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MEMORANDUM FOR ASSISTANT REGIONAL COUNSEL (CRIMINAL TAX)

FROM: Barry J. Finkelstein
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SUBJECT: Attorney's Fees Awards Under the Hyde Amendment and
the Equal Access to Justice Act (EAJA)

Public Law 105-119, Title VI § 617, 111 Stat. 2440, 2519 (1997), commonly referred to as the "Hyde Amendment," enables a prevailing party in a criminal case to recoup attorney's fees and litigation expenses from the government in cases where the government's position was vexatious, frivolous, or in bad faith. The Hyde Amendment was enacted as a criminal counterpart to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, which authorizes courts to award attorney's fees and costs in most civil cases. The Hyde Amendment applies to the conduct of the investigating agency, as well as Department of Justice prosecutors. Thus, the Service may be wholly or partially liable for payment of such awards based on the conduct of its personnel during the underlying criminal investigation and/or referral of a case for prosecution. Attached for your information is a discussion of the statutory framework governing such awards and developing case law.

The Hyde Amendment incorporates the procedures and limitations contained in the EAJA, but unlike the EAJA, it shifts the burden to the defendant to establish he was the prevailing party and prove the government's position was vexatious, frivolous, or in bad faith. To assist courts in determining whether to make an award, the law permits courts to receive evidence ex parte or in camera (including classified evidence or evidence which may reveal confidential or undercover information or matters occurring before a grand jury). If a prevailing party meets the burden of proof, the party will be entitled to attorney's fees and expenses unless the court finds special circumstances make such an award unjust.

Since the enactment of the Hyde Amendment two years ago,¹ this law has spurred a regular course of post trial motions for attorney fee awards in criminal cases. Case law

¹ Enacted November 26, 1997, the Hyde Amendment applies to any criminal case instituted during fiscal year 1988 and in any fiscal year thereafter.

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under the Hyde Amendment is still in its infancy. A handful of published federal district court opinions and more than a dozen unpublished ones have rendered some important guidance in applying the law and construing its provisions. Generally, these courts have based their decisions on a plain reading of the law. As discussed in the attached document, some courts have found it necessary to read certain EAJA provisions broadly to effectuate the intended purpose of the Hyde Amendment.

Attachment

AWARDS OF ATTORNEY'S FEES AND COSTS UNDER THE HYDE AMENDMENT

The Hyde Amendment was enacted as part of a 1997 appropriations bill and is recorded as a statutory note to 18 U.S.C. § 3006A (relating to court appointed counsel). The Hyde Amendment provides in its entirety as follows:

During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act, may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of Title 28, United States Code. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal. Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.

I. Equal Access to Justice Act (EAJA) Overview

The Hyde Amendment, just like the EAJA, is a limited waiver of sovereign immunity allowing awards of costs and attorney fees against the United States and its agencies. Since the Hyde Amendment derives much of its statutory form and substance from the EAJA, the following provides an overview of EAJA procedures and limitations made applicable under the law.

There are two distinct methods for a district court to award attorney's fees under the EAJA.² Under subsection 2412(b), a district court may award attorney's fees "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." Since the common law allows awards of attorneys fees in only a few exceptional cases and most statutes do not specifically provide for such awards, most EAJA litigation arises under the more inclusive terms of subsection 2412(d) of the EAJA. Under subsection 2412(d)(1)(A), a district court is mandated to award attorney's fees to a prevailing party against the government, unless the court finds the government was substantially justified in its legal

² 28 U.S.C. §§ 2412(b) and (d).

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position or there are special circumstances that make an award unjust. However, as discussed below, subsection 2412(d) erects certain threshold requirements and other limitations not applicable under subsection 2412(b). Perhaps the most significant consequence in proceeding under subsection 2412(d) is that the calculation of the amount of the fees is tied to Criminal Justice Act (C.J.A.) rates (currently \$125.00/hr.). Whereas, a district court awarding fees under subsection 2412(b) may use prevailing market rates which can greatly exceed the C.J.A. cap.

