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Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

IN FUTURE ISSUES

- Supreme Court holds utility patents may be issued for plants

Fifth Circuit rules Federal Crop Insurance Act does not preempt state law claims against crop insurance agents

The Fifth Circuit has held that the Federal Crop Insurance Act (FCIA), 7 U.S.C. § 1501 et seq., does not completely displace state law claims against an agent of a private insurance company who sold federally reinsured crop insurance. *Rio Grande Underwriters, Inc. v. Pitts Farms, Inc.*, No. 01-40823, 2001 WL 1616794 (5th Cir. 2001). Previously, the Ninth, Tenth, and Eleventh Circuits had also ruled that the FCIA does not preempt state law claims against crop insurers and their agents. *See Holman v. Laulo-Rowe Agency*, 994 F.2d 666, 669 (9th Cir. 1993); *Meyer v. Conlon*, 162 F.3d 1264, 1268-70 & n.2 (10th Cir. 1998); *Williams Farms of Homestead, Inc. v. Rain and Hail Ins. Servs., Inc.*, 121 F.3d 630, 633-34 (11th Cir. 1997). The court also affirmed the district court's dismissal, for lack of subject matter jurisdiction, of the crop insurance company's petition for a stay of the state court action pending arbitration.

Pitt Farms produces onions in Texas. It brought its action against the insurance company's agent in state court, alleging state law causes of action arising from the failure of the company's agent to insure its red and yellow onions as separate insurable units. Insuring the two crops as separate units was permitted under regulations implementing the FCIA. Because the agent had not insured the red and yellow onions in separate units, Pitt Farms did not fully recover its losses. *Rio Grande Underwriters* at *1.

Rio Grande, the insurance company, first unsuccessfully petitioned the state court to enforce the arbitration clauses in the insurance contract. Rio Grande then petitioned the federal district court requesting an order staying the state court action and compelling arbitration. The district court dismissed the petition for want

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GAO reviews effect of increased payment limits for 1999 and 2000 marketing assistance loan program payments

The United States General Accounting Office (GAO) has concluded that the increase of the payment limit for marketing assistance loan gains and loan deficiency payments from $75,000 to $150,000 in 1999 and 2000 had "only modest effects" on total marketing assistance loan program payments. More specifically, the GAO estimated that the payments were 1.9 percent–or $261.1 million–more than they would have been had the limit remained at $75,000. In addition, the GAO found that a total of 147 farmers used commodity certificates in 1999 and 2000 to receive more than the $150,000 limit. United States Gen. Accounting Office, *Farm Programs: Changes to the Marketing Assistance Loan Program Have Had Little Impact on Payments* (GAO-01-964, Sept. 2001) at 3-4 (*Marketing Assistance Loan Program*)

Under the marketing assistance loan program, producers who have entered into a production flexibility contract are eligible for nonrecourse marketing assistance loans for feed grains, wheat, upland cotton, and rice. 7 U.S.C. § 7231(b)(1). Each of these commodities is eligible for a loan irrespective of whether it was produced on the farm's contract acreage. *Id*. Producers do not have to have entered into a production flexibility contract to be eligible for a nonrecourse marketing assistance loan for extra-long staple cotton and oilseeds, however. Any production of extra-long staple cotton and oilseeds is eligible. *Id*. § 7231(b)(2).

Eligible producers may obtain a marketing assistance loan at the end of the crop year by using all or a portion of their eligible crop as collateral. Basic loan rates are

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established for each eligible commodity. These rates, and the provisions for their adjustment for each marketing year, vary by commodity. *Id*. § 7232. Nonrecourse marketing assistance loans for feed grains, rice, and wheat have a nine-month term. *Id*. § 7233(a). Loans for upland cotton have a ten-month term. *Id*. § 7233(b).

In lieu of repaying a loan in cash, a producer may forfeit the commodity to the CCC. *Id*. § 7284(a). This feature gives the loans their characterization as "nonrecourse" loans. Because the loans have this nonrecourse feature, the loan rate has tended historically to establish the floor for the domestic market price of the commodity. Marketing assistance loans, however, were authorized in part to eliminate the price floors created by the loan rates.

