

To: Client  
From: Tracie Groh  
RE: Analysis of Equal Access to Justice Act

## **ISSUE**

What is the statutory structure of the Equal Access to Justice Act (EAJA) and how have the courts interpreted and applied its individual elements when determining whether to award attorney's fees to a prevailing party?

## **RULES**

Section 2412 of Title 28 in the United States Code allows for awarding attorneys' and costs to prevailing parties in civil litigation against the United States, but under very specific conditions. Particularly, the heart of the section provides:

“Except as otherwise specifically provided by statute, a court shall award to a prevailing party, other than the United States, fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.”<sup>1</sup>

The highest points of contention with this statute lie primarily in the definitions of “prevailing party” and “substantially justified” but even after satisfying those two elements, subsequent sections of the statute, as well as case law, have established further limits on its use.

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<sup>1</sup> Title 28 U.S.C. § 2412 (d)(1)(A)

Generally, in order to get an award of attorneys' fees, in addition to the above, the party utilizing the statute is subject to the following conditions:

1. Have either a net worth of less than \$7,000,000 if an organization and less than \$2,000,000 if an individual or qualify for an exemption;
2. File the request for attorney's fees under EAJA within 30 days of the final judgment;
3. The award may be reduced to the extent the prevailing party delayed resolution;
4. The fees and costs sought are reasonable in amount;
5. The matter carries no special circumstances to justify denying attorney's fees despite satisfaction of all other elements; and<sup>2</sup>
6. Lacking a formal assignment arrangement, payment issues to the litigant directly, not their attorney.<sup>3</sup>

## ANALYSIS

### **I. THE PLAINTIFF MUST BE THE "PREVAILING PARTY" TO QUALIFY FOR ATTORNEY'S FEES UNDER THE STATUTE.**

The first threshold for any plaintiff under the EAJA is qualifying as a prevailing party. This means two things: one, the plaintiff has actually recovered something of value from the defendant, and two, on at least one of the plaintiff's claims.

#### **a. The prevailing party recovered at least some relief on the merits of their claim.**

The Supreme Court provided the definition for a "prevailing party" in its analysis in *Hewitt v. Helms*.<sup>4</sup> The case involved a former Pennsylvania State Correctional Institution at Huntingdon inmate's appeal of a denial for attorney's fees in a civil rights action. Helms was accused of striking a corrections officer during the melee of a prison riot. Prison authorities

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<sup>2</sup> Title 28 U.S.C. § 2412

<sup>3</sup> *Gors v. Colvin*, WL 960230 S. Dakota (S.D. 2013)

<sup>4</sup> *Hewitt et al. v. Helms*, 107 S. Ct. 2672 (1987).

placed Helms in administrative segregation while the investigation into the accusation was pending, which lasted for seven months.

Ultimately, a committee found him guilty based solely on an officer's report of testimony by an unnamed informant. Helms brought a civil rights suit against prison officials claiming that the lack of a prompt hearing and conviction based on one official's hearsay testimony violated his rights to due process. In response, the prison officials asserted qualified immunity from the suit and contested the constitutional claim on its merits. Notably, while the suit was pending, Helms was released on parole.

After his release, but still during the suit's proceedings, the Pennsylvania Bureau of Corrections revised its rules and procedures to include the use of information from confidential sources in disciplinary proceedings for inmates. This prompted Helms to seek attorney's fees under the civil rights statute as a prevailing party, despite the fact that court proceedings had resulted in favor of the Bureau. He argued that because his case was the spark for the Bureau's policy change, he had prevailed. The U.S. Supreme Court disagreed.

Explaining that "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail," the Court pointed to Helms' complete lack of any such relief.<sup>5</sup> Noting that Helms had not obtained a damages award, the Court further clarified that he also did not get an injunction, declaratory judgment or even a consent decree or settlement.<sup>6</sup> There was nothing to support his alleged "prevailing plaintiff" status.

The Court went on to examine what conditions could make someone the prevailing party. For instance, a voluntary action by the defendant that provides the plaintiff with any of the relief

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<sup>5</sup> *Id.* at 2675.

