutional right."¹¹⁸

In *Iron Workers Local 272 v. Bowen*,¹¹⁹ the Fifth Circuit refused to apply the private attorney general doctrine to ERISA plaintiffs, explaining that

[t]he policies underlying ERISA are certainly important ones, but they simply do not rise to the level of assuring that all citizens are accorded their civil rights. . . . [T]he need for attorneys' fees as an enforcement incentive is less under ERISA than the . . . civil rights statutes. Plaintiffs suing under the latter statutes are "private attorneys general" in the sense that they seek injunctive relief to vindicate important public rights. . . . Plaintiffs under Title I of ERISA may be seeking injunctive relief for the benefit of all the participants and beneficiaries of a particular plan, but they may also be seeking damages on behalf of their plan or simply the recovery of benefits from the plan that are due them alone. . . . Thus, incentives in the form of attorneys' fees are . . . less necessary to insure that the statute is enforced.¹²⁰

rights under the Act has been likened to a private attorney-general who protects the public's interest." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346, 3358 (1985) (explaining importance of Sherman Act's treble damages provision) (quoting *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826 (2d Cir. 1968)). However, courts do not have to rely upon the private attorney general doctrine to award fees in antitrust cases, because such awards are mandatory rather than discretionary. See 15 U.S.C. § 15 (1982). Furthermore, although ERISA affects millions of individuals, it does not affect the nation's collective economy in the manner of the anti-trust law.

Some courts have also extended the private attorney general doctrine into the area of environmental litigation. See Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 CORNELL L. REV. 1222, 1237-46 (1973). However, environmental litigation can affect the entire population of a locality, while ERISA suits benefit only the particular plan's members. These examples show that courts have extended the private attorney general doctrine to nonconstitutional rights only when societal, rather than individual, rights are affected.

¹¹⁸ Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HASTINGS L.J. 733, 738 (1973). *Accord, e.g.*, *Souza v. Travisono*, 512 F.2d 1137, 1138 (1st Cir.) (justifying private attorney general doctrine on basis that "the protection of . . . constitutional rights depended on the efforts of skilled attorneys"), *vacated and remanded for further consideration in light of Alyeska*, 423 U.S. 809 (1975); *Taylor v. Perini*, 503 F.2d 899, 905 (6th Cir. 1974) (applying doctrine because plaintiffs "vindicated constitutional rights strongly favored by congressional policy"), *vacated and remanded for further consideration in light of Alyeska*, 421 U.S. 982 (1975); *Fowler v. Schwarzwalder*, 498 F.2d 143, 144-46 (8th Cir. 1974) (discussing doctrine only in terms of constitutional rights); *Brandenburger v. Thompson*, 494 F.2d 885, 889 (9th Cir. 1974) (employing doctrine when plaintiff enforced statute that "expresse[d] a strong policy of vindicating federal constitutional rights").

¹¹⁹ 624 F.2d 1255 (5th Cir. 1980).

¹²⁰ *Id.* at 1265-66 (footnotes omitted). For similar explanations of why the Fees Act is not analogous to § 502(g)(1), see *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 829-30 (7th Cir. 1984) (pension plan participants do not constitute a "vulnerable group" like racial minorities); *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 592

The other circuits that reject the Fees Act analogy also implicitly adopt this view.¹²¹ Furthermore, courts have denied awards under the Fees Act to prevailing plaintiffs, in spite of the liberal *Newman* presumption, where courts found that the plaintiff did not act as a private attorney general or that the plaintiff had adequate incentives for his action independent of the Fees Act.¹²² Likewise, plaintiffs in ERISA actions are not acting as private attorneys general seeking to protect some broad public right, and they may have adequate resources to bring ERISA actions without relying on the fee-shifting provision.¹²³

Even if an ERISA plaintiff properly could be characterized as a private attorney general, courts should not apply the *Newman* presumption to section 502(g)(1). The Fees Act is only applicable to civil rights cases.¹²⁴ Congress incorporated the *Newman* presumption into the Fees Act because it wanted to ensure that civil rights plaintiffs would almost always be awarded attorney's fees.¹²⁵ If a court analogizes the Fees Act to section 502(g)(1), it implicitly holds that Congress equated the rights protected by ERISA with civil rights, because it granted both classes of plaintiffs the same protection. The Court's decision in *Alyeska*,¹²⁶ however, stands for the proposition that Congress, rather than the judiciary, must make major fee-shifting decisions. Without a legislative mandate courts should not equate economic interests with constitutional rights for fee-shifting purposes.

