COLLECTING ATTORNEY'S FEES IN SOCIAL SECURITY DISPUTES: PROCEDURES, ANALYSIS, AND RETROACTIVE APPLICATION OF EQUAL ACCESS TO JUSTICE ACT TIMING REQUIREMENTS

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To encourage meritorious challenges of adverse Social Security benefit determinations, Congress has established two mechanisms by which the successful litigant may recover attorney's fees. In this note Ms. Chalstrom analyzes the statutory mechanisms for attorney's fee collection under both the Social Security Act and the Equal Access to Justice Act (EAJA). In particular, she reflects on recent Supreme Court decisions clarifying the application of EAJA timing requirements and the inconsistent application of those decisions by lower federal courts. Finally, Ms. Chalstrom concludes that in light of the policies underlying the Act, the retroactive application of newly clarified EAJA timing requirements is not appropriate.

I. Introduction

Filing an application for financial assistance with the Social Security Administration (Administration) may be the only action a person needs to take in order to begin her receipt of Social Security benefits.[1] However, some persons, unsatisfied with either a denial of benefits or the amount of benefits awarded to them by the Administration, will go through a prolonged appeals process to challenge the Administration's initial determination of a benefit award.[2] A disgruntled claimant ultimately may litigate his claim in a federal district court and then may be remanded to the administrative level

1. *See infra* note 11 and accompanying text.
2. *See infra* notes 14-16 and accompanying text.

for a final resolution of his benefits claim.[3] Consequently, a claimant litigating against the Administration during this potentially lengthy appeals process eventually will need to procure the services of an attorney.

In order to encourage meritorious litigation against the government, where the cost of litigation otherwise would be a deterrent to bringing suit, as well as to curb unreasonable government decisions, Congress has provided two means by which a claimant who successfully litigates against the Administration may recover her attorney's fees. Both the Social Security Act and the Equal Access to Justice Act (EAJA or Act) allow possible recovery of attorney's fees by a private party who successfully litigates against the government.[4] Specifically, the EAJA provides that a prevailing party who meets all of the Act's requirements may be entitled to recover her attorney's fees from the government agency over which she prevails.[5] This allows a litigant who is ultimately successful in his benefits appeal against the Administration to recover his attorney's fees from the Administration.

Recently, the Supreme Court provided definitive interpretations of several EAJA timing requirements applicable when a successful litigant files an application to collect his attorney's fees from the Administration.[6] However, after each case was decided, the lower federal courts were divided as to whether to apply these Supreme Court timing requirement decisions retroactively to cases filed, yet undecided before these rulings came down.[7] Retroactive application of these Supreme Court decisions by the lower federal courts entirely precluded attorney's fees awards to otherwise successful claimants who may have been entitled to an award of attorney's fees from the Administration.

This note details the potentially lengthy process of filing a Social Security benefits application and appealing an adverse benefits determination made by the Administration. It then identifies the two methods by which a successful claimant may recover her attorney's fees arising from litigation against the Administration. Next, the history and procedural requirements of the EAJA are outlined. After identifying the Supreme Court's holdings which clarify EAJA attor-

3. *See infra* notes 14-16 and accompanying text.
4. *See infra* notes 32-33, 44-49 and accompanying text.
5. *See infra* notes 48-49 and accompanying text.
6. *See* cases cited *infra* notes 122, 126, and 158.
7. *See* cases cited *infra* notes 133, 136, 148, 149, 162, and 168.

ney's fees application timing requirements, this note analyzes the split among the federal courts regarding the retroactive application of the Supreme Court decisions. Finally, due to the policies underlying the EAJA, congressional intent in enacting the Act, as well as ensuring fairness to claimants who successfully litigate against the Administration, this note concludes that the lower federal courts should not retroactively apply Supreme Court EAJA timing requirement decisions if retroactive application of such decisions would preclude an award of attorney's fees to potentially successful claimants who otherwise may be entitled to a fee award.

II. Filing an Application for Financial Assistance with the Social Security Administration

The three primary financial assistance programs available under the Social Security Act for those persons who qualify to receive benefits include: (1) old-age assistance (social security retirement benefits);[8] (2) old-age and survivors insurance trust fund and disability benefits (social security disability benefits);[9] and (3) supplemental security income for the aged, blind, and disabled (supplemental security income).[10] In order to become eligible for any one of these benefit programs, a claimant must file an application[11] prescribed by the Administration[12] with an office of the Administration.[13] Because a claimant has the right to appeal a benefits entitlement decision with which he does not agree,[14] the entire process, from filing an original application for benefits, to appealing an adverse benefits determination made by the Administration through the different administrative levels, to filing a claim in the federal court system, can be arduous and expensive for an appealing claimant. In fact, from initially filing an application for financial assistance with the Administration to filing a civil action in a district court contesting the Secretary of Health and

8. *See* 42 U.S.C. § 301 (1994).
9. *See id.* § 401.
10. *See id.* § 1381.
11. *See* 20 C.F.R. § 404.603 (1996). Filing an application for benefits accomplishes three things: (1) it permits a formal decision to be made regarding the claimant's entitlement to benefits; (2) it protects the receipt of benefits to which the claimant was entitled six to twelve months before he filed the application; and (3) it gives the claimant the right to appeal the entitlement decision. *Id.*
12. *See id.* § 404.611.
13. *See id.* § 404.614.
14. *See supra* note 11.

Human Services' (Secretary)[15] final determination of benefits normally takes more than one and one-half years.[16]

Many intricate requirements accompany the procedures a claimant must follow during the application and appeals process in order for her to receive benefits. Because the initial determination made by the Administration as to a claimant's entitlement to benefits upon her original application is subject to both administrative and judicial review,[17] a disgruntled claimant's first step in the appeals process is to request a reconsideration of her application by the Administration.[18]

In the event a claimant is still dissatisfied with the Administration's reconsidered determination, he may request a hearing on his application before an administrative law judge (ALJ).[19] At the hearing before the ALJ, a claimant may appear in person to contest the Ad-

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15. Effective March 31, 1995, Congress established the Social Security Administration as an independent agency of the federal government. Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 110(a), 108 Stat. 1465, 1490 (1994). Congress also established within the Administration the office of Commissioner of Social Security. 42 U.S.C. § 902. In its legislative reform, Congress noted that when any law, regulation, or provision referred to the Department of Health and Human Services functions under the Social Security Act, such references would be considered references to the Administration. Social Security Independence and Program Improvements Act of 1994 § 109(a). Moreover, Congress provided that when any law, regulation, or provision referred to the Secretary of Health and Human Services ("Secretary") functions under the Social Security Act, such reference would be considered a reference to the Commissioner of Social Security. *Id.* § 109(b). Despite this change, this note still refers to duties and determinations of the Secretary rather than the Commissioner, because the majority of the cases discussed in this note refer to the old regime, when the Secretary decided matters regarding the Social Security Act. However, when quoting statutory language, this note recognizes the official change by addressing the duties of the Commissioner.

16. *See* Dawn C. Bradshaw, Note, *EAJA: An Analysis of the Final Judgment Requirement as Applied to Social Security Disability Cases*, 58 FORDHAM L. REV. 1269, 1276 (1990).

17. *See* 20 C.F.R. § 404.902. Among other things, the Administration's initial determination consists of a claimant's entitlement to benefits, the amount of benefits, and the nonpayment of benefits.

18. *See id.* § 404.908. To properly request a reconsideration, a claimant must file a written request within 60 days after she receives notice of the initial determination. *See id.* § 404.909(a)(1). If the claimant does not file a request for reconsideration within the 60-day period the Administration's initial determination is binding. *See id.* § 404.905. The reconsideration process consists of a case review by the Administration in which the claimant may present additional evidence. The Administration then makes a new determination based on all of the evidence. *See id.* § 404.913.