<sup>6</sup> *Id.*

they are seeking, satisfies the prevailing party requirement.<sup>7</sup> In contrast, a judicial statement made during litigation, which may be favorable to plaintiff's case, but "does not affect the relationship between the plaintiff and defendant" does not satisfy the requirement.<sup>8</sup>

**b. The prevailing party is not required to prevail on every claim.**

In *Hensley v. Eckerhart* the Supreme Court again took up the definition of a prevailing party in the context of a civil rights claim that also applies to EAJA cases. The plaintiffs had brought a suit challenging the constitutionality of the treatment and conditions in the forensic unit of a state hospital. After a judgment in their favor, plaintiffs brought a claim for attorney's fees under the civil rights statute, which then raised the issue of whether or not a plaintiff must prevail on every claim in order to qualify as prevailing overall.<sup>9</sup> The Court said no, stressing that the accepted view was that prevailing parties, for the purpose of an award of attorney's fees, must succeed just on *any* substantial issue which results in at least some of the benefit requested.<sup>10</sup>

Referring to a Senate Report, the Third Circuit found "prevailing party" was intended to apply in wide varieties of scenarios. A prevailing party could be one who obtains a favorable settlement, or a voluntary dismissal of a groundless complaint or won on an interim order which was central to the case or even an interlocutory appeal that is significant enough to be treated separately.<sup>11</sup>

**II. LACKING A COMPLETE DISREGARD FOR THE LAW, "SUBSTANTIALLY JUSTIFIED" IS NOT A HUGE HURDLE FOR THE UNITED STATES TO SURMOUNT.**

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<sup>7</sup> *Id.* at 2676.

<sup>8</sup> *Id.*

<sup>9</sup> *Hensley et al. v. Eckerhart et al.*, 103 S. Ct. 1933 (1983).

<sup>10</sup> *Id.* at 1939.

<sup>11</sup> *Natural Resources Defense Council Inc. v. U.S. Environmental Protection Agency*, 703 F.2d 700, 707-708 (3<sup>rd</sup> Cir. 1983).

A finding of substantial justification regarding the government action will defeat a prevailing party's claim for attorney's fees. However, such an outcome is not an easy thing to come by, short of an obvious and egregious failure on the part of the government. For instance, in *Pierce v. Underwood* the Secretary of Housing and Urban Development simply decided to not pay owners of government-subsidized apartments buildings their subsidy as required by statute. After the plaintiff's filed suit, the Secretary settled and, upon the plaintiff's claim under the EAJA, the district court awarded the plaintiffs attorney's fees as prevailing parties on the grounds the Secretary had unjustifiably failed to follow the law. The government sought review by the Supreme Court.

The Supreme Court's analysis revealed its overall deference to the district court's decision.<sup>12</sup> Finding the appropriate standard of review as abuse of discretion, the Court recognized, in these cases, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decided the issue in question."<sup>13</sup> Due to their relationship to their proceedings, district courts are more likely to know of elements relevant to whether or not the government's position was substantially justified. Further, the district courts have more knowledge of what the evidence was regarding the facts and have insights that cannot be effectively transferred via an official record.<sup>14</sup> The *Pierce* district court found that the government was not substantially justified in its refusal to make the subsidy payments in accordance with the law and, thus, the Supreme Court affirmed the award of attorney's fees.<sup>15</sup>

The challenge to a prevailing plaintiff's success under the EAJA is likely to be found in the definition for "substantially," as courts apply a lesser standard of "justified to a degree that

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<sup>12</sup> *Pierce v. Underwood, et al.*, 108 S. Ct. 2541 (1988).

<sup>13</sup> *Pierce* at 2547, citing *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

<sup>14</sup> *Pierce* at 2547.

<sup>15</sup> *Pierce* at 2555

could satisfy a reasonable person.”<sup>16</sup> Said a different way, the standard for “substantially justified” is reasonable in both law and fact.<sup>17</sup> Put even plainer, “[t]he test for substantial justification is whether the agency had a rational ground for thinking it had a rational ground for its action.”<sup>18</sup> The standard is, therefore, quite subjective. If the court agrees the government action was, at the very least, reasonably valid, then it had substantial justification for whatever action it took, no matter how illogical or damaging the consequences. Minus a complete lack of regard for the law, this standard takes most government actions off the table for attorney’s fees under the EAJA.<sup>19</sup>

Notably, this also means the government does not carry the burden of showing a substantial probability it would win.<sup>20</sup> For the party seeking attorney’s fees, arguing the government had no substantial justification for its action is nowhere near as simple as saying “I won, so the government action was not substantially justified.” The Fifth Circuit has noted, “that a finding of unreasonable governmental action is not ‘conclusive on the substantial justification issue, else...the issue would always simply merge with the decision on the merits.’”<sup>21</sup> Similarly, while obtaining a settlement is a plus for establishing the plaintiff as a prevailing party, it does not follow that agreeing to unfavorable terms in a settlement means the government’s position was not substantially justified.<sup>22</sup>

Further, and contrary to what may be instinct, substantial justification is not about the legal strategy the government’s attorneys implement during litigation. The measure strictly

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<sup>16</sup> *Id.* at 565.