B. The Fees Act Approach Should Apply to Prevailing Defendants Under Section 502(g)(1)

Although courts should not adopt the Fees Act approach for determining awards to prevailing plaintiffs, courts best fulfill section

(9th Cir. 1984) (Wallace, J., concurring) (refusing to analogize § 502(g)(1) to civil rights statute, citing *Carpenters S. Cal. Admin. Corp. v. Russell*, 726 F.2d 1410, 1415-16 (9th Cir. 1984)); see also *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 259 (1st Cir. 1986) (suggesting ERISA plaintiffs are not private attorneys general).

¹²¹ See *supra* notes 58-60 and accompanying text.

¹²² See *supra* note 25. See also Note, *supra* note 25, at 335-38 (arguing that, contrary to some authority, plaintiff need not benefit others beside himself to qualify as private attorney general).

¹²³ Courts requiring a public benefit should never find an ERISA plaintiff to be a private attorney general because an ERISA plaintiff primarily benefits persons associated with his pension plan by acquiring an interpretation of a particular plan provision. See *supra* text accompanying notes 113-20. Courts holding any Fees Act plaintiff to be a private attorney general do so because by enforcing his own civil rights, he vindicates an important congressional priority. See Note, *supra* note 2, at 284-85. An ERISA plaintiff does not achieve the same result. See *supra* text accompanying note 120.

¹²⁴ 42 U.S.C. § 1988 (1982).

¹²⁵ See *supra* notes 22-25 and accompanying text.

¹²⁶ See *supra* notes 16-20 and accompanying text.

502(g)(1)'s function by adopting the Fees Act approach for awards to prevailing defendants in ERISA suits. That approach is more appropriate for application to ERISA defendants than the *Eaves* five-factor test.

It is unclear whether a prevailing defendant must show bad faith by the plaintiff to receive an award under the Fees Act or whether a showing of frivolousness is sufficient.¹²⁷ However, under either of these standards it is more difficult for defendants to receive fees than under the *Eaves* five-factor test.¹²⁸ This is a proper result, given the function of section 502(g)(1) as facilitating ERISA suits that plaintiffs otherwise would not bring.¹²⁹ An unpredicted defeat on the merits resulting in liability for the defendant's attorney's fees would easily discourage potential plaintiffs from enforcing their rights under the statute. Few lawsuits are guaranteed winners. Thus, if courts do not adopt a bad faith or frivolousness standard for prevailing defendants, potential ERISA plaintiffs will hesitate to bring suits. At the same time, such a standard will discourage suits that are frivolous or in bad faith. By allowing courts to award fees to either the plaintiff or the defendant in an ERISA action,¹³⁰ Congress surely envisioned that prevailing defendants would sometimes receive awards. However, courts should limit awards of attorney's fees to prevailing defendants by applying the Fees Act approach to protect the overriding purposes of the fee-shifting provision.

The *Christiansburg* frivolousness standard¹³¹ is more appropriate than a strict bad faith standard.¹³² Although applying the frivolousness standard might make potential plaintiffs less inclined to bring suit, the standard is nevertheless appropriate because very few frivolous cases are brought in good faith. Cases may exist where the plaintiff believes the suit has a reasonable basis under the law when in fact it does not. However, the *Christiansburg* test allows for such cases by not holding the plaintiff liable for fees unless the suit clearly becomes unreasonable during the course of the litigation. Thus, if the suit is not frivolous at the outset, courts assess no fees.

¹²⁷ See *supra* notes 26-31 and accompanying text; see also *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 259-60 (1st Cir. 1986) (denying defendant's request for fees because no bad faith despite frivolous suit).

¹²⁸ Under the *Eaves* test, courts may award fees to a prevailing defendant even though the plaintiff brought an action in good faith if, for example, the plaintiff could pay the award. See *supra* text accompanying note 39.

¹²⁹ See *supra* notes 90-106 and accompanying text.

¹³⁰ 29 U.S.C. § 1132(g)(1) (1982) ("court . . . may allow . . . fee . . . to either party").

¹³¹ See *supra* text accompanying notes 27-28.

¹³² If courts adopt a bad faith standard, § 502(g)(1) would become superfluous for prevailing defendants because courts can equitably assess attorney's fees against bad faith litigants even in the absence of any statutory provision. See *Christiansburg*, 434 U.S. at 419; see also *infra* notes 144-48.