Courts addressing Hyde Amendment claims generally have followed the EAJA “procedures and limitations” set forth under subsection 2412(d)(1)(B). Accordingly, applications for an award of fees and expenses must be filed with the court within 30 days of final judgment.³ Timely submission of an EAJA application is a jurisdictional prerequisite to governmental liability for attorney fees.⁴

A party seeking an award under subsection (d) must establish certain threshold criteria: (1) show the party is a prevailing party; (2) show the party is eligible to receive an award; (3) contain an itemized statement of the amount of the award sought; and (4) allege the position of the United States was not substantially justified.⁵

The term “prevailing party” is not well defined by the EAJA,⁶ but is generally understood as the party who wins the relief sought in the particular action.⁷ A party need not obtain total victory in the case to be entitled to fees as a prevailing party, but need only obtain

³ 28 U.S.C. § 2412(d)(1)(B).

⁴ See, Grivois v. Brown, 7 Vet App. 100 (Vet. App. 1994) (application filed on 31st day after judgment became final was untimely). See also, Owens v. Brown, 10 Vet. App. 65 (Vet. App. 1997) (party may not correct a defective application after expiration of 30 day filing period); Onstead v. Brown, 9 Vet. App. 189 (Vet. App.), reconsideration denied, 10 Vet. App. 1 (1996).

⁵ 28 U.S.C. § 2412(d)(1)(B).

⁶ The EAJA does not provide a general definition of the term, but does provide a definition of the term for specific application in eminent domain cases. 28 U.S.C. § 2412(d)(2)(H).

⁷ See, Dahlem v. Board of Education of Denver Pub. Sch., 901 F.2d 1508, 1512 (10th Cir. 1990).

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his desired result as to “any significant issue.”⁸ Thus, most decisions to award attorney fees under subsection (d) will be based on the nature of the case and the totality of the circumstances.⁹

Subsection (d) applications must establish the prevailing party’s eligibility to receive an award.¹⁰ Eligibility is based on a net worth limitation and the ripeness of the statutory claim for attorney’s fees. These eligibility limitations are established within the statutory definitions of the terms “party” and “final judgment.”¹¹ The term “party” is defined to exclude individuals whose net worth at the time the action was filed exceeded \$2 million, as well as the owners of an unincorporated business or any partnership, corporation, association, or organization whose net worth at the time the action was filed exceeded \$7 million (charitable organizations are exempted from this limitation). Thus, the application must show the prevailing party’s net worth was under the applicable ceiling. Ripeness requires a showing that a final judgment has been rendered in the case. The EAJA defines “final judgement” to mean “a judgment that is final and not appealable, and includes an order of settlement.”¹² Subsection (d) applications must provide an itemized statement of the amount of the award sought.¹³ The fees and expenses which may be recouped in subsection (d) awards are specifically enumerated.¹⁴

Finally, subsection (d) applications must allege the position of the government was not substantially justified.¹⁵ Whether the position of the government was substantially justified is 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

⁸ Texas State Teacher’s Association v. Garland Independent School District, 489 U.S. 782, 792-93 (1989).

⁹ See generally, Goatcher v. Chater, 57 F.3d 980 (10th Cir. 1995); Cooper v. U.S. R.R. Retirement Bd., 24 F.3d 1414 (C.A. D.C. 1994).

¹⁰ 28 U.S.C. § 2412(d)(1)(B).

¹¹ 28 U.S.C. §§ 2412(d)(2)(B) and (G), respectively.

¹² 28 U.S.C. § 2412(d)(2)(G).

¹³ 28 U.S.C. § 2412(d)(1)(B).

¹⁴ 28 U.S.C. § 2412(d)(2)(A).

¹⁵ 28 U.S.C. § 2412(d)(1)(B).

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made in the civil action for which the award is sought. *Id.* The Supreme Court has defined the term “substantially justified” for purpose of the EAJA as meaning justified in substance or in the main, that is, justified to a degree that could satisfy a reasonable person.¹⁶ A position is substantially justified even though incorrect, if a reasonable person would think it correct, that is, if it had a reasonable basis in law and fact.¹⁷ The government has the burden of proving that its position was substantially justified for purposes of the EAJA.¹⁸ Reasonableness is determined by a totality of the circumstances and not by any single factor.¹⁹

II. Attorney’s Fees Under the Hyde Amendment

The operative language of the Hyde Amendment provides that a court in any criminal case may award a prevailing party reasonable attorney’s fees and other litigation expenses, where the court finds the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust.