<sup>17</sup> *Id.*

<sup>18</sup> *Kolman v. Shalala*, 39 F.3d 173, 177 (7<sup>th</sup> Cir. 1994).

<sup>19</sup> *State of Louisiana v. Lee*, 853 F.2d 1219 (5<sup>th</sup> Cir. 1988), finding where the government failed to prepare an Environmental Impact Statement according to National Environmental Protection Act’s requirements, the government’s action was not substantially justified.

<sup>20</sup> *Natural Resources* at 711.

<sup>21</sup> *State of Louisiana* at 1222, citing its earlier decision in *Griffon v. U.S. Dept. of Health and Human Services*, 832 F.2d 51 (5<sup>th</sup> Cir. 1987).

<sup>22</sup> *Pierce* at 2552.

applies to the action taken by the government official or agency that gave rise to the litigation.<sup>23</sup> In *Commissioner, Immigration and Naturalization Service v. Jean*, the Supreme Court cited Congress' 1985 amendment to the EAJA to explain. The amendment defined "position" of the United States to mean "in addition to the position taken by the United States in a civil action, the action or failure to act by the agency upon which the civil action is based."<sup>24</sup> Noting the singular of "position," coupled with the phrase "was not substantially justified," the Court reasoned that Congress intended it to apply to the United States' past action, not the current or future action in the litigation itself.<sup>25</sup>

In addition to the above, courts have also determined what qualifies as an official "position" for the purposes of the EAJA statute. Simply enough, the statute is triggered with "agency action" making it "necessary for a party to file suit".<sup>26</sup> For example, when the EPA, following an executive order, postponed the implementation of amendments to the Clean Water Act without notice and comment, this action was a sufficient catalyst for implementing the EAJA.<sup>27</sup> This definition also encompasses "any official of the United States acting in his or her official capacity".<sup>28</sup>

### **III. THERE ARE ADDITIONAL STATUTORY AND JUDICIAL LIMITS ON §2412 TO CONSIDER.**

If a party can successfully conquer the hurdles of "prevailing" and "substantial justification" there are other issues that can either defeat, or at least deflate, their claim for attorney's fees. Matters such as the applicability of other fee-shifting statutes, exceeding a

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<sup>23</sup> *Commissioner, Immigration and Naturalization Service et al. v. Jean, et al.*, 110 S. Ct. 2316 (1990).

<sup>24</sup> 28 U.S.C. § 2412(d)(2)(D).

<sup>25</sup> *Commissioner* at 2319.

<sup>26</sup> *Natural Resources* at 707.

<sup>27</sup> *Id* at 713-714.

<sup>28</sup> *Natural Resources*, at 710.

minimum net worth, deadlines, fee reasonableness and, if everything else is successful, exactly *who* gets paid, all remain.

**a. The EAJA applies only when there is no other applicable statute under which a claim for attorney’s fees is available.**

In *Natural Resources Defense Council*, the Third Circuit applied the EAJA in a case involving violations of the Clean Water Act, but only because the Clean Water Act is silent with respect to such fees in those circumstances (a petition for review in the court of appeals).<sup>29</sup> Justifying its action, the court delved into the legislative history of the EAJA, citing the House Report explaining that the EAJA is not intended to “replace or supersede” existing statutes with fee-shifting provisions. Rather, the intent was for the EAJA to “*apply only to cases (other than tort cases) where fee awards against the government are not already authorized*”.<sup>30</sup>

**b. The prevailing party must meet the net worth requirement or fall within an exemption.**

The statute carries a limit on a prevailing party’s net worth. If the value exceeds that limit, despite satisfying the other criteria, a party may not recover attorney’s fees. The statute prohibits an award of attorney’s fees to individuals, who are prevailing parties, with a net worth of \$2,000,000 or more. If the prevailing party is an organization, corporation or the like, the net worth cap on recovery eligibility is \$7,000,000. However, if the prevailing party is a non-profit under §501 (c)(3) of the Internal Revenue Code of 1986 or a cooperative association under § 2412(d)(B)(ii) the plaintiff is excused from the net worth restrictions.<sup>31</sup>

Under this area of §2412, the government has argued attorney’s fees should not be awarded in situations where there are multiple plaintiffs and one or more of those plaintiffs

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<sup>29</sup> *Id.* at 704-705.

