

# Attorney's Fee Awards for Unreasonable Government Conduct: Notes on the Equal Access to Justice Act



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The “American Rule” of attorney’s fees ordinarily requires each party to pay its own fees in the absence of express statutory authority to the contrary.<sup>1</sup> When one of the parties is the federal government this rule is bolstered by the government’s sovereign immunity. Yet even if the federal government has waived its sovereign immunity and consented to be sued, a general waiver of sovereign immunity is not to be “construed to extend to attorney’s fees unless Congress has clearly indicated that it should.”<sup>2</sup>

In about 200 statutes Congress has clearly put aside the American Rule and waived the federal government’s sovereign immunity to permit the award of attorney’s fees to prevailing parties other than the federal government.<sup>3</sup> Nearly all of these statutes apply only to particular statutory causes of action, for often they were enacted in tandem with

the creation of the right of action to which they apply. For example, private parties who “substantially prevail” in actions brought under the Freedom of Information Act may recover their reasonable attorney fees.<sup>4</sup>

The Equal Access to Justice Act (EAJA), on the other hand, is not attached to any particular substantive cause of action. Instead, subject to its exceptions and limitations, the EAJA operates as a broad waiver of the federal government’s sovereign immunity from awards of attorney’s fees in non-tort civil proceedings. For this reason it probably is the most important of the federal fee-shifting statutes.

The EAJA also is among the most litigated fee-shifting statutes; indeed, it is “one of the most heavily and intensely litigated sections of the United States Code.”<sup>5</sup> Near the end of its 2003-2004 Term, the United States Supreme Court in *Scarborough v.*

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1. See *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 247-62 (1975). Under most other developed legal systems, prevailing parties usually are entitled to fees from their opponents. See Thomas Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 651.

2. *Fitzgerald v. United States Civil Serv. Comm’n*, 554 F.2d 1186, 1189 (D.C. Cir. 1977).

3. See Joseph J. Ward, *Corporate Goliaths in the Costume of David: The Question of Association Aggregation Under the Equal Access to Justice Act—Should the Whole Be Greater Than Its Parts?*, 28 FLA. ST. U. L. REV. 151, 156 (1998).

4. See 5 U.S.C. § 552(a)(4)(E) (2000). All citations in this article to the United States Code are to the 2000 edition.

5. Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney’s Fees for Unreasonable Government Conduct (Part One)*, 55 LA. L. REV. 217, 221 (1994) [hereinafter Sisk *EAJA Essentials, Pt. 1*]. For other overviews of

*Principi*<sup>6</sup> again resolved a question of interpretation of the EAJA, one that had divided several circuits. In light of this decision, now may be an opportune time to re-acquaint readers of Arkansas Law Notes with the most basic features of the EAJA. This article intends to do just that.

## Background

The EAJA serves two basic purposes. First, it is intended to “reduce[] the disparity of resources between individuals, small businesses, and other organizations with limited resources and the federal government.”<sup>7</sup> Second, it seeks to deter wrongful behavior by federal officials without discouraging them from vigorously enforcing the law.<sup>8</sup> It may also serve the “‘salutary function [of] creating the appearance of fairness’ by providing more complete compensation to those who have suffered a breach of the public trust through arbitrary and unreasonable use of government power.”<sup>9</sup>

The EAJA is codified in Titles 5 and 28 of the United States Code. The Title 5 codification, 5 U.S.C. § 504, governs awards arising from “adversary adjudications” before federal administrative agencies. “Adversary adjudications” is defined to

include adjudication conducted under section 554 of the Administrative Procedure Act<sup>10</sup> “in which the position of the United States is represented by counsel or otherwise.”<sup>11</sup> Section 504 also covers other proceedings, including certain appeals under the Contract Dispute Act.<sup>12</sup>

In Title 28, the EAJA is found at 28 U.S.C. § 2412. This section governs awards arising from civil litigation, except tort actions, against the United States, its agencies, or any official of the United States acting in his or her official capacity. It applies in Article III courts and two Article I courts—the Court of Federal Claims and the Court of Veteran Appeals.<sup>13</sup>