19. *See id.* § 404.907. A hearing before an ALJ will be granted if a claimant meets one of the requirements in 20 C.F.R. § 404.930. In addition, a written request for such a hearing must be filed with the Administration within 60 days after a claimant receives notice of the prior reconsidered determination. *See id.* § 404.933(b)(1).

ministration's determination of his application.[20] In addition, a claimant may "submit new evidence, examine the evidence used in making the determination . . . and present and question witnesses" at the hearing before the ALJ.[21] Following this hearing, the ALJ will issue a written decision based upon the evidence presented at the hearing and in the record and will disclose the findings of fact and reasons for the decision.[22]

If a claimant opposes the ALJ's determination, she may request yet another review of her application by the Appeals Council.[23] Upon receiving a claimant's request for review, the Appeals Council can deny or grant review. If the Appeals Council grants review, it can issue a decision or remand the case back to an ALJ.[24] The decision of the Appeals Council becomes binding on the parties to the contest unless a claimant files his case in federal district court.[25] If the district court, in lieu of making its own decision regarding the claimant's entitlement to benefits, remands the case for further consideration, the Appeals Council may issue its own decision or it may remand the case back to an ALJ.[26] If the Appeals Council makes a new, independent decision based on the entire record, that decision will be the final decision of the Secretary on the claimant's application for benefits.[27] However, if the case is remanded to an ALJ, that decision becomes the final, binding decision of the Secretary.[28]

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20. *See id.* § 404.929.

21. *Id.* The evidence that a claimant wants considered at the hearing should be submitted to the ALJ either with the request for the hearing or within 10 days of filing that request if possible. *See id.* § 404.935.

22. *See id.* § 404.935(a). The ALJ's decision is binding upon all parties to the hearing unless: (1) a claimant requests a review by the Appeals Council or a federal district court; (2) either the Appeals Council or the ALJ revises the decision; (3) the decision is a recommended decision directed to the Appeals Council; or (4) the case is remanded by a federal district court. *See id.* § 404.955.

23. *See id.* § 404.967. A claimant must file a written request for review by the Appeals Council, along with the evidence that she wants considered in the review, with the Administration within 60 days after the date she receives notice of the ALJ's decision. *See id.* § 404.968(a)(1).

24. *See id.* § 404.967.

25. *See id.* § 404.981.

26. *See id.* § 404.983.

27. *See id.* § 404.984(a).

28. *See id.*

III. Collecting Attorney's Fees Under the Social Security Act

Because a claimant may suffer through a time-consuming and intricate process in filing his original benefits application and contesting the Administration's subsequent adverse benefits entitlement determinations, he may need to procure the services of an attorney. Although a claimant has no constitutional right to an attorney at a hearing against the Administration,[29] the Social Security Act provides that a claimant has a statutory right to an attorney.[30] Nevertheless, the Administration is under no duty to provide counsel for a claimant.[31]

In order to encourage effective representation of a claimant against the Administration, the Social Security Act, in 42 U.S.C. § 406(b), provides a mechanism by which a successful claimant's attorney may recover her fees earned for representation during a civil court action against the Administration, not in excess of past-due benefits to which the claimant is entitled.[32] Section 406(b) specifically provides that

> [w]henever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner may . . . certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits.[33]

As this section demonstrates, a court awards fees only for those court-related services performed by an attorney relating to civil litigation against the Administration. It is the Secretary who determines the amount of attorney's fees to be awarded for services provided by the attorney for the claimant for proceedings at the administrative level.[34]

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29. *E.g.*, Clark v. Schweiker, 652 F.2d 399, 403 (5th Cir. 1981).

30. 42 U.S.C. § 406 (1994). Section 406(a)(1) allows a claimant against the Administration to procure the services of an attorney where "[a]n attorney in good standing . . . shall be entitled to represent claimants before the Commissioner of Social Security." *Id.* § 401(a)(1).

31. *See, e.g.*, Jeralds v. Richardson, 445 F.2d 36, 39 (7th Cir. 1971); Lonzollo v. Weinberger, 387 F. Supp. 892, 893 (N.D. Ill. 1974), *rev'd. on other grounds*, 534 F.2d 712 (7th Cir. 1976).

32. 42 U.S.C. § 406(b)(1)(A). In order for a claimant's attorney to recover her fees, she must petition the Commissioner in writing to recover fees and obtain approval for the amount of reasonable fees to be collected. *See id.* § 406(a)(2)(A).

33. *Id.* § 406(b)(1)(A).

34. *See id.* § 406(a)(1); *see also* Brown v. Sullivan, 917 F.2d 189, 191 (5th Cir. 1990) (concluding that a court has authority to award attorney's fees only for court-related services provided by an attorney); Pittman v. Sullivan, 911 F.2d 42, 46

A distinguishing feature of attorney's fees awards under this section of the Social Security Act is that the fee award comes out of a claimant's past-due benefits award. Consequently, this section is not a fee-shifting provision because it does not authorize a fee award directly from the governmental agency over which the claimant prevails.[35] In addition, § 406(b) limits the amount of fees recoverable by a claimant's attorney to a maximum of twenty-five percent of the claimant's past-due benefits award.[36] This section balances an attorney's right to collect his fees against a claimant's rights to retain her past-due Social Security benefits. By enacting this twenty-five-percent cap, Congress sought to encourage effective legal representation by providing a successful claimant's attorney some compensation for his services, while ensuring that a claimant would not be deprived of much of the Social Security benefits award to which she was entitled.[37]

IV. Collecting Attorney's Fees Under the Equal Access to Justice Act

Before the EAJA was enacted in 1981,[38] a successful claimant was limited to recovering only court costs from the federal government when the claimant litigated a suit against the government or one of its agencies.[39] The disallowance of attorney's fees collection in this manner adhered to the American Rule, which provides that each party in a litigation proceeding is responsible for its own attorney's fees and other costs incurred during the litigation.[40] The purpose of the American Rule is to ensure that a person will not be discouraged from exercising his right to defend or initiate a lawsuit, because under the rule a

(8th Cir.), *cert. denied*, 499 U.S. 919 (1990) (concluding that the Social Security Act mandates that the Secretary is exclusively responsible for awarding attorney's fees for services provided at the administrative level). In addition, fee awards made by the Secretary for an attorney's services at the administrative level are not subject to judicial review. *See Pittman*, 911 F.2d at 46.

35. *See* Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct*, 55 LA. L. REV. 217, 251 (1994).

36. *See* 42 U.S.C. § 406(b).

37. *See, e.g.*, Watford v. Heckler, 765 F.2d 1562, 1566 (11th Cir.), *cert. denied*, 473 U.S. 906 (1985); Dawson v. Finch, 425 F.2d 1192, 1195 (5th Cir.), *cert. denied*, 400 U.S. 830 (1970).

38. *See* Pub. L. 96-481, tit. II, § 204(a), (c), 94 Stat. 2327, 2329 (1980).

39. *See* Pub. L. 89-507, 80 Stat. 308 (1966).

40. *See* James R. Cromwell, *A Substantial Paradox: Attorney's Fees Under the Equal Access to Justice Act in Social Security Appeals*, 7 U. ARK. LITTLE ROCK L.J. 355, 357 (1984).

losing party is not penalized by being required to pay attorney's fees to the winning party.[41] However, Congress recognized that the American Rule actually discourages the initiation of litigation against the federal government.[42] Congress noted that because government regulation has steadily increased and because the government has greater resources than individual claimants, it can coerce compliance with its determinations without challenge from individuals.[43]

As a result of the above predicament, Congress enacted the EAJA in 1981.[44] By promulgating the EAJA, Congress sought to give those persons, for whom cost may be a deterrent to challenging government determinations, an incentive to litigate against the government.[45] Moreover, the EAJA's fee-shifting provision was implemented in order to curb "excessive regulation and the unreasonable exercise of Government authority."[46] Not only was the EAJA a significant statutory exception to the American Rule, but it also acted as a partial waiver of federal sovereign immunity.[47] In general, the EAJA allows a prevailing party, in an adversarial adjudication against the federal government, to collect attorney's fees and related expenses

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41. *See* H.R. REP. NO. 96-1418, at 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4988.

