

No. _____

In The
Supreme Court of the United States

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DAKOTAS AND WESTERN MINNESOTA
ELECTRICAL INDUSTRY HEALTH & WELFARE
FUND, BY RANDY STAINBROOK AND EDWARD
CHRISTIAN, IN THEIR REPRESENTATIVE
CAPACITY AS TRUSTEES, AND EACH OF THEIR
SUCCESSORS,

Cross-Petitioner,

v.

FIRST AGENCY, INC. AND GUARANTEE TRUST
LIFE INSURANCE COMPANY,

Cross-Respondents.

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On Conditional Cross-Petition for a Writ Of
Certiorari to the United States Court of Appeals
for the Eighth Circuit

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CONDITIONAL CROSS-PETITION FOR
A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court abuses its discretion to award attorney's fees pursuant to ERISA § 502(g)(1) when the awardee obtained at least some degree of success on the merits.

**PARTIES TO THE PROCEEDING AND
RULE 29.6 STATEMENT**

The caption identifies all parties. Cross-Petitioner is the Dakotas & Western Minnesota Electrical Industry Health & Welfare Fund (“Dakotas Fund”), by and through its trustees. The Dakotas Fund was the Plaintiff in the district court, and the Appellee/Cross-Appellant in the Eighth Circuit Court of Appeals.

Cross-Respondents are First Agency, Inc. and Guarantee Trust Life Insurance Company. The cross-respondents were the defendants in the district court, and the Appellants/Cross-Respondents in the Eighth Circuit.

The Dakotas and Western Minnesota Electrical Industry Health and Welfare Fund is not a nongovernmental corporation. The Fund does not have a parent corporation or shares held by a publicly traded company.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

The Dakotas and Western Minnesota Electrical Industry Health & Welfare Fund respectfully submits this conditional cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit. For the reasons set forth in the Dakotas Fund’s Brief in Opposition to the Petition for Certiorari filed in No. 17-863, the Court should deny that Petition. If the Court grants GTL’s Petition, however, then it should also grant this conditional cross-petition in order to review all issues involved in the case and correct the Eighth Circuit’s misinterpretation of the standard for awarding attorney’s fees under ERISA § 502(g)(1) in contradiction to this Court’s opinion in *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242 (2010).



OPINIONS AND ORDERS BELOW

The unreported decision from the United States District Court for the District of North Dakota was filed on July 15, 2016 and can be found in the Cross-Petition Appendix at C.App. 1–5. The Eighth Circuit Court of Appeals opinion is reported at *Dakotas and Western Minnesota Electrical Industry Health & Welfare Fund v. First Agency, Inc.*, 865 F.3d 1098 (8th Cir. 2017) and can be found in the Appendix to GTL’s Petition in No. 17-863 at 1–16.



JURISDICTION

The Eighth Circuit entered judgment on August 3, 2017. GTL petitioned for panel rehearing, which was denied on September 14, 2017. GTL filed a Petition for Writ of Certiorari, which was docketed as No. 17-863 on December 16, 2017. This Conditional Cross-Petition is timely pursuant to Sup. Ct. R. 12.5. This Court has jurisdiction under 28 U.S.C. § 1254(1).



STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1132(g)(1), ERISA § 502(g)(1), provides, “In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney’s fee and costs of action to either party.”



STATEMENT OF THE CASE

The Dakotas & Western Minnesota Electrical Industry Health & Welfare Fund (“Dakotas Fund”), by its trustees, brought an action in the United States District Court for the District of North Dakota against First Agency, Inc. and Guarantee Trust Life Insurance Company (collectively, “GTL”), seeking a declaratory judgment pursuant to ERISA § 502(a)(3) and 28 U.S.C. § 2201 as to whether the Dakotas Fund or GTL was responsible for providing primary coverage for overlapping claims sustained by a common insured. The background of this underlying dispute is set forth more fully in the Dakotas Fund’s

Brief in Opposition to GTL's Petition for Writ of Certiorari in No. 17-863.

On March 11, 2016, the district court granted the Dakotas Fund's motion for summary judgment and denied GTL's motion to dismiss. *See* App. 17–27.¹ Within the time permitted by Fed. R. Civ. P. 54(d)(2), the Dakotas Fund then moved for an award of attorney's fees and non-taxable costs pursuant to ERISA § 502(g)(1). The district court issued a separate order on July 15, 2016 granting the Dakotas Fund's motion in part, awarding the Fund a reduced amount of fees plus costs. C.App. 1–5.

The district court analyzed the Eighth Circuit's *Westerhaus*² factors in deciding whether to award the Dakotas Fund fees under ERISA § 502(g)(1). C.App. 2. In weighing those factors, the court found that GTL's arguments that it was an “excess only” policy were “without merit” and had been rejected by at least one other federal court of appeals in which GTL was a party. C.App. 2–3. The district court further found that an award of fees would provide some level of deterrence to similar claims in the future and that GTL certainly had the ability to pay the fee award. *Id.* at 3.

GTL appealed the award of fees to the Eighth Circuit Court of Appeals on August 4, 2016. The Dakotas Fund filed a cross-appeal challenging the reduction in the amount of the fees on August 15,

¹ References to “App.” are to the Appendix filed with GTL's Petition for Writ of Certiorari in No. 17-863. References to “C.App.” will be to the Appendix filed with this Conditional Cross-Petition.

