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Employment Law

Attorney Fees Under EAJA Subject to Govt. Offset, Justices Rule

Jeffrey Campolongo and Jennie Maura McLaughlin All Articles

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Jeffrey Campolongo

The Equal Access to Justice Act, or EAJA, provides that "a court shall award to a prevailing party … fees and other expenses … in any civil action … brought by or against the United States … unless the court finds that the position of the United States was substantially justified." (See 28 U.S.C. § 2412(d).)

It is widely held that the primary use of the EAJA statute has been for private claimants seeking Social Security or veterans' benefits. Claimants in these areas often do not have the means to afford an attorney and the cases do not lend themselves to a contingency arrangement because of the relatively modest amount at issue. Thus, the EAJA has traditionally been the only way individuals can seek to challenge a wrongful denial of benefits with the assistance of competent legal counsel.

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In a recent U.S. Supreme Court decision, the high court has cautioned claimants "not so fast," as the federal government has a right to recoup any pre-existing debt before the claimant can recover his or her share of benefits.

In *Astrue v. Ratliff* , the Supreme Court on June 14 determined that an award of attorney fees granted under the EAJA is subject to EAJA's offset requirement for the litigant's debt to the government. Unfortunately for the lawyers handling these cases, the Supreme Court has confirmed that the government can use this law to reduce or even eliminate an attorney fee.

Astrue v. Ratliff came about as a result of an individual, Ruby Kills Ree, being denied Social Security disability benefits. With the help of an attorney, Catherine Ratliff, the claimant was able to successfully appeal the unfavorable decision. The attorney was then eligible for just over $2,000 in attorney fees under EAJA. However, the federal government soon determined that the claimant, Ree, owed it money. In order to pay off that debt, the government offset the amount it paid to the claimant against the debt owed to the government. In this case, the debt was in excess of the amount of the attorney fee award, leaving the claimant's counsel with no fee.

The attorney sought to have the fee reinstated by the district court, which determined she lacked standing to challenge the offset because EAJA awards the fee to the litigant, not directly to the attorney. On appeal to the 8th U.S. Circuit Court of Appeals, the attorney, Ratliff, won. The 8th Circuit acknowledged that the language of the EAJA may support the district court's decision, and that there is a split of authority among the circuits. However, because the purpose of EAJA would not be fulfilled if the attorney fee were subject to an offset by the government to pay off the litigant's debt, the 8th Circuit reinstated the fee award free of any withholding by the government.

The Supreme Court reversed the 8th Circuit decision, agreeing with the federal government's position that the language of the EAJA statute makes clear that the attorney fee award is given to the claimant. The statute provides the award to a "prevailing party," which the court explained is a term of art that traditionally means the litigant, not the attorney representing the litigant. The court illustrated this point by declaring that the law also provides that the "prevailing party" must apply for the fee award and provide an itemized statement from an attorney. Thus, the distinction between "prevailing party" and the attorney is clear in EAJA. Further, because the fee is awarded to the litigant, and awards to a litigant can be offset by the federal government to pay pre-existing debts, the attorney fee can be reduced or eliminated if such a debt exists.

The court compared the EAJA language to that of the Social Security Act's provisions that provide for attorney fees — which are not subject to offsets to pay off a litigant's debts. (See 42 U.S.C. § 406(b)(1)(A).) The difference lies in the language that Congress used to describe the fee allowance. The SSA's provisions expressly allow the payment of a fee to the attorney. Thus, Congress previously drafted legislation that awards the fee directly to the attorney as opposed to awarding it to the litigant but did not do so in the EAJA statute.

In her first concurring opinion as a Supreme Court justice, Justice Sonia Sotomayor acknowledged that this decision will make it more difficult for potential claimants to find representation. If the government can take away attorney fees in these types of cases, which do not generate large fees to begin with, there is a reduced incentive for an attorney to even consider taking such a case. Sotomayor suggested that in all likelihood "Congress did not consider" this occurrence, and that "it would not have wanted EAJA fee awards to be subject to offset" since "such offsets undercut the effectiveness of the EAJA."

Recognizing the detrimental effects this decision may have, Sotomayor acknowledged that, as a practical matter, the intent of EAJA is most likely to pay the counsel fee to the attorney representing the prevailing party, despite the statutory text's plain meaning. However, in the absence of vague language, the justices were bound to interpret the statute as it reads, not as they think it should be interpreted as a practical matter.

It would appear that the result of this decision runs completely contrary to the purpose of the EAJA statute. The intent of EAJA was to provide some incentive for attorneys to assist these claimants and thereby help individuals who may otherwise be reluctant, if not completely unable, to seek the assistance of the judicial system.

The *Ratliff* decision may affect more than just fees awarded under EAJA. The decision suggests that the reasoning of the court could also apply to Section 1988 (civil rights) cases. Individuals with civil rights claims very frequently cannot afford an attorney, but the attorney fee provisions of Section 1988 provide an incentive for attorneys to take on those cases. The length, complexity and uncertainty of such cases make it risky enough for civil rights attorneys to take them in the first instance. The risk of the government applying a fee shifting provision that takes away the attorney fees puts the civil rights arena into much greater jeopardy.

Sotomayor's concurrence appeared to be an outright plea for Congress to change the wording of the law, where the justices could not, and make the law clear that the attorney fee is payable to the attorney and is exempt from the offsetting provisions. Likewise, local members of the National Employment Law Association have been encouraging their representation in Congress to address this matter in an expedient fashion.

Noted Philadelphia civil rights attorney Lorrie McKinley recently wrote to Sen. Robert Casey to explain the depths of this slippery slope:

"The attorneys fees provisions have created an incentive for lawyers to accept these cases as private attorneys general. Many of them do so without charging the clients much or anything at all. Particularly in the area of employment discrimination, this is essential because most litigants are without jobs. Without the fee shifting provisions, most attorneys would be unable to afford to undertake such representation. The nation's civil rights laws would be unenforceable except by the very rich."

In all practicality, it seems clear that the EAJA fee award provision is meant to pay the attorney fee as a separate award from the Social Security or veterans' benefit payable to the successful litigant. EAJA fees are not awarded on a contingent fee basis, so the fee is not coming out of the client's award. Instead, the attorney is being paid by the government pursuant to a submission of incurred fees and costs.

However, the high court determined that, as written, the EAJA fee is awarded to the litigant, thus it falls within the reach of the offset provisions. Stay tuned as this is likely to become a hot button topic for civil rights lawyers. •

Jefrey Campolongo *is the founder of the Law Office of Jeffrey Campolongo, a boutique firm focusing on employee rights and counseling aspiring and established entertainers. He can be reached at jcamp@jcamplaw.com or 215-592-9293.* **Jenie Maura McLaughlin** *works on employment discrimination and workers' compensation cases for the Law Office of Jeffrey Campolongo and the Law Office of Christian Petrucci.*

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