



UNITED STATES GOVERNMENT ACCOUNTING OFFICE

Representative Banking Minority Member,
Subcommittee on Oversight of
Government Management and the
District of Columbia, Committee on
Government Affairs, U.S. Senate

October 1995

PRIVATE ATTORNEYS

Selected Attorneys' Fee Awards Against Nine Federal Agencies in 1993 and 1994



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QUALITY IMPROVEMENT

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United States
General Accounting Office
Washington, D.C. 20548

General Government Division

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October 31, 1995

The Honorable Carl Levin
Ranking Minority Member
Subcommittee on Oversight
of Government Management
and the District of Columbia
Committee on Governmental Affairs
United States Senate

Dear Senator Levin:

On June 22, 1994, you requested that we provide information on (1) attorneys' fee awards paid to bid protesters by federal agencies and (2) attorneys' fees awarded under other provisions of law in suits against the government. Our November 1994 fact sheet¹ responded to part one of your request. This report responds to part two of your request.

As agreed with your office, we are reporting data on the number of cases and amount of plaintiff attorneys' fees awarded over \$10,000 against nine federal agencies,² for cases closed during fiscal years 1993 and 1994. These data include the highest individual fees and hourly rates awarded under federal statutes against the nine federal agencies. The nine agencies are the Departments of Defense, Health and Human Services (HHS),³ Housing and Urban Development (HUD), the Interior, Justice, Transportation, and the Treasury; the General Services Administration (GSA); and the U.S. Postal Service⁴. In addition, we are providing attorneys' fee awards data reported in the fiscal year 1993 Equal Access to Justice Act annual reports⁵

¹Bid Protests: Attorneys' Fees Paid to Bid Protesters by Federal Agencies (GAO/GGD-95-17FS, Nov. 7, 1994).

²The scope of our work was limited to nine agencies and individual attorneys' fee awards over \$10,000 because a data system on plaintiff attorneys' fee awards did not exist, and it would have placed a hardship on agencies to manually collect award case file data on all cases closed during the 2-year period.

³HHS did not provide data on attorneys' fee awards over \$10,000 for Social Security Administration cases. It said that attorneys' fee awards were paid in thousands of cases, and it would be too burdensome to search these cases to find those that met our criteria. Many attorneys' fee awards against the Social Security Administration were awarded under the Equal Access to Justice Act. Also, because of the large volume of cases, HHS said it reviewed about one-half of the cases under the Vaccine Injury Compensation Program. It provided information on 64 cases that met our criteria.

⁴The U.S. Postal Service is an independent establishment in the executive branch. In this report, we refer to it as a federal agency.

⁵The Attorney General and the Chairman of the Administrative Conference of the United States must report annually to Congress on the amount of attorneys' fees and other expenses awarded under certain provisions of the act during the preceding fiscal year.

Private Attorneys:
Selected Attorney's
Fee Awards Against
Nine Federal
Agencies in
1993 and 1994

DISTRIBUTION STATEMENT A

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and attorneys' fee awards paid from the Judgment Fund⁶ during fiscal years 1993 and 1994.

Background

Generally, the federal government may not be assessed attorneys' fee awards unless such awards are expressly authorized by law. The Congressional Research Service (CRS) identified approximately 180 federal statutes that authorize awards of attorneys' fees against the government in certain cases where an opposing party prevails against the government.⁷ Many of the statutes that authorize the award of attorneys' fees against the government specify that payment of those awards shall come from agency appropriations. Some of these statutes authorize a set hourly rate or a percentage of the plaintiff's award amount for determining attorneys' fee awards. Most of these statutes authorize reasonable attorneys' fees but do not specify how they are to be calculated.

One key statute, the Equal Access to Justice Act, allows a party who prevails against the United States to recover attorneys' fees and other expenses under certain circumstances. Portions of the act, codified at 5 U.S.C. 504, allow specific categories of prevailing parties⁸ to recover reasonable attorney fees, expert witness expenses, and related costs in adversary adjudications⁹ in administrative proceedings unless the hearing officer finds that the agency's position was substantially justified or that special circumstances make an award unjust. Under section 504, attorney fee rates are limited to \$75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee. Fees and expenses awarded under section

⁶The Judgment Fund is used to pay for certain awards against the United States, sometimes including awards of attorneys' fees under judgments, settlements, and certain other administrative proceedings, when agency appropriations may not be used.

