

-CITE-

28 USC Sec. 2412

02/01/2010

-EXPCITE-

TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE

PART VI - PARTICULAR PROCEEDINGS

CHAPTER 161 - UNITED STATES AS PARTY GENERALLY

-HEAD-

Sec. 2412. Costs and fees

-STATUTE-

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(2) A judgment for costs, when awarded in favor of the United States in an action brought by the United States, may include an amount equal to the filing fee prescribed under section 1914(a) of this title. The preceding sentence shall not be construed as requiring the United States to pay any filing fee.

(b) Unless expressly prohibited by statute, **a** court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (**a**), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such 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.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (**a**) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is **a** finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(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), including proceedings for judicial review of agency action, 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.

(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 were computed. The party shall also allege that the position of the United States was not substantially justified. 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) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the

extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(D) If, in **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, 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, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed **a** willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as **a** consequence of appropriations provided in advance.

(2) For the purposes of this subsection -

(**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 \$125 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.);

(B) "party" means (i) an individual whose net worth did not exceed \$2,000,000 at the time the civil action was filed, 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 1986 (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 or for purposes of subsection (d)(1)(D), **a** small entity as defined in section 601 of title 5;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(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 Court of Federal Claims and the United States Court of Appeals for Veterans Claims;

(G) "final judgment" means **a** judgment that is final and not appealable, and includes an order of settlement;

(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; and

(I) "demand" means the express demand of the United States which led to the adversary adjudication, but shall 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.

(3) In awarding fees and other expenses under this subsection to

a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (**a**) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(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) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1986 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding under subsection (**a**) of section 2412 of title 28, United States Code, of costs enumerated in section 1920 of such title (as in effect on October 1, 1981).

(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.

-SOURCE-

(June 25, 1948, ch. 646, 62 Stat. 973; Pub. L. 89-507, Sec. 1, July 18, 1966, 80 Stat. 308; Pub. L. 96-481, title II, Sec. 204(a), (c), Oct. 21, 1980, 94 Stat. 2327, 2329; Pub. L. 97-248, title II, Sec. 292(c), Sept. 3, 1982, 96 Stat. 574; Pub. L. 99-80, Secs. 2, 6, Aug. 5, 1985, 99 Stat. 184, 186; Pub. L. 99-514, Sec. 2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 102-572, title III, Sec. 301(a), title V, Secs. 502(b), 506(a), title IX, Sec. 902(b)(1), Oct. 29, 1992, 106 Stat. 4511-4513, 4516; Pub. L. 104-66, title I, Sec. 1091(b), Dec. 21, 1995, 109 Stat. 722; Pub. L. 104-121, title II, Sec. 232, Mar. 29, 1996, 110 Stat. 863; Pub. L. 105-368, title V, Sec. 512(b)(1)(B), Nov. 11, 1998, 112 Stat. 3342.)

-MISC1-

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., Secs. 258, 931(a) (Mar. 3, 1911, ch. 231, Sec. 152, 36 Stat. 1138; Aug. 2, 1946, ch. 753, Sec. 410(a), 60 Stat. 843).

Section consolidates the last sentence of section 931(a) of title 28, U.S.C., 1940 ed., with section 258 of said title 28. For other provisions of said section 931(a), see Distribution Table.

Subsection (a) is new. It follows the well-known common-law rule that a sovereign is not liable for costs unless specific provision

for such liability is made by law. This is **a** corollary to the rule that **a** sovereign cannot be sued without its consent.

Many enactments of Congress relating to fees and costs contain specific exceptions as to the liability of the United States. (See, for example, section 548 of title 28, U.S.C., 1940 ed.) **A** uniform rule, embodied in this section, will make such specific exceptions unnecessary.

Subsection (b) incorporates section 258 of title 28, U.S.C., 1940 ed.

Subsection (c) incorporates the costs provisions of section 931(**a**) of title 28, U.S.C., 1940 ed.

Words "and for summoning the same," after "witnesses," were omitted from subsection (b) as covered by "those actually incurred for witnesses."

Changes were made in phraseology.

-REFTEXT-

REFERENCES IN TEXT

The Contract Disputes Act of 1978, referred to in subsec. (d)(2)(E), (3), is Pub. L. 95-563, Nov. 1, 1978, 92 Stat. 2383, as amended, which is classified principally to chapter 9 (Sec. 601 et seq.) of Title 41, Public Contracts. For complete classification of this Act to the Code, see Short Title note set out under section 601 of Title 41 and Tables.

Section 7430 of the Internal Revenue Code of 1986, referred to in subsec. (e), is classified to section 7430 of Title 26, Internal

Revenue Code.

-MISC2-

AMENDMENTS

1998 - Subsec. (d)(2)(F). Pub. L. 105-368 substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".

1996 - Subsec. (d)(1)(D). Pub. L. 104-121, Sec. 232(a), added subpar. (D).