42. *See id.*

43. *See id.* More specifically, Congress was concerned that

> For many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process. When the cost of contesting a Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it.

Id.

44. The EAJA is codified in both 5 U.S.C. § 504 (1994) and 28 U.S.C. § 2412 (1994). The date of enactment of the EAJA was October 1, 1981. Pub. L. 96-481, 94 Stat. 2325 (1980).

45. *See* H.R. REP. NO. 96-1418, at 9, *reprinted in* 1980 U.S.C.C.A.N. at 4988. Congress explained that, "providing an award of fees to a prevailing party represents one way to improve citizen access to courts and administrative proceedings. When there is an opportunity to recover costs, a party does not have to choose between acquiescing to an unreasonable government order or prevailing to his financial detriment." *Id.* at 12, *reprinted in* 1980 U.S.C.C.A.N. at 4991.

46. *Id.* at 12, *reprinted in* 1980 U.S.C.C.A.N. at 4991.

47. *See* Louise L. Hill, *An Analysis and Explanation of the Equal Access to Justice Act*, 19 ARIZ. ST. L.J. 229, 230 (1987). More specifically, Congress provided that the EAJA would ensure that the "United States will be subject to the common law and statutory exceptions to the American Rule regarding attorney fees." H.R. REP. NO. 96-1418, at 6, *reprinted in* 1980 U.S.C.C.A.N. at 4984. The language of the statute makes this intent explicit by providing that "the United States shall be liable for such fees and expenses to the same extent that any party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. § 2412(b).

unless the government's action was "substantially justified or special circumstances would make an award unjust."[48] More specifically, the EAJA provides that the particular agency over which the party prevails is responsible for paying the award of attorney's fees.[49]

V. The Interaction Between the Social Security Act and the EAJA

At first blush, it may appear that a claimant who successfully litigates against the Administration only could recover her attorney's fees either under the Social Security Act or under the EAJA. In fact, after the EAJA was enacted, the Administration argued that a successful claimant could not collect attorney's fees under the EAJA because she could already recover attorney's fees under the Social Security Act.[50] However, a fundamental difference exists between these two statutory fee award provisions, which makes it possible for a successful claimant to collect his attorney's fees under both. Under the Social Security Act, the attorney's fee award is taken out of the claimant's award of past-due benefits,[51] whereas under the EAJA, the fee award comes directly from the government agency.[52] Consequently, the EAJA is considered a "fee-shifting" statute, unlike the Social Security Act, which is why the EAJA award may supplement the award provided for under the Social Security Act.[53]

As early as 1980, when Congress was considering the legislation which spawned the EAJA, it clarified that the only limitation on the applicability of the EAJA was to be that it was not "intended to replace or supersede any existing *fee shifting statutes* . . . . It is intended to apply only to cases [other than tort cases] where fee awards against

48. H.R. REP. No. 96-1418, at 9, *reprinted in* 1980 U.S.C.C.A.N. at 4987-88.

49. *See* 28 U.S.C. § 2412(d)(4).

50. *See* Cromwell, *supra* note 40, at 366.

51. *See* 42 U.S.C. § 406(b)(1)(A). "[T]he Commissioner of Social Security may . . . certify the amount of such fee for payment to such attorney *out of, and not in addition to*, the amount of such past-due benefits." *Id.* (emphasis added).

52. *See* 28 U.S.C. § 2412(d)(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." *Id.* (emphasis added).

53. *See* H.R. REP. No. 99-120, at 20 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 138; H.R. REP. No. 96-1418, at 18, *reprinted in* 1980 U.S.C.C.A.N. at 4997; Cromwell, *supra* note 40, at 366; Hill, *supra* note 47, at 250; Sisk, *supra* note 35, at 251.

the *government* are not already authorized."[54] In fact, it is this specific concern which the language of the statute now addresses.[55] And courts considering this issue have similarly recognized that the Social Security Act is not a fee-shifting statute where fees are collected from the government agency itself that "otherwise specifically provides" for attorney's fees from the government, so that the award of attorney's fees in an action against the Administration may be made under both provisions.[56]

As a result of the controversy surrounding whether attorney's fees could be awarded under both statutory provisions, Congress clarified its intent and specifically provided that

> Section 206(b) of the Social Security Act 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.[57]

In the same instance that it authorized a fee award under the EAJA notwithstanding an award of attorney's fees under the Social Security Act, Congress addressed a resultant concern. It specifically provided that an award under both provisions would not result in double fee recovery by a successful claimant's attorney:

> It is the Committee's intent that when fee awards are made in Social Security or SSI cases under the EAJA, and provision is also allowed under the Social Security Act for recovery of attorney fees of up to 25% of the claimant's benefits, that the EAJA award should be used as a set off to reduce the payment which the claimant would otherwise owe the attorney.[58]

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54. H.R. REP. No. 96-1418, at 18, *reprinted in* 1980 U.S.C.C.A.N. at 4997 (emphasis added).

55. *See* 28 U.S.C. § 2412(d)(1)(A). Section 2412(d)(1)(A) provides "[e]xcept as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses." *Id.* The "except as otherwise specifically provided" language does not prohibit an award under the EAJA in addition to an award under the Social Security Act. It only prohibits the EAJA from supplanting a previously applicable fee-shifting statute. *See* Wolverston v. Heckler, 726 F.2d 580, 582 (9th Cir. 1984).

56. *See, e.g.*, Watford v. Heckler, 765 F.2d 1562, 1566 (11th Cir.), *cert. denied*, 473 U.S. 906 (1985); *Wolverston*, 726 F.2d at 582.

57. Equal Access to Justice Act, Extension and Amendment, Pub. L. No. 99-80, § 3(2)(b), 99 Stat. 183, 186 (1985).

58. H.R. REP. No. 99-120, at 20, *reprinted in* 1985 U.S.C.C.A.N. at 148. Congress also provided that the "courts and the Secretary would be expected to scrutinize such awards to ensure that the attorney is reducing the liability of the claimant so that the claimant is the primary beneficiary of the EAJA award." *Id.*

Courts have recognized their duty to ensure that attorneys are not recognizing a double recovery from fee awards under both statutes. They have held that because the fee award under the Social Security Act comes from the claimant's recovery of past-due benefits, whereas under the EAJA the fee award comes from the government agency directly, the attorney must remit the smaller award back to the claimant to reimburse her for expenses which were taken out of her past-due benefits award.[59]

Procedurally, the courts have made application to collect fees under both provisions relatively simple. In fact, even before the amount of a claimant's benefits are calculated, the federal district court may review the Social Security Act and EAJA fee applications simultaneously and determine the extent of both awards.[60]

VI. The Procedural Requirements of the EAJA

A. Original Enactment, Subsequent Extension, and the Purpose and Effect of the EAJA

The EAJA was first enacted and took effect on October 1, 1981.[61] However, as originally enacted, the EAJA contained a sunset provision which caused it to expire on September 30, 1984.[62] Congress, obviously pleased with the results which the EAJA provided during its test period, reenacted it in 1985.[63] The reenacted version applied the new version of the EAJA retroactively to those cases which took place between the time the old EAJA expired and the new EAJA was made effective.[64] The reenacted EAJA also made "clarifying technical and substantive amendments" to the EAJA while making it permanent as well.[65]

Although this note primarily focuses on 28 U.S.C. § 2412, the EAJA is also codified at 5 U.S.C. § 504. In short, both of these sections

59. *E.g.*, Russell v. Sullivan, 930 F.2d 1443, 1446 (9th Cir. 1991); Wells v. Bowen, 855 F.2d 37, 42 (2d Cir. 1988).

