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# STATE OF ALASKA THE LEGISLATURE

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Jeanie Henry

*House Judiciary 3-13-86*

*1:30 pm*



U.S. SMALL BUSINESS ADMINISTRATION  
WASHINGTON, D.C. 20416

**DRAFT**

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

DEC 12 1983

HB 349

U. S. Small Business Administration  
Office of the Chief Counsel for Advocacy  
Model State Small Business Equal Access to Justice Act

Section One: Findings and Purposes

The Legislature finds that small businesses are deterred from challenging or defending against unreasonable state actions by the expense of vindicating their rights. The Legislature further finds that because of the greater legal and financial resources of this state, the standard for the award of attorneys fees and expenses against this state should be different from the standard otherwise applicable to a private litigant. The purpose of this Act is to allow eligible small businesses, in situations specified herein, to recover reasonable litigation expenses from this state in civil court actions and certain agency proceedings. Concomitantly, the purpose of this Act is to promote reasonable regulatory and enforcement activities in this state.

Section Two: For the purposes of this Act --

(a) "small business" means any commercial or business entity, including a sole proprietorship or a partnership, with a net worth of less than \$2 million and fewer than 250 employees at the time of the civil judicial action or agency adjudication, but does not include an entity which is a subsidiary or affiliate of another entity which is not a small business.

(b) "this state" means the state of \_\_\_\_\_, its agencies, commissions, boards or departments and its officers acting in their official capacity.

(c) "prevailing" means obtaining a favorable judgment in a civil judicial action or agency adjudication, or reaching a settlement of a civil judicial action or agency adjudication on terms favorable to the small business.

(d) "fees and expenses" includes the reasonable expenses

of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, project or discovery expense which is found by the adjudicative officer or court to be necessary for the preparation of the small business' case, and reasonable attorney fees. (The amount of fees awarded shall be set according to the prevailing market rate for legal services of like quality, but shall not exceed a rate of \$75 per hour in the absence of a showing either that an increase in the cost of living justifies a higher rate, or that special circumstances justifies a higher rate. Fees for witnesses under this Act shall not be awarded at a rate higher than the maximum rate paid by this state for such witnesses. The total amount of fees and expenses awarded under this Act shall not exceed \$25,000 in any single case).

(e) "position of this state" means both the litigation stance taken by this state in a civil action or agency adjudication as defined in this Act, and the action or policy of this state which gave rise to the agency adjudication or civil action.

(f) "substantially justified" means reasonable in both law and fact.

(g) "agency adjudication" means any adversary proceeding in which this state is represented by counsel, but does not include:

(i) proceedings not involving the business regulatory function of this state;

(ii) proceedings to establish or fix a rate;

(iii) proceedings involving eminent domain, condemnation, or proceedings in which this state is only a nominal party.

(h) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer, examiner, referee or otherwise, who presided at the adversary adjudication.

### Section Three: Award of fees and expenses in court cases

(a) In addition to any costs which are awarded as prescribed by statute, a court shall award to a prevailing small business reasonable fees and expenses incurred by the small business in either of the following:

(1) a civil judicial action brought by or against this state where the action involves the business regulatory function of this state, unless this state shows and the court finds that the position of this state was substantially justified;

(2) a judicial proceeding to review an agency adjudication of this state unless this state shows and the court finds that during such agency adjudication, the position of this state was substantially justified.

(b) In awarding reasonable fees and expenses pursuant to Subsection (a)(2) of this Section, the court shall include in that award reasonable fees and expenses incurred during such agency adjudication unless this state shows and the court finds that during such agency adjudication the position of this state was substantially justified.

### Section Four: Award of fees and expenses in agency adjudications

(a) When this state initiates an agency adjudication it shall award to a prevailing small business reasonable fees and expenses incurred by the small business in connection with that proceeding, unless this state shows and the adjudicative officer of the agency finds that the position of this state was substantially justified.

(b) A prevailing small business dissatisfied with the fee determination made by the adjudicative officer pursuant to Subsection (a) of this Section may appeal such fee determination to the court having jurisdiction to review a final decision of this state's agencies, notwithstanding the fact that the small business prevailed on the merits of the adjudication.

(c) Each agency of this state shall by rule establish specific procedures for the submission and consideration of applications for an award of reasonable fees and expenses pursuant to Subsection (a) of this Section.

Section Five: Discretion to reduce or deny an award

The judge in a court action pursuant to Section Three of this Act or the adjudicative officer in an agency adjudication pursuant to Section Four of this Act, in their discretion, may deny or reduce the award upon finding:

(a) that during the course of either the court action or the agency adjudication, the prevailing small business unduly and unreasonably protracted the final resolution of the matter, or

(b) that the prevailing small business refused an offer of settlement by this state which was at least as favorable to the prevailing small business as the relief ultimately obtained.

