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The Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325 (1980)

P. Scott Mitchell

Civil Procedure—ATTORNEY'S FEES—RECOVERY OF ATTORNEY'S FEES AGAINST THE UNITED STATES—The Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325 (1980)

The Equal Access to Justice Act[1] (EAJA), which took effect October 1, 1981, substantially changed existing law.[2] Formerly, private litigants could recover attorney's fees against the United States only when specifically authorized by statute.[3] Enacted by Congress to offset this deterrent to challenging unreasonable government actions,[4] the EAJA provides for fee awards to parties who prevail against the government in civil actions and adversarial adjudications.[5]

Although the statute retains a general provision barring an award of attorney's fees and expenses against the federal government, sections 2412(b) and 2412(d) provide sweeping exceptions. Under section 2412(b), the United States is now liable to a prevailing adversary "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" except where an award is prohibited by statute.[6]

Section 2412(d) is the EAJA's most significant provision. Under its terms, the court *shall* award attorney's fees and expenses to the prevailing party in any civil action (except tort actions) *unless* the government can show its position to have been substantially justified or unless special circumstances make such an award unjust.[7] The effect of this subsection is to provide a means of shifting fees to the government in most situations where an award is not authorized under common law principles or a specific statute.

The purpose of this note is to identify the common issues which

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1. Equal Access to Justice Act, Pub. L. No. 96-481, tit. II, 94 Stat. 2325 (1980) (codified at 5 U.S.C.A. §§ 500,504, amending 28 U.S.C.A. §§ 2401, 2412, 42 U.S.C.A. § 1988 (West Supp. 1981)) [hereinafter cited as EAJA].

2. This note addresses only those portions of the EAJA amending 28 U.S.C. § 2412. In addition the Act repealed Fed. R. Civ. P. 37(f), thus subjecting the government to that rule's sanctions for abuse of discovery. EAJA § 205(a), 94 Stat. 2330.

3. 28 U.S.C. § 2412 (1976).

4. *See* H.R. REP. No. 1418, 96th Cong., 2d Sess. 5, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984 [hereinafter cited as H.R. REP.]; H. CONF. REP. No. 1434, 96th Cong., 2d Sess. 21, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 5003, 5010 [hereinafter cited as H. CONF. REP.].

5. 5 U.S.C. § 504 provides for fee awards, but only in adjudications where the United States is an adversary. At the administrative level, the factor distinguishing whether the adjudication is adversarial in nature is whether the government agency has taken a position through counsel. Berman v. Schweiker, 531 F. Supp. 1149, 1153 (N.D. Ill. 1982).

6. 28 U.S.C.A. § 2412(b) (West. Supp. 1982).

7. *Id.* § 2412(d)(1)(A).

have arisen in the initial decisions construing the EAJA. Where appropriate, the resolution of these issues is analyzed in light of the Act's legislative history and the goals it was intended to achieve. Finally, it is suggested that the Act effectively accomplishes its intended purposes.

I. ISSUES COMMON TO SECTIONS 2412(b) AND 2412(d)

The EAJA applies to those actions pending on or commenced as of October 1, 1981.[8] Because the Act does not provide a definition of "pending," some issues have arisen concerning the term's meaning and application. Although these issues will eventually disappear, they deserve some treatment due to the many cases filed before that date which are still awaiting final resolution.

Most courts considering the issue have decided that an action was pending for EAJA purposes as long as the right to appeal had not expired or been exhausted.[9] Some courts have so held even where the only matter involved on appeal was whether a fee award should be granted. In *Knights of the KKK v. East Baton Rouge Parish School Board*,[10] the Klan had requested and been denied a fee award against the Department of Health, Education and Welfare.[11] The EAJA went into effect while the Klan's appeal was pending before the Supreme Court, which then remanded the action for "reconsideration in light of that Act."[12] The Fifth Circuit decided the Act's provisions applied:

> The fact that a motion for attorneys' fees is the only matter pending before a court does not mean that court lacks jurisdiction or that the case is not 'pending.'. . . Because the Klan's right to appeal had not expired or been exhausted, its action was 'pending' on the effective date for the purposes of applying the [EAJA].[13]

The Seventh Circuit, however, has taken the opposite stance. In *Commissioners of Highways of Towns of Annawan v. United*

8. EAJA § 208, 94 Stat. 2330.

9. *E.g.*, Knights of the KKK v. East Baton Rouge Parish School Bd., 679 F.2d 64, 67 (5th Cir. 1982); United States v. Citizens State Bank, 668 F.2d 444, 446 (8th Cir. 1982); Berman v. Schweiker, 531 F. Supp. 1149, 1151 (N.D. Ill. 1982).