60. *See* Watford v. Heckler, 765 F.2d at 1562.

61. Small Business Export Expansion Act of 1980, Pub. L. No. 96-481, 94 Stat. 2325 (1980).

62. Pub. L. No. 96-481, § 203(c), 94 Stat. 2325, 2327 (1980); *id.* § 204(c), 94 Stat. at 2329.

63. Equal Access to Justice Act, Extension and Amendment, Pub. L. No. 99-80, § 6(b)(2), 99 Stat. 186, 186 (1985).

64. *See* H.R. REP. NO. 99-100, at 7 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 136.

65. *Id.* at 4, *reprinted in* 1985 U.S.C.C.A.N. at 132.

make an attorney's fee award possible only in adversarial adjudications between the claimant and the government.[66] The distinguishing feature between the two sections is that pursuant to § 2412, fee awards are made only for those services an attorney provides in preparing for and litigating a civil court action against the government.[67] On the other hand, § 504 provides for a possible fee award for those services rendered by an attorney during an adversarial administrative proceeding.[68]

At a glance, it may appear that any claimant who is involved in a Social Security administrative proceeding may be entitled to an award of attorney's fees under § 504. This section, however, does not provide for recovery of attorney's fees in all administrative proceedings, but only those administrative proceedings which are "*adversary* adjudication[s]."[69] Because the EAJA does not provide for attorney's fees awards for nonadversarial administrative proceedings, most administrative hearings before the Administration will not afford a claimant an opportunity to recover an award of attorney's fees.[70] As one commentator observed, "Even when the agency proceedings are the result of a court order of remand, no fee may be awarded for time spent by the claimant's attorney at the administrative hearing ordered by the court."[71]

This "adversarial adjudication" requirement severely restricts the award of attorney's fees in administrative level proceedings. However, Congress provided that an administrative proceeding would fall within the scope of the § 504 adversary adjudication requirement if, at some point during the administrative proceeding, the Administration takes a position and is represented by counsel.[72] Unsurprisingly, it appears from the rules delineating the requirements for filing an original benefits application and contesting the adverse determination of a claimant's application that the Administration will

66. *See* 5 U.S.C. § 504(a)(1) (1994); 28 U.S.C. § 2412(b) (1994). 5 U.S.C. § 504 provides that an award of attorney's fees is possible when the agency conducts an "adversary adjudication." 5 U.S.C. § 504(a)(1). Section 2412(b) provides for the possibility of a fee award when the claimant is involved in "any civil action brought by or against the United States or any agency or any official of the United States." 28 U.S.C. § 2412(b).

67. *See* 28 U.S.C. § 2412(b).

68. *See* 5 U.S.C. § 504(a)(1).

69. *Id.* (emphasis added).

70. *See* Cromwell, *supra* note 40, at 364.

71. *Id.* at 364-65 (citations omitted).

72. *See* H.R. REP. NO. 99-120, at 10 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 138.

rarely, if ever, take an adversarial stance during the administrative proceeding.[73] Consequently, with respect to those persons who bring claims against the Administration, it appears that most attorney's fees awards will be made pursuant to 28 U.S.C. § 2412, for services rendered during the civil litigation. As a result, from this point, this note will focus on the requirements of 28 U.S.C. § 2412.

As previously mentioned, Congress's intent in enacting the EAJA was to "reduce the deterrents and disparity by entitling certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States unless the [g]overnment action was substantially justified."[74] In addition to providing an incentive to increase the number of challenges to questionable government action, Congress also enacted the EAJA in order to deter federal agencies from taking frivolous positions and making frivolous determinations.[75] Furthermore, courts have noted that "the prevailing party's entitlement to an award under the EAJA *is presumed*, unless the government's position in the challenged conduct and in the litigation itself is 'substantially justified.'"[76] The language of the statute creates this presumption and prohibits an award of attorney's fees to a claimant who meets all of the other statutory requirements only when the "court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."[77] Of course, the statute also prohibits an award of attorney's fees to a party "for any portion of the litigation in which the party has unreasonably protracted the proceedings."[78]

By enacting the EAJA, Congress sought to remove those financial barriers that discouraged persons from pursuing claims against

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73. *See infra* notes 11-28 and accompanying text. More specifically, the Administration has noted that "[i]n making a determination or decision in your case, we conduct the administrative review process in an informal nonadversary manner." 20 C.F.R. § 404.900(b) (1996).

74. H.R. REP. No. 96-1418, at 6 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4984.

75. *See* Miles v. Bowen, 632 F. Supp. 282, 283 (M.D. Ala. 1986).

76. Clark v. Busey, 959 F.2d 808, 810 (9th Cir. 1992) (emphasis added; citations omitted).

77. 28 U.S.C. § 2412(d)(1)(A) (1994). At least one commentator has questioned the application of the "substantially justified" standard in EAJA cases when a successful claimant meets all of the other statutory requirements. "[T]he paradox posed by the application of the Equal Access to Justice Act to successful appeals from administrative adjudication: How can substantial justification be found for a government position that, by definition, was not supported by substantial evidence presented to the Agency?" Cromwell, *supra* note 40, at 384.

78. 28 U.S.C. § 2412(d)(2)(D).

the government and federal agencies by allowing for the possible recovery of attorney's fees arising from successful civil litigation against the government. The EAJA also sought to deter frivolous positions and decisions of the government and its agencies. Although a presumption exists which favors an award of attorney's fees to claimants successfully litigating against the government, two obstacles remain to a successful claimant's recovery of attorney's fees. First, a claimant will be denied a fee award if the government's position was "substantially justified"[79] or if "special circumstances make an award unjust."[80] And, secondly, so many intricate statutory requirements exist, of which the Supreme Court has clarified the meanings, that a successful claimant must jump flawlessly through numerous hoops before he will be awarded attorney's fees. In addition, even after the Supreme Court has interpreted these EAJA timing requirements, courts have debated over whether or not to apply these Supreme Court interpretive timing requirement decisions retroactively.

B. The Government's "Position" as "Substantially Justified"

1. WHICH GOVERNMENT "POSITION"

The first issue to be resolved in determining whether the government was sufficiently "substantially justified" in its position to prohibit the award of attorney's fees to a successful claimant is which "position" of the government or federal agency should be evaluated. Before the 1985 reenactment amendment of the EAJA, determining which "position" of the government to consider was difficult. Due to the lack of clarity in defining this requirement, the courts took several different approaches when interpreting it.