Although it is hard to predict victory with accuracy, a potential ERISA plaintiff should rely on the advice of his attorney that his suit has some reasonable basis under the law and that courts will not assess attorney's fees against him. Indeed, in many cases an ERISA suit provides an easier determination that a claim is reasonable at the outset, because these suits involve such factual issues as whether a fiduciary complied with plan provisions, rather than a civil rights claim, which may present more difficult questions.¹³³ Consequently, the frivolousness standard will discourage few reasonable suits.¹³⁴ Of course, where courts find the suit initially frivolous, the good faith plaintiff could ask the judge to assess the award against the plaintiff's attorney as a sanction.¹³⁵

It is not inconsistent for courts to reject the Fees Act approach for prevailing ERISA plaintiffs while accepting it for prevailing defendants. Unlike the Fees Act, ERISA's legislative history does not compel application of the *Newman* presumption. The Fees Act's policy, which is to encourage private enforcement of the civil rights laws, requires that courts should almost automatically award prevailing plaintiffs attorney's fees and award fees to prevailing defendants only for suits brought frivolously or in bad faith.¹³⁶ In contrast, section 502(g)(1)'s function is to facilitate ERISA suits plaintiffs could not otherwise bring,¹³⁷ and does not require a virtual guarantee that courts will award plaintiffs fees. Its function does, however, imply that courts should not award defendants fees in actions brought in good faith.

Few courts, however, have adopted a bad faith or frivolousness standard for prevailing defendants under ERISA.¹³⁸ Instead, some courts apply the *Marquardt* court's application of the *Eaves* test. Under this approach, prevailing defendants rarely receive awards, reflecting the result under the frivolousness test.¹³⁹ The opposing view, that courts should earnestly apply the *Eaves* five-factor test to

¹³³ If the *Christiansburg* court was willing to impose a frivolousness standard on civil rights plaintiffs, it would presumably be even less apprehensive in applying it to an ERISA plaintiff because ERISA achieves only nonconstitutional policy objectives.

¹³⁴ In applying this standard, "it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable." *Christiansburg*, 434 U.S. at 421-22.

¹³⁵ Rule 11 of the Federal Rules of Civil Procedure allows courts to impose "an appropriate sanction . . . including a reasonable attorney's fee" upon an errant counsel. Use of this sanction has been increasing. See generally Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985).

¹³⁶ See *supra* notes 21-31 and accompanying text.

¹³⁷ See *supra* notes 90-106 and accompanying text.

¹³⁸ See *supra* note 63 and accompanying text.

¹³⁹ See *supra* notes 64-70 and accompanying text.

prevailing defendants,¹⁴⁰ discourages potential plaintiffs from bringing suits having a reasonable basis under the law and therefore conflicts with section 502(g)(1)'s function. Finally, the view that courts can award fees to a prevailing defendant only if the plaintiff is able to pay them¹⁴¹ is inappropriate to analysis of fee shifting under section 502(g)(1). This approach forces financially secure plaintiffs to pay fees in suits they lose, even if reasonable and brought in good faith, and thus discourages potentially meritorious actions. Conversely, it affords penniless plaintiffs the luxury of suing for harassment purposes with impunity.

C. Courts Should Not Apply the *Eaves* Five-Factor Test to Determine Attorney's Fees Awards Under Section 502(g)(1)

The five-factor test is an unhelpful method for determining the appropriateness of awards to prevailing plaintiffs in ERISA actions. Any test to determine the appropriateness of an award must be consistent with an approximation of Congress's intent in enacting section 502(g)(1),¹⁴² and should be justifiable by general principles of fee shifting.¹⁴³ Furthermore, if the test only codifies existing rules, it adds nothing to the development of the law.

None of the *Eaves* factors meets these guidelines. The first factor courts consider under the *Eaves* test, "the degree of the offending parties' culpability or bad faith,"¹⁴⁴ is superfluous because even absent any statute courts may shift fees if bad faith exists. Consideration of the defendant's bad faith is unnecessary with a statutory fee-shifting provision.¹⁴⁵ Thus, there is no need to formalize the consideration of a defendant's bad faith¹⁴⁶ in a test under section 502(g)(1), because if bad faith is present, courts can shift attorney's fees under their inherent power. At least one court has adopted this position,¹⁴⁷ and modified the *Eaves* test to exclude any consideration of the defendant's bad faith.¹⁴⁸ Furthermore, this factor is im-

¹⁴⁰ See *supra* note 71 and accompanying text.