Subsec. (d)(2)(A)(ii). Pub. L. 104-121, Sec. 232(b)(1), substituted "\$125" for "\$75".

Subsec. (d)(2)(B). Pub. L. 104-121, Sec. 232(b)(2), inserted before semicolon at end "or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5".

Subsec. (d)(2)(I). Pub. L. 104-121, Sec. 232(b)(3)-(5), added subpar. (I).

1995 - Subsec. (d)(5). Pub. L. 104-66 struck out par. (5) which read as follows: "The Attorney General shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards."

1992 - Subsec. (a). Pub. L. 102-572, Sec. 301(a), designated existing provisions as par. (1) and added par. (2).

Subsec. (d)(2)(F). Pub. L. 102-572, Sec. 902(b)(1), substituted

"United States Court of Federal Claims" for "United States Claims Court".

Pub. L. 102-573, Sec. 506(a), inserted before semicolon at end "and the United States Court of Veterans Appeals".

Subsec. (d)(5). Pub. L. 102-572, Sec. 502(b), substituted "The Attorney General shall report annually to the Congress on" for "The Director of the Administrative Office of the United States Courts shall include in the annual report prepared pursuant to section 604 of this title,".

1986 - Subsecs. (d)(2)(B), (e). Pub. L. 99-514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954".

1985 - Subsecs. (a), (b). Pub. L. 99-80, Sec. 2(a)(1), substituted "or any agency or any official of the United States" for "or any agency and any official of the United States".

Subsec. (d). Pub. L. 99-80, Sec. 6, repealed amendment made by Pub. L. 96-481, Sec. 204(c), and provided that subsec. (d) was effective on or after Aug. 5, 1985, as if it had not been repealed by section 204(c). See 1980 Amendment note and Revival of Previously Repealed Provisions note below.

Subsec. (d)(1)(A). Pub. L. 99-80, Sec. 2(a)(2), inserted ", including proceedings for judicial review of agency actions," after "in tort)".

Subsec. (d)(1)(B). Pub. L. 99-80, Sec. 2(b), inserted provisions directing that whether or not the position of the United States was

substantially justified must 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 was based) which is made in the civil action for which fees and other expenses are sought.

Subsec. (d)(2)(B). Pub. L. 99-80, Sec. 2(c)(1), substituted "\$2,000,000" for "\$1,000,000" in cl. (i), and substituted "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;" for "(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; and".

Subsec. (d)(2)(D) to (H). Pub. L. 99-80, Sec. 2(c)(2), added subpars. (D) to (H).

Subsec. (d)(4). Pub. L. 99-80, Sec. 2(d), amended par. (4) generally. Prior to amendment, par. (4) read as follows:

"(A) Fees and other expenses awarded under this subsection may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517 of this title.

"(B) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984, such sums as may be necessary to pay fees and other expenses awarded pursuant to this subsection in such fiscal years."

Subsec. (f). Pub. L. 99-80, Sec. 2(e), added subsec. (f).

1982 - Subsec. (e). Pub. L. 97-248 added subsec. (e).

1980 - Pub. L. 96-481, Sec. 204(a), designated existing provisions as subsec. (a), struck out provision that payment of a judgment for costs shall be as provided in section 2414 and section

2517 of this title for the payment of judgments against the United States, and added subsecs. (b) to (d). Pub. L. 96-481, Sec. 204(c), repealed subsec. (d) eff. Oct. 1, 1984. See Effective Date of 1980 Amendment note below.

1966 - Pub. L. 89-507 empowered **a** court having jurisdiction to award judgment for costs, except as otherwise specifically provided by statute, to the prevailing party in any action brought by or against the United States or any agency or official of the United States acting in his official capacity, limited the judgment for costs when taxed against the Government to reimbursing in whole or in part the prevailing party for costs incurred by him in the litigation, required the payment of **a** judgment for costs to be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States and eliminated provisions which limited the liability of the United States for fees and costs to those cases in which liability was expressed provided for by Act of Congress, permitted the district court or the Court of Claims, in an action under section 1346(**a**) or 1491 of this title if the United States put in issue plaintiff's right to recover, to allow costs to the prevailing party from the time of joining such issue, and which authorized the allowance of costs to the successful claimant in an action under section 1346(b) of this title.

EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by Pub. L. 105-368 effective on first day of first

month beginning more than 90 days after Nov. 11, 1998, see section 513 of Pub. L. 105-368, set out as **a** note under section 7251 of Title 38, Veterans' Benefits.

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104-121 applicable to civil actions and adversary adjudications commenced on or after Mar. 29, 1996, see section 233 of Pub. L. 104-121, set out as **a** note under section 504 of Title 5, Government Organization and Employees.

