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Equal Access to Justice Act

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EQUAL ACCESS TO JUSTICE ACT

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The new statute entitled the *Equal Access to Justice Act*[1] (hereinafter Act) is of great importance because it provides, on a three year experimental basis, for the award of possibly large attorneys' fees and other expenses to private parties of modest means in successful civil actions against the government, its agencies or officials. The Act, however, is specifically not applicable in tort actions.[2]

The new Act entitles certain private parties prevailing in government litigation to recover attorneys' fees, expert witness fees, and other expenses against the United States, unless the government action was "substantially justified" or "special circumstances make an award unjust."[3] Within thirty days of final judgment in the action, the party seeking an award must submit an application to the court specifying the amount sought, including an itemized statement showing the actual time expended and the rate at which fees and other expenses were computed.[4] "Fees and other expenses" include fees of

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[1] Pub. L. No. 96-481, § 201, enacted October 21, 1980, 94 Stat. 2325 (to be codified at 28 U.S.C. § 2412).

[2] 28 U.S.C.A. § 2412(d)(1) (West Supp. 1982).

[3] 28 U.S.C.A. § 2412(d)(1)(A) (West Supp. 1982) provides:

> (d)(1)(A) 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) 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.

[4] The thirty day period is a statutory period, not a period established by rule, and therefore, it cannot be extended by the courts. *See* Wallis v. United States, No. 453-79C (Ct. Cl., Nov. 25, 1981) (trial judge procedural order).

28 U.S.C.A. § 2412(d)(1)(B) (West Supp. 1982) provides:

> (B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses

expert witnesses, the reasonable cost of any study, test, technical or engineering report, and generally attorneys' fees not in excess of $75.00 per hour.[5] Only a prevailing party of modest means is entitled to an award, i.e., an individual whose net worth does not exceed $1 million, a corporation whose net worth does not exceed $5 million, or the sole owner of a business which does not have more than 500 employees.[6]

A number of earlier statutes, some with criminal sanctions, limited the attorneys' fees which the private party was permitted to pay its attorney. Some of these statutes include Social Security,[7] Veterans Insurance,[8] Trading with the Enemy Act,[9] and Military Personnel.[10]

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are computed. The party shall also allege that the position of the United States was not substantially justified.

[5] 28 U.S.C.A. § 2412(d)(2)(A) (West Supp. 1982) provides:

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

[6] 28 U.S.C.A. § 2412(d)(2)(B) (West Supp. 1982) provides:

(B) "party" means (i) an individual whose net worth did not exceed $1,000,000 at the time the civil action was filed, (ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed $5,000,000 at the time the civil action was filed, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association, or (iii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed;

[7] 42 U.S.C. § 406(a) (1976). Attorneys' fees may equal, whichever is smaller, (A) 25 percent of past-due benefits awarded the claimant, (B) fixed fees, or (C) fees agreed upon between the claimant and attorney as compensation for services. A violation of these limitations may subject the attorney to a fine not exceeding $500, imprisonment not exceeding one year, or both.

[8] 38 U.S.C. § 784(g) (1976). Attorneys' fees may be awarded by the court but not in excess of 10 percent of the amount recovered and to be paid by the Veterans' Administration.

[9] 50 U.S.C. app. § 20 (1976). The aggregate of fees paid attorneys, agents, or representatives is limited to 10 percent of the property, interests, or proceeds. Any person accepting any fee in excess of this limitation, or retaining for more than thirty days any portion of the excess, violates this statute.

[10] 31 U.S.C. § 243 (1976). Attorneys' fees in excess of 10 percent of the amount paid in settlement violate this statute and subject the recipient to a misdemeanor conviction and a fine not exceeding $1,000.

The purpose of these statutory provisions has primarily been "to protect just claimants from extortion or improvident bargains."[11] However, the purpose of the new Act is entirely different. Its purpose is "Equal Justice"—to insure that private parties are not deterred from seeking review of or defending against unreasonable governmental action because of the expense involved. And as Congress found, its purpose is "to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorneys' fees, expert witness fees, and other costs against the United States."[12]

The new Act provides that, upon court order, the government can be required to make a payment of fees to the private attorney. As the legislative history points out,[13] this is a significant modification of the "American rule" and is more in accordance with civil law and the law of the British Commonwealth. The "American rule" requires each side to pay for its own counsel, although federal and state laws contain many exceptions to this majority rule. The distinct feature of the civil law and the British Commonwealth law is that "the loser pays all," including the attorneys' fees of the winning party.

