



## EAJA Payee Discussion Board

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### [NOSSCR's memo: EAJA fees: Who is the Payee](#)

 by [cmartin](#) on Sun Jul 22, 2007 1:39 pm

#### **What is happening to the EAJA fees?**

Within the last two months, the Government has routinely filed motions in district courts opposing the payment of EAJA fees directly to the plaintiff's attorney. In these opposition briefs, the government argues that the statutory language of the Equal Access to Justice Act awards the fee to the "prevailing party," not to the attorney. Thus, it must be payable to the plaintiff, not to the plaintiff's attorney. The government will no longer agree to stipulate that the EAJA check be made payable to the plaintiff's attorney. Instead, the government will file a motion that it is not opposing the entitlement to, or amount of, EAJA fees, but does oppose the payment of the fee directly to the attorney.

Now that the government has raised the issue, several courts have recently held that the plaintiff is the "prevailing party" entitled to EAJA fees. See *Ratliff v. Astrue*, Civ. 06-5070-RHB (D.S.D. May 10, 2007); *Nagy v. Astrue*, Case No. CV 05-3718 (C.D.Ca. 2007); *Manning v. Astrue*, No. 06-7127 (E.D.Okla. 2007) (on appeal in the 19th Circuit); *Reeves v. Barnhart*, 473 F.Supp.2d 1173 (M.D.Ala. 2007) (on appeal in the 11th Circuit); *Stephens v. Barnhart*, No. CIV 06-296 LFG (D.N.M.).

### **Is this happening everywhere?**

The Department of Justice and SSA are pursuing a uniform national policy. We expect that this issue will arise in every circuit, and that the government will be filing similar briefs in every case. The one exception currently is the Fifth Circuit where the government, relying on *Marre v. United States*, 117 F.3d 297 (5th Cir. 1997), has withdrawn its objections to fees being paid to the client in two cases from the Northern District of Mississippi. In *Marre*, a case involving the IRS, the court held that attorney's fees paid under the Internal Revenue Code belong to the plaintiff's attorney.

### **Why is this happening?**

Recently, the Department of Justice has instituted a new policy that requires EAJA fees to be made payable only to the plaintiff. SSA is complying with this policy. Apparently, this change in policy stems from the Department of Justice's determination to collect outstanding federal debts (child support, student loans, etc.) of the plaintiff from the EAJA award. The Department of Treasury, through its bureau, the Financial Management Service, operates a centralized delinquent debt collection program known as the Treasury Offset Program. In January 2005, the Financial Management Service implemented offset of so-called "miscellaneous" payments, which include payments for attorneys fees pursuant to EAJA.

The correct interpretation of the law, we believe, is that the government has the right to offset an EAJA award to an attorney by any outstanding federal debt owed by that attorney.

### **Can I still have my client sign an assignment so the check will be made payable to me?**

In the past, many NOSSCR members have resolved this issue by having their clients sign an assignment, which assigns the EAJA check to the attorney. When a copy of this assignment agreement was filed with the court, the court would usually order the check payable to the attorney. Be aware, however, that the government will now likely appeal any such order to the circuit court. The DOJ's new position is any assignment must comply with 31 USC § 3727, which requires that, to be valid, a check can be assigned only after the payment is authorized and that, to be a valid assignment, it must be signed and notarized before two witnesses. This timing prevents the court from relying on the assignment to order the check payable to the attorney.

The government has not objected to the check, payable to the client, being sent to the attorney's office. As a result, the scenario would be that the EAJA check is sent to the attorney, but payable to the client. When it arrives, to comply with the statute, you would gather two witnesses and a notary and have your client sign an assignment of the check to you.

### **What can I do?**

There is no downside in continuing to get an assignment from your client, though we are concerned that the government will continue to fight this. We can give you sample assignment language.

Have your client sign a limited power of attorney allowing you to deposit the EAJA check into your account. For this to be successful, you must be sure that the check is sent to your office and that you already have the power of attorney signed.

Fight back. We can give you copies of reply briefs filed by other NOSSCR members. Be aware, however, that no circuit court has yet ruled on this issue, so we do not yet know whether the arguments these briefs raise will be successful. Arguments to include are:

- An EAJA award is the property of the lawyer, since an unrepresented plaintiff is not entitled to any EAJA payments at all.
- An attorney who receives fees under 406(b) and EAJA for the same work is required to refund the lesser of the two to the claimant. Although this provision of the EAJA is not codified in the United

States Code, it is found in Section 206 of Pub. L. 96-481, as amended by Pub L. 99-80 § 3 Aug.5, 1985, 99 Stat. 186, and provides that:

(b) Section 206(b) of the Social Security Act (42 U.S.C. 406(b)(1) shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 206(b)(2) of the Social Security Act shall not apply with respect to any such award but only if, where the claimant's attorney receives fees for the same work under both section 206(b) of that Act and section 2412(d) of title 28, United States Code, the claimant's attorney refunds to the claimant the amount of the smaller fee.

- The purpose of EAJA fees is to provide access to the federal courts to plaintiffs who have been wronged by the government, and who could not otherwise afford the costs of litigation. The Act provides that if the plaintiff is successful and the government's position was not substantially justified, the government will pay the attorney's fees. In Social Security cases, it has provided access to the courts to many disabled plaintiffs whose claims were denied wrongly by the agency. These ultimately successful plaintiffs would not be able to afford the cost of litigation if the government were not paying the attorneys' fees. A important consequence of the DOJ's new policy, whether intended or not, is that the door to the federal courts will be closed to these individuals.

- Even if the client does not have a federal debt, he would receive a windfall if the EAJA check was paid to him. The more hours the attorney worked, the greater would be the amount the plaintiff receives. It is illogical and unreasonable to think that Congress intended the client to receive this money based on the legal work performed by his attorney.

- Sending an EAJA fee to an SSI recipient can result in his losing eligibility for SSI benefits and Medicaid due to excess income or resources. Again, surely this is not the intent of the Act.

**Keep NOSSCR informed.** Continue to send us copies of your briefs and decisions on this vitally important issue. This enables us to help you and keep you informed as to what the government may be planning to do in your future cases.

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Charles Martin

[clmartin@ssappeals.com](mailto:clmartin@ssappeals.com)

404-373-3116, fax 404-373-4110

[cmartin](#)

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