10. 679 F.2d 64 (5th Cir. 1982).

11. *Id.* at 65.

12. *Id.* (footnote omitted).

13. *Id.* at 68 (citation omitted).

States,[14] the court refused to apply the EAJA where the Commissioners' appeal from a denial of attorney's fees was pending on the Act's effective date.[15] The decision was based on an observation that the Act represents a waiver of sovereign immunity which must be strictly construed rather than "extended by implication."[16]

In those actions found to be "pending" on the Act's effective date where a fee award has been allowed, the courts have uniformly included fees and expenses incurred prior to that date.[17] These decisions have been primarily based on a concern that "construing the Act to bifurcate cases on October 1, 1981 would eschew the purpose of the Act to provide financial assistance to those litigants who would not ordinarily be able to contest unreasonable government action."[18] In addition, this intention was implied by Congress when the Act was made applicable to cases pending on its effective date.[19]

Another threshold requirement for recovery under each of the Act's operative subsections is that the party seeking the fee award must be a "prevailing party."[20] In *United States v. Citizens State Bank*,[21] the Eighth Circuit decided this requirement may be met by something less than a total victory after a full trial on the merits: "A party may be deemed prevailing if he or she obtains a favorable settlement of the case, . . . if the plaintiff has sought a voluntary dismissal of a groundless complaint, . . . or even if he or she does not ultimately prevail on all issues."[22]

To what extent a failure to prevail on all issues affects the right to recovery is unclear. In *United States v. Miscellaneous Pornographic Magazines*,[23] the plaintiff, YourStyle Publishers, sought recovery of attorney's fees incurred in litigation involving allegedly

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14. 684 F.2d 443 (7th Cir. 1982).

15. *Id.* at 444. The commissioners had sought attorneys' fees in the district court under 42 U.S.C. § 4654(a)(2), which allows such an award in condemnation proceedings abandoned by the United States. *Id.* at 445.

16. *Id.* at 444.

17. *E.g.*, Shumate v. Harris, 544 F. Supp. 779, 783 (W.D.N.C. 1982); Nunes-Correia v. Haig, 543 F. Supp. 812, 816 (D.D.C. 1982); United States v. Pomp, 538 F. Supp. 513, 515 (M.D. Fla. 1982); Wolverton v. Schweiker, 533 F. Supp. 420, 423 (D. Idaho 1982); Photo Data, Inc. v. Sawyer, 533 F. Supp. 348, 351 (D.D.C. 1982).

18. *Photo Data*, 533 F. Supp. at 351.

19. *Id.*

20. 28 U.S.C.A. §§ 2412(b), 2412(d)(1)(A) (West Supp. 1982).

21. 668 F.2d 444 (8th Cir. 1982).

22. *Id.* at 447 (citations omitted). The court also observed that a party may be deemed prevailing prior to the losing party having exhausted its right to appeal in certain situations. *Id.*

23. 541 F. Supp. 122 (N.D. Ill. 1982).

pornographic magazines seized by federal authorities.[24] YourStyle had urged six arguments in the seizure litigation. Acceptance of any of the six by the court would have resulted in the release of the seized materials.[25] Finding one of these arguments valid, the court released the magazines.[26] Without deciding whether a fee award was appropriate, the court deemed the publishing company "a prevailing party as to a very small part of the services provided by its counsel."[27] The company was ordered to amend its claim to include only those fees and expenses incurred in preparing the winning argument.[28]

This decision may have been intended to discourage attempts to increase the amount of recovery by preparation and assertion of groundless claims in addition to those reasonably expected to prevail. If strictly applied, however, such an approach would have a "chilling effect" on the best efforts of counsel in contesting unreasonable government actions, thus undercutting the congressional intention in enacting the EAJA.[29] Attorneys for parties in litigation against the government should not be deterred from urging every reasonable argument in behalf of their clients. Toward this end, a winning party who does not prevail on all asserted arguments should simply be considered a "prevailing party" entitled to further determination of what recovery, if any, is appropriate under the Act's operative subsections. Both sections 2412(b) and 2412(d) provide sufficient discretionary latitude for a court to reduce an award to allow for perceived abuse.[30]

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24. *Id.* at 123.