<sup>30</sup> *Id.* at 705 citing H.R.Rep. No.1418, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 8-9 *reprinted in* 1980 U.S. Code Cong. & Admin.News 1980, p. 4997.

<sup>31</sup> 28 U.S.C. §2412 (d)(2)(B)

exceed the statutory minimum. Courts' decisions have often turned on consideration of whether the unqualified plaintiff, the other plaintiffs, or some other party has been footing the bill during the proceedings. For example, the District of Columbia Circuit stated that using general revenues originating from membership dues to finance litigation did not convert an organization's members into real parties in interest.<sup>32</sup> An earlier case in the same court, *Unification Church v. INS*, applied the "real party in interest" doctrine, which allowed the piercing of the associational veil in situations where an ineligible non-party (such as an association member) paid the fees of a party (such as the association) in order to circumvent the net worth restriction.<sup>33</sup> The holding in *Unification Church* explained "where the fee arrangement among the plaintiffs is such that only some of them will be liable for attorneys' fees, the court shall consider only the qualification...of those parties that will themselves be liable for fees if court-awarded fees are denied."<sup>34</sup>

Significantly, the Fifth Circuit has not allowed the government to add the net worth of all plaintiff's together in order to meet the statute's limit.<sup>35</sup> Additionally, it is not the organization's burden to show that it holds a real party status, but the government's burden to prove it is does not.<sup>36</sup> A simple declaration stating, under penalty of perjury, that the organization's members were neither responsible for the costs of litigation, nor in control of it is sufficient to make the organization itself a real party.<sup>37</sup>

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<sup>32</sup> *National Association of Manufacturers v. Department of Labor*, 159 F.3d 597, 604 (D.C. Cir. 1998).

<sup>33</sup> *National Association* at 603, citing *Unification Church v. INS*, 762 F.2d 1077 (1985).

<sup>34</sup> *Id.*, citing *Unification Church* at 1082.

<sup>35</sup> *Texas Food Industry Association v. United States Department of Agriculture*, 81 F.3d 578 (5<sup>th</sup> Cir. 1996).

<sup>36</sup> *National Association* at 604.

<sup>37</sup> *Id.*

**c. The prevailing party only has 30 days after a final, unappealable judgment to submit a claim for attorney’s fees.**

While the deadline for submitting a claim for attorney’s fees is clearly stated in the statute, courts have had to speak to when the clock starts ticking as well as whether an amendment to the claim after the deadline passes gets treated as having missed the deadline. Administrative decisions, notably, are not final decisions within the scope of the statute. The judgment referred to in the statute must be one entered by a court of law.<sup>38</sup> This issue is most often hashed out in terms of Social Security benefits, but is transferable to any administrative agency.<sup>39</sup> Further, if the application is submitted on time, but needs to be amended in order to satisfy the statute’s requirements, the Supreme Court has found no deadline breach.<sup>40</sup>

**d. Courts may consider the presence of special circumstances to justify denying a fee award.**

The statute allows courts to consider any special circumstances that may warrant refusing an award of attorney’s fees. There are several kinds of special circumstances. For instance, if an agency tries a novel extension of the law that can be shown as even somewhat credible, even without sufficient legal precedent, the agency would not be subject to an award for attorney’s fees.<sup>41</sup>

Additionally, the presence of an ineligible plaintiff may suffice as a special circumstance in which attorney’s fees be denied. In *State of Louisiana et al. v. Lee*, the Fifth Circuit held that awarding attorney’s fees, with the state of Louisiana as a plaintiff, may make an award for the other plaintiffs unfair. The holding came down to finding an equitable result in situations where

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<sup>38</sup> *Melkonyan v. Sullivan*, 111 S. Ct. 2157, 2162 (1991).

<sup>39</sup> *Id.*

<sup>40</sup> *Scarborough v. Principi*, 124 S. Ct. 1856 (2004), a timely EAJA attorney’s fee application can be amended after the 30-day filing period has run to cure an initial failure to allege that the government’s position...lacked substantial justification.