² *See Lawrence v. Westerhaus*, 749 F.2d 494, 496 (8th Cir. 1984).

2016. The appeals were consolidated with GTL's appeal of the March 11, 2016 order on the merits. On August 3, 2017, the Eighth Circuit issued an opinion affirming the district court's March 11, 2016 order, but reversing the July 15, 2016 order granting the Dakotas Fund fees. App. 1–16.

On the attorney's fee issue, the Eighth Circuit concluded that the district court abused its discretion in awarding any fees because "[w]hile [GTL's] primary coverage may be rather obvious if the ERISA plan's COB provisions apply, [GTL's] position that ERISA should not govern this dispute was not obviously wrong, and its argument that Dakotas was not entitled to declaratory relief under § 502(a)(3) was virtually untested." App. 14. The Eighth Circuit opinion does not cite to or apply the appropriate standard set forth by this Court in *Hardt*, 560 U.S. 242 (2010).



REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

The Dakotas Fund has opposed GTL's petition for a writ of certiorari. Thus, if the Court denies that petition, it need not consider this petition either. If the Court grants GTL's petition, however, then it should also review this issue. The reason for granting this conditional cross-petition is simple: the Eighth Circuit's decision relating to the standard for an award of attorney's fees under ERISA § 502(g)(1) is an important question of federal law that conflicts with relevant decisions of this Court. *See* Sup. Ct. R. 10(c).

A. The Eighth Circuit’s Opinion Directly Conflicts with this Court’s Prior Decision in *Hardt v. Reliance Standard Life Insurance Co.*

In 2010, this Court analyzed the proper standard for awarding attorney’s fees under ERISA § 502(g)(1). *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242 (2010). In *Hardt*, a participant brought an action against an administrator of an ERISA employee benefit plan seeking long-term disability benefits. *Id.* at 245. Following the denial of the administrator’s motion for summary judgment and remand for additional consideration of the participant’s claim, the participant moved for attorney’s fees pursuant to § 502(g)(1). The district court granted the motion, but the Fourth Circuit Court of Appeals vacated the award, finding that a fee claimant must be a “prevailing party” to be eligible for a fee award. *Id.* at 242. The Court granted certiorari and reversed the Fourth Circuit, holding that “a court ‘in its discretion’ may award fees and costs ‘to either party’ as long as the fee claimant has achieved ‘some degree of success on the merits.’” *Id.* at 245 (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983)).

The Court in *Hardt* considered two issues: (1) whether a fee claimant must be a “prevailing party” to be eligible for a fee award; and (2) under what circumstances may a court award fees under § 502(g)(1). *Id.* at 250–51. In reviewing the statutory text of § 502(g)(1), the Court stated that “[w]e must enforce plain and unambiguous statutory language according to its terms.” *Id.* at 251. The Court found that the words “prevailing party” do not appear

anywhere in the statute, but rather a district court has discretion to award fees “to *either* party.” *Id.* at 252. Thus, the Court found that a fee claimant need not be a “prevailing party” in order to receive an award of fees under § 502(g)(1). *Id.* at 252.

This first issue is not relevant to the matter at hand because the Dakotas Fund can be considered a “prevailing party” given that its motion for summary judgment was granted in the district court and affirmed on appeal. The real issue is the Court’s second consideration in *Hardt*—when a court may award fees under § 502(g)(1).

On this point, the Court again looked first to “the language of the section, which unambiguously allows a court to award attorney’s fees in its discretion to either party.” *Id.* at 254 (internal quotations omitted). The Court noted, however, that a judge’s discretion is not unlimited. *Id.* The district court in the case, therefore, applied five factors (identical to the Eighth Circuit’s *Westerhaus* factors) to guide its discretion. *See id.* But the Court stated that “[b]ecause these five factors bear no obvious relation to § 1132(g)(1)’s text or to our fee-shifting jurisprudence, they are not required for channeling a court’s discretion when awarding fees under this section.” *Id.* at 254–55 (emphasis added).

Instead, the Court’s previous decision in *Ruckelshaus* “lays down the proper markers to guide a court in exercising the discretion that § 1132(g)(1) grants.” *Id.* at 255. Under that decision, a court does not abuse its discretion in awarding fees under this section as long as the fees claimant shows “some degree of success on the merits.” *Id.*

Notwithstanding this straightforward standard set forth in *Hardt*, and despite the fact that the Dakotas Fund undisputedly achieved “some degree of success on the merits,” the Eighth Circuit reversed the district court’s award of fees to the Dakotas Fund under an *abuse of discretion* standard of review on the basis that GTL’s procedural argument that the court lacked jurisdiction under ERISA was “virtually untested” and therefore not in bad faith. But this holding clearly contradicts the standard this Court set forth in *Hardt* and *Ruckelshaus* for awarding fees under § 502(g)(1). Accordingly, because the Dakotas Fund met the proper standard of achieving some degree of success on the merits, the district court did not abuse its discretion to award fees, and the Eighth Circuit erred by reversing that decision and applying an incorrect standard.

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CONCLUSION

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If this Court grants GTL’s Petition for a Writ of Certiorari in No. 17-863, then it should also grant this conditional cross-petition to correct the Eighth Circuit’s erroneous view of the standard for awarding attorney’s fees under ERISA § 502(g)(1) and prevent that incorrect standard from plaguing all future ERISA fee petitions in the Eighth Circuit.

Respectfully submitted,

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