¹⁴¹ See *supra* notes 74-76 and accompanying text.

¹⁴² See *supra* notes 90-106 and accompanying text.

¹⁴³ See *supra* note 32 and accompanying text.

¹⁴⁴ See *supra* text accompanying note 39.

¹⁴⁵ See *supra* notes 17-18 and accompanying text.

¹⁴⁶ The doctrine of bad faith takes into account the possibility that some, but not all, of the defendant's conduct may have been in bad faith. Courts should only award fees to cover those expenses which resulted from the defendant's bad faith. See Mallor, *supra* note 18, at 638.

¹⁴⁷ Baeten v. Van Ess, 474 F. Supp. 1324 (E.D. Wis. 1979).

¹⁴⁸ *Id.* at 1332. See also Landro v. Glendenning Motorways, Inc., 625 F.2d 1344, 1356 (8th Cir. 1980) (noting that courts have discretion at common law to award attorney's fees against losing parties who have acted in bad faith and that there is presump-

proper because considering the degree of a defendant's culpability uses fee shifting as a punitive measure. Similarly, the fifth *Eaves* factor, "the relative merits of the parties' position"¹⁴⁹ when applied to a case where the plaintiff has prevailed, also requires investigating the defendant's culpability.¹⁵⁰

An inquiry into culpability is improper because it suggests that courts will deny a fee award to an otherwise worthy plaintiff upon a finding that the losing defendant was "nonculpable." This denial is inappropriate because the function of section 502(g)(1) is to facilitate the prosecution of suits which plaintiffs would not otherwise bring.¹⁵¹ Application of the degree of culpability factor would deter some plaintiffs from bringing suit in close cases, thereby discouraging potentially meritorious actions. Conversely under this approach potential plaintiffs able and willing to finance litigation absent fee shifting would still get an award if courts found the defendant's position meritless. The degree of the defendant's culpability has no bearing on the plaintiff's financial resources and is therefore unhelpful in determining the propriety of fee awards under section 502(g)(1).

The second *Eaves* factor, "the degree of the ability of the offending parties to personally satisfy an award of attorneys fees,"¹⁵² concerns situations where the fees "would be paid not out of the pockets of the people responsible for the denial of benefits to the plaintiff—the plan's trustees, for example—but out of the plan assets themselves, thus hurting the plan beneficiaries."¹⁵³ This concern is misplaced. Section 502(g)(1) aims to facilitate ERISA litigation by removing the burden of paying attorney's fees from plaintiffs who might not otherwise bring suit. The ultimate source of payment should be subordinate to the goal of enabling plaintiffs to bring suit. Furthermore, as the *Eaves* test acknowledges in its fourth factor, an individual plaintiff's action may benefit an entire group of plan participants, either through acquiring delinquent funds or establishing a favorable point of law. In these cases it is proper to assess fees to the plan if the culpable defendant is unable to pay. Even if a particular suit benefits only the plaintiff, a general

tion against interpreting statute so as to render it superfluous); *Bugher v. Consolidated X-Ray Serv. Corp.*, 705 F.2d 1426, 1436 (5th Cir. 1983) (assessing fees against party who had acted in bad faith when award was not justifiable under § 502(g)(1)), *cert. denied*, 105 S. Ct. 3524 (1985); *supra* note 132 (same analysis in context of Fees Act).

¹⁴⁹ See *supra* text accompanying note 39.

¹⁵⁰ See *Marquardt v. North Am. Car Corp.*, 652 F.2d 715, 718, 720 (7th Cir. 1981) (defining merits of defendant's position in terms of his culpability).

¹⁵¹ See *supra* notes 90-106 and accompanying text.

¹⁵² See *supra* text accompanying note 39.