Section Six: Payment of awards; report to the Legislature

(a) An award of reasonable fees and expenses under this Act shall be payable by the state agency, commission, board or department over which the small business prevailed, out of its regular operating budget. In the event sufficient funds are not available to pay an award, the award shall be paid from any subsequent appropriation made to the agency, commission, board or department.

(b) Each agency, commission, board or department that pays an award under this Act shall report annually to the Legislature at the end of the fiscal year on the number, nature and amount of the awards, the claim involved in the action and such other relevant information which may aid the Legislature in evaluating the scope and impact of this Act.

Section Seven: Effective date and sunset provision

This Act shall apply to court action and adversary adjudications initiated after (date).

This Act shall expire on (date) unless reauthorized before that time by the Legislature of this state.

proved for safety and effectiveness under this section may include on its label the statement "FDA Approved" followed by the number assigned to the application by the Secretary and, upon the expiration of eighteen months from the date of the enactment of this subsection, such a drug which is manufactured after the expiration of such months shall include such statement and number. Such a drug may also include, in accordance with regulations of the Secretary, such statement and number in its advertising and in any labeling (other than the label)."

#### SEC. 3. REGULATIONS.

The Secretary of Health and Human Services shall, not later than one year from the date of the enactment of this Act, promulgate regulations under the last sentence of section 505(k) of the Federal Food, Drug, and Cosmetic Act (as added by subsection (b) of section 1).

The SPEAKER pro tempore. Pursuant to the rule, a second is not required on this motion.

The gentleman from California (Mr. WAXMAN) will be recognized for 20 minutes and the gentleman from Utah (Mr. NIELSON) will be recognized for 20 minutes.

The Chair recognizes the gentleman from California (Mr. WAXMAN).

#### GENERAL LEAVE

Mr. WAXMAN. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on this legislation, H.R. 2244.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from California?

There was no objection.

Mr. WAXMAN. Mr. Speaker, I yield myself such time as I may consume.

(Mr. WAXMAN asked and was given permission to revise and extend his remarks.)

Mr. WAXMAN. Mr. Speaker, H.R. 2244 permits the manufacturers of prescription drugs to state "FDA approved" followed by the approval number in their drug labeling and advertising. This is the same bill that passed the House last year by voice vote.

Currently, section 301(L) of the Federal Food, Drug, and Cosmetic Act prohibits drug manufacturers from making any representation regarding FDA approval in their labeling or advertising. During hearings conducted by the Subcommittee on Health and the Environment, there were numerous complaints about section 301(L) because of the difficulty of determining whether a drug has been approved by FDA.

The FDA Approval Labeling Act carves out an exception to section 301(L). During the 18-month period after enactment of the bill, any drug manufacturer would be allowed to state in its drug labeling or advertising that the drug is FDA approved. After the 18-month period, all manufacturers would be required to use the statement regarding FDA approval in their drug labels.

This bill protects the public by giving pharmacists and physicians the

ability to determine that their patients are only getting drugs approved by the FDA.

I urge my colleagues to support this bill.

Mr. Speaker, I reserve the balance of my time.

Mr. NIELSON of Utah. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I rise in support of H.R. 2244, the FDA Approval Labeling Act. As the chairman of the Subcommittee on Health and the Environment, the gentleman from California (Mr. WAXMAN) has stated, the bill would permit the manufacturers of prescription drugs to state "FDA approved," followed by their approval number on the drug label on their advertising. It is currently not allowed under section 301(L) of the Food, Drug, and Cosmetic Act.

The bill is in response to numerous complaints from pharmacists about the difficulty of determining whether a drug has been approved by the FDA.

Mr. Speaker, I believe this bill is noncontroversial. It passed the subcommittee and the full committee without dissent and, as Mr. WAXMAN has indicated, passed the House last year by a voice vote. Unfortunately, it was not taken up by the Senate. It has the support of the administration and it also has the support of pharmacists and at least the acquiescence of the Proprietary and Pharmaceutical Association.

Mr. Speaker, I urge adoption and everyone's support of the bill.

Mr. WAXMAN. Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from California (Mr. WAXMAN) that the House suspend the rules and pass the bill, H.R. 2244.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the bill was passed.

A motion to reconsider was laid on the table.

#### EQUAL ACCESS TO JUSTICE ACT AMENDMENTS

Mr. KASTENMEIER. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 2378) to amend section 504 of title 5, United States Code, and section 2412 of title 28, United States Code with respect to awards of expenses of certain agency and court proceedings, and for other purposes, as amended.