25. *Id.* at 126.

26. *Id.*

27. *Id.* at 125.

28. *Id.* at 126. Upon further consideration, the court concluded no fee award was appropriate under the EAJA. *Id.*

29. The stated purpose of the EAJA is to encourage the challenging of unreasonable government actions by reducing the disparity of financial resources between private parties and the federal government. *See* H.R. REP. *supra* note 4 at 4988, which states that:

> The Government with its greater resources and expertise can in effect coerce compliance with its position. Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views. In fact, there is evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue. This kind of truncated justice undermines the integrity of the decision making process.

30. Section 2412(b) provides that a court *may* award fees and expenses under its provision. 28 U.S.C. § 2412(b). While its language requires a fee award unless the government meets its burden, section 2412(d) allows the court, in its discretion, to reduce or deny an award to the extent the prevailing party "engaged in conduct which unduly and unreasona-

Once a party has met these threshold requirements for application of the EAJA, a determination of whether fee shifting is appropriate is made under either section 2412(b) or 2412(d), or both. As will be seen, these two subsections differ substantially.[31] Therefore, they will be discussed separately.

II. Recovery Under Section 2412(b)

Section 2412(b) of the EAJA provides that:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity 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.[32]

A. *Common Law*

The general rule followed in the federal courts (the "American Rule") is that litigants must pay their own attorney's fees, regardless of the outcome of the case.[33] There are two traditional exceptions to this rule. Fees are recoverable under the "bad faith" and the "common fund/common benefit" doctrines in proper situations.[34] The award of attorney's fees under these doctrines is "an exercise of the general equity jurisdiction of the federal courts."[35]

The bad faith exception applies when a party's opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive rea-

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bly protracted the final resolution of the matter in controversy." 28 U.S.C.A. § 2412(d)(1)(C) (West Supp. 1982).

31. *See infra* text accompanying notes 58-64.

32. 28 U.S.C.A. § 2412(b) (West Supp. 1982).

33. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245 (1975); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967). In contrast, English courts have traditionally assessed attorneys' fees against the losing litigant in most cases. *See generally* Goodhart, *Costs* 38 Yale L.J. 849 (1929).

34. *See generally Alyeska, supra* note 33. In *Alyeska*, the Court discontinued the use in federal courts of another American Rule exception, the "private attorney general" doctrine, which provided for fee awards where a party acted to vindicate a public policy which the legislature had deemed important. 421 U.S. at 270 n.46.

35. Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co., 62 F.R.D. 353, 354 (D. Del. 1974) (footnote omitted).

sons."[36] The requisite bad faith may be found either in actions leading to a lawsuit or in the conduct of the litigation itself.[37] This exception has limited application, however, and is found only in extreme cases.[38]

A finding of bad faith in actions leading up to litigation usually involves a situation where one party has unjustifiably refused to recognize the legal rights of another, thereby forcing that party to resort to litigation to enforce those rights.[39] Thus, bad faith has been found when a company unjustifiably refused to compensate its employees when it had a clear duty to do so,[40] a school board continued to hinder desegregation efforts long after the Supreme Court mandated desegregated education[41] and a labor union which had a duty to protect its members' rights was found guilty of racial discrimination.[42]

Bad faith in the conduct of litigation may be found on the part of either party. Common examples include situations where a plaintiff has instituted a groundless claim against the defendant who is then forced to defend against the claim,[43] a defendant asserts a baseless defense forcing the plaintiff into an unnecessary trial to prove the defendant's liability[44] or either party engages in conduct such as refusing to comply with court orders or introducing groundless, oppressive motions or petitions which prolong the litigation.[45]

Although the EAJA facially subjects the United States to common law principles, a bad faith finding may be more difficult to obtain against the government than against private parties. At least one court has held that federal officials are entitled to a presumption of "good faith dealing." Pointing to its own pre-EAJA precedent, the court in *Haney v. United States*[46] declared that:

> [a]ny analysis of a question of Governmental bad faith must be-

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36. F.D. Rich Co., Inc. v. Industrial Lumber Co., Inc., 417 U.S. 116, 129 (1974).
37. Hall v. Cole, 412 U.S. 1, 15 (1973).
38. 6 J. MOORE, FEDERAL PRACTICE ¶ 54.77(2)(2d ed. 1982).
39. Note, *Attorney's Fees and the Federal Bad Faith Exception*, 29 HASTINGS L.J. 319, 325 (1977).
40. Lewis v. Texaco, Inc., 418 F. Supp. 27 (S.D.N.Y. 1976).
41. Bell v. School Board, 321 F.2d 494 (4th Cir. 1963).
42. Rolax v. Atlantic Coast Line R.R. Co., 186 F.2d 473 (4th Cir. 1951).
43. Guardian Trust Co. v. Kansas City So. Ry. Co., 28 F.2d 233 (8th Cir. 1928).
44. Gates v. Collier, 70 F.R.D. 341 (N.D. Miss. 1976).
45. Local No. 149, UAW v. American Brake Shoe Co., 298 F.2d 212, 214-15 (4th Cir.), *cert. denied*, 369 U.S. 873 (1962).
46. 676 F.2d 584 (Ct. Cl. 1982).

> gin with the presumption that public officials act 'conscientiously in the discharge of their duties'. . . . A finding of bad faith requires well-nigh irrefragable proof in order for the court to abandon the presumption of good faith dealing. . . . The necessary and almost irrefutable proof has been equated with evidence of a *'specific intent to injure the plaintiff.'*[47]

Thus, plaintiffs in an action against the United States may face an almost insurmountable obstacle when attempting to prove governmental bad faith in conduct leading up to the litigation.

The *Haney* approach appears to be in conflict with the language of section 2412(b) making the government liable for fees and expenses "to the same extent that any other party would be liable under common law." Although the approach has apparently not been expressly adopted by other courts, their decisions do indicate a reluctance to find bad faith on the part of the government.[48]

The other major exception to the American rule, the common fund/common benefit doctrine, allows fee shifting where a litigant's actions have conferred a substantial benefit upon an ascertainable class.[49] This may include two situations. First, the party may create or preserve a fund of money or assets for the benefit of a class of which he or she is a member (common fund). Secondly, the party may preserve substantial non-pecuniary benefits for the class (common benefit).[50]

A proper discussion of this complex exception is beyond the scope of this comment.[51] However, a few general observations should be made. In the common fund situation, the fee award to the litigating party is made from the fund created or preserved by

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47. *Id.* at 586 (citations omitted) (emphasis in original).

48. No EAJA decisions have been found allowing a fee award against the United States under the bad faith exception. Cases denying recovery against the government under bad faith principles include Commissioners of Highways v. United States, 684 F.2d 443 (7th Cir. 1982), Haney v. United States, 676 F.2d 584 (Ct. Cl. 1982); Donovan v. Dillingham, 668 F.2d 1196 (11th Cir. 1982); United States v. 341.45 Acres of Land, 542 F. Supp. 482 (D. Minn. 1982); Matthews v. United States, 526 F. Supp. 993 (M.D. Ga. 1982). It should be noted that the Federal Tort Claims Act does not allow recovery against the United States for intentional torts. 28 U.S.C. § 2680(h). Therefore, a litigant who has successfully brought a negligence action against the government may be estopped from asserting that the government's actions were taken in bad faith, because to prevail on this issue would be tantamount to establishng an intentional tort in most cases.

49. Dods & Kennedy, *The Equal Access to Justice Act*, 50 UMKC L. REV. 48, 59 (1981).

50. *Id.*

51. For a general discussion of common fund/common benefit application, *see* Comment, *Attorney Fees: Slipping From The American Rule Strait Jacket*, 40 MONT. L. REV. 308, 309-12 (1979).

the party's action.[52] In this sense, the award is not made against the losing party. Rather the award is recovered from the non-litigating class members for their share of the expense incurred.

In the common benefit situation, the award is also a shifting of the financial burden of litigation to those benefited by the action. In some situations, such as when the benefited class consists of the general public, the award could be made against the government within the rationale underlying this type of fee-shifting.[53]

B. Statutory Authorization

Section 2412(b) also allows recovery of fees against the United States under the terms of statutes which specifically provide for such an award. Such statutory exceptions to the American rule have been enacted by Congress to promote desired policies in many areas.[54] Because these statutes set forth their own requirements for fee recovery, they will not be discussed in this comment. It should be noted, however, that courts interpreting the EAJA have generally refused to allow fee awards under statutes which do not specifically authorize recovery against the United States,[55] although the existence of such statutes does not preclude an award under common law principles or under section 2412(d).[56]

III. Recovery Under Section 2412(d)

Even if recovery is unavailable under section 2412(b), a prevailing party may still recover attorney's fees against the United States under the EAJA:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States

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52. *Id.* at 309.