¹⁵³ *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 829 (7th Cir. 1984).

rule assessing fees to the plan if the defendant cannot pay is ultimately beneficial to all plan participants because it enables each of them to bring his own action without concern for the defendant's financial condition.¹⁵⁴

The third *Eaves* factor, "whether or not an award of attorneys fees against the offending parties would deter other persons acting under similar circumstances,"¹⁵⁵ does not reflect Congress's intent in enacting section 502(g)(1) and cannot be justified by an accepted rationale of fee shifting. Fee shifting is punitive when employed to deter conduct.¹⁵⁶ However, some mechanisms may deter conduct without being considered punitive.¹⁵⁷ ERISA allows for compensatory damage awards,¹⁵⁸ apart from fee shifting under section 502(g)(1). Compensatory damages, along with the necessity of bearing one's own costs if a suit is brought, deter conduct violative of ERISA without being punitive. Additionally, the statute's punitive provisions¹⁵⁹ and its strict fiduciary standard¹⁶⁰ also deter such conduct. Because deterrence exists absent section 502(g)(1), using that section as a further deterrent only adds an extra penalty for improper conduct. Neither punitive nor deterrent fee shifting is justified absent bad faith,¹⁶¹ and Congress did not intend that section 502(g)(1) be applied punitively.¹⁶²

The fourth *Eaves* factor, "the amount of benefit conferred on members of the pension plan as a whole,"¹⁶³ resembles the established common fund or common benefit doctrine. A court may, at equity, assess fees to a class that benefits from the litigation.¹⁶⁴ Thus, if a common benefit results from an ERISA suit, courts can shift the cost of attorney's fees from the plaintiff to the benefitted class independent of section 502(g)(1). Applying the common benefit doctrine reflects the statute's purpose and enables qualifying potential plaintiffs, regardless of their financial status, to bring ERISA

¹⁵⁴ Rowe, *supra* note 32, at 661.

¹⁵⁵ See *supra* text accompanying note 39.

¹⁵⁶ See Mallor, *supra* note 18, at 652; Rowe, *supra* note 32, at 661.

¹⁵⁷ The tort of negligence, for example, is thought to deter careless conduct by exacting purely compensatory damages from those who commit it. See W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 25-26 (5th ed. 1984).

¹⁵⁸ 29 U.S.C. § 1132(a)(1)(B) (1982).

¹⁵⁹ See, e.g., 29 U.S.C. § 1132(i) (1982) (administrative assessment of civil penalties).

¹⁶⁰ 29 U.S.C. § 1109 (1982).

¹⁶¹ See *supra* note 106 and accompanying text.

¹⁶² See *supra* note 105 and accompanying text.

¹⁶³ See *supra* note 39. Courts appear to most commonly use this factor as a device that cuts against the defendant rather than the plaintiff. "The benefit conferred on other plan participants . . . is an important consideration in evaluating the merit of the plaintiff's case." *Bitner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 829 (7th Cir. 1984).

¹⁶⁴ See *supra* notes 19-20 and accompanying text.

actions.¹⁶⁵ The *Eaves* test, however, which treats the creation of a common benefit as an opportunity to shift fees to the defendant, results in unjust enrichment to the benefitted class.¹⁶⁶ Proper application of the common benefit rationale offers no justification for shifting a plaintiff's attorney's fees to a defendant. One court apparently agrees and has adopted the *Eaves* test omitting the common benefit factor.¹⁶⁷

The *Eaves* court addressed the common fund issue, stating that "a specific statutory authorization of attorneys fees [] will, in most cases, eliminate the necessity which gave rise to the common fund exception."¹⁶⁸ However, as the court admitted,¹⁶⁹ the common fund doctrine may still apply to ERISA plaintiffs when they fail to receive awards under section 502(g)(1).¹⁷⁰ Because section 502(g)(1) is a weak fee-shifting provision which should operate only to facilitate suits which plaintiffs could not otherwise bring, the statute never applies when the common benefit theory makes an award proper. Nothing in ERISA indicates that Congress intended to preempt the common benefit doctrine. If that equitable doctrine may be used by courts to award attorney's fees, the plaintiff may bring his action without individually paying attorney's fees, thus making section 502(g)(1) unnecessary.

D. Nonprevailing Plaintiffs Should Receive Awards in Limited Circumstances

In enacting section 502(g)(1), Congress did not intend to en-

¹⁶⁵ One court has applied the common fund doctrine to an ERISA case, but found on the facts that a common benefit was not conferred, so an award was inappropriate. *Fase v. Seafarers Welfare & Pension Plan*, 589 F.2d 112 (2d Cir. 1978). The court implied that if a common benefit is conferred, the common benefit doctrine should be used in an ERISA case.