The Clerk read as follows:

H.R. 2378

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

#### SECTION 1. AMENDMENTS TO SECTION 504 OF TITLE 5.

(A) AWARDING OF FEES IN ADVERSARY ADJUDICATIONS.—

(1) DETERMINATION OF "SUBSTANTIALLY JUSTIFIED".—Subsection (a)(1) of section 504 of

title 5, United States Code, is amended by adding at the end thereof the following: "Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought."

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

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

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

(c) DEFINITIONS.—

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

"(B) 'party' means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed \$2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141)(a)), may be a party regardless of the net worth of such organization or cooperative association."

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

(A) by inserting "(1)" before "an adjudication under";

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

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

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

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

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

"(E) 'position of the agency' means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based; except that fees and other expenses may not be awarded to a party for any portion of the adversary

adjudication in which the party has unreasonably protracted the proceedings."

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

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

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

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

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

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

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

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

(b) **DETERMINATION OF "SUBSTANTIALLY JUSTIFIED."**—Section 2412(d)(1)(B) of title 28, United States Code, is amended by adding at the end thereof the following: "Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought."

(c) **DEFINITIONS.**—

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

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

(B) by striking out "(ii)" and all that follows through the end of the subparagraph and inserting in lieu thereof the following: "or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141(a)), may be a party regardless of the net worth of such organization or cooperative association."

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

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

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

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

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

"(F) 'court' includes the United States Claims Court;

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

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

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

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

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

"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."

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

Section 208 of the Equal Access to Justice Act is amended—

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

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

"(b) Section 208(b) of the Social Security Act (42 U.S.C. 408(b)(1)) shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 208(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 208(b) of that Act and section 2412(d) of title 28, United States Code, the claimant's attorney refunds to the claimant the amount of the smaller fee."

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

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

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

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

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

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

(b) **REPEALS.**—

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

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

#### SEC. 7. EFFECTIVE DATE.

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

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

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

The SPEAKER pro tempore. Pursuant to the rule, a second is not required on this motion.

The gentleman from Wisconsin (Mr. KASTENMEIER) will be recognized for 20 minutes and the gentleman from California (Mr. MOORHEAD) will be recognized for 20 minutes.

The Chair recognizes the gentleman from Wisconsin (Mr. KASTENMEIER).

#### GENERAL LEAVE

Mr. KASTENMEIER, Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on H.R. 2378, the bill about to be considered.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Wisconsin?

There was no objection.

Mr. KASTENMEIER, Mr. Speaker, I yield myself such time as I may consume.

(Mr. KASTENMEIER asked and was given permission to revise and extend his remarks.)

Mr. KASTENMEIER, Mr. Speaker, I rise in support of H.R. 2378, legislation expanding the liability of the Federal Government for attorneys' fees and related expenses. H.R. 2378 extends and clarifies the Equal Access to Justice Act [EAJA] (title II, Public Law 96-481), which had amended title 5

United States Code, section 504 and title 28 United States Code, section 2412. The main purpose of the legislation is to ensure access to justice for individuals and small businesses and organizations who are involved in civil disputes with the Federal Government.

The original act modified 5 U.S.C. 504 and 28 U.S.C. 2412(d) to make the United States liable for attorneys' fees and other expenses of a prevailing party in an adversary adjudication or civil action brought by or against the United States unless the agency or court could find that the position of the agency or the United States was substantially justified or that special circumstances would make an award unjust. Eligible parties under the original act have been individuals with a net worth of not more than \$1 million or small businesses or organizations with a net worth of not more than \$5 million.

H.R. 2378 is a revised version of H.R. 5479 (98th Congress) which passed both Houses unanimously on October 11, 1984. The final version of H.R. 5479 was a compromise between H.R. 5479 as reported by this committee and S. 919 as reported by the Senate Judiciary Committee. H.R. 5479 was vetoed by the President on November 9, 1984. In his veto message, the President expressed objections to the broadness of the definition "position of the United States," explaining that it could lead to lengthier proceedings than if only the litigation position were at issue and could lead to extensive discovery on how the position was formulated. He also expressed concern about the interest provision and disparate treatment of litigants under that provision.

During the 99th Congress, several Members and I have made efforts to fashion a bill which would address concerns which the administration raised in the President's veto message on H.R. 5479 and in later meetings.

On April 25, 1985, H.R. 2223, a revision of H.R. 5479, was introduced by Messrs. MOORHEAD, FISH, KENNEDY and myself. On April 30, the Subcommittee on Courts, Civil Liberties and the Administration of Justice—which I chair—conducted a hearing on H.R. 2223. Witnesses included representatives of the U.S. Department of Justice, Small Business United, Small Business Legal Defense Committee, the National Federation of Independent Business, and the Alliance for Justice. All witnesses supported H.R. 2223.