Marketing assistance loans allow the nonrecourse loans to be repaid at a rate lower than the original or basic loan rate. This rate is determined by the Secretary based on criteria that take into account market prices. *Id*. § 7234. For example, for upland cotton and rice, the Secretary is required to establish a repayment rate at the lesser of the basic loan rate or the prevailing world market price for each commodity, adjusted to United States quality and location. *Id*. § 7234(c). When the repayment rate is lower than the basic loan rate, producers realize a financial gain corresponding to the difference between the two rates, minus storage costs, interest, and a non-refundable loan service fee. *See, e.g.,* 7 C.F.R. § 1421.12.

As a part of the marketing assistance loan program, loan deficiency payments (LDPs) are available to producers of feed grains, wheat, upland cotton, rice, and oilseeds who are eligible to obtain a nonrecourse marketing assistance loan but who chose to forego obtaining one. In exchange for not obtaining a loan, these producers can receive loan deficiency payments. 7 U.S.C. § 7235(a). These payments are made available because, by not obtaining a loan, these producers avoid imposing on the government the administrative costs associated with making a loan and the potential for their forfeiture of the commodity in lieu of repaying the loan in cash.

The loan deficiency payment rate is the difference between the commodity's basic loan rate and its repayment rate. *Id*. § 7235(c). The quantity to which this rate is applied is "the quantity of the loan commodity that the producers are eligible to place under loan but for which the producers forego obtaining the loan in return for payments...." *Id*. § 7235(c). Loan deficiency payments are not available for extra-long staple cotton because the basic loan rate is always the repayment rate for extra-long staple cotton.

A combined payment limit of $75,000 applies to marketing assistance loan gains and LDPs. *Id*. § 1308(2). For the 1999, 2000, and 2001 crop years, however, Congress raised the limit to $150,000. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2000, Pub. L. No. 106-78, tit. VIII, § 813, 113 Stat. 1135, 1182; Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-387, tit. VIII, § 837, 114 Stat. 1549, 1549A-155 - 1549A-156; H.R. 2213, § 10, 107th Cong. (2001) (enacted).

In 1999 Congress also authorized the use of commodity certificates to make in-kind payments under the nonrecourse marketing assistance loan and loan deficiency payment programs. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2000, Pub. L. No. 106-78, tit. VII, § 727, 113 Stat. 1135, 1164. On February 8, 2000, the Secretary announced that commodity certificates would be made available to producers to use in acquiring collateral pledged to the Commodity Credit Corporation (CCC) for a nonrecourse marketing assistance loan. USDA, Farm Service Agency, Notice LP-1723 (Feb. 15, 2000). The practical consequence of using commodity certificates is the elimination of a payment limitation on marketing assistance loan gains.

Commodity certificates eliminate the limit because, if the marketing has not matured, a producer may purchase a commodity certificate priced at the amount to repay the loan at the repayment rate. The certificate is then immediately exchanged for the commodity serving as the collateral for the loan. A certificate does not actually exist, however, for this transaction is only a series of accounting software entries. Nonetheless, assuming that a gain results because of the difference between the loan rate at the loan's inception–the "basic rate"–and the subsequently established repayment rate, the "purchase" of the certificate and its immediate "exchange" for the loan collateral eliminates the payment limit on the gain that would otherwise apply.

In its report on the effect of the increased payment limit and commodity certificates on payments made under the marketing assistance loan program in the 1999 and 2000 crop years, the GAO noted that $15 billion was provided to farmers under the marketing assistance loan program in 1999 and 2000 through May 2001. In each year, however, less than one percent of these recipients benefitted from the increase in the payment limit from $75,000 to $150,000. *Marketing Assistance Loan Program* at 3. In addition, the GAO found that the benefits of this increase were concentrated in relatively few states. In 1999, the states with the most farmers benefitting from the increase were Arkansas, South Dakota, and Texas. In 2000, the beneficiaries farmed in Illinois, North Dakota, and South Dakota. *Id*.

