

Public Law 99-80  
99th Congress

An Act

To amend section 504 of title 5, United States Code, and section 2412 of title 28, United States Code, with respect to awards of expenses of certain agency and court proceedings, and for other purposes.

Aug. 5, 1985  
[H.R. 2378]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SECTION 1. AMENDMENTS TO SECTION 504 OF TITLE 5.

(a) AWARDING OF FEES IN ADVERSARY ADJUDICATIONS.—

(1) DETERMINATION OF "SUBSTANTIALLY JUSTIFIED".—Subsection (a)(1) of section 504 of title 5, United States Code, is amended by adding at the end thereof the following: "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."

(2) CLARIFYING AMENDMENT.—Subsection (a)(1) of such section is amended by striking out "as a party to the proceeding".

(3) DECISION OF AGENCY TO BE FINAL ADMINISTRATIVE DECISION.—Subsection (a)(3) of such section is amended by adding at the end thereof the following: "The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section."

(b) DETERMINATION OF FEES DELAYED IN CASE OF APPEAL.—Subsection (a)(2) of section 504 of title 5, United States Code, is amended by adding at the end thereof the following: "When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal."

(c) DEFINITIONS.—

(1) PARTY.—Paragraph (1)(B) of section 504(b) of title 5, United States Code, is amended to read as follows:

"(B) 'party' means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed \$2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; 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 such Code, or 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;”.

(2) **ADVERSARY ADJUDICATION.**—Paragraph (1)(C) of such section is amended—

(A) by inserting “(i)” before “an adjudication under”;

(B) by inserting before the semicolon at the end thereof the following: “, and (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607)”;

(C) by striking out “and” at the end thereof.

(3) **POSITION OF THE AGENCY.**—Paragraph (1) of such section is amended—

(A) by striking out the period at the end of subparagraph (D) and inserting in lieu thereof “; and”; and

(B) by adding at the end thereof the following:

“(E) ‘position of the agency’ means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based; except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.”.

(d) **APPEALS OF FEE DETERMINATIONS.**—Subsection (c)(2) of section 504 of title 5, United States Code, is amended to read as follows:

“(2) If a party other than the United States is dissatisfied with a determination of fees and other expenses made under subsection (a), that party may, within 30 days after the determination is made, appeal the determination to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. The court’s determination on any appeal heard under this paragraph shall be based solely on the factual record made before the agency. The court may modify the determination of fees and other expenses only if the court finds that the failure to make an award of fees and other expenses, or the calculation of the amount of the award, was unsupported by substantial evidence.”.

(e) **AWARDS PAID FROM AGENCY FUNDS.**—Subsection (d) of section 504 of title 5, United States Code, is amended to read as follows:

“(d) Fees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.”.

## SEC. 2. AMENDMENTS TO SECTION 2412 OF TITLE 28.

(a) **CLARIFYING AMENDMENTS.**—Section 2412 of title 28, United States Code, (relating to costs and fees) is amended—

(1) in subsections (a) and (b) by striking out “or any agency and any official of the United States” each place it appears and inserting in lieu thereof “or any agency or any official of the United States”; and

(2) in subsection (d)(1)(A) by inserting “, including proceedings for judicial review of agency action,” after “in tort”.

(b) **DETERMINATION OF “SUBSTANTIALLY JUSTIFIED”.**—Section 2412(d)(1)(B) of title 28, United States Code, is amended by adding at the end thereof the following: “Whether or not the position of the United States was substantially justified shall be determined on the basis of 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.”

(c) DEFINITIONS.—

(1) Subparagraph (B) of section 2412(d)(2) of title 28, United States Code, is amended—

(A) in clause (i) by striking out “\$1,000,000” and inserting in lieu thereof “\$2,000,000”; and

(B) by striking out “(ii)” and all that follows through the end of the subparagraph and inserting in lieu thereof the following: “or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the civil action was filed, and which had not more than 500 employees 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 such Code, or 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;”

(2) ADDITIONAL DEFINITIONS.—Subsection (d)(2) of such section is amended—

(A) by striking out the period at the end of subparagraph (C) and inserting in lieu thereof a semicolon; and

(B) by adding at the end thereof the following:

“(D) ‘position of the United States’ means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

“(E) ‘civil action brought by or against the United States’ includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

“(F) ‘court’ includes the United States Claims Court;

“(G) ‘final judgment’ means a judgment that is final and not appealable, and includes an order of settlement; and

“(H) ‘prevailing party’, in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government.”