On May 2, 1985, the subcommittee conducted a markup of H.R. 2223, and with two minor amendments recommended that a clean bill be introduced and sent to the committee. On May 15, that bill with a minor amendment was ordered reported favorably by the committee, with a quorum present, by voice vote no objection being heard. (H. Rept. 99-120, and Part 2.) H.R. 2378 has the unanimous support of

the members of the Committee on the Judiciary. The bill also has the support of the administration, as well as the Office of Advocacy of the Small Business Administration.

The legislation has wide support from such groups as Small Business United, the Small Business Legal Defense Committee, the Small Business Legislative Council, the Independent Business Association of Wisconsin, the National Federation of Independent Business, the Chamber of Commerce of the United States, the National Association of Manufacturers, the National Tire Dealers and Retreaders Association, the Menswear Retailers of America, the National Small Business Association, the American Bar Association, the ACLU, and the Alliance for Justice.

H.R. 2378 clarifies that the United States will be liable for attorneys' fees and related expenses unless the position of the Government—the action or failure to act by the Government upon which the administrative proceeding or civil action is based, as well as the litigation position—is substantially justified, or unless special circumstances would make an award unjust. Courts have been divided on whether the "position of the agency/United States" referred to the agency action which was the subject of the lawsuit or only the Government's litigation position.

The bill would limit the determination of whether the position of the United States was substantially justified to the record—including the record with respect to the action or failure to act by the agency upon which the adversary adjudication or civil action is based—which is made in the adversary adjudication or civil action for which fees and other expenses are sought. The effect of this amendment, which is designed to respond to concerns raised by the President's veto message, will be to limit discovery in EAJA fee proceedings.

In H.R. 2378 eligibility under the act would be expanded to include individuals with a net worth of \$2 million or less or businesses and other organizations with \$7 million or less net worth.

The legislation allows the agency rather than the adjudicative officer to make the final decision on fee awards at the agency level. A fee claimant dissatisfied with the awards may appeal the denial of or measure of the award. The legislation makes other improvements in the act, including revising the interest payment provision, defining "final judgment," and clarifying other provisions.

The bill revises certain portions of the original act which were repealed on October 1, 1984, and modifies the original legislation.

I would like to clarify the effective date provisions of H.R. 2378 and the relationship of these provisions with the original act. Cases which were pending on October 1, 1984, including fee application proceedings would be

governed by the original act, provided that the time to file the fee application expired before the date of enactment of this bill. This bill would apply to any case pending on October 1, 1984, and finally disposed of before the date of enactment of this bill, if the time for filing an application for fees and other expenses had not expired as of such date of enactment. This bill would also apply to any case commenced on or after October 1, 1984, and finally disposed of before the date of the enactment of this bill, and in that case the 90-day period referred to in section 504(a)(2) of title 5, United States Code, or section 2412(d)(1)(B) of title 28, United States Code, as the case may be, shall be deemed to commence on the date of enactment of this bill. If a fee case is complete and a fee petition has been fully adjudicated before the date of enactment, with no further appeal pending on the date of enactment, the case may not, or course, be reopened except as explicitly allowed in certain proceedings before boards of contract appeals.

I should note before closing that since the committee report was filed, the District Court of the Northern District of California has decided *Miller v. Hotel and Restaurant Employees and Bartenders Union*, C84-6382, (N.D. Calif., May 24, 1985) relating to eligibility for fees. This case agrees with the position taken in the committee report at page 17, finding a local union eligible for EAJA fees. This decision makes clear that even before these amendments the financial condition of a local union would be considered separately from its international affiliate.

The original act has resulted in approximately \$4 million in fees and expenses. CBO has estimated a cost of \$3.1 million in fiscal year 1986 to \$7 million in fiscal year 1990. The legislation is a high priority for the small business community and is a valuable vehicle for improving access to justice. I urge my colleagues to support it.

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Mr. MOORHEAD. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I rise in strong support of H.R. 2378, a bill to authorize and make permanent the Equal Access to Justice Act. From its effective date of October 1, 1981, until it was sunset on October 1, 1984, the Equal Access to Justice Act has provided an important avenue of redress for small businesses and individuals against unjustifiable Government action.

Last year, Congress unanimously passed legislation to make the act permanent and the bill, H.R. 5479, was vetoed by the President on November 9, 1984. In the wake of the veto, negotiations were commenced between representatives of the administration, the small business community, the public

Interest groups and members and staffs of the House and Senate Judiciary Committees, in an effort to address the issues detailed in the President's veto message. These negotiations produced H.R. 2378, which I am happy to note is without opposition and is strongly supported by the administration, the American Bar Association, the Office of Advocacy of the Small Business Administration, the U.S. Chamber of Commerce, Small Business United, the National Small Business Association, the ACLU, and the Alliance for Justice.