Before 1985, three predominate views existed as to what constituted the government's position: (1) the agency determination with respect to the underlying conflict giving rise to the appeal;[81] (2) the litigation position of the government;[82] or (3) the position of the agency both before and during the litigation.[83] Two primary flaws were noted with respect to those courts which only considered the position of the government as its litigation position. First, commentators and Congress both recognized that one rationale for enacting the

79. *Id.* § 2412(d)(1)(A).
80. *Id.*
81. *See* Cromwell, *supra* note 40, at 379.
82. *See id.*
83. *See id.*

EAJA was to deter frivolous and unjustified agency action. Consequently, if a court determined the position of the agency to be only its litigation position, then that "would remove the very incentive for careful agency action that Congress hoped to create in 1980."[84] A second concern of Congress was that if a court only considered the government's litigation position and not its action or inaction which formed the basis of the litigation, then if the government either settled or conceded error, such actions would be reasonable litigation positions and therefore would be substantially justified so as to preclude the claimant from recovering an award of attorney's fees resulting from the civil litigation.[85]

As a result of the split among the courts in interpreting this requirement and in order to effectuate the purpose of the EAJA, Congress clarified this requirement in the 1985 EAJA amendments.[86] The EAJA currently provides that the "position of the United States" constitutes not only "the position taken by the United States in the civil action," but also "the action or failure to act by the agency upon which the civil action is based."[87]

2. "SUBSTANTIAL JUSTIFICATION"

The EAJA provides that if the government's position in the action was "substantially justified," then a successful claimant who has met all of the other statutory requirements in order to recover attorney's fees resulting from the civil litigation against the government still may be precluded from recovering those fees. In short, if the government's underlying substantive position and its litigation position are "substantially justified," then an otherwise successful claimant may be prohibited from recovering any attorney's fees from the agency over which she prevails.[88] The statute does not state which party has the burden of proof in showing that the agency's position

84. H.R. REP. NO. 99-120, at 12 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 141 (citation omitted). Similarly, "[i]f reasonable justification is determined by the litigation position of the Agency, however, there is no deterrent for unreasonable agency action." Cromwell, *supra* note 40, at 381.

85. *See* H.R. REP. NO. 99-120, at 13, *reprinted in* 1985 U.S.C.C.A.N. at 141.

86. 28 U.S.C. § 2412(d)(2)(D) (1994). In fact, Congress noted that its original intent was not to limit the "position" requirement to the litigation position; but even when the EAJA was originally written, it considered this requirement to also include the underlying agency action which spurred the litigation. H.R. REP. NO. 99-120, at 11-12, *reprinted in* 1985 U.S.C.C.A.N. at 141.

87. 28 U.S.C. § 2412(d)(2)(D).

88. *See* 28 U.S.C. § 2412(d)(2)(D); *id.* § 2412(d)(1)(A).

was or was not substantially justified. However, the courts have determined that the government agency and not the individual claimant has the burden of proving a substantially justified position.[89]

The issue debated by the courts regarding this requirement was what criteria a court should consider in determining if the government agency's underlying and litigation positions were "substantially justified" so as to preclude the recovery of attorney's fees by a successful claimant. The language of the statute itself gives no guidance as to what standard determines substantial justification of the agency's position.[90] At the time the EAJA was enacted, the only insight for interpreting this term came from a 1980 House Judiciary Committee report.[91] In that report, Congress provided that the appropriate standard to be applied when determining substantial justification in this context is a "reasonableness" standard.[92] The report further provided that no fee award was to be made to a claimant if the governmental agency could show that its position had a reasonable basis in *both* law and fact.[93]

Despite these congressional words of guidance, courts, between the time the EAJA was enacted and the time it was reenacted in 1985, applied different standards in the substantial justification analysis. One commentator noted that "[c]ourts frequently have required that the government show reasonableness in both law and fact. It has also been suggested that the test is whether there is a reasonable basis in law *or* fact for the government position."[94]

During this time period, three different standards existed which courts used to determine substantial justification.[95] Some courts relied

89. *E.g.*, Welter v. Sullivan, 941 F.2d 674, 676 (8th Cir. 1991); Green v. Bowen, 877 F.2d 204, 207 (2d Cir. 1989); Jackson v. Bowen, 807 F.2d 127, 128 (8th Cir. 1986) (per curium).

90. The EAJA only provides that a claimant, if she meets all of the other statutory requirements, will be precluded from fee recovery if the "position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A). However, in other sections of the statute, Congress found that it was necessary to provide definitions of other ambiguous terms. For example, Congress defined "fees and other expenses" at 28 U.S.C. § 2412(d)(2)(A); "party" at 28 U.S.C. § 2412(d)(2)(B); "position of the United States" at 28 U.S.C. § 2412(d)(2)(D); "final judgment" at 28 U.S.C. § 2412(d)(2)(G); and "prevailing party" at 28 U.S.C. § 2412 (d)(2)(H).

91. H.R. REP. No. 96-1418, at 10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4989.

92. *See id.*

93. *See id.*

94. Cromwell, *supra* note 40, at 389 n.217 (citations omitted).

95. *See id.* at 383.

on the "fees as a matter of course" determination.[96] These courts determined that a presumption that the agency position was not substantially justified existed when the appeal was resolved in favor of the claimant on a motion for summary judgment.[97] Other courts based their decisions on the "no evidence standard."[98] Under this test, courts would look to see if "any evidence was presented at the administrative hearing that might have supported the Agency on the appeal of the denial of a claim."[99] These courts determined that an agency was without substantial justification if there was no evidence, or "essentially no evidence," upon which the agency based its claim.[100] And finally, some courts used the "reasonableness" standard.[101] These decisions noted the inability of the agency to justify the legal basis for its action.[102] However, a reasonableness test was applied "not only to the legal standard advocated by the Agency, but to the quantum of evidence in the agency record."[103]

The proper standard by which to determine substantial justification became even more elusive as a result of the 1985 reenactment of the EAJA. In fact, the House Judiciary Committee report submitted with this reenactment legislation advocated a standard which squarely contradicted the "reasonableness" standard preferred by the House Committee only five years earlier.[104] The 1985 Committee report provided that "[s]everal courts have held correctly that 'substantial justification' means more than merely reasonable. Because in 1980 Congress rejected a standard of 'reasonably justified' in favor of 'substantially justified,' the test must be more than mere reasonableness."[105] Nevertheless, Congress seemed to recognize the problems associated with the "more than mere reasonableness" standard that

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96. *See id.* at 384.
97. *See id.*
98. *See id.* at 385.
99. *Id.*
100. *See id.*
101. *See id.* at 389.
102. *See id.*
103. *Id.*
104. *See generally* H.R. REP. NO. 99-120 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132; *see also* H.R. REP. NO. 96-1418, at 10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4989.
105. H.R. REP. NO. 99-120, at 9-10, *reprinted in* 1985 U.S.C.C.A.N. at 138. The House Judiciary Committee report also showed Congress's disapproval with situations where courts determined that an

> administrative decision may be substantially justified under the Act even if it must be reversed because it was arbitrary and capricious or was not supported by substantial evidence. Agency action found to

the "determination of what is 'substantially justified' will be decided on a case-by-case basis due to the wide variety of factual contexts and legal issues which make up government disputes."[106]

Finally, after years of debate, in *Pierce v. Underwood*,[107] the Supreme Court resolved the meaning of "substantially justified." The Court posited that the primary difficulty which faced courts in interpreting this standard was rooted in the two possible meanings of "substantial."[108] One meaning focused on a position being justified to a high degree, while the other interpretation focused on a position being justified "in substance or in the main."[109] The Court concluded that the correct interpretation, in light of how the term was used in the EAJA, focused on the government's position being justified in the main.[110] The Court provided that the appropriate test was whether the government's position was "justified to a degree that could satisfy a reasonable person. That is no different from the 'reasonable basis both in law and fact' formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue."[111] Consequently, the *Pierce* holding supported the "reasonableness" standard articulated by the 1980 House Judiciary Committee.[112]

The *Pierce* Court's holding finally provided some concreteness to the "substantially justified" requirement. However, it is still unclear which factors actually determine whether the government's position has a reasonable basis in law and fact. In general, the 1980 House

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be arbitrary and capricious or unsupported by substantial evidence is virtually certain not to have been substantially justified under the Act.

Id.

106. *Id.*

107. 487 U.S. 552 (1988).

108. *See id.* at 564.

109. *Id.*

110. *See id.* at 564-65.