In more recent years, special statutes have been enacted under which the successful party-claimant can collect its attorneys' fees from the vanquished party. There are approximately 125 federal statutes that entitle a prevailing party to obtain compensation for its attorneys' fees.[14] Possibly the most outstanding example in this regard is *The Civil Rights Attorney's Fees Awards Act of 1976.*[15] This statute per-

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[11] Calhoun v. Massie, 253 U.S. 170, 173-174 (1920) (Brandeis, J.).
Its purpose has been in part to protect just claimants from extortion or improvident bargains and in part to protect the Treasury from frauds and imposition. See United States v. Van Leuven, 62 Fed. Rep. 52, 56. While recognizing the common need for the services of agents and attorneys in the presentation of such claims and that parties would often be denied the opportunity of securing such services if contingent fees were prohibited, Taylor v. Bemiss, 110 U.S. 42, 45, Congress has manifested its belief that the causes which gave rise to laws against champerty and maintenance are persistent. By the enactment, from time to time, of laws prohibiting the assignment of claims and placing limitations upon the fees properly chargeable for services' Congress has sought both to prevent the stirring up of unjust claims against the Government and to reduce the temptation to adopt improper methods of prosecution which contracts for large fees contingent upon success have sometimes been supposed to encourage. The constitutionality of such legislation, although resembling in its nature the exercise of the police power, has long been settled. (Marshall v. Baltimore & Ohio R.R. Co., 16 How. 314, 336; United States v. Hall, 98 U.S. 343, 354, 355; Ball v. Halsell, 161 U.S. 72, 82, 84) (footnote omitted).

[12] *Equal Access to Justice Act*, Pub. L. No. 96-481, § 202(c)(1) 94 Stat. 2325 (1980).

[13] H.R. Rep. No. 1418, S. Rep. No. 265, (96th Cong., 2d Sess., *reprinted in* U.S. Code Cong. & Ad. News 10B, at 8633-8635 (Dec. 1980).

[14] Fed. Attorney Fee L. Rep. (Harcourt-Brace).

[15] 42 U.S.C. § 1988 (1976 & Supp. III 1979).

mits the reasonable attorneys' fees of the prevailing party to be reimbursed by the vanquished party in suits under certain enumerated civil rights statutes[16] and formerly in certain tax suits.[17] This provision is an important modification of the general "American rule" that attorneys' fees are not recoverable by the prevailing party as part of its damages or costs unless a statute otherwise provides.[18] The Civil Rights Act has no specific provisions as to whether an award of attorneys' fees can be recovered from the United States as the defendant.[19] But this omission has been remedied by the *Equal Access to Justice Act*. Section 2412(b) of the Act provides that the *"United States shall be liable for [attorneys'] 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."*[20]

Statutes embodying the principle that the successful claimant can recover damages from the vanquished opponent, applicable against the United States, include *Title VII* of the *Civil Rights Act of 1964*,[21] the *Freedom of Information Act*,[22] and the *Back Pay Act*.[23]

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[16] *Id.* Reasonable attorneys' fees may be awarded the prevailing party, other than the United States, in any action under sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Pub. L. 92-318, or title VI of the *Civil Rights Act of 1964*.

[17] The language of the 1976 Act applying the Act to actions to enforce a provision of the U.S. Internal Revenue Code was stricken by section 205(e) of the *Equal Access to Justice Act*, Pub. L. No. 96-481, 94 Stat. 2330.

[18] *See* Aleyska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). The Supreme Court disallowed the recovery of attorneys' fees by the Wilderness Society from the United States in litigation to prevent the issuance of permits required for construction of the Alaskan oil pipeline. The Court held that under the "American rule" attorneys' fees are not ordinarily recoverable by the prevailing party in federal litigation in the absence of statutory authorization.