¹⁶⁶ Of course, when the defendant is the pension plan that plaintiff is a member of and the plan members are benefitted by the plaintiff's action, assessing fees to the defendant is proper under the common benefit doctrine. The plaintiff, as a member of the benefitted class, would pay at least some fraction of the fees under this approach. However, assessing fees to those defendants not benefitted or in a class with the plaintiff, as the fourth *Eaves* factor allows, distorts the common benefit doctrine.

¹⁶⁷ *Baeten v. Van Ess*, 474 F. Supp. 1324, 1332 (E.D. Wis. 1979). Although the court offered no explanation for the omission, it similarly did not consider the defendant's degree of bad faith, on the grounds that such an analysis was unnecessary in light of a court's equity powers. See *supra* notes 147-48 and accompanying text.

¹⁶⁸ 587 F.2d at 464.

¹⁶⁹ *Id.* at 465.

¹⁷⁰ Commentators suggest that "where plaintiff's attorney succeeds in having a plan provision declared invalid under ERISA, a court may, and perhaps should, under Section 502(g) of ERISA, exercise its discretion to award reasonable attorney's fees from the fund on the grounds that the class as a whole was benefited." Kroll & Tauber, *Compendium of ERISA and Fiduciary Litigation: The Breadth of Jurisdiction and Available Relief*, 38 INST. ON FED. TAX'N 4-1, 4-31 (ERISA Supp. 1980).

courage suits against defendants who did not violate ERISA. These suits do not vindicate any of the policies the statute is designed to implement.¹⁷¹ In some meritorious actions, however, the plaintiff loses on procedural grounds or because the court makes new law. By enacting section 502(g)(1) Congress may have intended to promote these suits. Therefore, although awarding fees to nonprevailing plaintiffs "would require federal courts to make sensitive, difficult, and ultimately highly subjective determinations,"¹⁷² courts should attempt to determine when fee awards to nonprevailing plaintiffs are appropriate. Awards would be appropriate in the types of situations just mentioned, but not where the action was meritless or filed to harass the defendant.¹⁷³

III

PROPOSAL FOR PREVAILING PLAINTIFFS

Courts considering whether to award attorney's fees to a prevailing plaintiff should first examine whether the defendant acted in bad faith or if the plaintiff's suit created a common fund or benefit for a wider class.¹⁷⁴ If so, equity empowers fee shifting absent section 502(g)(1).¹⁷⁵ If neither of these equitable doctrines applies, the second tier of analysis should be to determine whether ERISA justifies an award.

Section 502(g)(1)'s function is to facilitate meritorious ERISA litigation that plaintiffs would not otherwise bring because of the cost of retaining an attorney. Consequently, courts should award attorney's fees to those plaintiffs who could not bring their action but for the knowledge that if they won on the merits courts would award them fees. To make this determination, the court should consider whether a reasonable plaintiff would have brought the suit if no award of attorney's fees was possible. Specifically, at the close of the litigation, the court should compare the damage award with the amount of attorney's fees¹⁷⁶ charged to the plaintiff.¹⁷⁷ Economically rational plaintiffs will not bring suit if the action's cost is ex-

¹⁷¹ See *supra* notes 90-106 and accompanying text.

¹⁷² *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983).

¹⁷³ *Id.* There appears to be no basis for distinguishing the Clean Air Act from ERISA for purposes of awarding fees to nonprevailing plaintiffs. The fact that the government would have reimbursed the plaintiff in *Ruckelshaus*, where the EPA was the defendant, actually cuts against a nonprevailing ERISA plaintiff, who would most likely collect his fees from a private individual.

¹⁷⁴ One court has made such a determination in awarding fees. See *supra* note 165.

¹⁷⁵ See *supra* notes 17-20 and accompanying text.

¹⁷⁶ For a discussion of the amount of money attorneys should reasonably charge their clients, see generally Berger, *supra* note 19; Comment, *Calculation of a Reasonable Award of Attorneys' Fees Under the Attorneys' Fees Awards Act of 1976*, 13 J. MAR. L. REV. 331 (1980). The same set of factors is generally considered regardless of the statute which

pected to exceed its return.¹⁷⁸ Courts should always grant a plaintiff's request for attorney's fees if the fee is equal to or greater than the damage award. Easy cases under the proposed test include suits where the damage award far exceeds the attorney's fees and thus courts would deny the plaintiff's request, and suits where the fees greatly exceed the damages and thus courts would grant the plaintiff's request. In close cases,¹⁷⁹ when it was probably difficult for the plaintiff to determine whether or not his damages would exceed his attorney's fee, the court should grant the plaintiff's request. This will prevent the proposal from having a chilling effect on potential plaintiffs whose expected costs are close to their expected recovery. Because section 502(g)(1) aims to encourage suits which plaintiffs would not otherwise bring, courts should err on the side of allowing more ERISA plaintiffs to bring suit. In effect, under this proposal courts should grant the plaintiff's request for attorney's fees unless the damage award substantially exceeds the attorney's fees.

