DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

27709

FILE: B-40342.3 DATE: March 19, 1984

MATTER OF: Attorney fees--judicial awards under Equal Access to Justice Act

DIGEST: Permanent indefinite appropriation for judgments established by 31 U.S.C. § 1304 is available to pay attorney fees, except for "bad faith" cases, awarded under the authority of 28 U.S.C. § 2412(b), as long as award is final and payment is not otherwise provided for. However, judgment appropriation is not available to pay awards under 28 U.S.C. § 2412(d), nor "bad faith" awards under § 2412(b), both of which must be paid from agency appropriations.

This decision responds to a question that has arisen in a number of recent cases--whether the permanent indefinite appropriation for judgments (31 U.S.C. § 1304) is available to pay attorney fees awarded under the authority of 28 U.S.C. § 2412(b). As discussed below, except for awards based on a finding that the United States acted in bad faith, we believe it is.

A sample of the cases raising this issue is National Trust for Historic Preservation, et al., v. Corps of Engineers, 570 F. Supp. 465 (S.D. Ohio 1983). The plaintiffs in that case alleged that the Corps of Engineers violated Federal historic preservation statutes by issuing a permit to construct and maintain a barge loading facility on the Ohio River. The Court found that the Corps had violated the National Historic Preservation Act, and then awarded costs and attorney fees to the plaintiffs in the amount of $46,726.43. Under 16 U.S.C. § 470w-4 (1982), courts may award attorney fees in actions to enforce provisions of the National Historic Preservation Act:

> "In any civil action brought in any United States district court by any interested person to enforce the provisions of this subchapter, if such person substantially prevails in such action, the court may award attorneys' fees, expert witness fees, and other costs of participating in such action, as the court deems reasonable."

Background

Prior to 1981, the liability of the United States for attorney fees was governed by the so-called American Rule,

enunciated by the Supreme Court in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). Under the American Rule, the prevailing party in litigation is not entitled to recover attorney fees unless provided for by statute. In the case of the United States, the American Rule was further reenforced by statute. 28 U.S.C. § 2412 (1976).

Over the years, Congress had dealt with fee-shifting on a piecemeal basis, and had enacted over 30 statutes expressly making the United States liable for attorney fees in specific contexts. Prominent examples are Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(k), and the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E). For convenience, we will refer to this category as "Group I." Under a Group I statute, the payment of judicial fee awards is governed by the statutes governing the payment of judgments against the United States generally, 28 U.S.C. §§ 2414 and 2517, and 31 U.S.C. § 1304. In brief, the awards, when final, are paid, upon certification by the General Accounting Office, from the permanent appropriation established by 31 U.S.C. § 1304 unless payment has been "otherwise provided for."

In addition to the Group I statutes, Congress has enacted several dozen other fee-shifting statutes which do not mention the United States or Federal agencies, and which therefore, under the doctrine of sovereign immunity, have been viewed for the most part as not authorizing fee awards against the United States. We will refer to these as "Group II." One such example is 16 U.S.C. § 470w-4, quoted above.[1/]

[1/] We are aware that WATCH v. Harris, 535 F. Supp. 9 (D.Conn. 1981), relying heavily on legislative history, held that 16 U.S.C. § 470w-4 does authorize fee awards against Federal agencies. The Court went on to point out that, to the extent there may be any doubt, it was removed by the Equal Access to Justice Act, discussed in the text. We do not quarrel with that decision, and cite 16 U.S.C. § 470w-4 merely as an example of a fee-shifting statute which does not expressly mention the United States or Federal agencies. In any event, to the extent that 16 U.S.C. § 470w-4 may be viewed as independently authorizing fee awards against the United States without the need to rely on the Equal Access to Justice Act, it is clearly an exception to the "Group II" statutes.

The Equal Access to Justice Act

On October 21, 1980, Congress enacted the Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, title II, 94 Stat. 2321, 2325, effective October 1, 1981. EAJA authorizes fee awards against the United States in a variety of administrative and judicial contexts in which they were not previously authorized. First, EAJA added a new 5 U.S.C. § 504, authorizing fee awards in certain administrative proceedings, specifically, adversary adjudications under the Administrative Procedure Act. Second, EAJA addressed judicial fee awards by extensively revising 28 U.S.C. § 2412.