The GAO also found that "commodity certificates represented a small proportion of all marketing assistance loan payments–$380 million of the more than $15 billion in total payments made over the period." *Id*. In 1999, almost all of these gains were for rice and cotton. In 2000, rice and cotton again accounted for most of the gains, followed by corn and soybeans. *Id*.

As to the use of commodity certificates to avoid the combined $150,000 payment limit in effect in 1999 and 2000, the GAO determined that 47 farmers used certificates to receive more than $150,000 in

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1999, and that number increased to 100 in 2000. The GAO noted, however, that the Congressional Budget Office estimates that the savings to the government by avoiding forfeiture of the crop securing the loans and the costs of farmers receiving more than $150,000 "roughly offset each other." *Id*. at 4. A copy of this report and other GAO reports can be obtained at www.gao.gov.

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Attorneyfee awards under the Equal Access To Justice Act

By Christopher R. Kelley

American agriculture is highly regulated. A considerable portion of this regulation emanates from the federal government. Occasionally disputes arise between a regulated party and the federal agency charged with administering a regulatory scheme. When these disputes are resolved through the agency's administrative appeal processes or litigation, the regulated party is likely to incur attorneys fees. Ordinarily litigants are responsible for their own attorney fees. In addition to this bar to fee-shifting, the federal government enjoys sovereign immunity. In certain circumstances, however, the Equal Access to Justice Act (EAJA) removes both of these bars to fee-shifting. The EAJA thus merits attention by parties who find themselves in disputes with the federal government or its agencies. This article provides a brief introduction to the EAJA.

About 200 federal statutes permit the award of attorney fees to prevailing parties other than the United States. *See* Joseph J. Ward, *Corporate Goliaths in the Costume of David: The Question of Association Aggregation Under the Equal Access to Justice Act–Should the Whole Be Greater Than Its Parts?*, 28 Fla. St. U. L. Rev. 151, 156 (1998). Most of these statutes apply to a particular cause of action or statutory waiver of sovereign immunity. For example, private parties who "substantially prevail" in actions brought under the Freedom of Information Act (FOIA) may recover their attorney fees. 5 U.S.C. § 552(a)(4)(E). Better known is the authorization for attorney fee awards under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k).

While the Equal Access to Justice Act (EAJA) is not the exclusive authority for the award of attorney fees, it is probably the most important fee-shifting statute because of its broad applicability. Unlike the fee-shifting provisions such as those found in the FOIA and Title VII of the Civil Rights Act of 1964, the EAJA is not attached to any particular substantive cause of action or statutory waiver of sovereign immunity. Instead, subject to its exceptions and limitations, the EAJA operates as a broad waiver of the federal government's sovereign immunity from awards of attorney fees in civil proceedings.

The EAJA serves two basic purposes. First, it is intended to "reduce[] the disparity of resources between individuals, small businesses, and other organizations with limited resources and the federal government." H.R. Rep. No. 120, 99th Cong., 1st Sess. 4 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 133. Second, it seeks to deter wrongful behavior by federal officials without discouraging them from vigorously enforcing the law. *Id.* at 10, *reprinted in* 1985 U.S.C.C.A.N. 132, 139. It may also serve the "'salutary function [of] creating the appearance of fairness' by providing more complete compensation to those who have suffered a breach of the public trust through arbitrary and unreasonable use of government power." Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 La. L. Rev. 217, 226 (1994)(quoting Harold J. Krent, *Fee Shifting Under the Equal Access to Justice Act–A Qualified Success*, 11 Yale L. & Pol'y Rev. 458, 478 (1993).

The EAJA is codified in Titles 5 and 28 of the United States Code. The Title 5 codification, 5 U.S.C. § 504, governs awards arising from "adversary adjudications" before federal administrative agencies. "Adversary adjudications" is defined to include adjudication conducted under 5 U.S.C. § 554 "in which the position of the United States is represented by counsel or otherwise." 5 U.S.C. § 504(b)(1)(C). It also covers other proceedings, including certain appeals under the Contract Dispute Act. *Id*.