Under § 2412(d), civil actions for which fees may be awarded include actions for judicial review of agency action, including agency action that is not the product of formal adjudication. A party who prevails on judicial review of agency action is entitled to attorney fees incurred both before the agency and on judicial review, but only if § 504 would have permitted the award of fees if the private party had prevailed at the agency level. In other words, only a party who prevails on judicial review of an agency’s formal adjudication can recover fees incurred at both levels.<sup>14</sup>

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the EAJA, see Louise Hill, *An Analysis and Explanation of the Equal Access to Justice Act*, 19 ARIZ. ST. L.J. 229 (1987), and Brigitte Fresco, *Lundin v. Mecham: Defining the Scope of the Equal Access to Justice Act*, 62 G.W. L. REV. 795 (1994).

6. 124 S. Ct. 1856 (2004).

7. H.R. Rep. No. 120, 99th Cong., 1st Sess. 4 (1985), reprinted in 1985 U.S.C.C.A.N. 132, 133.

8. *Id.* at 10, reprinted in 1985 U.S.C.C.A.N. 132, 139.

9. Sisk, *EAJA Essentials, Pt. 1*, supra note 5, at 226 (quoting Harold J. Krent, *Fee Shifting Under the Equal Access to Justice Act—A Qualified Success*, 11 YALE L. & POL’Y REV. 458, 478 (1993)).

10. 5 U.S.C. § 504 (2000).

11. 5 U.S.C. § 504(b)(1)(C). For an example of the Eighth Circuit’s interpretation and application of the term “adversary adjudication,” see *Lane v. United States Dep’t of Agric.*, 120 F.3d 106 (8th Cir. 1997). There, over the objections of the U.S. Department of Agriculture (USDA), the USDA National Appeals Division administrative appeals process was held to be an “adversary adjudication” for purposes of the EAJA. See *id.* at 108-11.

12. See 5 U.S.C. § 504(b)(1)(C).

13. See 28 U.S.C. § 2412(d)(1)(A). For a discussion of the application of the EAJA to bankruptcy proceedings, see Sisk, *EAJA Essentials, Pt. 1*, supra note 5, at 242-44.

14. See AMERICAN BAR ASS’N, SECTION OF ADMIN. L. & REG. PRACTICE, A GUIDE TO FEDERAL AGENCY ADJUDICATION 191 (Michael Asimow, ed. 2003).

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### The EAJA Fee-Shifting Provisions-28 U.S.C. § 2412(b)

The EAJA contains several fee-shifting provisions. The first, which is codified at 28 U.S.C. § 2412(b), applies only to court proceedings. This provision waives the federal government's sovereign immunity and permits fee-shifting against the United States under the common law rules and any federal fee-shifting statute. By specifically making the United States liable for attorney fees "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,"<sup>15</sup> § 2412(b) puts the federal government on "equal footing" with private parties for attorney fee awards.<sup>16</sup>

By virtue of § 2412(b) the United States is subject to the traditional exceptions to the American Rule. These exceptions apply to a party found to be in contempt of a court's order; to a losing party who acted in bad faith, vexatiously, wantonly, or for oppressive reasons; and in litigation that created or protected a common fund from which the fees would be drawn.<sup>17</sup> In addition, § 2412(b) incorporates against the United States all federal statutes authorizing attorney fee awards against non-federal entities.<sup>18</sup>

Section 2412(b) only waives sovereign immunity; it does not create new substantive rights. Other provisions of the EAJA, however, do create new substantive rights to attorney's fees. More specifically, the EAJA creates four substantive causes of action for attorney's fees.

### The EAJA Fee-Shifting Provisions-5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A)

The first two and most longstanding of these causes of action are created by 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A). The former applies to administrative "adversary adjudications" and the latter to court actions, but the basic elements of each of these two causes of action are the same.