I would like to commend my colleagues on the Subcommittee on Courts, Civil Liberties and the Administration of Justice for their work on this important legislation. I would especially like to commend and thank the chairman of the Courts Subcommittee, the gentleman from Wisconsin [Mr. KASTENMEIER], the gentleman from New York [Mr. FISH], and the gentleman from Ohio [Mr. KINDNESS] for their leadership and hard work in developing H.R. 2378. Also Senator's GRASSLEY and THURMOND are to be commended for their leadership on this issue in the other body.

Mr. Speaker, small businessmen and individuals with limited assets have been without the important protection afforded by the Equal Access to Justice Act for the last 7½ months. In H.R. 2378, we have legislation with which we can quickly restore that protection. I urge my colleagues to do so by adopting H.R. 2378.

Mr. Speaker, I yield such time as he may consume to the gentleman from Ohio [Mr. KINDNESS].

Mr. KINDNESS. Mr. Speaker, I thank the gentleman for yielding this time to me.

Mr. Speaker, I urge support for H.R. 2378, which would make permanent law of the successful experiment known as the Equal Access to Justice Act. It has been gratifying to work with others and to see this matter coming together after the disappointment of last year's veto of a similar bill passed in the 98th Congress.

We believe that the objections and concerns of the administration have been fully considered and thoughtfully dealt with, that the Members of the other body who have worked on this matter are committed to proceeding with this legislation in a compatible manner, and that the Equal Access to Justice Act should become law without encountering any last-minute roadblocks from the Office of Management and Budget. In fact, we are informed today that the administration supports the passage of H.R. 2378, for which I am duly grateful.

It does seem necessary, however, to bring attention to a portion of the committee's report which would tend to mislead those uninitiated in the lore of the substantial evidence rule. At the bottom of page 9 of the report of the committee, the following statement appears:

Agency action found to be arbitrary and capricious or unsupported by substantial evidence is virtually certain not to have been substantially justified under the Act. Only the most extraordinary special circumstances could permit such an action to be found to be substantially justified under the Act.

This gratuitously authoritarian overstatement appears to be the only error I found in the report. I wish I could have known about it or that it could have been discovered sooner than it was, but the filing deadline for the report was approaching within the hour, practically speaking, when the error was discovered. At least, however, Mr. Speaker, we can clarify the point in the record of these proceedings.

The committee report statement should not be interpreted to be the position of the committee on the point it seeks to describe and should not be interpreted to suggest that a finding of an agency action that was not supported by substantial evidence would automatically entitle a prevailing party to fees or would establish a presumption of entitlement to fees. Of course, the Government has the burden of demonstrating substantial justification under the Equal Access to Justice Act. Substantial justification is a different and lesser standard than the substantial evidence standard applied in a review of administrative proceedings. The Government may still prove that its position was substantially justified even if the court does not believe that the case on the merits was supported by "substantial evidence on the record as a whole."

The committee recognizes the close relationship between the concepts, and the fact that a finding by the Government was not supported by substantial evidence should be accorded careful scrutiny. But indeed the quoted two sentences from the bottom of page 9 and the top of page 10 of the report do not represent a clear or a appropriately explanatory statement of the intent of the committee in the reporting of H.R. 2378.

I would, of course, welcome the comments of others with respect to the point involved, but certainly I urge that there not be confusion between the substantial evidence rule and the substantial justification measurement that is really novel to the Equal Access to Justice Act.

Mr. Speaker, I urge my colleagues to support H.R. 2378.

Mr. MOORHEAD. Mr. Speaker, if the gentleman will yield, I would just like to state that I concur in the remarks of the gentleman from Ohio [Mr. KINDNESS], especially as they relate to his clarification of the relationship between the standards of substantial evidence and substantial justification.

Mr. KASTENMEIER. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, reference has been made to the report. In its report (H.

Rept. 99-120) the committee discusses the relationship between a finding by a court that Government action was not supported by substantial evidence and a finding that the Government's position was not substantially justified. Now, I do not understand the committee report to suggest that a finding that an agency action that was not supported by substantial evidence would automatically entitle the prevailing party to fees and expenses or would establish a legal presumption of entitlement to fees.

□ 1330

The committee recognizes the close relationship between the concepts and the fact that a finding that Government action was not supported by substantial evidence should be accorded significant weight.

Of course, the government has the burden of proof of demonstrating substantial justification. Substantial justification is a different standard than the substantial evidence standard. The Government may still prove that the position it took was substantially justified. Having it is not intended to be so difficult that the Government may only avoid fees by prevailing in the litigation.

Mr. Speaker, I believe this bill is in excellent shape and ought to be overwhelmingly approved by the House.

● Mr. FISH. Mr. Speaker, as one who was an original cosponsor of the Equal Access to Justice Act when it was first approved by Congress in 1980 (Public Law 96-431), I would like to indicate my strong support for H.R. 2378. This legislation, of which I am also an original cosponsor, will reauthorize and make permanent this important regulatory reform measure.