Over the objections of the USDA, the USDA National Appeals Division appeals process has been held to be "adversary adjudication" for purposes of the EAJA. *Lane v. United States Dep't of Agric.*, 120 F.3d 106, 108-11 (8th Cir. 1997). The USDA, on the other hand, acknowledges that its administrative process for disciplinary proceedings under the Packers and Stockyards Act, the Perishable Agricultural Commodities Act, and other statutes is "adversary adjudication" for purposes of the EAJA. *See* 7 C.F.R. § 1.183(a)(2)(referencing the formal adjudication procedures codified at 7 C.F.R. §§ 1.130 - 1.151).

In Title 28, the EAJA is found at 28 U.S.C. § 2412. This section governs awards arising from civil litigation, except tort actions, against the United States, its agencies, or any official of the United States acting in his or her official capacity. It applies in Article III courts and two Article I courts–the Court of Federal Claims and the Court of Veteran Appeals. 28 U.S.C. § 2412(d)(1)(A).

Waiver of sovereign immunity: 28 U.S.C. § 2412.(b)

The EAJA contains several fee-shifting provisions. The first, which is codified at 28 U.S.C. § 2412(b), applies only to court proceedings. This provision waives the federal government's sovereign immunity and permits fee-shifting against the United States under the common law rules and any federal fee-shifting statute. Specifically, § 2412(b) makes the United States liable for attorney 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."

By virtue of § 2412(b) the United States is subject to exceptions to the general American rule that each party must bear its own legal expenses. These exceptions apply to a party found to be in contempt of a court's order; a losing party who acted in bad faith, vexatiously, wantonly, or for oppressive reasons; and litigation that created or protected a common fund from which the fees would be drawn. In addition, § 2412(b) incorporates against the United States all federal statutes authorizing attorney fee awards, including FRCP Rule 11.

Section 2412(b) only waives sovereign immunity; it does not create new substantive rights. Other provisions of the EAJA, however, do create new rights to attorney's fees. These rights essentially constitute four substantive causes of action for attorneys fees.

The prevailing party provisions: 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A)

The first two and most longstanding of these causes of action are created by 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A). As noted previously, the former applies to administrative "adversary adjudications" and the latter to court actions, but the basic elements of each of these two causes of action are the same.

First, only certain individuals and entities are eligible for fee awards. Eligible parties are limited to the following:

a. Individuals with a net worth of no more than $2 million at the time the adversary adjudication or civil action was initiated;

b. Sole proprietorships, businesses, associations, units of local government, and organizations with a net worth of no more than $7 million and no more than 500 employees at the time the adversary adjudication or civil action was initiated;

c. Organizations that are tax exempt

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under Internal Revenue Code § 501(c)(3) with no more than 500 employees, regardless of net worth, at the time the adversary adjudication or civil action was initiated; and

d. Agricultural cooperatives as defined in § 15(a) of the Agricultural Marketing Act, 12 U.S.C. § 1141(j), with no more than 500 employees, regardless of net worth at the time the adversary adjudication or civil action was initiated.

5 U.S.C. § 504(b)(1)(B), 28 U.S.C. § 2412(d)(2)(B).

The remaining basic elements of both causes of action are as follows:

a. The private party, appearing as a plaintiff or a defendant, must prevail on a substantive issue and achieve at least some of the substantive relief it sought; *and*

b. The position of the government must not have been "substantially justified," *or*

c. "Special circumstances" must not make an award "unjust."

5 U.S.C. § 504(a)(1), 28 U.S.C. § 2412(d)(1)(A).

As to the "prevailing party" requirement, "prevailing" requires the party seeking a fee award to have attained "some relief on the merits of his claim." *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980). Success on procedural, evidentiary, or most preliminary matters is not sufficient, for there must be some final determination of the "substantial rights of the parties." *Id.* at 758. The party seeking fees must succeed on a significant issue and thereby achieve some of the benefits sought in the litigation, but success on the "central issue" is not required. *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 789, 792 (1989).

