

Memorandum

November 29, 1984

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TO : Jon Ellifritz, GGD/Claims

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FROM : Bob Centola, OGC

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SUBJECT: [REDACTED] v. United States, Z-2856642

The issue presented by this case is whether an award of attorney's fees against the United States made under the authority of Rule 37 of the Federal Rules of Civil Procedure may be certified for payment from the permanent judgment appropriation, 31 U.S.C. § 1304. Rule 37 authorizes the imposition of sanctions, including the award of attorney's fees, for certain specified abuses of discovery.

Prior to the Equal Access to Justice Act ("EAJA"), it was clear that fees could not be awarded against the United States under Rule 37. In fact, Rule 37 included a subsection (f) which expressly barred fee awards against the United States "except to the extent permitted by statute." (See Attachment 1.) The courts, although reluctantly at times, recognized and applied subsection (f). E.g., Equal Employment Opportunity Commission v. Los Alamos Constructors, Inc., 382 F. Supp. 1373 (D.N.Mex. 1974); United States v. Northside Realty Associates, 324 F. Supp. 287 (N.D.Ga. 1971).

The legislative history of EAJA makes it clear that the new 28 U.S.C. § 2412(b) was intended to encompass Rule 37 awards. S. Rep. No. 96-253, page 4 ("Fees may also be recovered against the United States under rule 37, Federal Rules of Civil Procedure, which provides for sanctions for failure to make discovery") (Attachment 2). While the EAJA conference report does not specifically mention Rule 37, it expressly adopted the Senate version. H.R. Rep. No. 96-1434, page 25 (Attachment 3). To remove any doubt, EAJA repealed subsection (f) of Rule 37. Pub. L. No. 96-481, § 205(a), 94 Stat. 2330 (Attachment 4). While there is still very little case law on the books on this point, the courts are beginning to recognize that they now can make fee awards against the United States under Rule 37. E.g., National Lawyers Guild v. Attorney General, 94 F.R.D. 600, 615 n.32 (S.D.N.Y. 1982).

Accordingly, 28 U.S.C. § 2412(b) (1982) permits fee awards against the United States under FRCP Rule 37. In cases which do not involve findings of bad faith, the awards are payable from the judgment appropriation. 63 Comp. Gen. 260 (1984).

The [REDACTED] award may therefore be certified for payment if otherwise proper. As we lawyers say, "the file is returned herewith."

Attachments

cc: Sharon Green, GGD/Claims

ATTORNEYS

Fees

Equal Access to Justice Act
Appropriation availability

COURTS

Judgments, decrees, etc.

Payment

Permanent indefinite appropriation availability
Effect of Equal Access to Justice Act

COURTS

Judgments, decrees, etc.

Payment

Indefinite appropriation availability
Judgments against Government