53. However, the use of the doctrine in this manner may be precluded. *See Alyeska*, 421 U.S. at 264 n.39, where the Court stated that the common fund/common benefit exception "ill suits litigation in which the purported benefits accrue to the general public. . . . [S]ophisticated economic analysis would be required to gauge the extent to which the general public, the supposed beneficiary, as distinguished from selected elements of it, would bear the costs."

54. *E.g.*, Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1976); Voting Rights Act, 42 U.S.C. § 1973*l*(e) (1976); Civil Rights Act, 42 U.S.C. § 1988 (1976).

55. *See, e.g.*, Donovan v. Dillingham, 668 F.2d 1196, 1198 (11th Cir. 1982); United States v. Pomp, 538 F. Supp. 513, 514 (M.D. Fla. 1982). *But see* Matthews v. United States, 526 F. Supp. 993, 1008 (M.D. Ga. 1981).

56. Ocasio v. Schweiker, 540 F. Supp. 1320, 1322 (S.D.N.Y. 1982); United States v. Pomp, 538 F. Supp. at 514.

> 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) 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.[57]

A. Limitations on Recovery

Section 2412(d) includes several limitations not applicable to section 2412(b). Initially, even though prevailing,[58] a litigant must further qualify under the subsection's definition of "party" to invoke its operative provision. To qualify as a party, an individual's net worth must not exceed $1,000,000 at the time the action is filed.[59] A sole proprietorship, partnership, corporation, association, or organization may qualify as a party if (1) its net worth does not exceed $5,000,000,[60] or (2) it employs no more than 500 persons.[61]

The subsection also limits the rate of recovery. "Reasonable" attorney and expert witness fees are based on the prevailing market rates for the kind and quality of the services furnished.[62] In addition, an upper limit of $75 per hour is set for attorney's fees unless an increase in the cost of living or other special factor justifies a higher fee.[63] Expert witness compensation is further limited to the highest rate paid such experts by the United States.[64]

B. The Substantial Justification Standard

To recover under section 2412(d), a prevailing party must first allege that the position of the United States was not substantially justified.[65] The government then has the burden of demonstrating

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57. 28 U.S.C.A. § 2412(d)(1)(A) (West Supp. 1982).
58. *See supra* text accompanying notes 20-30.
59. 28 U.S.C.A. § 2412(d)(2)(B)(i) (West Supp. 1982).
60. *Id.* § 2412(d)(2)(B)(ii).
61. *Id.* § 2412(d)(2)(B)(iii).
62. *Id.* § 2412(d)(2)(A).
63. *Id.* § 2412(d)(2)(A)(ii).
64. *Id.* § 2412(d)(2)(A)(i).
65. *Id.* § 2412(d)(1)(B). The term "substantially justified" was adopted from rule 37 of the Federal Rules of Civil Procedure, which provides for sanctions against parties who abuse the discovery process. *See* Notes, *Will the Sun Rise Again for the Equal Access to Justice Act?* 48 BROOKLYN L. REV. 265, 290-95 (1982). To this point, however, courts have interpreted section 2412(d) without looking to the common law application of the rule 37 term for guidance.

substantial justification for its position.[66] The standard is described as "essentially one of reasonableness" of the government's actions.[67] Where the government demonstrates that its case had a reasonable basis "both in law and in fact," no award will be granted.[68] This new standard was intended to serve as a "middle ground" between an automatic fee award to a prevailing party and permitting a fee award only where the government's position was arbitrary or frivolous.[69]

Some courts have held that the substantial justification standard focuses only on the government's position in the litigation.[70] Others, however, have scrutinized the government's actions leading up to the lawsuit as well. Thus, in *Photo Data, Inc. v. Sawyer*,[71] the government's position was not substantially justified where the plaintiff's low bid on a government printing contract had been rejected upon a finding that the plaintiff was irresponsible. This finding had been the result of erroneously coded computer tapes.[72] After prevailing in a declaratory action brought to obtain further consideration in the contract award process, the plaintiff sought attorney's fees.[73] The court granted the award because plaintiff's bid had been rejected "with no more than a terse three-sentence letter," observing that "[i]n order to ensure evenhandedness the Court must scrutinize not only the government's theory in defending the legal issues raised but also the occurrences that impelled plaintiff to bring this action."[74]

One significant factor in a substantial justification analysis is the manner in which the underlying action has been resolved. In *Berman v. Schweiker*,[75] Berman successfully sought reversal of a Social Security Administration decision denying his request for re-

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66. H.R. REP., *supra* note 4, at 4989.