"Prevailing" includes obtaining a favorable consent decree or settlement. *See, e.g., Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 121 S.Ct. 1835, 1838 (2001). Even the recovery of nominal damages may be enough to be a prevailing party. *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). To the extent that the recovery of nominal damages constitutes limited success in the litigation, however, the limited recovery is relevant to the assessment of what constitutes a reasonable fee. The EAJA only authorizes the award of "reasonable" attorney fees. *See generally* Gregory C. Sisk, *A Primer on Awards of Attorney's Fees Against the Federal Government*, 25 Ariz. St. L.J. 753, 743-44 (1993)(discussing *Farrar v. Hobby* and noting that "the fact of success may be enough to qualify a party for fees, but the extent of success remains important to the assessment of what constitutes a reasonable fee").

The Supreme Court recently rejected the view that a prevailing party includes a party whose litigation served as a "catalyst" for voluntary government action that achieved the result sought by that party. *Buckhannon*, 121 S.Ct. at 1838. Although this case did not involve the EAJA, the Court has treated the "prevailing party" standard as generally applicable to all federal statutes authorizing fee awards to "prevailing parties." *See Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983). Among the reasons that the Court offered for rejecting the "catalyst theory" was its concern that the government might be deterred from altering its conduct if such action could result in a fee award. *Buckhannon*, 121 S.Ct. at 1842.

The prevailing part must allege that the government's position "was not substantially justified." 5 U.S.C. § 504(a)(2), 28 U.S.C. § 2412(d)(1)(B). This element is the most contentious, for most of the litigation over the EAJA's requirements has involved the question of whether the government's position was "substantially justified." *See* Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part Two)*, 56 La. L. Rev. 1, 5 (1995). Fees are not to be awarded to prevailing parties if the position of the United States was "substantially justified."

Under 28 U.S.C. § 2412(d), the "position of the government" includes its litigation position in court *and* "the action or the failure to act by the agency upon which the litigation is based...." Similarly, under 5 U.S.C. § 504, the "position of the agency" means the position of the agency in the adversary adjudication *and* "the action or failure to act by the agency upon which the adversary adjudication is based...."

Thus, the court "must focus on two questions: first, whether the government was substantially justified in taking its original action; and, second, whether the government was substantially justified in defending the validity of the action in court." *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988). Although the prevailing party must allege the absence of substantial justification, the government "bears the burden of proving substantial justification, both in its litigation position and its posture during the underlying administrative proceedings." *Baker v. Bowen*, 839 F.2d 1075, 1080 (5th Cir. 1988).

The EAJA requires "substantial justification" determinations to be based on "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." 28 U.S.C. § 2412(d)(1)(B). *See also* 5 U.S.C. § 501(a)(1) ("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.").

Whether the position of the government was "substantially justified" is assessed under a "reasonableness" standard. The United States Supreme Court has held that "substantially justified" means "justified in substance or in the main—that is, justified to a degree that would satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). A "substantially justified" position is one that has a "reasonable basis both in law and fact." *Id.* In making this assessment, the Court has stated that the case should be considered "as an inclusive whole, rather than as atomized line-items." *Commissioner, INS v. Jean*, 496 U.S. 154, 162 (1990).

The mere fact that a party has prevailed does not create a presumption that the government's position was not substantially justified. *See, e.g., Spawn v. Western Bank-Westheimer*, 989 F.2d 830, 831 (5th Cir. 1993). Likewise, the mere fact that a court has found, on the merits, that the agency action was "arbitrary or capricious" does not automatically mean that the government's position was not substantially justified. *See, e.g., Griffon v. United States Dep't of Health & Human Serv.*, 832 F.2d 51, 52 (5th Cir. 1987)("[m]erely because the government's underlying action [is] held legally invalid as being 'arbitrary and capricious' does not necessarily mean that the government acted without substantial justification for purposes of the [EAJA]"). In the final analysis, because a "reasonableness" test applies, the "substantially justified" standard "is inherently a discretionary one, which can only be applied on a case-by-case basis." Niki Kuckes, *Reenacting the Equal Access to Justice Act: A Proposal for Automatic Attorney's Fee Awards*, 94 Yale L.J. 1207, 1218 (1985).