A. Alternate Statutory Provisions to Base Awards: § 2412(b) or § 2412(d)

Although the language of the Hyde Amendment incorporates the procedures and limitations of the EAJA by reference to § 2412, it does not refer more specifically to either of its alternative procedures provided in subsections 2412(b) and (d). Decisions in civil cases under the EAJA have found that parties who elect to proceed under § 2412(b) are not subject to the procedures and limitations of § 2412(d) (e.g., limiting fees to C.J.A. rates). Until recently, all Hyde Amendment cases to date sought awards under the procedures enumerated in § 2412(d). However, one district court has held, as a matter of law, that the Hyde Amendment permits awards under either of these two EAJA provisions. United States v. Holland, 34 F. Supp. 2d 346, 357 (E.D. Va 1999).

¹⁶ Pierce v. Underwood, 487 U.S. 552 (1988).

¹⁷ E.E.O.C. v. O & G Spring and Wire Forms Speciality Co., 38 F.3d 872 (Cir. 1994), cert. denied, 513 U.S. 1198 (1995); Roanoke River Ass’n v. Hudson, 991 F.2d 132, 137 (4th Cir. 1993).

¹⁸ Willoughby v. Chater, 930 F. Supp. 1466 (D. Utah 1996); Burkins v. United States, 921 F. Supp. 704 (D. Colo. 1996); Swedish Hosp. Corp. v. Shalala, 845 F. Supp. 894 (D. D.C. 1993); Doria v. Brown, 8 Vet. App. 157 (Vet. App. 1995).

¹⁹ Howyer v. Brown, 7 Vet. App. 549 (Vet. App. 1995).

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The Holland court found the language of the Hyde Amendment unambiguous and that Congress did not intend to limit an applicant's rights to those granted by § 2412(d). The court found no reason to believe the Hyde Amendment intended to confer lesser rights upon criminal defendants than the EAJA conferred upon civil litigants. Accordingly, the court held applicants in criminal cases may make the same election as civil litigants in claims under the EAJA and, thus, the defendants could proceed under § 2412(b), free of § 2412(d) limitations (discussed below). By holding that defendants can bypass the restrictions in subsection (d), the Holland court has significantly expanded the potential for substantial recoveries under the Hyde Amendment.

B. Awards under Subsection 2412(d)

In order to recover attorney's fees and expenses under the Hyde Amendment, the moving party must establish four threshold criteria in his application. The application must: (1) show the party is a prevailing party; (2) show the party is eligible to receive an award; (3) contain an itemized statement of the amount of the award sought; and (4) allege the position of the United States was vexatious, frivolous, or in bad faith.

Although the remedy provided by the Hyde Amendment is modeled on the EAJA and framed by EAJA procedures and limitations, there are a few important distinctions between the statutes. Additionally, case law developing under the Hyde Amendment has created some legal nuances.

The most obvious distinction between the statutes is that the Hyde Amendment pertains to criminal and not civil cases. What may not be so obvious here, however, is that the term "case" in this context has been interpreted to include a subpoena to appear before a grand jury and a subsequent motion to quash. In re: Grand Jury Subpoena Duces Tecum, Marsha L. Viglianco, 31 F. Supp. 2d 542 (N.D.W.Va., December 21, 1998).²⁰

²⁰ The district court in Viglianco rejected the Government's argument that a grand jury proceeding, in which criminal charges or an indictment have not been filed, does not constitute a criminal case. The court's decision was guided in part by the definition of the term "case" provided by Black's Law Dictionary (i.e., a general term for an action, cause, suit or controversy, at law or in equity; a question contested before a court of justice; and aggregate of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice; a judicial proceeding for the determination of a controversy between the parties wherein rights are enforced or protected, or wrongs are prevented or redressed.)

(continued...)

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Another distinction is that the “position of the United States” at issue is evaluated as to whether it was vexatious, frivolous, or in bad faith and not whether it was substantially justified. The Hyde Amendment does not define the terms “vexatious,” “frivolous,” or “bad faith” or provide any illustrative examples. Courts generally have referred to definitions provided in Black’s Law Dictionary and case law when evaluating the position of the government in the underlying case. See, e.g., U.S. v. Gardner, 23 F. Supp. 2d 1283, 1293 (N.D. Okla. 1998). Black’s Law Dictionary defines the term “frivolous” to mean “of little weight or importance” and the term “*vexatious*” to mean “without reasonable or probable cause or excuse.” The Supreme Court has defined “vexatious” to mean “frivolous, unreasonable, or without foundation, even though not brought in bad faith.” Christianburg v. EEOC, 434 U.S. 412, 421 (1978). The term “bad faith,” according to Black’s Law Dictionary, “implies the conscious doing of a wrong because of dishonest purpose or moral obliquity.” In law enforcement contexts, the Supreme Court has defined “bad faith” to include a “reckless disregard for the truth.” Franks v. Delaware, 438 U.S. 154, 171 (1978). Thus, for example, concealing *Brady* material constitutes bad faith for purposes of the Hyde Amendment. United States v. Ranger Electronic Communications, 22 F. Supp. 2d 667 (W.D. Mich. 1998).