For a full discussion of this case and its limitations, *see* R. Schlesinger, *Comparative Law* 666 (4th ed. 1980).

[19] *Cf.* NAACP v. Civiletti, 609 F.2d 514 (D.C. Cir.), *cert. denied*, 447 U.S. 922 (1979), holding that the *Civil Rights Attorney's Fees Awards Act of 1976* does not expressly authorize recovery of fees against the United States so as to waive federal sovereign immunity. Thus, the United States is immune with respect to awards of attorneys' fees absent clear or express statutory authority to the contrary.

[20] 28 U.S.C. § 2412(b) (West Supp. 1982). *But see*, Red School House, Inc. v. Office of Economic Opportunity, 386 F. Supp. 1177 (D. Minn. 1974); Director, Office of Workers' Compensation Programs v. South East Coal Co., 598 F.2d 1046 (6th Cir. 1979).

[21] 42 U.S.C. § 2000e-5 (1964), *amended by* 42 U.S.C. § 2000e-5(k) (1976). The language of this statute indicates that the calculation of the fee should not vary with the identity of the losing defendant: "[T]he Court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs, and the . . . *United States shall be liable for the costs the same as a private person.*" (emphasis added).

See also, Copeland v. Marshall, 641 F.2d 880 (D.C. Cir 1980) (en banc). In a successful prosecution of a gender-discrimination class suit against the United States Department of Labor, the court *en banc* adopted the market value of services approach for computing attorneys' fees. The court stated that fees should be calculated no differently when the United States rather than a private party is the losing party.

[22] 5 U.S.C. § 552(a)(4)(E) (1976).

[23] 5 U.S.C. § 5596(b) (1976), *amended by* 5 U.S.C. § 5596(b)(1)(A)(ii) (Supp. III 1979).

Some statutes award attorneys' fees under limited circumstances; some require a party to establish specific proof of its claims, and some have time limits for the submission of claims. The question arises whether, under the discretionary authority of the court,[24] attorneys' fees may be awarded in excess of the fee limitations specifically set forth by these statutes. The answer should clearly be in the affirmative for several reasons: (1) The fee limitations of these statutes are different from the "costs" provisions of section 2412(d) of the Act;[25] (2) the Act does not mention provisions of this earlier legislation; and (3) the specific exclusion of tort actions from the Act demonstrates that in the absence of that provision, tort actions would have been covered by the Act, even though there is a distinct fee limitation in the *Federal Tort Claims Act*.[26]

On the other hand, the fact that the attorney of the successful claimant has received a substantial fee from the client may very well be taken into consideration in the court's determination of whether

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[24] The term "court" within the meaning of section 2412(d)(1)(A) is "any court having jurisdiction of that action," i.e., District Court, or in a proper case, the Court of Claims.

[25] For the rule authorizing the courts to impose costs, but not attorneys' fees, on the vanquished government, *see* Pub. L. No. 89-507, 80 Stat. 308, 28 U.S.C. § 2412(a) (1976); Jacoby, *The 89th Congress and Government Litigation*, 67 Colum. L. Rev. 1212, 1235 n.165 (1967); Jacoby, *Recent Legislation Affecting the Court of Claims*, 55 Geo. L. J. 397, 405 (1966). But that legislation was not implemented by the Court of Claims, apparently for the reason that no costs should be awarded in the Court of Claims, and certainly not against the private party losing a case. The same reasoning does not seem to apply against application of the new Act, which is one-sided *against* the United States. There is no reason why the new Act should not be applied in the Court of Claims.

[26] 28 U.S.C. §§ 1346(b), 2671 to 2680 (1976). The reason why "cases sounding in tort" were excluded from § 2412(d)(1)(A) seems to be due to the many ambiguities in the *Federal Torts Claim Act*. This statute, in comparison with other equally brief statutes, has most frequently led to Supreme Court litigation because many of the important issues were not explained specifically in the statute; e.g., who can recover under the statute (soldiers? prisoners?); what does the undefined term "discretion" mean; and has the tort law of absolute liability been excluded? The government's desire to litigate not only a particular case but also to secure a whole program of statutory enforcement, can be expected to result in many higher court cases. If the *Federal Torts Claim Act* were applicable to the *Equal Access to Justice Act*, many higher court cases would result and would generally be considered "substantially justified," within the meaning of § 2412(d)(1)(A).

