

107TH CONGRESS
1ST SESSION

S. 106

To amend the provisions of titles 5 and 28, United States Code, relating to equal access to justice, award of reasonable costs and fees, taxpayers' recovery of costs, fees, and expenses, administrative settlement offers, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 22, 2000

Mr. FEINGOLD (for himself and Mr. HUTCHINSON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the provisions of titles 5 and 28, United States Code, relating to equal access to justice, award of reasonable costs and fees, taxpayers' recovery of costs, fees, and expenses, administrative settlement offers, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. EQUAL ACCESS TO JUSTICE REFORM.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Equal Access to Justice Reform Amendments of 2001”.

6 (b) AWARD OF COSTS AND FEES.—

1 (1) ADMINISTRATIVE PROCEEDINGS.—Section
 2 504(a)(2) of title 5, United States Code, is amended
 3 by inserting after “(2)” the following: “At any time
 4 after the commencement of an adversary adjudica-
 5 tion covered by this section, the adjudicative officer
 6 may ask a party to declare whether such party in-
 7 tends to seek an award of fees and expenses against
 8 the agency should such party prevail.”.

9 (2) JUDICIAL PROCEEDINGS.—Section
 10 2412(d)(1)(B) of title 28, United States Code, is
 11 amended by inserting after “(B)” the following: “At
 12 any time after the commencement of an adversary
 13 adjudication covered by this section, the court may
 14 ask a party to declare whether such party intends to
 15 seek an award of fees and expenses against the
 16 agency should such party prevail.”.

17 (c) PAYMENT FROM AGENCY APPROPRIATIONS.—

18 (1) ADMINISTRATIVE PROCEEDINGS.—Section
 19 504(d) of title 5, United States Code, is amended by
 20 adding at the end the following: “Fees and expenses
 21 awarded under this subsection may not be paid from
 22 the claims and judgments account of the Treasury
 23 from funds appropriated pursuant to section 1304 of
 24 title 31.”.

1 (2) JUDICIAL PROCEEDINGS.—Section
 2 2412(d)(4) of title 28, United States Code, is
 3 amended by adding at the end the following: “Fees
 4 and expenses awarded under this subsection may not
 5 be paid from the claims and judgments account of
 6 the Treasury from funds appropriated pursuant to
 7 section 1304 of title 31.”.

8 (d) TAXPAYERS’ RECOVERY OF COSTS, FEES, AND
 9 EXPENSES.—

10 (1) ADMINISTRATIVE PROCEEDINGS.—Section
 11 504 of title 5, United States Code, is amended by
 12 striking subsection (f).

13 (2) JUDICIAL PROCEEDINGS.—Section 2412 of
 14 title 28, United States Code, is amended by striking
 15 subsection (e).

16 (e) OFFERS OF SETTLEMENT.—

17 (1) ADMINISTRATIVE PROCEEDINGS.—Section
 18 504 of title 5, United States Code (as amended by
 19 subsection (d) of this section), is amended by adding
 20 at the end the following:

21 “(f)(1) At any time after the filing of an application
 22 for fees and other expenses under this section, an agency
 23 from which a fee award is sought may serve upon the ap-
 24 plicant an offer of settlement of the claims made in the
 25 application. If within 10 days after service of the offer the

1 applicant serves written notice that the offer is accepted,
 2 either party may then file the offer and notice of accept-
 3 ance together with proof of service thereof.

4 “(2) An offer not accepted shall be deemed with-
 5 drawn. The fact that an offer is made but not accepted
 6 shall not preclude a subsequent offer. If any award of fees
 7 and expenses for the merits of the proceeding finally ob-
 8 tained by the applicant is not more favorable than the
 9 offer, the applicant shall not be entitled to receive an
 10 award for attorneys’ fees or other expenses incurred in re-
 11 lation to the application for fees and expenses after the
 12 date of the offer.”.

13 (2) JUDICIAL PROCEEDINGS.—Section 2412 of
 14 title 28, United States Code (as amended by sub-
 15 section (d) of this section), is amended by inserting
 16 after subsection (d) the following:

17 “(e)(1) At any time after the filing of an application
 18 for fees and other expenses under this section, an agency
 19 of the United States from which a fee award is sought
 20 may serve upon the applicant an offer of settlement of the
 21 claims made in the application. If within 10 days after
 22 service of the offer the applicant serves written notice that
 23 the offer is accepted, either party may then file the offer
 24 and notice of acceptance together with proof of service
 25 thereof.

1 “(2) An offer not accepted shall be deemed with-
 2 drawn. The fact that an offer is made but not accepted
 3 shall not preclude a subsequent offer. If any award of fees
 4 and expenses for the merits of the proceeding finally ob-
 5 tained by the applicant is not more favorable than the
 6 offer, the applicant shall not be entitled to receive an
 7 award for attorneys’ fees or other expenses incurred in re-
 8 lation to the application for fees and expenses after the
 9 date of the offer.”.

10 (f) ELIMINATION OF SUBSTANTIAL JUSTIFICATION
 11 STANDARD.—

12 (1) ADMINISTRATIVE PROCEEDINGS.—Section
 13 504 of title 5, United States Code, is amended—

14 (A) in subsection (a)(1), by striking all be-
 15 ginning with “, unless the adjudicative officer”
 16 through “expenses are sought”; and

17 (B) in subsection (a)(2), by striking “The
 18 party shall also allege that the position of the
 19 agency was not substantially justified.”.

20 (2) JUDICIAL PROCEEDINGS.—Section 2412(d)
 21 of title 28, United States Code, is amended—

22 (A) in paragraph (1)(A), by striking “, un-
 23 less the court finds that the position of the
 24 United States was substantially justified or that
 25 special circumstances make an award unjust”;

1 (B) in paragraph (1)(B), by striking “The
 2 party shall also allege that the position of the
 3 United States was not substantially justified.
 4 Whether or not the position of the United
 5 States was substantially justified shall be deter-
 6 mined on the basis of the record (including the
 7 record with respect to the action or failure to
 8 act by the agency upon which the civil action is
 9 based) which is made in the civil action for
 10 which fees and other expenses are sought.”; and

11 (C) in paragraph (3), by striking “, unless
 12 the court finds that during such adversary ad-
 13 judication the position of the United States was
 14 substantially justified, or that special cir-
 15 cumstances make an award unjust”.

16 (g) REPORTS TO CONGRESS.—

17 (1) ADMINISTRATIVE PROCEEDINGS.—Not later
 18 than 180 days after the date of the enactment of
 19 this Act, the Administrative Conference of the
 20 United States shall submit a report to Congress—

21 (A) providing an analysis of the variations
 22 in the frequency of fee awards paid by specific
 23 Federal agencies under the provisions of section
 24 504 of title 5, United States Code; and

1 (B) including recommendations for extend-
 2 ing the application of such sections to other
 3 Federal agencies and administrative pro-
 4 ceedings.

5 (2) JUDICIAL PROCEEDINGS.—Not later than
 6 180 days after the date of the enactment of this Act,
 7 the Department of Justice shall submit a report to
 8 Congress—

9 (A) providing an analysis of the variations
 10 in the frequency of fee awards paid by specific
 11 Federal districts under the provisions of section
 12 2412 of title 28, United States Code; and

13 (B) including recommendations for extend-
 14 ing the application of such sections to other
 15 Federal judicial proceedings.

16 (h) EFFECTIVE DATE.—The provisions of this Act
 17 and the amendments made by this Act shall take effect
 18 30 days after the date of the enactment of this Act and
 19 shall apply only to an administrative complaint filed with
 20 a Federal agency or a civil action filed in a United States
 21 court on or after such date.

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