Last year, based primarily on the 3 years of experimentation that were provided by the original act, which expired on October 1, 1984, Congress approved reauthorizing legislation (H.R. 5479). However, President Reagan saw fit to veto that legislation on November 9, 1984. Since the veto I have cooperated with the administration, the small business community, the public interest groups, as well as members and staffs of the House and Senate Judiciary Committees in an effort to produce an acceptable bill. I believe that our collective efforts have produced a bill in H.R. 2378 that will prove to be workable in a manner that ensures fairness to both sides in regulatory proceedings and court actions.

I am happy to note that H.R. 2378 includes the language of an amendment which I offered in the full Judiciary Committee last Congress to expand the definition of eligible "party" under the statute. As originally enacted, the definition of party contained the words "corporation" and "organization." The issue as to whether or not units of local government were eligible to be reimbursed for attorney's fees and court costs was left

ambiguous. The unfortunate result has been that, for the most part, smaller governmental bodies have not been considered to be eligible parties under the act.

In my estimation, the Equal Access to Justice Act should assist any small organization, whether private or governmental, that is involved in a regulatory or litigation dispute with the United States and where the position of the United States is determined to be not "substantially justified." Units of local government are frequently involved in adjudications or litigation regarding grant eligibility and grant reductions under a variety of Federal assistance programs. Smaller governmental entities face the same cost deterrents and other disadvantages that small businesses do in such proceedings. They should be eligible for reimbursement for their fees and expenses where appropriate.

This extension of the Equal Access to Justice Act has received broad support from the administration, the Chamber of Commerce of the United States, the National Federation of Independent Business, the American Bar Association, the National Small Business Conference of the United States, the Office of Advocacy of the Small Business Administration, the ACLU and the Alliance for Justice.

In summary, this legislation permanently codifies a remedial statute that has proven that it can work well and, in addition, makes numerous clarifications in the language of the law to correct existing ambiguities. I strongly urge my colleagues to support the passage of H.R. 2378. ©

Mr. KASTENMEIER. Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

Mr. MOORHEAD. Mr. Speaker, I yield back the balance of my time.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Wisconsin [Mr. KASTENMEIER] that the House suspend the rules and pass the bill, H.R. 2378, as amended.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the bill, as amended, was passed.

A motion to reconsider was laid on the table.

#### STATUE OF LIBERTY-ELLIS ISLAND COMMEMORATIVE COIN ACT

Mr. ANNUNZIO. Mr. Speaker, I ask unanimous consent to take from the Speaker's table the bill (H.R. 47) entitled "An Act to provide for the minting of coins in commemoration of the centennial of the Statue of Liberty," with Senate amendments thereto, and concur in the Senate amendments.

The Clerk read the title of the bill.

The Clerk read the Senate amendments, as follows:

Strike out all after the enacting clause and insert:

#### TITLE I—STATUE OF LIBERTY-ELLIS ISLAND COMMEMORATIVE COINS

##### SHORT TITLE

Sec. 101. This Act may be cited as the "Statue of Liberty-Ellis Island Commemorative Coin Act".

##### COIN SPECIFICATIONS

Sec. 102. (a)(1) The Secretary of the Treasury (hereafter in this title referred to as the "Secretary") shall issue not more than 500,000 five dollar coins which shall weigh 8.358 grams, have a diameter of 0.850 inches, and shall contain 90 percent gold and 10 percent alloy.

(2) The design of such five dollar coins shall be emblematic of the centennial of the Statue of Liberty. On each such five dollar coin there shall be a designation of the value of the coin, an inscription of the year "1986", and inscriptions of the words "Liberty", "In God We Trust", "United States of America", and "E Pluribus Unum".

(b)(1) The Secretary shall issue not more than ten million one dollar coins which shall weigh 26.73 grams, have a diameter of 1.500 inches, and shall contain 90 percent silver and 10 percent copper.

(2) The design of such dollar coins shall be emblematic of the use of Ellis Island as a gateway for immigrants to America. On each such dollar coin there shall be a designation of the value of the coin, an inscription of the year "1986", and inscriptions of the words "Liberty", "In God We Trust", "United States of America", and "E Pluribus Unum".

(c)(1) The Secretary shall issue not more than twenty-five million half dollar coins which shall weigh 11.34 grams, have a diameter of 1.505 inches, and shall be minted to the specifications for half dollar coins contained in section 5112(b) of title 31, United States Code.

(2) The design of such half dollar coins shall be emblematic of the contributions of immigrants to America. On each such half dollar coin there shall be a designation of the value of the coin, an inscription of the year "1986", and inscriptions of the words "Liberty", "In God We Trust", "United States of America", and "E Pluribus Unum".