See Laird v.Nelms, 406 U.S. 797 (1972); United States v. Demko, 385 U.S. 149 (1966); United States v. Muniz, 374 U.S. 150 (1963); Rayonier, Inc. v. United States, 352 U.S. 315 (1957); Indian Towing Co. v. United States, 350 U.S. 61 (1955); Dalehite v. United States, 346 U.S. 15 (1953); Feres v. United States, 340 U.S. 135 (1950); Brooks v. United States, 337 U.S. 49 (1949).

The legislative history of the *Equal Access to Justice Act* specifically expressed that "Constitutional tort" cases were not to be excluded, *e.g.*, United States v. Causby, 328 U.S. 256 (1946) (pertaining to the constitutionality of taking private property for public use); 28 U.S.C. §§ 1346(a) and 1491. *See* H.R. Rep. No. 1418, 96th Cong., 2d Sess., *reprinted in* U.S. Code Cong. & Ad. News 10B, at 8643 (Dec. 1980).

"special circumstances" exist which "make an award unjust."[27] It seems that in the proper case the award may be reduced, although not completely denied.

The general question arises as to the effective date of application of the new Act. While it has the effective date of October 1, 1981, a more specific problem presented is whether the positions of the United States which occurred *before* October 1, 1981, may be considered in making the determination under the Act. In other words, is the new Act applicable to a case where the substance of the court proceedings took place before October 1, 1981, as long as the "thirty days of final judgment"[28] of the court occur after October 1, 1981?

The guidelines of the United States Department of Justice, recently issued for all government attorneys confronting requests for attorneys' fees, reach a negative conclusion.[29] The arguments against application of the Act are as follows: (1) "Consent to suit should be strictly construed;"[30] (2) the Act does not expressly give an affirmative answer to the question posed; and (3) a retroactive application of the Act occurs by applying it to proceedings begun before the Act was even in effect.

In response to this line of argument, it may be pointed out: (1) a liberal interpretation of the "strict construction" principle, recited above, has sometimes been adopted by the courts;[31] and (2) the argument of a retroactive application of the Act, if adopted, would render meaningless section 2412(d), which makes the Act applicable to any civil action "which is pending on October 1, 1981."[32] If a case were

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[27] 28 U.S.C.A. § 2412(d)(1)(A) (West Supp. 1982).

[28] 28 U.S.C.A. § 2412(d)(1)(B) (West Supp. 1982).

[29] Office of Legal Policy, U.S. Department of Justice, *Award of Attorney Fees and Other Expenses in Judicial Proceedings Under the Equal Access to Justice Act.*

See Lempert, *Critics Hit Justice Equal Access Guidelines*, Legal Times of Washington, D.C., Jan. 25, 1982. *See also* the position of the Justice Department in Globe, Inc. v. United States, No. 80-1898 (D.D.C. 1981).

[30] *See e.g.*, Mitchell v. United States, Ct. Cl., No. 772-71 (Oct. 21, 1981) (Nichols, J., dissenting) (recites the strict construction ideas of the Supreme Court in Court of Claims cases).

[31] *See* United States v. Aetna Surety Co., 338 U.S. 336, 383 (1949) and United States v. Yellow Cab Co., 340 U.S. 543, 545 (1951):

> In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in Anderson v. Hayes Construction Co., 243 N.Y. 140, 147, 153 N.E. 28, 29-30: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'

See also, United States v. Capital Transit Co., 108 F. Supp. 348 (D.D.C. 1952).

[32] 94 Stat. 2325, 2330 § 208; U.S. Code Cong. & Ad. News 10B, at 8645 (Dec. 1980).

pending on October 1, 1981, and the activities of the private attorney caused the unjustified position and activities of the government before October 1, 1981, then the Act could not provide for a recovery of attorneys' fees. Further argument against the Department of Justice guidelines is found in the Congressional Record of the House of Representatives. The Cost Estimate of the Congressional Budget Office, adopted by the House, listed the estimated authorization for fiscal year 1982 as $92 million, and for fiscal year 1983 as $109 million.[33] If activities before October 1, 1981, were intended to be totally excluded, there should have been a big difference between these two fiscal years.