111. *Id.* at 565. The Court addressed some of the concerns evidenced in the 1985 House Judiciary Committee Report, which questioned the softness of such a reasonableness test. The *Pierce* Court provided that its definition of substantial justification meant "more than merely undeserving of sanctions for frivolousness." *Id.* at 566.

112. *See id.* at 567. The Court provided four reasons why the 1985 Committee report's "more than mere reasonableness" standard was not controlling in its interpretation of the meaning of "substantially justified": (1) the courts have the duty to interpret the meaning of a statute; (2) the 1985 Committee did not draft the language of the statute, it was merely reenacting the provision; (3) before 1985, there was "almost uniform appellate interpretation [12 Circuits out of 13] [which] contradicted the interpretation endorsed in the [1985] Committee Report"; and (4) the 1985 House Report contradicted the 1980 House Report from which the appellate courts drew their interpretations. *Id.* at 566-67.

report provided that certain things may indicate when the government may not have been "substantially justified" in its position, including: (1) if there was a judgment on the pleadings; (2) a directed verdict; or (3) a prior suit on the same claim which was dismissed.[113] However, the report specifically notes that a government agency's loss of a case does not automatically imply that its position was not "substantially justified."[114] Furthermore, the government does not have to show that "its decision to litigate was based on a substantial probability of prevailing."[115]

In addition, the *Pierce* Court implied which factors may be relevant in conducting a substantial justification analysis. The parties in *Pierce* both advocated that "courts should rely on 'objective indicia' such as the terms of a settlement agreement, the stage in the proceedings at which the merits were decided, and the views of other courts on the merits."[116] The *Pierce* Court noted that although such factors were not determinative in that specific case, "[w]e do not disagree that objective indicia can be relevant."[117]

As demonstrated by the debate concerning the EAJA's substantial justification requirement, the Act's requirements are difficult to determine, as conflicting views exist among the courts, between the courts and Congress, and between different congressional committees from year to year. Recently, additional EAJA requirements have been interpreted by the Supreme Court. The dilemma currently confronting the lower federal courts is whether to apply these interpretive timing requirement decisions retroactively, when the retroactive application of these decisions results in some classes of claimants being totally precluded from recovering attorney's fees.

113. *See* H.R. REP. No. 96-1418, at 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4989-90.

114. *See id.* at 10-11, *reprinted in* 1980 U.S.C.C.A.N. at 4989-90.

115. *Id.* at 11, *reprinted in* 1980 U.S.C.A.A.N. at 4990.

116. *Id.*

117. *Pierce*, 487 U.S. at 568. The parties in *Pierce* advocated a decision based on objective indicia in order for a court to "avoid the time-consuming and possibly inexact process of assessing the strength of the Government's position." *Id.*

C. Pre-1993 Interpretations of the EAJA Timing Requirements: "Prevailing Party" and "Final Judgment"

1. THE SUPREME COURT'S INTERPRETATION OF THE EAJA REQUIREMENTS

The EAJA provides that to be awarded attorney's fees, a party litigating against the government must be a "prevailing party."[118] In addition, the EAJA mandates that "[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."[119] Although both "prevailing party"[120] and "final judgment"[121] are defined in the EAJA, some dispute existed as to when a party actually became a "prevailing party" and what specifically constituted a "final judgment."

In *Sullivan v. Hudson*,[122] the Supreme Court clarified this "prevailing party" requirement. The *Hudson* Court concluded that where a "[district] court's remand to the agency for further administrative proceedings does not necessarily dictate the receipt of benefits, the claimant will not normally attain 'prevailing party' status within the meaning of § 2412(d)(1)(A) until after the result of the administrative proceeding is known."[123] Consequently, under *Hudson*, a Social Security claimant did not obtain "prevailing party" status when a district court remanded her action for further proceedings to determine her receipt of benefits.[124] Rather, the claimant had to obtain a favorable

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118. *See* 28 U.S.C. § 2412(d)(1)(A) (1994).

119. *Id.* § 2412(d)(1)(B).

120. 28 U.S.C. § 2412(d)(2)(H) defines "prevailing party" only in the case of an eminent domain proceeding.

121. 28 U.S.C. § 2412(d)(2)(G) defines "final judgment" as "a judgment that is final and not appealable, and includes an order of settlement." *Id.* More specifically, a final judgment occurs where a final judgment has been entered and the time for appealing that judgment has expired. According to 28 U.S.C. § 2412(d)(1)(B) then, the fee application must be submitted within 30 days after the final judgment's appeal period has run. *Id.*

122. 490 U.S. 877 (1989).

123. *Id.* at 886. The *Hudson* Court based its decision on the premise that to attain "prevailing party" status, a claimant "must achieve some of the benefit sought in bringing the action." *Id.* at 887.

124. *See id.* One commentator, agreeing with the decision and reasoning of *Hudson* noted, "[A]n interim procedural victory is insufficient in a lawsuit brought for the purpose of obtaining substantive relief from the government in the form of an entitlement, such as restoration of employment or payment of a benefit." Sisk, *supra* note 35, at 271. Sisk further explained that "[w]hen the goal is substantive in nature, any remand that does not effectively dictate the receipt of the claimed benefit cannot confer prevailing party status 'since [the claimant's] rights and liabilities and those of the government have not yet been determined.'" *Id.* at 272 (quoting John J. Sullivan, Note, *The Equal Access to Justice Act in the Federal Courts*, 84 COLUM. L. REV. 1089, 1100 (1984)).

adjudication on the administrative remand to be considered a "prevailing party." The *Hudson* Court also noted that with respect to the "final judgment" requirement provided in 28 U.S.C. § 2412(d)(1)(B), where the claimant prevailed on administrative remand, no "final judgment" would be entered until the administrative remand proceedings concluded.[125]

Two years later in *Melkonyan v. Sullivan*,[126] the Court clarified the EAJA's "final judgment" requirement. First, the *Melkonyan* Court noted that under the EAJA, a "final judgment" could be rendered only by a court of law and not by an administrative agency.[127] Consequently, the Court held that a "final judgment" for EAJA purposes consisted of a "judgment rendered by a court that terminates the civil action for which EAJA fees may be received. The 30-day EAJA clock begins to run after the time to appeal that 'final judgment' has expired."[128]

Despite this clarification, the *Melkonyan* Court's holding was not determinative in the abstract. In fact, the Court noted that the effect of its holding depended upon whether the district court entered a remand pursuant to sentence four of 42 U.S.C. § 405(g) or according to sentence six of that section.[129] For the first time, the Court noted that only these two types of district court remands back to the administrative agency are available. The sentence four remand occurs when a court enters a judgment affirming, modifying, or reversing the Secretary's decision along with an order of remand.[130] In contrast, when a court issues a sentence six remand, it does not make a substantive ruling on the correctness of the Secretary's decision but remands only in light of new, additional evidence which should be considered by the agency or if the Secretary requests remand before filing her answer.[131] Consequently, the application filing period for EAJA attor-

125. *See* Sullivan v. Hudson, 490 U.S. at 887.

126. 501 U.S. 89 (1991).

127. *See id.* at 94-95. The Court explained that "[c]learly Congress knew how to distinguish between a 'final judgment in an action' and a 'final disposition in an adversary adjudication' [found in 5 U.S.C. § 504(a)(2) (1994)]. One is rendered by a court; the other includes adjudication by an administrative agency." *Id.* at 95.

128. *Id.* at 96.

129. *See id.* at 97-98.

130. *See id.* at 99-100. Sentence four of 42 U.S.C. § 405(g) provides, "The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g).