(d) The coins issued under this title shall be legal tender as provided in section 5103 of title 31, United States Code.

##### SOURCES OF BULLION

Sec. 103. (a) The Secretary shall obtain silver for the coins minted under this title only from stockpiles established under the Strategic and Critical Materials Stock Piling Act (50 U.S.C. 93 et seq.).

(b) The Secretary shall obtain gold for the coins minted under this title pursuant to the authority of the Secretary under existing law.

##### DESIGN OF THE COINS

Sec. 104. The design for each coin authorized by this title shall be selected by the Secretary after consultation with the Chairman of the Statue of Liberty-Ellis Island Foundation, Inc. and the Chairman of the Commission of Fine Arts.

##### SALE OF THE COINS

Sec. 106. (a) Notwithstanding any other provision of law, the coins issued under this title shall be sold by the Secretary at a price equal to the face value, plus the cost of designing and issuing such coins (including labor, materials, dies, use of machinery, and overhead expenses).

(b) The Secretary shall make bulk sales at a reasonable discount to reflect the lower costs of such sales.

(c) The Secretary shall accept prepaid orders for the coins prior to the issuance of such coins. Sales under this subsection shall be at a reasonable discount to reflect the benefit of prepayment.

(d) All sales shall include a surcharge of \$35 per coin for the five dollar coins, \$7 per coin for the one dollar coins, and \$2 for the half dollar coins.

##### ISSUANCE OF THE COINS

Sec. 108. (a) The gold coins authorized by this title shall be issued in uncirculated and proof qualities and shall be struck at no more than one facility of the United States Mint.

(b) The one dollar and half dollar coins authorized under this title may be issued in uncirculated and proof qualities, except that not more than one facility of the United States Mint may be used to strike any particular combination of denomination and quality.

(c) Notwithstanding any other provision of law, the Secretary may issue the coins minted under this title beginning October 1, 1985.

(d) No coins shall be minted under this title after December 31, 1988.

##### GENERAL WAIVER OF PROCUREMENT REGULATIONS

Sec. 107. No provision of law governing procurement or public contracts shall be applicable to the procurement of goods or services necessary for carrying out the provisions of this title. Nothing in this section shall relieve any person entering into a contract under the authority of this title from complying with any law relating to equal employment opportunity.

##### DISTRIBUTION OF SURCHARGES

Sec. 108. All surcharges which are received by the Secretary from the sale of coins issued under this title shall be promptly paid by the Secretary to the Statue of Liberty-Ellis Island Foundation, Inc. (hereinafter in this title referred to as the "Foundation"). Such amounts shall be used to restore and renovate the Statue of Liberty and the facilities used for immigration at Ellis Island and to establish an endowment in an amount deemed sufficient by the Foundation, in consultation with the Secretary of the Interior, to ensure the continued upkeep and maintenance of these monuments.

##### AUDITS

Sec. 109. The Comptroller General shall have the right to examine such books, records, documents, and other data of the Foundation as may be related to the expenditure of amounts paid, and the management and expenditures of the endowment established, under section 108.

##### COINAGE PROFIT FUND

Sec. 110. Notwithstanding any other provision of law—

(1) all amounts received from the sale of coins issued under this title shall be deposited in the coinage profit fund;

(2) the Secretary shall pay the amounts authorized under this title from the coinage profit fund; and

(3) the Secretary shall charge the coinage profit fund with all expenditures under this title.

##### FINANCIAL ASSURANCES

Sec. 111. (a) The Secretary shall take all actions necessary to ensure that the issuance of the coins authorized by this title shall result in no net cost to the United States Government.

(b) No coin shall be issued under this title unless the Secretary has received—

(1) full payment therefor;

BACKGROUND OF HB 349

MANY SMALL BUSINESSES HAVE BEEN ADVERSELY EFFECTED BY UNREASONABLE ENFORCEMENT OF ALASKA LAWS AND REGULATIONS INITIATED BY A GOVERNMENTAL AGENCY. MANY OF THESE ENFORCEMENT ACTIONS ARE REALLY A FORM OF HARASSMENT. THE SMALL BUSINESSMAN HAS BEEN UNABLE TO DEFEND HIMSELF AGAINST THIS UNREASONABLE ACTION BY STATE AGENCIES DUE TO THE UNLIMITED RESOURCES OF THE STATE AND THE VERY HIGH ATTORNEY FEES AND COURT COSTS ENTAILED IN A SUIT.

THIS BILL ALLOWS THE SMALL BUSINESSMAN TO GO TO COURT--WIN HIS CASE-- AND BE REIMBURSED IN FULL FOR HIS EFFORTS. THE BILL WILL GIVE THE SMALL BUSINESSMAN A FIGHTING CHANCE TO VINDICATE HIS POSITION ON TAX MATTERS OR REGULATORY MATTERS WITH ANY PUBLIC AGENCY OF THE STATE AND STILL RECOVER HIS ATTORNEY AND COURT COSTS IN FULL IF HE PREVAILS.