First, only certain individuals and entities are eligible for fee awards. Eligible parties are limited to the following:

- a. Individuals with a net worth of no more than \$2 million at the time the adversary adjudication or civil action was initiated;
- b. Sole proprietorships, businesses, associations, units of local government, and organizations with a net worth of no more than \$7 million and no more than 500 employees at the time the adversary adjudication or civil action was initiated;
- c. Organizations that are tax exempt under Internal Revenue Code section 501(c)(3) with no more than 500 employees, regardless of net worth, at the time the adversary adjudication or civil action was initiated; and
- d. Agricultural cooperatives as defined in section 15(a) of the Agricultural Marketing Act<sup>19</sup> with no more than 500 employees, regardless of net worth at the time the adversary adjudication or civil action was initiated.<sup>20</sup>

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15. 28 U.S.C. § 2412(b).

16. H.R. Rep. No. 1418, 96th Cong. 2d Sess. 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4987.

17. See Alice Miller, Comment, *Calling Sierra Club for Help?: Attorney Fees Under the Equal Access to Justice Act and Its Effects on Litigation Involving Large Environmental Groups*, 9 DICK. J. ENVTL. L. & POL'Y 553, 558-59 (2001).

18. See Gregory C. Sisk, *A Primer on Awards of Attorney's Fees Against the Federal Government*, 25 ARIZ. ST. L.J. 733, 786-87 (1993) [hereinafter Sisk, *Attorney's Fees Primer*].

19. 12 U.S.C. § 1141(j).

20. 5 U.S.C. § 504(b)(1)(B), 28 U.S.C. § 2412(d)(2)(B).

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The remaining basic elements of both causes of action are as follows:

- a. The private party, appearing as a plaintiff or a defendant, must prevail on a substantive issue and achieve at least some of the substantive relief it sought; and
- b. The position of the government must not have been “substantially justified,” or
- c. “Special circumstances” must not make an award “unjust.”<sup>21</sup>

As to the “prevailing party” requirement, a plaintiff prevails when “actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.”<sup>22</sup> The party seeking fees must succeed on a significant issue and thereby achieve some of the benefits sought in the litigation, but success on the “central issue” is not required.<sup>23</sup> For example, the D.C. Circuit has applied the following test:

To determine whether a party has prevailed in a case in which judicial relief was not awarded, we have applied a two-part test that asks: (1) whether the party received a significant part of the relief it sought; and (2) whether the lawsuit was a necessary or substantial factor in obtaining the result.<sup>24</sup>

“Prevailing” includes obtaining a favorable consent decree or settlement.<sup>25</sup> Even a party who recovers nominal damages may be a prevailing party.<sup>26</sup> To the extent that the recovery of nominal damages constitutes limited success in the litigation, however, the limited recovery is relevant to the assessment of what constitutes a reasonable fee. The EAJA only authorizes the award of “reasonable” attorney’s fees.<sup>27</sup>

In 2001, in *Buckhannon Board and Home Care, Inc. v. West Virginia Department of Health and Human Services*,<sup>28</sup> the United States Supreme Court rejected the view that a prevailing party for purposes of an award of attorney’s fees under the American with Disabilities Act<sup>29</sup> and the Fair Housing Amendments Act of 1988<sup>30</sup> includes a party

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21. 5 U.S.C. § 504(a)(1), 28 U.S.C. § 2412(d)(1)(A).

22. *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992).

23. *See Texas State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989).

24. *Lundin v. Mecham*, 980 F.2d 1450, 1457 (D.C. Cir. 1992) (citations and footnote omitted).

25. *See, e.g., Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Res.*, 532 U.S. 598, 604 (2001). Under *Buckhannon*, however, a settlement must have a “judicial imprimatur”; that is, it cannot be a purely private settlement. *Doe v. Boston Public Schools*, 358 F.3d 20, 30 (1st Cir. 2004) (denying an award of attorney’s fees under fee-shifting provisions of the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)). A court’s retention of jurisdiction over enforcement of a settlement can provide sufficient judicial sanction to convey prevailing party status. *See Roberson v. Giuliani*, 346 F.3d 75, 82-84 (2d Cir. 2003) (involving prevailing party status under 42 U.S.C. § 1988); *see also Smalbein v. City of Daytona Beach*, 353 F.3d 901, 904-08 (11th Cir. 2003) (same).