The "relative financial strength of the parties" rationale of fee shifting justifies this proposal.¹⁸⁰ Courts would only award fees to that weak class of potential plaintiffs which normally could not afford to bring suit. More important, this test would implement the statute's function of facilitating litigation enforcing the underlying rights furnished by ERISA. The proposal, if adopted, would mean that courts would deny fee awards to many prevailing plaintiffs. For example, plaintiffs who can make a contingency fee arrangement

shifted the fees. See, e.g., *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673-78 (3d Cir. 1983) (giving factors to be considered in evaluating reasonableness of attorney's fees).

¹⁷⁷ A potential plaintiff obviously also considered his chances for success on the merits when deciding whether or not to bring suit. However, since awards of attorney's fees are almost never granted to nonprevailing plaintiffs, see *supra* notes 77-87 and accompanying text, judges need not consider the plaintiff's initial prediction of victory. A plaintiff must realize that if he loses the suit, he will not recover his attorney's fees. When deciding whether or not to bring suit on the basis of § 502(g)(1), the plaintiff should only consider the financial ramifications if he wins the suit.

¹⁷⁸ Absent the possibility of a fee award, a plaintiff will bring suit only if "his expected judgement would be at least as large as his legal costs." Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 58 (1982).

Because all plaintiffs are not economically rational, the proposed test is overinclusive because it awards attorney's fees to parties who would bring a suit regardless of its potential financial reward. Although § 502(g)(1) was not designed to protect these plaintiffs, it is too cumbersome for the judiciary to undertake the task of sorting them out. Such requests should be denied, except if the trial testimony reveals conclusively that the plaintiff would have brought suit even if no fee-shifting provision existed.

¹⁷⁹ For instance, when the damage award is \$5,000 and the attorney's bill is \$4,000, courts should make an award to the prevailing plaintiff. The line drawing problems of what constitutes a "close case" are naturally a function of the judge's discretion under the statute.

¹⁸⁰ See *Rowe*, *supra* note 32, at 663-65.

with their attorney do not need to rely on section 502(g)(1), as they already are able to "secure effective access to federal courts."¹⁸¹ This result is proper because ERISA protects a purely financial interest and neither section 502(g)(1)'s language nor its legislative history suggest a rule that would grant awards almost automatically to prevailing plaintiffs.¹⁸² If Congress intended to guarantee fee awards to prevailing ERISA plaintiffs, it would not have left the decision to the discretion of the court, or at least would have, as in the Fees Act,¹⁸³ provided guidance as to an appropriate standard.

CONCLUSION

None of the existing methods of determining when to award attorney's fees under ERISA is logically and practically suited to its purpose. Courts that analogize section 502(g)(1)'s application to prevailing plaintiffs to the Fees Act ignore Congress's intent. Although Congress mandated a virtually automatic fee award for plaintiffs in civil rights actions, such an approach is inappropriate in ERISA actions.

Other courts employ the *Eaves* five-factor test to determine the appropriateness of an award. However, several of the *Eaves* factors merely restate the court's inherent equity powers to shift attorney's fees. Furthermore, the factors do not comport with section 502(g)(1)'s status as a nonpunitive fee-shifting provision based on the language of ERISA and generally accepted fee-shifting principles.

Standards for fee shifting involving prevailing defendants are different. The Fees Act approach to prevailing defendants, which rarely permits courts to shift fees to the plaintiff, is appropriate under section 502(g)(1). Defendants should recover attorney's fees only if the plaintiff files a suit that is frivolous or for the purpose of harassment.

Section 502(g)(1) is best viewed as a weak fee-shifting provision, intended merely to facilitate suits which enforce other provisions of ERISA. Courts should only apply the section when an award of attorney's fees would encourage potential plaintiffs who would not otherwise bring suit to do so.

Mark Howard Berlind

¹⁸¹ See *supra* note 93 and accompanying text.

¹⁸² See *supra* notes 90-126 and accompanying text.

¹⁸³ See *supra* note 22 and accompanying text.