EFFECTIVE DATE OF 1992 AMENDMENT

Section 506(b) of Pub. L. 102-572 provided that: "The amendment made by subsection (a) [amending this section] shall apply to any case pending before the United States Court of Veterans Appeals [now United States Court of Appeals for Veterans Claims] on the date of the enactment of this Act [Oct. 29, 1992], to any appeal filed in that court on or after such date, and to any appeal from that court that is pending on such date in the United States Court of Appeals for the Federal Circuit."

Section 506(d) of Pub. L. 102-572 provided that: "This section [amending this section and enacting provisions set out under this section], and the amendment made by this section, shall take effect on the date of the enactment of this Act [Oct. 29, 1992]."

Amendment by section 902(b)(1) of Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as **a** note under section 171 of this title.

Amendment by sections 301(a) and 502(b) of Pub. L. 102-572

effective Jan. 1, 1993, see section 1101(a) of Pub. L. 102-572, set out as a note under section 905 of Title 2, The Congress.

EFFECTIVE DATE OF 1985 AMENDMENT

Amendment by Pub. L. 99-80 applicable to cases pending on or commenced on or after Aug. 5, 1985, but with provision for additional applicability to certain prior cases and to prior board of contracts appeals cases, see section 7 of Pub. L. 99-80, set out as a note under section 504 of Title 5, Government Organization and Employees.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-248 applicable to civil actions or proceedings commenced after Feb. 28, 1983, see section 292(e)(1) of Pub. L. 97-248, set out as an Effective Date note under section 7430 of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by section 204(a) of Pub. L. 96-481 effective Oct. 1, 1981, and applicable to any adversary adjudication, as defined in section 504(b)(1)(C) of Title 5, Government Organization and Employees, and any civil action or adversary adjudication described in this section which is pending on, or commenced on or after, such date, see section 208 of Pub. L. 96-481, set out as an Effective Date note under section 504 of Title 5.

Section 204(c) of Pub. L. 96-481 which provided in part that effective Oct. 1, 1984, subsec. (d) of this section is repealed, except that the provisions of subsec. (d) shall continue to apply

through final disposition of any adversary adjudication initiated before the date of repeal, was repealed by Pub. L. 99-80, Sec. 6(b)(2), Aug. 5, 1985, 99 Stat. 186.

EFFECTIVE DATE OF 1966 AMENDMENT

Section 3 of Pub. L. 89-507 provided that: "These amendments [amending this section and section 2520 of this title] shall apply only to judgments entered in actions filed subsequent to the date of enactment of this Act [July 18, 1966]. These amendments shall not authorize the reopening or modification of judgments entered prior to the enactment of this Act."

REVIVAL OF PREVIOUSLY REPEALED PROVISIONS

For revival of subsec. (d) of this section effective on or after Aug. 5, 1985, as if it had not been repealed by section 204(c) of Pub. L. 96-481, and repeal of section 204(c) of Pub. L. 96-481, see section 6 of Pub. L. 99-80, set out as a note under section 504 of Title 5, Government Organization and Employees.

SAVINGS PROVISION

Section 206 of Pub. L. 96-481, as amended by Pub. L. 99-80, Sec. 3, Aug. 5, 1985, 99 Stat. 186, provided that:

"(a) Except as provided in subsection (b), nothing in section 2412(d) of title 28, United States Code, as added by section 204(a) of this title, alters, modifies, repeals, invalidates, or supersedes any other provision of Federal law which authorizes an award of such fees and other expenses to any party other than the United States that prevails in any civil action brought by or

against the United States.

"(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."

AUTHORITY OF COURT OF APPEALS FOR VETERANS CLAIMS TO AWARD FEES
UNDER EQUAL ACCESS TO JUSTICE ACT FOR NON-ATTORNEY PRACTITIONERS.

Pub. L. 107-330, title IV, Sec. 403, Dec. 6, 2002, 116 Stat. 2833, provided that: "The authority of the United States Court of Appeals for Veterans Claims to award reasonable fees and expenses of attorneys under section 2412(d) of title 28, United States Code, shall include authority to award fees and expenses, in an amount determined appropriate by the United States Court of Appeals for Veterans Claims, of individuals admitted to practice before the Court as non-attorney practitioners under subsection (b) or (c) of Rule 46 of the Rules of Practice and Procedure of the United States Court of Appeals for Veterans Claims."

NONLIABILITY OF JUDICIAL OFFICERS FOR COSTS

Pub. L. 104-317, title III, Sec. 309(a), Oct. 19, 1996, 110 Stat. 3853, provided that: "Notwithstanding any other provision of law,

no judicial officer shall be held liable for any costs, including attorney's fees, in any action brought against such officer for an act or omission taken in such officer's judicial capacity, unless such action was clearly in excess of such officer's jurisdiction."

FEE AGREEMENTS

Section 506(c) of Pub. L. 102-572 provided that: "Section 5904(d) of title 38, United States Code, shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 5904(d) of title 38, United States Code, 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 5904 of title 38, United States Code, and section 2412(d) of title 28, United States Code, the claimant's attorney refunds to the claimant the amount of the smaller fee."