(d) PAYMENT OF AWARDS.—Paragraph (4) of section 2412(d) of title 28, United States Code, is amended to read as follows:

“(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.”

(e) INTEREST.—Section 2412 of title 28, United States Code, is amended by adding at the end thereof the following:

“(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.”.

28 USC 1961.

### SEC. 3. AWARDS IN CERTAIN SOCIAL SECURITY PROCEEDINGS.

28 USC 2412  
note.

Section 206 of the Equal Access to Justice Act is amended—

(1) by striking out “Nothing” and inserting in lieu thereof “(a) Except as provided in subsection (b), nothing”; and

(2) by adding at the end thereof the following:

*Ante*, p. 184.

“(b) Section 206(b) of the Social Security Act (42 U.S.C. 406(b)(1)) shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 206(b)(2) of the Social Security Act shall not apply with respect to any such award but only if, where the claimant’s attorney receives fees for the same work under both section 206(b) of that Act and section 2412(d) of title 28, United States Code, the claimant’s attorney refunds to the claimant the amount of the smaller fee.”.

### SEC. 4. REPEAL OF LIMITATION ON PAYMENT OF AWARDS.

5 USC 504 note.

Section 207 of the Equal Access to Justice Act (P.L. 96-481) is hereby repealed.

### SEC. 5. AWARDS FOR CERTAIN FEES AND OTHER EXPENSES.

5 USC 504 note.

Section 208 of the Equal Access to Justice Act is amended by adding at the end thereof the following: “Awards may be made for fees and other expenses incurred before October 1, 1981, in any such adversary adjudication or civil action.”.

5 USC prec. 500,  
504 and note; 28  
USC 2412 and  
note.

### SEC. 6. TREATMENT OF EXPIRED PROVISIONS OF LAW.

Effective date.  
5 USC 500 *et seq.*

(a) **REVIVAL OF CERTAIN EXPIRED PROVISIONS.**—Section 504 of title 5, United States Code, and the item relating to that section in the table of sections of chapter 5 of title 5, United States Code, and subsection (d) of section 2412 of title 28, United States Code, shall be effective on or after the date of the enactment of this Act as if they had not been repealed by sections 203(c) and 204(c) of the Equal Access to Justice Act.

*Infra*.

#### (b) REPEALS.—

5 USC 504.

(1) Section 203(c) of the Equal Access to Justice Act is hereby repealed.

28 USC 2412 note.

(2) Section 204(c) of the Equal Access to Justice Act is hereby repealed.

5 USC 504 note.

### SEC. 7. EFFECTIVE DATE.

(a) **IN GENERAL.**—Except as otherwise provided in this section, the amendments made by this Act shall apply to cases pending on or commenced on or after the date of the enactment of this Act.

Effective date.

(b) **APPLICABILITY OF AMENDMENTS TO CERTAIN PRIOR CASES.**—The amendments made by this Act shall apply to any case commenced on or after October 1, 1984, and finally disposed of before the date of the enactment of this Act, except that in any such case, the 30-day period referred to in section 504(a)(2) of title 5, United States Code, or section 2412(d)(1)(B) of title 28, United States Code, as the case may be, shall be deemed to commence on the date of the enactment of this Act.

*Ante*, p. 184.

(c) **APPLICABILITY OF AMENDMENTS TO PRIOR BOARD OF CONTRACTS APPEALS CASES.**—Section 504(b)(1)(C)(ii) of title 5, United States Code, as added by section 1(c)(2) of this Act, and section 2412(d)(2)(E) of title 28, United States Code, as added by section 2(c)(2) of this Act, shall apply to any adversary adjudication pending on or commenced on or after October 1, 1981, in which applications for fees and other expenses were timely filed and were dismissed for lack of jurisdiction.

Approved August 5, 1985.

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**LEGISLATIVE HISTORY—H.R. 2378 (S. 1487):**

HOUSE REPORTS: No. 99-120 and Pt. 2 (Comm. on the Judiciary).

CONGRESSIONAL RECORD, Vol. 131 (1985):

June 24, considered and passed House.

July 24, S. 1487 considered and passed Senate; H.R. 2378 considered and passed Senate.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 21, No. 32 (1985):

Aug. 5, Presidential statement.