Several issues are likely to arise in the interpretation of the Act, principally because its terms seem to be vague. What is meant by the language "substantially justified?"[34] The Department of Justice guidelines express the view that a position of the government is substantially unjustified only when it is unreasonable or when the government has sued or defended even though no genuine dispute exists. Only future litigation will demonstrate how the courts are going to interpret that provision. But perhaps the position of the government need not be unreasonable; rather, it may be sufficient if the government in litigating the case paid too much attention to the general construction of a statutory scheme and too little attention to the individual's case.[35]

Other fundamental issues involve the burden of proof and the method of establishing that the activities were substantially unjustified. Does the private party have the burden of proving that the activities were substantially unjustified, or does the government have the burden of proving that they were "substantially justified?" Also, may policy materials such as opinions, recommendations, or memoranda generated in deciding whether to bring a suit, be required to be produced to establish the burden of proof?

A statement of the Assistant Attorney General submitted to the House Committee on the Judiciary on May 20, 1980, strongly opposed the efforts of the proposed bill to shift the burden of proof onto the

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[33] H.R. Rep. No. 1418, 96th Cong., 2d Sess., *reprinted in* U.S. Code Cong. & Ad. News 10B, at 8647 (Dec. 1980).

[34] 28 U.S.C.A. §§ 2412(d)(1)(A), (B) (West Supp. 1982).

[35] In testimony before the House Committee on the Judiciary, Alice Daniel, Assistant Attorney General of the Civil Division, Department of Justice, found objections in the broad language of "substantially unjustified" and would have preferred a statute which had the more stringent test of "arbitrary, frivolous, unreasonable, or groundless." *Hearing on S.265, Equal Access to Justice Act, Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess., May 20, 1980, Serial No. 62, at 38, 40. (Statement of Alice Daniel, Assistant Attorney General, Civil Division, Department of Justice).

government. Under that proposal, "the Government, in each case it lost, would be required to come forward with evidence to defeat an award of attorney fees."[36]

The final version of sections 2412(d)(1)(A) and (B) of the Act shows how the argument of the Assistant Attorney General was overcome in redrafting the statutory provisions. The grammatical structure of section 2412(d)(1)(A) makes it clear that the *burden of proof* is on the government to show that its position was "substantially justified." This section states in pertinent part: "when the court finds that the position of the United States was substantially justified. . . ." And the grammatical structure of section 2412(d)(1)(B) creates, not a burden of proof, but a *burden of allegation* requiring the private party to allege in specific detail the manner in which the government's position was unjustified.[37] The final sentence of this section states: "The party shall also allege that the position of the United States was not substantially justified." The last sentence of section 2412(d)(1)(B) was not drafted in S.265, 96th Congress, 1st Session, which had passed the Senate and on which hearings were held in the House Judiciary Committee.[38] It was later drafted into the bill in recognition of the fact that it is the private party who can identify the circumstances which allegedly make the position of the government unjustified. But the situation seems to be different when it comes to the actual proof of those circumstances. Here the burden is on the government.

The recent Department of Justice guidelines, in fact, take a very distinct stand on the suggested interpretation of "substantially justified" under the *Equal Access to Justice Act*. Because of the Act's similarity in language to Rule 37(a)(4) of the Federal Rules of Civil Procedure, the interpretation of Rule 37 should be given weight.[39]

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[36] *Id.* at 42.

[37] Under our procedural system, the burden of *allegation*, of course, is a different concept than the burden of *proof*. For a practical example showing in detail the two differing concepts in the area of contributory negligence, *see* R. Field, B. Kaplan, K. Clermont, Materials for a Basic Course in Civil Procedure 428 (4th ed. 1978).

[38] *Hearing on S.265, Equal Access to Justice Act, Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Con., 2d Sess., May 20, Serial No. 62, at 10-13.