Another important distinction is the Hyde Amendment specifically excepts the government from bearing the burden of proof otherwise applicable under the EAJA. Accordingly, the prevailing party bears the burden of showing the government’s position was vexatious, frivolous and in bad faith.

III. Developing Case Law

A. Filing Period: 30 Day Rule Subject to Reasonableness Exception

In United States v. Ranger Electronic Communications Inc., 22 F. Supp. 2d 667 (W.D. Mich. 1998), the defendant was a foreign manufacturer of radio equipment indicted for importing federally banned radio equipment. The government agreed to dismiss the case with prejudice after trial had begun due to problems that developed in the

²⁰(...continued)

The court also was guided by decisions arising in a different context which supported the proposition that an issue involving a subpoena is a sufficient "case" to establish jurisdiction under Article III of the U.S. Constitution. Citing, Boron Oil Co. v. Downie, 873 F.2d 67 (4th Cir. 1989) (where issues relating to the subpoena of a federal inspector in a civil case in state court properly were removed to federal district court, although the underlying civil case was not); North Carolina v. Carr, 386 F.2d 129, at 131 (4th Cir. 1967) (where the district court properly took cognizance of case regardless of whether the contempt proceeding was civil, criminal or *sui generis*).

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government's case. Four months after dismissal the defendant moved for attorney's fees under the Hyde Amendment. The motion was grounded upon the contention the government acted in bad faith by concealing *Brady* material -- including e-mail communications with the Federal Communications Commission regarding public confusion about federal regulations concerning the importation of electronic equipment and the need for public notices to clarify those regulations. The defendant did not discover the government's failure to disclose this information until after the case was dismissed.

Subsection 2412(d)(1)(b) of the EAJA requires applications for attorney's fees be made within 30 days of final judgment. Notwithstanding this limitation, the court found there was no judicial precedent as to how the temporal bar should apply to cases where the government's bad faith in concealing exculpatory evidence was not revealed until after the expiration of the 30 day period. The court refused to apply a strict reading of the limitation period, finding such a reading is diametrically opposed to the purposes of the Hyde Amendment and would convert the law into an empty legislative promise. The court concluded that in order to give effect to Congress' purpose and words, a further reasonable time period beyond 30 days after judgment should be permitted for the filing of an application for attorney's fees. The court then ordered briefing from the parties as to the exact amount of the award.

B. Prevailing Party

In United States v. Gardner, 23 F. Supp. 2d 1283 (N.D. Okla. 1998), the defendant was a tax preparer indicted on eighteen counts of assisting in the preparation of fraudulent tax returns in violation of 26 U.S.C. § 7206(2) and three counts of concealing assets in his bankruptcy. The first three counts alleged Gardner prepared false tax returns for I.R.S. undercover agents. In a series of motions the government was permitted to dismiss without prejudice eight of the tax counts and all three bankruptcy counts. The government subsequently moved to dismiss the remaining counts without prejudice. The district court granted the motion with the exception of the first three tax counts involving the I.R.S. undercover agents. Those counts were dismissed with prejudice on a finding that there was no actual tax matter at issue with respect to the false returns prepared. Gardner then moved for an award of attorney's fees pursuant to the Hyde Amendment.

The district court's consideration of this issue was a matter of first impression. In the absence of any evidence of legislative intent to the contrary, the district court determined the intent of the Hyde Amendment was to import the EAJA to the fullest extent possible to the criminal context. Based on the totality of the circumstances

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(including the litigation chronology and the fact that Gardner won the relief he sought), the district court found Gardner was a "prevailing party" within the meaning of the Hyde Amendment.