Finally, courts or a federal agency may deny an award of fees and expenses if "special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A), 5

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U.S.C. § 504(a)(1). This "special circumstances" provision is a

> "safety valve" [that] 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 effort. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.

H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4990.

The excessive demand provisions: 5 U.S.C. § 504(a)(4) and 28 U.S.C. § 2412(d)(1)(D)

Like the first and second substantive causes of action under the EAJA, the third and fourth are closely similar but for the forum in which they apply–one administrative, the other judicial. Both of these causes of action were enacted as part of the Contract with American Advancement Act of 1996. *See generally* Judith E. Kramer, *Equal Access to Justice Act Amendments of 1996: A New Avenue for Recovering Fees from the Government*, 51 Admin. L. Rev. 363 (1999).

The first of these recently created causes of action applies to "an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement." 5 U.S.C. § 504(a)(4). The other extends to "a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5 ...." 28 U.S.C. § 2412(d)(1)(D).

The definition of a "party" is the same for these causes of action as it is for the other causes of action, with one exception. For purposes of these causes of action, a "party" also includes "a small entity as defined in section 601 of Title 5...." 5 U.S.C. § 504(b)(1)(B), 28 U.S.C. § 2412(d)(2)(B).

Subject to the limitations discussed below, fees can be awarded to a party under § 504(a)(4) if "the demand of the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case...." Similarly, under § 2412(d)(1)(D), a party can be awarded fees in an action for judicial review of an "adversary adjudication described in section 504(a)(4) of title 5" if "the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case...." Because both causes of action are premised on the presence of an "excessive demand," they have become known as the "excessive demand" provisions of the EAJA.

"Demand" means the "express demand" that led to the adversary adjudication, but does not include "a recitation of the maximum statutory penalty (i) in the complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount." 5 U.S.C. § 504(b)(1)(F), 28 U.S.C. § 2412(d)(2)(I). Thus, a two-part standard applies. First, the demand and the award are compared to see if the award substantially exceeds the demand. Second, if there is such a difference, then the court or the adjudicative agency must determine whether the disparity is unreasonable under the facts and circumstances of the case. *See United States v. One 1997 Toyota Land Cruiser*, 248 F.3d 899, 906 (9th Cir. 2001). *See also* James M. McElfish, Jr., *Fee Simple? The 1996 Equal Access to Justice Act Amendments*, 26 Envtl. L. Rep. 10569, 10574-75 (1996) [McElfish]. Under this standard, achieving a result substantially less burdensome than the government's demand serves as the functional equivalent of prevailing under the first and second EAJA causes of action.

The EAJA limits awards to those covering the fees and expenses "related to defending against the excess demand...." 5 U.S.C. § 504(a)(4), 28 U.S.C. § 2412(d)(1)(D). Such a determination may be very difficult to make and may result in small awards in the case where most of the time is spent challenging the allegation that a violation occurred. *See* McElfish, *supra*, at 10579-80.

Fees can be denied if "the party has committed a wilful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust." Also, fees and expenses awarded under the "excessive demand" causes of action "shall be paid only as a consequence of appropriations provided in advance." 5 U.S.C. § 504(a)(4), 28 U.S.C. § 2412(d)(1)(D).

EAJA attorney fees are based on "prevailing market rates for the kind and quality of the services furnished" and are capped at $125.00 per hour. This cap may be adjusted upward based on cost-of-living or a "special factor, such as the limited availability of qualified attorneys for the proceeding involved." 5 U.S.C. § 504(b)(1)(A), 28 U.S.C. § 2412(d)(2)(A). "Reasonableness" is the standard for determining the amount of attorney fees. *Id*. Also recoverable are "expenses," including the reasonable expenses incurred in employing expert witnesses. *Id*.