As revised by EAJA, 28 U.S.C. § 2412 deals with judicial fee awards against the United States in two separate subsections, subsection (b) and subsection (d). Each subsection has its own payment provision.

Subsection (b) provides as follows:

> "Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys * * * to the prevailing party in any civil action brought by or against the United States or any agency * * * in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award."

The primary effect of subsection (b) is to authorize fee awards against the United States under the several dozen fee-shifting statutes which do not expressly mention the United States, i.e., the "Group II" statutes.[2/] The payment provision applicable to "subsection (b) awards" is subsection (c)(2):

2/ Subsection (b) also waives sovereign immunity under certain common-law exceptions to the American Rule--the "bad faith" exception and the "common fund" or "common benefit" exception. See S. Rep. No. 96-253, p. 3 (1979); H.R. Rep. No. 96-1418, p. 8 (1980). The "common fund" exception may present special problems and is not dealt with in this decision.

> "Any judgment against the United States or any agency * * * for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment."

Standing alone, subsection (c)(2) clearly contemplates payment from the judgment appropriation except in "bad faith" cases.

The second broad category of judicial fee awards authorized by EAJA is subsection (d)(1)(A) of the revised 28 U.S.C. § 2412:

> "Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and expenses * * * incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States * * * unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."

Subsection (d) goes on to prescribe eligibility requirements and application procedures, the details of which are not relevant here. The effect of subsection (d) is to authorize fee awards against the United States, as long as the "not substantially justified" test and the eligibility requirements are met, in cases where there was no pre-existing fee-shifting statute, that is, in cases where a fee award against a private litigant would not be authorized. The payment provision for "subsection (d) awards" is subsection (d)(4)(A):

> "Fees and other expenses awarded under this subsection may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517 of this title."

The subsection (d) payment provision is virtually identical to the payment provision for administrative awards. See 5 U.S.C. § 504(d)(1), 94 Stat. 2327. There is no need to attempt to determine when the judgment appropriation might be available under subsection (d)(4)(A), because EAJA § 207 provides that:

> "The payment of judgments, fees and other expenses in the same manner as the payment of final judgments as provided in this Act is effective only to the extent and in such amounts as are provided in advance in appropriations Acts."

Before proceeding with our discussion, another aspect of the EAJA must be noted. Subsection (d) and 5 U.S.C. § 504 are considered experimental and have a "sunset" date of October 1, 1984; they will be automatically repealed as of that date unless Congress enacts legislation to make them permanent. EAJA §§ 203(c) and 204(c), 94 Stat. 2327 and 2329. The sunset date does not apply to subsection (b), however, which will therefore remain as permanent legislation even if Congress takes no further action to retain the other provisions.

Awards under 5 U.S.C. § 504 and 28 U.S.C. § 2412, subsection (d)

In a recent decision, 62 Comp. Gen. ____ (B-208637, September 29, 1983), we traced the legislative history of EAJA § 207 in detail, and considered its application to fee awards under 5 U.S.C. § 504 and subsection (d) of 28 U.S.C. § 2412. We pointed out that section 207 was inserted in response to a point of order which had been sustained based on the expansion of the availability of the permanent judgment appropriation. We concluded that section 207 prohibits use of the judgment appropriation to pay awards under either 5 U.S.C. § 504 or subsection (d) of 28 U.S.C. § 2412. We noted further that agency operating appropriations are available to pay these awards without the need for specific appropriations, unless prohibited by some other statute. We see no need to repeat that extensive discussion in this decision, and incorporate it here by reference.

Awards under 28 U.S.C. § 2412, subsection (b)

The real issue in this decision is whether our holding in B-208637, supra, applies as well to subsection (b) awards. Restated, the issue is whether section 207 prohibits use of the judgment appropriation to pay awards under subsection (b).