67. *Id.* Some courts have interpreted this language to mean the standard is slightly *above* one based on reasonableness, *e.g.*, Nunes-Correia v. Haig, 543 F. Supp. 812, 817 (D.D.C. 1982); Wolverton v. Schweiker, 533 F. Supp. 420, 424 (D. Idaho 1982).

68. H.R. REP., *supra* note 4, at 4989.

69. Berman v. Schweiker, 531 F. Supp. 1149, 1154 (N.D. Ill. 1982), *citing* H.R. REP., *supra* note 4, at 4993.

70. Operating Engineers Local Union No. 3 v. Bohn, 541 F. Supp. 486, 495 (D. Utah 1982); Alspach v. District Director of Internal Revenue, 527 F. Supp. 225, 228 (D. Md. 1981).

71. 533 F. Supp. 348 (D.D.C. 1982).

72. *Id.* at 349.

73. *Id.* at 349-50.

74. *Id.* at 352 (footnote omitted.)

75. 531 F. Supp. 1149 (N.D. Ill. 1982).

vision of his earnings record.[76] Emphasizing the fact that Berman had prevailed on summary judgment, the court relied on the legislative history of section 2412(d) to find the government's position had not been substantially justified:

> Certain types of case dispositions may indicate that the Government action was not substantially justified. A court should look closely at cases, for example where there has been a judgment on the pleadings or where there is a directed verdict or where a prior suit on the same claim had been dismissed. Such cases clearly raise the possibility that the government was unreasonable in pursuing the litigation.[77]

The fact that the government loses the underlying action does not, however, raise a presumption that its position was not substantially justified.[78] In addition, the government need not show that its decision to litigate was based on a substantial probability of prevailing.[79] In *Wyandotte Savings Bank v. NLRB*,[80] the NLRB had certified the employees of several of the bank's branches as appropriate bargaining units and had ordered the bank to begin negotiations with those units.[81] The Sixth Circuit refused to enforce the order; its own precedent clearly established that the NLRB's actions constituted an abuse of its discretion.[82] Nevertheless, the court found the government's position had been substantially justified as "a reasonable attempt to reopen a closed question."[83]

The *Wyandotte* decision has the effect of further muddling an already unclear standard. It signals that a government agency's position, despite being contrary to precedent, may be considered substantially justified if the agency argues that such precedent should be changed. Such a position does not seem justifiable in law. While, as indicated, the government need not establish that its de-

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76. *Id.* at 1150. The government had argued that Berman should be classified in an employee category which had not existed during the time of his employment. *Id.* at 1154.

77. *Id.* at 1154, *quoting* H.R. REP., *supra* note 4, at 4989-90.

78. H.R. REP., *supra* note 4, at 4990.

79. *Id.*

80. 682 F.2d 119 (6th Cir. 1982).

81. *Id.* at 119.

82. *Id.* at 119-20.

83. *Id.* at 120. It is considered ethically permissible for an attorney to advance "a claim or defense that is unwarranted under existing law" when that claim or defense is supportable "by good faith argument for an extension, modification, or reversal of existing law." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2)(1982).

cision to litigate was based on a substantial probability of prevailing, the standard does require some reasonable probability to have existed. Assuming the Sixth Circuit did not wish to deter the NLRB from advancing similar claims, the court could have accomplished the same result through application of the "special circumstances" language in section 2412(d). Congress intended this "safety valve" provision be used for the purpose.[84]

Some substantial justification analyses have focused on the factual, rather than legal, bases of the government's positions. In these cases, a fairly clear pattern has emerged. Where the government's position is supported by some evidence or information, substantial justification will be found. Such was the case in *United States v. Citizens State Bank*,[85] where the plaintiff taxpayer had prevailed in an action to narrow the scope of an Internal Revenue Service summons.[86] The IRS had received information that the taxpayer had not filed an income tax return for several years while receiving income.[87] The Eighth Circuit found this information sufficient to justify the attempt to enforce the summons, which had required production of bank records.[88]

The evidence upon which the government's action is based need not be substantial. In *Bennett v. Schweiker*,[89] Bennett brought an action for review of a final decision by the Secretary of Health and Human Services denying her claim for retirement insurance benefits.[90] The court found the Secretary's position had not been supported by substantial evidence and reversed his decision.[91] The court denied Bennett's motion for fees and expenses, concluding that "a finding that the Secretary's decision was not supported by substantial evidence does not require a concurrent finding by this court that the Secretary's decision was not substantially justified."[92]

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84. *See* H.R. REP., *supra* note 4, at 4990, where the report states: "the Government should not be held liable where 'special circumstances would make the award unjust.' This 'safety valve' 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."