26. *Farrar*, 506 U.S. at 112.

27. *See generally Sisk, Attorney’s Fees Primer, supra* note 18, at 743-44 (discussing *Farrar v. Hobby* and noting that “the fact of success may be enough to qualify a party for fees, but the extent of success remains important to the assessment of what constitutes a reasonable fee”).

28. 532 U.S. 598 (2001).

29. 42 U.S.C. § 12205.

30. 42 U.S.C. § 3613(c)(2).

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whose litigation served as a “catalyst” for voluntary government action that achieved the result sought by that party.<sup>31</sup> This case did not involve the EAJA, but, following *Buckhannon*, the weight of the extant authority tilts against awarding fees based on the catalyst theory under the EAJA.<sup>32</sup>

The prevailing party must allege that the government’s position “was not substantially justified.”<sup>33</sup> Most of the litigation over the EAJA’s requirements has involved the question of whether the government’s position was “substantially justified.”<sup>34</sup> Fees are not to be awarded to prevailing parties if the position of the United States was “substantially justified.”

In *Scarborough v. Principi*,<sup>35</sup> the Court ruled that a party who has timely submitted a fee application may amend the application after the time for its filing has expired to cure its initial failure to allege that the government’s position was not substantially justified. It reached this result by applying the “relation back” doctrine codified in Rule 15 of the Federal Rules of Civil Procedure.<sup>36</sup>

In so holding and as also noted below, the Court recognized that this allegation does not impose the burden of proof on the fee applicant; instead, that burden rests on the federal government. As

explained by the Court in *Scarborough*, Congress imposed this requirement because

Congress did not . . . want the “substantially justified” standard to “be read to raise a presumption that the Government position was not substantially justified simply because it lost the case . . . .” By allocating the burden of pleading “that the position of the United States was not substantially justified”-and that burden only to the fee applicant, Congress apparently sought to dispel any assumption that the Government must pay fees each time it loses. Complementarily, the no-substantial-justification-allegation requirement serves to ward off irresponsible litigation, i.e., unreasonable or capricious fee-shifting demands.<sup>37</sup>

Under 28 U.S.C. § 2412(d), which applies in court proceedings, the “position of the government” includes its litigation position in court and “the action or the failure to act by the agency upon which the litigation is based . . . .”<sup>38</sup> Similarly, under 5 U.S.C. § 504, which applies in administrative pro-

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31. *Id.* at 605.

32. *See, e.g.*, *Thomas v. National Science Foundation*, 330 F.3d 486, 492-93 (D.C. Cir. 2003); *Perez-Arellano v. Smith*, 279 F.3d 791, 793-94 (9th Cir. 2002); *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371 (Fed. Cir. 2002). *See generally* Lucia A. Silechia, *The Catalyst Calamity: Post-Buckhannon Fee Shifting in Environmental Litigation and a Proposal for Congressional Action*, 29 COLUM. J. ENVTL. L. 1 (2004); Robin Stanley, Note, *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources: To The Prevailing Party Goes The Spoils . . . and the Attorney Fees!*, 36 AKRON L. REV. 363 (2003); Macon Dandridge Miller, Comment, *Catalysts as Prevailing Parties under the Equal Access to Justice Act*, 69 U. CHICAGO L. REV. 1347 (2002); J. Douglas Klein, Note, *Does Buckhannon Apply? An Analysis of Judicial Application and Extension of the Supreme Court Decision Eighteen Months After and Beyond*, 13 DUKE ENVTL. L. & POL’Y F. 99 (2002).

33. 5 U.S.C. § 504(a)(2), 28 U.S.C. § 2412(d)(1)(B).