[39] Fed. R. Civ. P. 37(a)(4) states in part:

> (4) AWARD OF EXPENSES OF MOTION. If the motion is granted, the court shall . . . require the party or deponent whose conduct necessitated the motion . . . to pay the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was *substantially justified* or that *other circumstances make an award of expenses unjust.*
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> If the motion is denied, the court shall . . . require the moving party . . . to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was *substantially justified* or that *other circumstances make an award of expenses unjust.* (emphasis added)

Specifically, there should not be any attempt to discover "recommendations and advice on program policy" or documents that are "intraoffice and on policy, the kind that a banker gets from economists or accountants."[40] Such matters pertain to the inner operations of the government and should not be discoverable. Whether this broad admonition will always be followed is difficult to predict. In exceptional cases, these matters might be discoverable. For example, following the United States Supreme Court's reversal in *United States v. Proctor & Gamble Co.*,[41] the lower court ordered the broad discovery of intraoffice memoranda in the "upper echelon" of the Department of Justice.[42] The extent of discovery seems to depend on the legitimate breadth of the issues which have properly been raised by the private party in its allegation of substantially unjustified activities. Certainly, the issues under the Act are broader than those under Rule 37(c)(4), where the issues relate only to clear failure to take a required discovery step under Rule 37(a)(2). It is important that the allegation of the private party under section 2412(d)(1)(B) of the Act be made specific and definite to avoid an unjustified expansion of discovery.

There is one certain allegation that would seem to be improper. The private party should not be permitted to allege that the government decided to litigate a certain issue in his case, which was present in a series of cases, because his large financial worth[43] eliminated the danger that the government would ever be ordered to pay the party's attorneys' fees. Could it be argued that it was unconstitutional under equal protection doctrines for the government to make that choice? Occasionally, the Court of Claims has held that equal treatment of all taxpayers who are similarly situated need not be specifically required by a statutory provision; however, in absence of a statutory scheme, unequal treatment cannot be tolerated under equal protection doctrines.[44] The government's choice to litigate against the wealthy party instead of a party of modest means would be permitted because of the fair statutory scheme. As a more subtle example, assume *arguendo* that the government institutes an action under the *False Claims Act*[45] against a wealthy defendant and a series of unrelated "false claims" actions against non-wealthy defendants, both types of

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[40] Kaiser Aluminum & Chemical Corp. v. United States, 141 Ct.Cl. 38 (1958).

[41] 356 U.S. 677 (1958).

[42] United States v. Proctor & Gamble Co., 187 F. Supp. 55 (D.N.J. 1960).

[43] For instance, a corporation whose net worth is $600 million is not entitled to an award of attorney's fees under § 2412(d)(2)(B).

[44] *See* IBM Corp. v. United States, 343 F.2d 914, *cert. denied*, 382 U.S. 1028 (1965). For a full discussion of this situation, *see* 2 West's Federal Practice Manual § 1849, at 777 (Rev. 2d ed. 1977) (S. Jacoby).

[45] 31 U.S.C. §§ 231 to 233 (1976).

cases involving the same issue. The government's selection of the case against the wealthy defendant for a trial on that issue would be proper. The constitutional principle of equal protection cannot be used to equalize the government's non-liability with possible liability for attorneys' fees because the *Equal Access to Justice Act* has made a fair distinction in the treatment of wealthy and non-wealthy private parties. Though it may seem strange and certainly unprecedented that the recovery of costs is determined by the wealth of the private party, still such a distinction seems reasonable and not unconstitutional. It should also be noted that the determination of whether a private party is of modest means has been made more rigid under the Equal Access to Justice Act. Section 2412(d)(2)(B) lists the financial worth of the private party which is considered modest, and it specifically provides that the party's net worth is determined "*at the time the action was filed.*"[46]

CONCLUSION

There are, of course, numerous other questions which may arise in the interpretation of the Act.[47] In conclusion, however, the discussion will consider what the abolition of the "American rule" may mean from a broader procedural point of view. The general rule of civil law and of the British Commonwealth is that the "loser pays all," including the attorneys' fees of the victorious opponent.[48] The application of this general rule, together with the civil law system which generally disallows contingent fees,[49] has the function of discouraging

[46] This would seem to render impossible attempts to change the status during the pendency of the action. *See also Anti-Assignment Act*, 31 U.S.C. § 203 (1976), which in cases of claims against the United States limits the assignment of those claims, with specified exceptions.