On the one hand, it is certainly possible to argue that section 207 applies to subsections (b) and (d) equally. It is not a part of either subsection, but is a separate provision applicable presumptively to the entire statute. As discussed in our September 1983 decision, the purpose of section 207 was to counteract a point of order based on the expansion of the availability of the judgment appropriation. Subsections (b) and (d) both purport to expand the availability of the judgment appropriation and thus, under this approach, would both be subject to section 207.

However, several factors suggest that section 207 was not intended to apply to subsection (b) awards.[3/] First, former Representative Danielson's point of order, the sustaining of which gave rise to section 207, objected to:

> "[A]n amendment to the bill, a title II, which provides for the award of attorneys' fees and other expenses to the prevailing party other than the United States, in certain actions or administrative proceedings in which the judgment or adjudication has been adverse to the United States, unless the court or adjudicative officer of the agency finds that the position of the United States was substantially justified or that special circumstances make the award unjust."

126 Cong. Rec. 28638 (October 1, 1980). Since subsection (b) is not limited to parties "other than the United States," nor is it limited by the "substantially justified" test, Mr. Danielson seems clearly to have been alluding to subsection (d) and the proposed new 5 U.S.C. § 504, rather than subsection (b).

Second, the language of section 207 ("payment of judgments * * * in the same manner as the payment of final judgments as provided in this Act") is patterned after the payment

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3/ We have been provided with an opinion dated December 15, 1983, by the Office of Legal Counsel, Department of Justice, concluding that section 207 applies to subsection (d), but not to subsection (b), and that agency funds may not be used to pay subsection (b) awards except in "bad faith" cases. This decision is in essential agreement with that opinion.

provisions of subsection (d) and 5 U.S.C. § 504, rather than subsection (b). See 28 U.S.C. § 2412(d)(4)(A), quoted earlier in this decision, and the virtually identical 5 U.S.C. § 504(d)(1). Thus, it can be argued that the real concern of the Congress was over the experimental portions of the EAJA rather than subsection (b).

Finally, it is important to note that, although agency funds are available to pay subsection (d) awards, they are not available to pay subsection (b) awards. The payment provision for subsection (b), subsection (c)(2), quoted above, directs payment from the judgment appropriation except for bad faith cases. Except for the bad faith cases, there is nothing in the language or legislative history of the EAJA to suggest that agency funds are available for subsection (b) awards. Thus, if the judgment appropriation is not available, there would be no source of funds available for immediate payment of subsection (b) awards, and agencies would be required to seek specific congressional appropriations. While this factor is not controlling in and of itself, viewing it in conjunction with the points noted above, it does not strike us as unreasonable to construe section 207 as barring use of the judgment appropriation in situations where agency funds are legally available for payment, but as not precluding its use where agency funds are not available.

In sum, although we do not view the matter as entirely free from doubt, we conclude that the prohibition of section 207 need not be applied to subsection (b) awards, although it continues to apply to awards under subsection (d) and 5 U.S.C. § 504. Accordingly, we will treat fee awards in the future under the following guidelines:

(1) Awards under "Group I" statutes--fee-shifting statutes which applied to the United States before enactment of the EAJA--will continue to be paid from the permanent judgment appropriation unless otherwise provided for. The EAJA has no effect on payment under these statutes.

(2) Awards under "Group II" statutes--fee-shifting statutes which did not apply to the United States prior to EAJA but which now apply to the United States by virtue of subsection (b)--will also be paid from the judgment appropriation unless otherwise provided for. Payment requests in this category should cite as authority both subsection (b) and the specific underlying fee-shifting statute involved in that case.

(3) Awards under subsection (d) and 5 U.S.C. § 504, as well as "bad faith" awards under subsection (b), will not be certified for payment from the judgment appropriation but must be paid from agency funds.

As a final note, in view of the October 1, 1984 sunset date for certain portions of the EAJA, it is likely that the Congress will be considering legislation in this area during the present session. We are therefore sending copies of this decision to the Senate and House Judiciary Committees for consideration in their deliberations as to precisely what form that legislation should take.

Milton J. Socolar

Acting Comptroller General
of the United States