34. *See* Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney’s Fees for Unreasonable Government Conduct (Part Two)*, 56 LA. L. REV. 1, 5 (1995) [hereinafter Sisk, *EAJA Essentials*, Pt. 2].

35. 124 S. Ct. 1856 (2004).

36. *Id.* at 1868.

37. *Id.* at 1866 (citation omitted).

38. 28 U.S.C. § 2412(d)(2)(D).

ceedings, the “position of the agency” means the position of the agency in the adversary adjudication and “the action or failure to act by the agency upon which the adversary adjudication is based . . . .”<sup>39</sup>

Thus, the court “must focus on two questions: first, whether the government was substantially justified in taking its original action; and, second, whether the government was substantially justified in defending the validity of the action in court.”<sup>40</sup> Although the prevailing party must allege the absence of substantial justification, the government “bears the burden of proving substantial justification, both in its litigation position and its posture during the underlying administrative proceedings.”<sup>41</sup>

Whether the position of the government was “substantially justified” is assessed under a “reasonableness” standard. The Court has held that “substantially justified” means “justified in substance or

in the main—that is, justified to a degree that would satisfy a reasonable person.”<sup>42</sup> A “substantially justified” position is one that has a “reasonable basis both in law and fact.”<sup>43</sup> In making this assessment, the Court has stated that the case should be considered “as an inclusive whole, rather than as atomized line-items.”<sup>44</sup>

As the quoted passage from the *Scarborough* decision above reiterates, the mere fact that a party has prevailed does not create a presumption that the government’s position was not substantially justified.<sup>45</sup> Likewise, the mere fact that a court has found, on the merits, that the agency action was “arbitrary or capricious” under § 706(2)(A) of the Administrative Procedure Act<sup>46</sup> does not automatically mean that the government’s position was not substantially justified.<sup>47</sup> In the final analysis, because a “reasonableness” test applies, the “substantially justified” standard “is inherently a discretionary one, which can only be applied on a case-by-

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39. 5 U.S.C. § 504(b)(1)(E).

40. *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988).

41. *Baker v. Bowen*, 839 F.2d 1075, 1080 (5th Cir. 1988). Specifically, the EAJA requires “substantial justification” determinations to be based on “the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.” 28 U.S.C. § 2412(d)(1)(B). See also 5 U.S.C. § 504(a)(1) (“Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.”).

42. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

43. *Id.*

44. *Commissioner, INS v. Jean*, 496 U.S. 154, 162 (1990) (citations omitted).

45. See, e.g., *Spawn v. Western Bank-Westheimer*, 989 F.2d 830, 840 (5th Cir. 1993).

46. 5 U.S.C. § 706(2)(A).

47. See, e.g., *Griffon v. United States Dep’t of Health & Human Serv.*, 832 F.2d 51, 52 (5th Cir. 1987) (“[m]erely because the government’s underlying action [is] held legally invalid as being ‘arbitrary and capricious’ does not necessarily mean that the government acted without substantial justification for purposes of the [EAJA] . . . .” (citation omitted)). As the D.C. Circuit observed: Under the APA, a judicial labeling of an agency’s action as “arbitrary and capricious” sets forth a legal conclusion. It is a standard against which courts measure all manner of governmental actions, some of which may represent reasonable policy choices but suffer from some defect in crafting or execution . . . . For example, an agency action accompanied by an inadequate explanation constitutes arbitrary and capricious conduct . . . . In short, the “arbitrary and capricious” label is just that, a label or conclusion applied to a rich variety of agency conduct, including sensible but legally flawed actions as well as outrageous ones.

*Federal Election Comm’n v. Rose*, 806 F.2d 1081, 1087-89 (D.C. Cir. 1986) (citations omitted).