<sup>41</sup> *Natural Resources* at page 711.

an ineligible party is completely able to prosecute the United States on it's own. Simply put, plaintiffs who would otherwise be eligible parties should not be allowed to "take a free ride through the judicial process" at the government's expense.<sup>42</sup> However, the Fifth Circuit did recommend such decisions also take into account whether the interests of the eligible and ineligible parties overlapped without being coextensive, and what resources the ineligible party had committed to the action. In situations where an ineligible party had minimal participation denying the eligible parties' use of the EAJA would not be justified.<sup>43</sup>

**e. Courts evaluate the reasonableness of fees and costs conservatively.**

Attorney's fees are awarded at a rate of \$125 an hour, but do allow for special factors justifying a higher rate.<sup>44</sup> Costs, such as the filing fee, may also be recovered.<sup>45</sup> The evidentiary burden to justify the award is, of course, with the party seeking said award.<sup>46</sup> When examining an appropriate award for attorney's fees, the court multiplies the number of hours spent preparing the case by an hourly rate. The Supreme Court applies an abuse of discretion standard, advising the exclusion of any hours that were not reasonably expended, so any hours that can be considered excessive, redundant or otherwise unnecessary are not included.<sup>47</sup> Essentially, the guideline for what is reasonable is if an attorney wouldn't bill his client for the hours, then it is not appropriate to bill the adversary for them either. Accordingly, the hours submitted must be verifiable and records on them should be organized and easy to understand. This means that the

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<sup>42</sup> *State of Louisiana* at 1225.

<sup>43</sup> *State of Louisiana* at 1225.

<sup>44</sup> 28 U.S.C. § 2412 (d)(2)(A).

<sup>45</sup> 28 U.S.C. §§ 2412 (a)(1) and (a)(2) and (d)(2)(A).

<sup>46</sup> *Hensley* at 437.

<sup>47</sup> *Id.* at 433-434.

attorneys and staff working on the case carefully and thoroughly documented all the time they worked on it.<sup>48</sup>

One important factor considered when reviewing an award for suitability is “results obtained.” In their deliberation of this factor, courts consider two items: whether the plaintiff was unsuccessful on claims that were unrelated to his successful claims and whether the plaintiff achieved success that justified the hours expended.<sup>49</sup> The final amount should not be so unreasonable as to lead to a second litigation, and parties are strongly encouraged to settle this issue themselves. Ultimately, there is no official formula used; it simply comes down to the degree of success achieved and is at the court’s discretion under the specific circumstances.<sup>50</sup> It is important to note that considerations such as results obtained, the novelty or difficulty of an issue, undesirability of a case, attorney skill and customary fees in similar cases are not considered *special* factors under the statute, but as simply additional support for the market rate set in the statute itself.<sup>51</sup>

**f. Payment awarded under the EAJA issues directly to the litigant, not their attorney.**

The Supreme Court made unquestionably clear the attorney’s fees are not generally paid directly to the attorney, but to the litigant, in *Astrue v. Ratliff*.<sup>52</sup> However, later decisions have found no issue with allowing fees to be paid directly to the attorney in circumstances where a

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<sup>48</sup> 28 U.S.C. §2412(d)(1)(B), requiring the application to provide itemized statements from any attorney or expert witness stated the actual time expended and the rate at which fees and other expenses were computed.

<sup>49</sup> Id at 434.

<sup>50</sup> Id at 435-436.

<sup>51</sup> *Pierce* at 2554.

<sup>52</sup> *Astrue v. Ratliff*, 130 S. Ct. 2521 (2010).

prevailing plaintiff has both assigned his award of attorney's fees over to counsel and does not have any outstanding government debt to which the award should first be allocated.<sup>53</sup>

### CONCLUSION

The EAJA is available for recovering attorney's fees in cases where a party is successful in its actions against the federal government. However, there will be a significant number of hoops to jump through before a party is able to qualify for, and then obtain, payment.

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<sup>53</sup> *Gors v. Colvin*, WL 960230 S. Dakota (S.D. 2013), citing *Wigginton v. Astrue* (2011) WL 1253898 (E.D.Ark.); *Blackwell v. Astrue* (2011) WL 1077765 (E.D.Cal.); *Spaulding v. Astrue* (2011) WL 1042580 (N.D.Ill.); *Dornbush v. Astrue* (2011) WL 779781 (D.Minn.) and *Bates v. Commissioner* (2011) WL 2149349 (N.D.Ohio).