131. *See Melkonyan*, 501 U.S. at 99-100. Sentence six of 42 U.S.C. § 405(g) provides:

ney's fees begins at different times, depending upon which type of remand the district court issues. The Court concluded and clarified:

> In sentence four cases, the filing period begins after the final judgment ("affirming, modifying, or reversing") is entered by the court and the appeal period has run, so that the judgment is no longer appealable. In sentence six cases, the filing period does not begin until after the postremand proceedings are completed, the Secretary returns to court, the court enters a final judgment, and the appeal period runs.[132]

The practical effect of this decision makes the final judgment under a sentence four remand come much quicker than a final judgment under a sentence six remand. Under sentence six, a final judgment is not entered until after the claimant goes through the administrative remand proceedings, wins, and the district court enters a final judgment upon the Secretary's remanded findings. Under a sentence four remand, the final judgment occurs at the time the district court enters its substantive decision along with its order of remand back to the agency.

The ramifications of reading the *Hudson* and *Melkonyan* decisions together are severe for a sentence four remand claimant. When read together, a sentence four remand claimant would rarely, if ever, be permitted to recover his EAJA attorney's fees. For example, if a claimant filed an application for attorney's fees after he was a "prevailing party" according to *Hudson*, after he was successful on the remanded administrative proceedings, he would be precluded from recovering fees because he did not file his fee application within thirty days after the district court's final judgment, order of remand per

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> The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commission of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based.

42 U.S.C. § 405(g).

132. *Melkonyan*, 501 U.S. at 102.

Melkonyan, became unappealable.[133] On the other hand, if the claimant filed her fee application within the thirty days of a *Melkonyan* final judgment, she would still be precluded from an award of attorney's fees if she had not yet obtained prevailing party status as dictated by *Hudson*. These decisions effectively precluded an entire class of potentially successful Social Security claimants from recovering any EAJA attorney's fees resulting from civil litigation against the Administration. After the *Melkonyan* decision, it was this problem which the lower federal courts confronted.

2. THE CIRCUIT SPLIT AMONG THE LOWER FEDERAL COURTS IN APPLYING *MELKONYAN* RETROACTIVELY

After the Supreme Court decided *Hudson* and *Melkonyan*, the federal district courts were confronted with the problem of reconciling these two decisions. Stated succinctly in *Lopez v. Sullivan*, the court noted that "[s]ince the Supreme Court issued its *Melkonyan v. Sullivan* decision on June 10, 1991, district courts throughout the country have been grappling with the question of whether they may retain jurisdiction for the purpose of making EAJA awards in social security cases that they remanded prior to *Melkonyan*."[134] Again, the primary problem is that when an EAJA attorney's fee application is untimely because it was filed after the appropriate deadline, the district court loses its jurisdiction to review the fee application.[135] These district court post-*Melkonyan* cases all involved sentence four remand claimants who were waiting to file their EAJA attorney's fee petitions until they became prevailing parties according to the *Hudson* standard. The *Melkonyan* case was decided while these claimant's proceedings on administrative remand were still pending. Noting the effects of this decision, some federal district courts refused to apply *Melkonyan* retroactively, while others did apply the decision retroactively so as to preclude those claimants from recovering their attorney's fees.

The district courts in *Lopez v. Sullivan* and *Thomas v. Sullivan*[136] both held that they would not apply *Melkonyan* retroactively to the

133. *See* Lopez v. Sullivan, 780 F. Supp. 496, 504 (N.D. Ill. 1991). The claimant only could recover fees if he became successful on the administrative remand proceedings and filed his fee application within 30 days after the district court's remand order became unappealable. However, it is highly unlikely that the remanded administrative proceedings would occur so quickly. *See id.*

134. *Id.* at 498.

135. *See id.*

136. 785 F. Supp. 788 (C.D. Ill. 1992).

Social Security claimants before them.[137] In short, the *Thomas* court based its decision not to apply *Melkonyan* retroactively on the premise that "*Melkonyan* drastically changed the timing of the EAJA fee filing in this circuit and to apply it retroactively would produce substantial injustice."[138] The *Thomas* court explicitly relied on the *Lopez* court's reasoning in not applying *Melkonyan* retroactively.[139]

The *Lopez* court's decision not to apply *Melkonyan* retroactively was based on the Supreme Court's holding in *Chevron Oil Co. v. Huson*,[140] which delineated three factors a court must consider when deciding if a holding should be applied retroactively.[141] These three factors include: (1) if the decision established a "new principal of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;"[142] (2) if when looking at the history, purpose, and effect of the new rule, the retroactive application of it will either promote or retard its operation;[143] and (3) if retroactive application will result in substantial inequitable results.[144]

The *Lopez* court found that: (1) *Melkonyan* overruled clear past precedent; (2) nonretroactive application would not inhibit the *Melkonyan* principle, whereas retroactive application would undermine the purpose of the EAJA; and (3) applying *Melkonyan* retroactively would cause substantial injustice because under the then prevailing standard, the claimant could not file a fee application until she had met the *Hudson* standard.[145] The court also emphasized that if *Melkonyan* were applied retroactively, "virtually no social security claimant who succeeded after a pre-*Melkonyan* remand from the district court would be able to file a timely fee petition."[146] The court also noted that in light of the purpose of the EAJA, Congress could not have intended that such an inequitable result would accrue to claimants potentially entitled to collect their attorney's fees from the Administration.[147]

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137. *See Lopez*, 780 F. Supp. at 503-04; *Thomas*, 785 F. Supp. at 793.
138. *Thomas*, 785 F. Supp. at 792.
139. *See id.*
140. 404 U.S. 97 (1971).
141. *See Lopez*, 780 F. Supp. at 503.
142. *Chevron*, 404 U.S. at 106.
143. *See id.* at 107.
144. *See id.*
145. *See Lopez*, 780 F. Supp. at 503.
146. Butts v. Bowen, 775 F. Supp. 1167 (N.D. Ill. 1991).
147. *See Lopez*, 780 F. Supp. at 504.

At the other end of the spectrum, although the courts in *Fergason v. Sullivan*[148] and *Harpster v. Sullivan*[149] recognized the friction caused by reading the *Hudson* and *Melkonyan* decisions together,[150] both courts applied *Melkonyan* retroactively to the cases before them.[151] The *Fergason* court refused to apply the *Chevron* analysis, which was the basis for the nonretroactive application in the other federal courts, and instead applied the *Melkonyan* decision retroactively based upon the Supreme Court's decision in *James B. Beam Distilling Co. v. Georgia*.[152] In that case, the Court held that it would be "error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so . . .[,] principles of equality and stare decisis here prevail over any claim based on a *Chevron* analysis."[153] The *Fergason* court further reasoned that because the *Melkonyan* Court applied the new "final judgment" rule to the parties in that case, it had to apply the rule retroactively in the case before it.[154] However, it appears that the *Harpster* court's reliance on the fact that the *Melkonyan* Court applied its new rule retroactively to the parties before it was misplaced. In fact, the *Melkonyan* Court could not determine what type of order the district court in that case had issued. It posited that the district court's order was one of three types: (1) a sentence six remand; (2) a sentence four remand; or (3) a voluntary dismissal under Federal Rule of Civil Procedure 41(a). The *Melkonyan* Court vacated the district court's judgment and remanded the matter to the district court so that it could clarify its first order.[155] Similarly, although the *Harpster* court rejected the *Chevron* analysis as applied to the case before it, it noted that application of that analysis would preclude retroactive application of *Melkonyan*.[156]

Although these federal district courts agreed that retroactive application of the *Melkonyan* decision would preclude nearly all pre-*Melkonyan* sentence four claimants then on administrative remand from recovering their attorney's fees, the courts split on whether to