EAJA fee requests usually must be supported by contemporaneously made, detailed records showing the time expended, the work performed, and usual billing rates. Expenses must also be itemized. *See* 5 U.S.C. § 504(a)(2), 28 U.S.C. § 2412(d)(1)(B). These records permit the court to consider the reasonableness of the requested fee, and inadequate documentation is a common basis for reducing fee award requests.

EAJA fee applications must be filed within 30 days. This requirement is jurisdictional; it cannot be waived, even for good cause. Under 5 U.S.C. § 504(a)(2) the 30-day period begins to run as "of the final disposition in the adversary adjudication." Under 28 U.S.C. § 2412(d)(1)(B), the time does not begin to run until "final judgment," which is a judgment that is "final and not appealable and includes an order for settlement."

Denials of attorney fee requests are appealable. Courts of appeal review district court determinations on the issue of whether the government's position was "substantially justified" under the abuse of discretion standard. *Pierce v. Underwood*, 487 U.S. 552, 557-63 (1988).

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of subject matter jurisdiction. *Id*.

In affirming the district court's dismissal, the Fifth Circuit rejected Rio Grande's claim that the Federal Arbitration Act (FAA) provided the needed subject matter jurisdiction. Rio Grande had contended that because the insurance contracts involved interstate commerce, the FAA applied. The Fifth Circuit, however, noted that the FAA, specifically 9 U.S.C. § 4, did not provide an independent source of jurisdiction. To the contrary, as the court stated, "[a] party may obtain relief in federal court under the FAA only when the underlying civil action would otherwise be subject to the court's federal question or diversity jurisdiction." *Id*. (citing 9 U.S.C. § 4).

The Fifth Circuit also rejected Rio Grande's contention that the FAA's preemption of the Texas arbitration statute created a federal question. The Fifth Circuit ruled that "conflict preemption is a defense, not an independent basis for jurisdiction." *Id*. (citation omitted).

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NORTH CAROLINA. Liability for canine attacks in North Carolina. In *Hill v. Williams,*[1] decided in June, the Court of Appeals of North Carolina clarified that North Carolina does not follow the "one-bite" rule; the North Carolina Supreme Court declined to review the decision. Plaintiffs, Richard Ray Hill (Richard) and his wife, Sophia Hill, sued for actual medical damages, lost wages, and loss of consortium that resulted from an attack by Rowdy, a Rottweiler dog owned by the defendants, Stephen T. Williams and his wife, Patricia Williams. Richard was employed as a drywall finisher by Drywall to work on defendants' new home on Lake Norman. Rowdy was confined to the defendants' lot by an underground electrical shock fence but was otherwise allowed to roam free. No evidence was presented that Rowdy had ever before exhibited vicious tendencies. Defendants had described him to the owners of Drywall as dog that was playful and would not bite. Richard was repairing a texturizing machine that was hooked to a van parked near the lake on defendants' lot when Rowdy jumped on Richard, pushed him against the machine, and swallowed his ear. Richard required substantial surgery and three hospitalizations.

Defendants raised a defense of contributory negligence, and filed a third-party complaint against Drywall based upon negligence. The jury unanimously awarded damages for actual medical expenses, lost wages, and contributory negligence. It found no contributory negligence on the part of Richard and found that Drywall's negligence played no role in Richard's injuries. After defendants' motion for a judgment notwithstanding the verdict was denied, the defendants appealed.

The primary issue in the case was whether the general propensities of certain animals as opposed to the vicious propensity of a specific animal could determine the appropriate standard of care. A secondary issue related to the type of expert qualified to testify as to the general tendencies of certain animals.