[47] One such question is what is meant by the clause that there shall be no recovery if "special circumstances make an award unjust?" 28 U.S.C.A. § 2412(d)(1)(A) (West Supp. 1982).

The "reasonable" attorneys' fees which may be awarded to the attorney of the private prevailing party shall be "based upon prevailing market rates" generally not in excess of $75 per hour "unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C.A. § 2412(d)(2)(A) (West Supp. 1982). The question arises what shall the rate be of a salaried attorney working for a public interest law firm?

In its Budget Message for fiscal year 1983, the Reagan Administration proposed to limit the legal fees now paid to opposing private attorneys by the United States in civil rights and other cases, and to severely restrict the amount of fees paid to public interest lawyers. Stuart, *Reagan Stalks Public Interest Lawyers' Fees*, N.Y. Times, Feb. 19, 1982, at 14.

[48] The author had occasion to observe the significance of this rule in Canada, in 1977, when he taught as a visiting professor at the Western Ontario Law School in London, Ontario. The author became familiar with some of the teaching materials in Canadian civil procedure. The American casebooks and textbooks on civil procedure serve as useful guides, but always have to be supplemented with a chapter showing the determination of attorneys' fees of the victorious party, to be paid by the vanquished party.

[49] England also generally disallows contingent fees, calling an attorney who would receive them a "speculative solicitor." The prohibition of contingent fees, of course, requires a more

some litigation. For instance, a poor plaintiff who is not permitted to obtain the services of an attorney on a contingent fee basis, and who would have to pay in addition to his own fees the attorneys' fees of the victorious opponent, might hesitate to bring a stockholder's derivative action. The existence of the "American rule," that is, the loser does not pay all, and the existence of the contingent fee might serve to explain why the United States, unlike other countries, has become such a litigious country.[50]

The *Equal Access to Justice Act* has become an important inroad upon the "American rule." In discussing the civil law rule and the contrary "American rule," Professor Schlesinger predicted that any abolition of the "American rule" will not follow the civil law system of awarding money "to all victorious litigants," but will grant recovery to "pragmatically defined interest groups," such as *plaintiffs* in certain *types* of actions, e.g., "environmentalists, victims of civil rights violations, or consumers."[51] The prediction of Professor Schlesinger has turned out correct only in part. But while, as illustrated above, many statutes provided that the loser pay the attorneys' fees, section 2412(d) is a provision on *costs*. The provision is highly discretionary but applies to *all civil government litigation;* it applies only for the benefit of the private party and not for the government. The provision also applies when the private party is the defendant.

As stated previously, section 2412(d) is valid only on a three year experimental basis. Interpretations by the courts of the new Act will indicate whether the Act is desirable. Is it wise to single out government litigation?[52] Is it wise to provide that the private party, when a defendant, may recover? Is it wise to provide that only the private party may recover? An affirmative answer to this last question seems proper, but the answers to the first and second questions are not now clear.

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highly developed statutory legal aid system than exists in this country, to make it possible for the poor plaintiff to obtain legal protection. *See* the comparative study by Jacoby, *Legal Aid to the Poor*, 53 Harv. L. Rev. 940 (1940).

[50] Adoption in this country of the principle "the loser pays all" has been strongly suggested; *see, e.g.*, Ehrenzweig, *Shall Counsel Fees be Allowed*, 26 Cal. St. B.J. 107 (1951). *But see*, Farmer v. American Oil Co., 379 U.S. 227, 235 (1964), in which Justice H. Black defended the present practice.

[51] R. SCHLESINGER, COMPARATIVE LAW 665-668 (4th ed. 1980). Professor Schlesinger discusses the judge made exceptions to the "American rule," namely that recovery of counsel fees can be obtained when (1) the opponent acted in bad faith, and (2) where the victory of the prevailing party has created a common fund. *Id.* at 666.

[52] Government litigation was clearly singled out in the federal system. In the procedural systems of the United States, there have been very few attempts to discard to some extent the "American rule." *See, e.g.*, Serrano v. Priest, 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303 (1977); Cal. Civ. P. Code § 1021.5 (West 1980).