85. 668 F.2d 444 (8th Cir. 1982).

86. *Id.* at 447.

87. *Id.* at 448.

88. The IRS sought production of bank records of accounts in plaintiff's name and in the name of an organization over which he had signature authority. *Id.* at 445.

89. 543 F. Supp. 897 (D.D.C. 1982).

90. *Id.* at 897.

91. *Id. at 898.*

92. *Id.* (quoting *Wolverton*, 533 F. Supp. at 425). *But see Operating Engineers*, 541 F.

In contrast, a government position will not be found to be substantially justified when there is no evidence to support that position. An example is *Wolverton v. Schweiker,*[93] where plaintiff brought an action for review of a Secretary of Health and Human Services decision denying his claim for disability insurance benefits.[94] As did the plaintiff in *Bennett,* Wolverton prevailed.[95] In *Wolverton,* however, the Secretary could point to no evidence in support of his decision and a fee award was granted.[96]

While *Citizen's State Bank, Bennett,* and *Wolverton* provide a consistent pattern, *Bennett* appears inconsistent with Congress' intent in enacting section 2412(d). As the legislative history of the subsection indicates, the standard and burden of proof adopted were intended "to caution agencies to carefully evaluate their cases and not to pursue those which are weak or tenuous."[97] In situations such as *Bennett,* where the Secretary had not only based his decision on insubstantial evidence, but had also ignored evidence presented by the claimant,[98] a finding of substantial justification subverts this congressional intent.

From these and other cases[99] applying the substantial justification standard, some general conclusions may be drawn. First, although the language of section 2412(d) has caused some commentators to label it a "mandatory" fee award, in practice the standard allows much more discretion than the term implies. Secondly, as is the case with any standard involving a "reasonableness" determination, its application requires case by case analysis. Finally, because the standard is new, a comprehensive body of precedent has not yet developed. The courts, therefore, will continue to look to the well-developed legislative history of the Act for guidance. The practitioner seeking a fee award under section 2412(d) would be

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Supp. at 495 ("It is difficult for this court to perceive how action unsupported by 'substantial' evidence could be 'substantially' justified.").

93. 533 F. Supp. 420.

94. *Id.* at 422.

95. *Id.*

96. *Id.* at 425-26.

97. H.R. REP., *supra* note 4, at 4993.

98. 543 F. Supp. at 898.

99. Other cases finding the government's position substantially justified include Donovan v. Dillingham, 668 F.2d 1196 (11th Cir. 1982); Kennedy v. United States, 542 F. Supp. 1046 (D.N.H. 1982); Matthews v. United States, 526 F. Supp. 993 (M.D. Ga. 1981). Those decisions not finding substantial justification include Shumante v. Harris, 544 F. Supp. 779 (W.D.N.C. 1982); Nunes-Correia v. Haig, 543 F. Supp. 812 (D.D.C. 1982); Hoang Ha v. Schweiker, 541 F. Supp. 711 (N.D. Cal. 1982); United States v. Pomp, 538 F. Supp. 513 (M.D. Fla. 1982).

well advised to review this history thoroughly.

IV. CONCLUSION

The EAJA is a carefully designed congressional effort to provide individuals and small businesses with greater incentive to contest unreasonable actions by government agencies and officials. On balance, the Act appears to achieve its intended purpose. Some of the initial decisions applying section 2412(d), however, indicate judicial reluctance to award fees and expenses against the government as long as there is any basis for the government's position. If the intended benefits of the EAJA are to be realized, the government must be discouraged from maintaining those positions which are weak or tenuous.

Section 2412(d) is scheduled for repeal through sunset in 1984. By that time, a substantial body of case law applying the subsection will have developed. It is hoped that application will be consistent with the Act's goals and that Congress will make the subsection's provisions permanent. The substantial justification standard, if applied as Congress intended, has the potential to provide greater scrutiny of government activity without significantly hindering valid and aggressive regulatory efforts, thus providing a clear incentive for federal agencies and officials to expend their resources more efficiently.

P. SCOTT MITCHELL