It is well established under North Carolina law that a strict liability standard is appropriately applied to an animal with vicious propensities, based upon its prior behavior.[2] What was established in *Hill* is that the general propensities of an animal could be used to establish a standard of care in support of an action in negligence. Dr. David Wilson (Dr. Wilson) testified that he had graduated in veterinary medicine from the University of Georgia where he had studied the behavioral characteristics of various breeds of dogs. Since entering small animal practice in the early 1980s he had had the opportunity to observe approximately 500 Rottweiler dogs. He testified that the breed was aggressive and temperamental, suspicious of strangers, protective of their space, and unpredictable, and that he took great care when handling mature Rottweilers in his practice because they were considered to be dogs that might bite. Dr. Wilson conceded that he was not an expert in the Rottweiler breed. The court found that his testimony was likely to be helpful to the jury and should be admitted.

Where a dog has exhibited a vicious propensity, the appropriate standard, as noted above, is one of strict liability; however, there may be circumstances where punitive damages are appropriate. In *Hunt v. Hunt*[3] the Court of Appeals held that where a dog has already demonstrated its vicious propensity, owners who freely allowed such a dog to run at large demonstrate "wilfulness, wantonness or recklessness that indicates at least an indifference to or disregard for the rights and safety of others." The court held that the dog need not bite anyone to demonstrate vicious propensity; it need only have attempted to do so. The court said that under such circumstances the tort should be considered aggravated.

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[1] 547 S.E. 2d 472; 2001 N.C. App. LEXIS 331 (2001); petition for rev. den'd, (Doc. #: 352P01 N.C. S.Ct., Oct. 4, 2001)

[2] See, N.C.G.S. §§ 67-4.1 - 67-4.5 (2001); see also, N.C.G.S. § 67-1 (2001) Strict liability for injury to livestock or fowl caused by a dog that was not on the premises of its owner (or the one in charge of the dog) at the time the injury occurred; N.C.G.S. § 67-12 (2001) Strict liability for injury to persons or property caused by a dog, over the age of six months, running at large at night.

[3] 86 N.C. App. 323; 357 S.E. 2d 444 (1987)

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Turning to the next argument advanced by Rio Grande, the Fifth Circuit declined to read Pitt Farm's state court petition as stating a claim directly under a federal regulation. The court concluded that a fair reading of the petition revealed that it alleged only the breach of state law duties arising from the company's agent failure to insure the two onion crops as separate units as was permitted on the federal crop insurance regulation. *Id*.

Finally, the Fifth Circuit refused to accept Rio Grande's assertion that the FCIA completely preempted state law claims and therefore provided an exception here to the well-pleaded complaint rule, thus creating federal question jurisdiction. The court applied the three-fold test it had adopted in *Hart v. Bayer Corp.*, 199 F.3d 239, 245-46 (5th Cir. 2000), to assess whether the FCIA evinced a congressional intent to "'occupy the field'" and completely preempt state law. Under this test, complete preemption does not exist unless the statute at issue "(1) contains a civil enforcement provision, (2) includes a specific grant of federal subject matter jurisdiction, and (3) reflects a clear manifestation of congressional intent to make preempted state-law claims removable to federal court.'" *Rio Grande Underwriters* at *2 (quoting *Hart*, 199 F.3d at 245-46).

As to these elements, the court concluded that neither the FCIA nor its implementing regulations contained "any civil enforcement provisions that would create a federal cause of action against crop insurance agents," but instead "presumes the existence of state causes of action and limits the damages to which reinsured companies might be exposed." *Id* & n.9 (citing *Williams Farms*, 121 F.3d at 655). It also noted that "the FCIA's express grant of federal jurisdiction is limited to suits by and against the FCIC, not other parties." *Id*. At *2 (citing 7 U.S.C. §§ 1506(d), 1508(j)(2)(A)). Finally, the court found no evidence in the FCIA indicating that Congress "intended to so displace state law claims against agents who sell policies reinsured by the FCIC as to convert them to federal claims and subject them to federal jurisdiction." *Id*. At *3. In this regard, the court found support in the earlier decisions of the Ninth, Tenth, and Eleventh Circuits cited above.

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