THIS BILL HAS BEEN REQUESTED BY HUNDREDS OF SMALL BUSINESSMEN IN THE STATE OF ALASKA.

THE BILL WILL ALSO SERVE AS A VERY STRONG DETERRENT FOR ANY STATE AGENCY TO USE THEIR POWERS IN ENACTING UNREASONABLE REGULATIONS OR PROCEEDING WITH IRRATIONAL ENFORCEMENT ACTIVITIES.

STATE OF ALASKA  
THE LEGISLATURE

POUCH Y STATE CAPITOL  
JUNEAU ALASKA 99811  
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M

March 25, 1985

SUBJECT: Legal opinion on proposed  
"equal access to justice" bill  
(Work Order No. 14-0905)

TO: Representative Richard Shultz

FROM: George W. Edwards, *GWE*  
Legislative Counsel

This memo accompanies a bill drafted in response to your request.

A possible constitutional problem with the bill is that the selection of a particular group of persons to receive special reimbursements for costs may deny other persons due process and equal protection of law. Under the bill's initial premise that expense deters litigation, it might be argued that individual Alaskans are as deterred in confronting the state in court as are small businesses. Under Article 1 of the Alaska Constitution all persons are entitled to equal rights, opportunities and protection under the law. Unless you can show that the classification of small businesses in this area has a fair and substantial relation to a legitimate governmental objective, the law proposed is probably unconstitutional.

A second possible problem that I see is that the bill may be interpreted by the court to have a chilling effect on the state's right to litigate. The state, as a representative of the people, is analogous to any other litigant in this regard. The United State Supreme Court has considered the question in Boddie v. Connecticut, 401 U.S. 371, 380, 91 S.Ct 780, 787, 28 L.Ed. 2d 113, 120 (1971) and held:

. . . a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard.

March 25, 1985

The Alaska Supreme Court has rejected the policy of awarding full attorney fees to a prevailing party in all but extreme cases on similar grounds (Malvo v. J.C. Penny Company, Inc., 512 P2d 575, 587 (Ak, 1973)).

Finally, section six of the bill may violate article IX, section 13 of the Alaska Constitution in providing for the expenditure of state money without an appropriation for the purpose for which the expenditure is made.

GWE:csh  
c3/063

Enclosure

Sec.1. Explains the purpose of the Act.

Sec.2. AS 09.60.050 is amended to include costs awarded against State or other public Agencies except as noted under (b) in this section.

Sec.3. AS 09.60.050 is amended by adding new subsection:

- (b) Except as provided under (c) of this section a court shall award costs and attorney's fees to prevailing party in
  - (1) a civil action against State including regulatory or tax function
  - (2) an appeal of a regulatory order or tax function of the State
- (c) Allows the court to deny or reduce an award of costs or attorney's fees under (b) if it finds
  - (1) the position of State was reasonable and in law
  - (2) if the prevailing party delayed the final resolution of the matter or
  - (3) if the State was joined in action in the matter only because action would be procedurally defective if it was not joined.
- (d) If the State is sharing liability with other parties, State will pay its fair share of litigation costs
- (e) (1) thru (5) gives definitions of terms used in this bill.

Sec.4. Amends AS 44.80 (a) if a small business prevails in an adjudication related to a business regulatory or tax function except decision concerning fixed rates, eminent domain or condemnation, the decision shall include attorney's fees and court costs except

- (1) when the litigation position of the State was reasonable in law
  - (2) when prevailing party delays final resolution of the matter
  - (3) when it was found action would be procedurally defective if the State did not join in the action.
- (b) Explains that an entitlement appeal may be made under AS 44.62.560.
  - (c) Provides for payment of entitlement from State agencies budget. If the Agency doesn't have sufficient funds, payments will be made from subsequent appropriations to the Agency with interest.

- (d) If an agency is found liable for an award payable under (c) of this section and has not paid all awards due then they must file a written report with the Legislature before Jan. 31 of succeeding year that includes
  - (1) nature and amount of award
  - (2) nature and amount of award remaining unpaid
  - (3) any other info to aid legislation in evaluating awards effecting the agency.
- (e) (1) thru (6) provides definitions of terms used in this bill.

Sec. 5. Rule 82(a) Alaska Rules of Civil Procedure is amended by adding (5) if a motion for attorney's fees is brought under 09.60.050 that section is controlling

Sec. 6. Section 5 amends Rule 82 (a) of Alaska Rules of Civil Procedure by including statutory requirements for the award of attorney's fees against the State under certain circumstances.

Sec.7. Describes effective date.