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case basis.”<sup>48</sup> And, as the Eighth Circuit has emphasized, this standard considers the government’s position in light of both the law and the facts.<sup>49</sup>

Finally, courts or a federal agency may deny an award of fees and expenses if “special circumstances make an award unjust.”<sup>50</sup> This “special circumstances” provision is a

“safety valve” [that] helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.<sup>51</sup>

### **The EAJA Fee-Shifting Provisions-5 U.S.C. § 504(a)(4) and 28 U.S.C. § 2412(d)(1)(D)**

Like the first and second substantive causes of action under the EAJA, the third and fourth are closely similar but for the forum in which they apply—one administrative, the other judicial. Both of these causes of action were enacted as part of the Contract with America Advancement Act of 1996.<sup>52</sup>

The first of these recently created causes of action applies to “an adversary adjudication arising from an agency action to enforce a party’s compliance with a statutory or regulatory requirement.”<sup>53</sup> The other extends to “a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5 . . . .”<sup>54</sup>

The definition of a “party” is the same for these causes of action as it is for the other causes of action, with one exception. For purposes of these causes of action, a “party” also includes “a small entity as defined in section 601 of Title 5 . . . .”<sup>55</sup>

Subject to the limitations discussed below, fees can be awarded to a party under § 504(a)(4) if “the demand of the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case . . . .”<sup>56</sup> Similarly, under § 2412(d)(1)(D), a party can be awarded fees in an action for judicial review of an “adversary adjudication described in section 504(a)(4) of title 5” if “the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case . . . .”<sup>57</sup> Because both causes of action are premised on the

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48. Niki Kuckes, *Reenacting the Equal Access to Justice Act: A Proposal for Automatic Attorney’s Fee Awards*, 94 YALE L.J. 1207, 1218 (1985).

49. See *Lauer v. Barnhart*, 321 F.3d 762, 764 (8th Cir. 2003) (stating that “[t]he standard is whether the [government’s] position is ‘clearly reasonable, well founded in law and fact, solid through not necessarily correct.’” (quoting, with emphasis added, *Friends of the Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995))).

50. 28 U.S.C. § 2412(d)(1)(A), 5 U.S.C. § 504(a)(1).

51. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4990.

52. See generally Judith E. Kramer, *Equal Access to Justice Act Amendments of 1996: A New Avenue for Recovering Fees from the Government*, 51 ADMIN. L. REV. 363 (1999) [hereinafter Kramer].

53. 5 U.S.C. § 504(a)(4).

54. 28 U.S.C. § 2412(d)(1)(D).

55. 5 U.S.C. § 504(b)(1)(B), 28 U.S.C. § 2412(d)(2)(B). 5 U.S.C. § 601(3) defines the term “small business” for purposes of the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612.

56. 5 U.S.C. § 504(a)(4).

57. 28 U.S.C. § 2412(d)(1)(D).

presence of an “excessive demand,” they have become known as the “excessive demand” provisions of the EAJA.<sup>58</sup>

“Demand” means the “express demand” which led to the adversary adjudication, but does not include “a recitation of the maximum statutory penalty (i) in the complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.”<sup>59</sup> Thus, a two-part standard applies. First, the demand and the award are compared to see if the award substantially exceeds the demand. Second, if there is such a difference, then the court or the adjudicative agency must determine whether the disparity is unreasonable under the facts and circumstances of the case.<sup>60</sup> Under this standard, achieving a result substantially less burdensome than the government’s demand serves as the functional equivalent of prevailing under the first and second EAJA causes of action.

The EAJA limits awards to those covering the fees and expenses “related to defending against the excess demand . . . .”<sup>61</sup> Such a determination may be very difficult to make and may result in small awards in the case where most of the time is spent

challenging the allegation that a violation occurred.<sup>62</sup>

Fees can be denied if “the party has committed a wilful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.”<sup>63</sup> Also, fees and expenses awarded under the “excessive demand” causes of action “shall be paid only as a consequence of appropriations provided in advance.”<sup>64</sup>

### EAJA Fee Calculations and Applications

EAJA attorney fees are based on “prevailing market rates for the kind and quality of the services furnished” and are capped at \$125.00 per hour.<sup>65</sup> This cap may be adjusted upward based on cost-of-living or a “special factor, such as the limited availability of qualified attorneys for the proceeding involved . . . .”<sup>66</sup> “Reasonableness” is the standard for determining the amount of attorney fees.<sup>67</sup> Also recoverable are expenses, including the reasonable expenses incurred in employing expert witnesses.<sup>68</sup>

EAJA fee requests usually must be supported by contemporaneously made, detailed records showing

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58. See Kramer, *supra* note 52, at 379-80.