148. 771 F. Supp. 1008 (W.D. Mo. 1991).
149. 793 F. Supp. 618 (W.D. Pa. 1991).
150. *See Fergason*, 771 F. Supp. at 1011; *Harpster*, 793 F. Supp. at 622.
151. *See Fergason*, 771 F. Supp. at 1011; *Harpster*, 793 F. Supp. at 622.
152. *See Fergason*, 771 F. Supp. at 1011 (citing James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) (plurality)).
153. *Id.* (quoting James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 540 (1991)).
154. *See id.* at 1011-12.
155. *See* Melkonyan v. Sullivan, 501 U.S. 89, 102 (1991).
156. *Harpster*, 793 F. Supp. at 621.

apply *Melkonyan* retroactively. In spite of their differing applications of that case, these courts agreed on one thing: the Supreme Court needed to reconcile the *Hudson* and *Melkonyan* holdings so that these sentence four remand claimants would not be barred from recovering their attorney's fees. As the *Fergason* court stated, "[T]he court recommends that the Supreme Court revisit this matter so as to reconcile its holding in *Melkonyan* with the EAJA's 'prevailing party' requirement."[157] In 1993, the Supreme Court did just that in *Shalala v. Schaefer*.[158]

D. *Shalala v. Schaefer*: Reconciling *Hudson* and *Melkonyan* and the Continuing Problem of Retroactive Application

The Supreme Court in *Schaefer* recognized the problem imposed upon sentence four remand claimants by reading the *Hudson* and *Melkonyan* decisions together. Consequently, the Court concluded that *Hudson*'s prevailing party requirement remained good law with respect to sentence six remand claimants but was no longer binding upon sentence four remand claimants.[159] The *Schaefer* Court formulated a new rule which provided that "a party who wins a sentence-four remand order is a prevailing party."[160] This rule relieved sentence four claimants of the friction imposed by the *Hudson* and *Melkonyan* decisions because the claimant can now be deemed a prevailing party at the time the district court enters its remand order, so that the claimant now can comply with the application filing deadline. The consequence of this holding is that a claimant may receive her EAJA attorney's fees award whether or not she succeeds on her substantive claim at the remanded administrative proceedings.[161]

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157. *Fergason*, 771 F. Supp. at 1013.

158. 509 U.S. 292 (1993).

159. *See id.* at 300 n.4. The Court justified its decision not to follow *Hudson* regarding sentence four claimants because: (1) the *Hudson* application to sentence four claimants was only dicta in that case; *see id.*, and (2) *Hudson* had failed to distinguish between sentence four and sentence six remands, as it only considered sentence six remands. *See id.* at 300 n.4.

160. *Id.* at 301.

161. *See* Sisk, *supra* note 35, at 276-77. Sisk noted that *Schaefer* was a specially tailored decision to deal with the "Catch-22" situation that would otherwise prevent even an ultimately successful benefits claimant from obtaining an EAJA award. *Id.* at 273. However, Sisk also noted that this appeared to be a reasonable decision under the unique circumstances, although it is "unsatisfactory both in terms of a general understanding of the prevailing party requirement and in practical terms of extending the full benefit of the EAJA to successful Social Security claimants." *Id.* at 277.

Although the *Schaefer* Court reconciled the problem presented by the two conflicting Supreme Court decisions, the lower federal courts again struggled over whether to apply the *Schaefer* decision retroactively to cases then before them. The court in *Holt v. Shalala*[162] refused to apply the *Schaefer* holding retroactively, where retroactive application would have precluded a fee award. The *Holt* court based its decision on the *Chevron* analysis[163] and emphasized that the claimant in that case "was following the established procedure for obtaining attorney's fees in Social Security cases"[164] whereby the fee application clock did not begin to run until the claimant had met *Hudson*'s prevailing party requirement.[165] However, the court noted that "under current analysis, when a court announces a new rule and retroactively applies it to the case before it, the rule must be applied retroactively."[166] The court justified its nonretroactive application of the *Schaefer* rule and the use of the *Chevron* analysis based on the fact that "the Supreme Court in *Schaefer* did not apply the new rule announced to the case at bar."[167]

On the other hand, the court in *Raines v. Shalala*[168] did apply *Schaefer* retroactively.[169] The court based its retroactive application decision on *Harper v. Virginia Department of Taxation*,[170] which provides:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.[171]

That court determined that the new rule in *Schaefer* was applied retroactively to that party once postremand proceedings were completed.[172]

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162. 35 F.3d 376 (9th Cir. 1994).
163. *See id.* at 380.
164. *Id.* at 377.
165. *See id.*
166. *Id.* at 380 n.3.
167. *Id.*
168. 44 F.3d 1355 (7th Cir. 1995).
169. *See id.* at 1363.
170. 509 U.S. 86 (1993).
171. *Raines*, 44 F.3d at 1363 (citing Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993)).
172. *See id.*

VII. Resolution

The recent Supreme Court interpretations of EAJA attorney's fees application timing requirements, although attempting to clarify the meaning of these provisions in specific contexts, have caused confusion for lower federal courts in applying those new rulings and created hardship for those potentially successful Social Security claimants who have been precluded from recovering attorney's fees. For several reasons, the Supreme Court and the lower federal courts never should retroactively apply Supreme Court EAJA timing requirement decisions if those decisions establish a new rule governing the timing of filing an application for attorney's fees and would preclude an award of attorney's fees to claimants ultimately successful in their litigation against the Administration.

Retroactive application of Supreme Court fee application timing requirement interpretations, which preclude attorney's fees awards, undermines the policies underlying the EAJA and contravenes explicit congressional intent. As explained above, Congress enacted the EAJA with a view toward: (1) discouraging unreasonable exercise of government authority; (2) providing an incentive to increase the number of challenges to questionable government action; and (3) decreasing frivolous or unsupported government determinations.[173] All three of these goals are effectively defeated if retroactive application of Supreme Court timing requirement rulings precludes fee recovery.

To encourage persons to bring civil actions against the government as well as to promote effective representation for a claimant who decides to litigate against the government, the EAJA provides for the recovery of fees for a successful claimant's attorney so that it is possible for the claimant and worthwhile for the attorney to pursue the action. Because courts previously have retroactively applied Supreme Court timing requirements decisions which precluded the recovery of an award of attorney's fees, attorneys now have a disincentive to represent a claimant against the Administration.

A decline in the number of attorneys willing to represent claimants against the Administration has far-reaching effects. This decrease in available representation leads to potentially successful claimants not bringing suit to challenge the propriety of the Administration's adverse determination of their Social Security benefits. In effect, the possibility of nonrecovery of attorney's fees leads to a decline in the

173. *See supra* notes 45-46 and accompanying text.

number of claimants who are willing and able to bring suit against the Administration. This, in turn, precludes a potentially successful claimant from recovering on her *substantive* claim to benefits, thereby depriving her of rightful Social Security benefits.

Finally, retroactive application of a Supreme Court ruling which precludes an award of attorney's fees results in substantial injustice to an affected class of claimants. A successful claimant should not be precluded from fee recovery because she relied on and comported with the law in effect at the time of her claim. There is no reason for an entire class of claimants to be precluded from recovering attorney's fees because they did not and could not predict when or how the Supreme Court would interpret and change an EAJA timing requirement to their disadvantage.

VIII. Conclusion

The possibility of recovering attorney's fees under the EAJA provides a means by which a person who applies to receive benefits from the Administration may challenge the Administration's adverse benefits determination. Not only does the EAJA encourage dissatisfied applicants to bring a claim against the Administration, but it also provides effective legal representation for a claimant, while discouraging unsupported administrative determinations. For these reasons, lower federal courts never should retroactively apply Supreme Court EAJA timing requirement decisions if such decisions would preclude an award of attorney's fees to otherwise successful claimants.