The district court granted Gardner's motion and ordered discovery to enable Gardner to establish his entitlement to attorney fees and litigation expenses under the Hyde Amendment. In so ruling the district court made special note that the EAJA requires review of the underlying agency action at issue. The district court expressly held that the term "position of the United States" includes the activities of the agency involved in the matter and is not limited to the litigating position taken by the Department of Justice. Other courts agree with this view. See, United States v. Ranger Electronic Communications Inc., 22 F. Supp. 2d 667 (W.D. Mich. 1998) (actions by FCC); United States v. Holland, 34 F. Supp. 2d 346 (E.D. Va 1999) (action by FDIC). Ultimately, an award was granted under the terms of a settlement agreement.

C. Acquittal Alone Is Insufficient For Award of Attorney's Fees

In United States v. Reyes, 16 F. Supp. 2d 759 (S.D. Tex. 1998), the defendant was indicted by a grand jury on one count of conspiracy and three counts of aiding and abetting federal program bribery in violation of 18 U.S.C. §§ 371 and 666. At the conclusion of the government's case in chief, the defendant moved for a judgment of acquittal. After examining the evidence in the light most favorable to the government, the district court determined a rational trier of fact could not have found the "essential elements of the offense beyond a reasonable doubt" and granted the defendant's motion. The defendant then filed a motion to recover attorney's fees and litigation expenses from the Justice Department pursuant to the Hyde Amendment.

On review of the motion, the district court determined the defendant did not carry his burden of proof to entitle him to an award of attorney's fees. He provided no evidence the government instituted its charges against him in a "vexatious" or "frivolous" manner or in bad faith. At most, he simply relied on the district court's granting of the judgment of acquittal as support for his motion for attorney's fees. While the district court determined the government had not carried its burden pursuant to Rule 29(a), it carefully examined and considered the evidence before reaching that determination. Several items of evidence produced against the defendant during the trial undermined his position that the charges were frivolous or brought in bad faith. These items included video and audio tape recordings of meetings between the defendant and his co-conspirators indicating their intention to bribe certain officials. The court determined the Government exercised proper discretion when it decided to charge the defendant with the counts of conspiracy and aiding and abetting federal program bribery. Thus, the court denied the defendant's motion for attorney's fees. See also, United States v.

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Troisi, 13 F. Supp. 2d 595, 596 (N.D. W.Va 1998) (acquittal alone does not automatically entitle that party to compensation under the statutory scheme).

D. Hyde Amendment Award under Subsection 2412(b)

In United States v. Holland, 34 F. Supp. 2d 346 (E.D. Va 1999), the defendants, the President and CEO of a bank, were investigated by the FDIC regarding seven loan transactions. The defendants cooperated fully in the FDIC investigation, no evidence of criminal wrongdoing was uncovered and the matter was resolved administratively under a settlement agreement. The FDIC then initiated and reopened a criminal referral of the defendants on bank fraud charges stemming from the same loan transactions. They were indicted, tried and acquitted on all 33 counts of bank fraud. The prevailing defendants moved for attorneys fees and litigation expenses pursuant to the Hyde Amendment and 28 U.S.C. § 2412(b) of the EAJA. Based on an amount stipulated by the parties, the district court awarded the two prevailing defendants a total of \$570,678.00 in attorneys fees and litigation expenses.

As discussed above, the court first held the defendants could proceed under § 2412(b), free of § 2412(d) limitations. The court then considered the issue of vexatiousness. It framed the applicable test as whether the defendants had proven that a reasonable FDIC decision maker and a reasonable prosecutor knew or should have had reason to know the criminal referrals and the continued prosecution were lacking justification, intended to harass, or constituted harassment by process of law. Based on a preponderance of the evidence, the court concluded the defendants proved the conduct of both the FDIC and the prosecutor were vexatious. With regard to the FDIC, the court found the initiation and reopening of the criminal referral were motivated by impermissible considerations; the FDIC used the threat of criminal prosecution and attendant publicity to unduly influence the settlement of the administrative action; and the FDIC impermissibly used the criminal referral as a substitute for its admittedly unsuccessful civil administrative proceedings against the defendants. The court then found prosecution's conduct was a corollary of the FDIC's vexatious use of criminal proceedings to accomplish its civil administrative enforcement objectives. The prosecution possessed no evidence of criminal conduct, no evidence of the requisite criminal intent for each count, and deliberately misled the court to obtain admission of certain favorable evidence.

The court apportioned the amount of the award on a pro rata basis. Because prosecutions are controlled in the final instance by the U.S. Attorney's Office, the court found it should bear the greater portion. The court found 67% of the obligation should be borne by the Department of Justice and the remaining 33% by the FDIC.