59. 5 U.S.C. § 504(b)(1)(F), 28 U.S.C. § 2412(d)(2)(I).

60. See *United States v. One 1997 Toyota Land Cruiser*, 248 F.3d 899, 906 (9th Cir. 2001). See also James M. McElfish, Jr., *Fee Simple? The 1996 Equal Access to Justice Act Amendments*, 26 ENVTL. L. REP. 10569, 10574-75 (1996) [hereinafter McElfish].

61. 5 U.S.C. § 504(a)(4), 28 U.S.C. § 2412(d)(1)(D).

62. See McElfish, *supra* note 60, at 10579-80.

63. 5 U.S.C. § 504(a)(1), 28 U.S.C. § 2412(d)(1)(A).

64. 5 U.S.C. § 504(a)(4), 28 U.S.C. § 2412(d)(1)(D).

65. 5 U.S.C. § 504(b)(1)(A), 28 U.S.C. § 2412(d)(2)(A).

66. 28 U.S.C. § 2412(d)(2)(A)(ii). Under 5 U.S.C. § 504(b)(1)(A)(ii), “agents” are also included. In *Select Milk Producers, Inc. v. Veneman*, 304 F. Supp.2d 45, 55-57 (D.D.C. 2004), the court awarded two attorneys fees at the rates of \$325 and \$385 per hour, respectively, based on their specialized knowledge of federal milk marketing orders and their use of that knowledge in the litigation.

67. See 5 U.S.C. § 504(b)(1)(A), 28 U.S.C. § 2412(d)(2)(A).

68. See *id.*

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the time expended, the work performed, and usual billing rates. Expenses must also be itemized.<sup>69</sup> These records permit the court to consider the reasonableness of the requested fee, and inadequate documentation is a common basis for reducing fee award requests.

EAJA fee applications must be filed within a 30 day period. Under 5 U.S.C. § 504(a)(2) the 30-day period begins to run as “of the final disposition in the adversary adjudication.”<sup>70</sup> Under 28 U.S.C. § 2412(d)(1)(B), the time does not begin to run until “final judgment,” which is a judgment that is “final and not appealable and includes an order for settlement.”<sup>71</sup> This requirement is jurisdictional; it cannot be waived, even for good cause.<sup>72</sup>

Denials of attorney fee requests are appealable. Courts of appeal review district court determina-

tions on the issue of whether the government’s position was “substantially justified” under the abuse of discretion standard.<sup>73</sup>

### Conclusion

The EAJA has been described as “a bright star fixed in the firmament of fee-shifting statutes.”<sup>74</sup> Recognizing that its purpose is to “discourage the federal government from using its superior litigating resources unreasonably,” the D.C. Circuit has, more bluntly, called it “an ‘anti-bully’ law.”<sup>75</sup> However the EAJA is characterized, its availability and a working knowledge of it offer potential assistance to those who litigate against the federal government.

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69. See 5 U.S.C. § 504(a)(2), 28 U.S.C. § 2412(d)(1)(B).

70. 5 U.S.C. § 504(a)(2).

71. 28 U.S.C. § 2412(d)(1)(B).

72. See generally Sisk, *EAJA Essentials*, Pt. 2, *supra* note 34, at 177-183.

73. *Pierce v. Underwood*, 487 U.S. 552, 557-63 (1988).

74. Sisk, *EAJA Essentials*, Pt. 1, *supra* note 5, at 221.

75. *Battles Farm Co. v. Pierce*, 806 F.2d 1098, 1101 (D.C. Cir. 1986), *vacated*, 487 U.S. 1229 (1988).