⁷Awards of Attorneys' Fees by Federal Courts and Federal Agencies (CRS 94-970A, Nov. 28, 1994).

⁸In order for the prevailing party to be paid attorneys' fees under 5 U.S.C. 504 and 28 U.S.C. 2412(d), it must be a "party" as defined in the act. In general, both provisions define "party" as an individual with net worth of not more than \$2 million at the time the action was filed; any owner of an unincorporated business, or any corporation, partnership, association, local governmental unit or organization, with a net worth of not more than \$7 million and not more than 500 employees at the time the action was filed; or a tax-exempt organization under 26 U.S.C. 501(c)(3) or an agricultural cooperative under 12 U.S.C. 1141j(a) regardless of net worth.

⁹These are defined to include adjudications under 5 U.S.C. 554 (i.e., adjudications under the Administrative Procedure Act) in which the United States is represented by counsel, with the exception of adjudications for the purpose of granting or renewing a license or for the purpose of establishing or fixing a rate, as well as contract dispute proceedings before agency boards of contract appeals under 41 U.S.C. 607, hearings conducted under chapter 38 of title 31, and proceedings under the Religious Freedom Restoration Act of 1993.

504 are paid by the agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

Portions of the act, codified at 28 U.S.C. 2412(b), authorize a court to award reasonable attorneys' fees and expenses to a prevailing party in civil actions brought by or against the United States. Under this subsection, the United States is to be liable for such fees to the same extent that any other party would be liable under the common law or under the terms of any federal statute that specifically provides for the award of such fees.

Subsection 2412(d) provides that a court shall award fees and other expenses to a party prevailing against the United States in any nontort civil action unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. Under this subsection, the hourly rate for attorney fees is not to exceed \$75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. Fees and expenses awarded under this subsection are to be paid by the agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

The Equal Access to Justice Act requires that attorneys' fees and other expenses awarded under the act be reported annually to Congress.¹⁰ The Attorney General is to report attorneys' fees and expenses awarded in certain judicial proceedings, and the Chairman of the Administrative Conference of the United States is to report attorneys' fees and expenses awarded in administrative proceedings.

The Judgment Fund is a permanent, indefinite appropriation that is jointly administered by us and the Departments of Justice and the Treasury. Congress established the Judgment Fund to pay awards, sometimes including attorneys' fees and other costs, under judgments, compromise settlements, and certain other administrative proceedings when agencies are not authorized to pay awards with their appropriated funds or other funds available to them.¹¹

¹⁰Department of Justice and Administrative Conference of the United States officials told us about some data reporting problems. (See app. II for more information on data problems.)

¹¹It should be noted that some of the attorneys' fee awards reported by certain agencies may have been paid from the Judgment Fund. Therefore, the same fee awards may have been included in (1) the attorneys' fee awards reported to us by some agencies and (2) the attorneys' fee awards reported under the Judgment Fund.

Results in Brief

The 9 federal agencies reported 441 plaintiff attorneys' fee awards¹² over \$10,000 during fiscal years 1993 and 1994. These awards totaled about \$20 million and were authorized under 19 federal statutes, including awards under the Equal Access to Justice Act. The highest single attorney's fee awarded during this 2-year period was \$800,000 against HUD. The highest single hourly attorney rate, \$320 per hour, was awarded in separate cases against three agencies: HHS, the Treasury, and GSA.

The 9 agencies reported that 4 of the attorneys' fee awards were based on a percentage of the plaintiff's award, 179 were based on an hourly rate, and 263 were lump-sum payments.¹³ The 9 agencies reported that of these 441 attorneys' fee awards against the government, 210 were from administrative proceedings and 231 were from judicial proceedings.¹⁴ Of the 441 awards, 276 awards were the result of settlement agreements. Of the 276 awards, 153 were from administrative proceedings, and 123 were from judicial proceedings. (See app. I for more information on these awards.)

According to the Equal Access to Justice Act annual reports, attorneys' fee awards authorized under this act totaled \$1.3 million in fiscal year 1993, \$1 million from judicial proceedings and \$0.3 million from administrative proceedings. However, the fee awards under the act of over \$10,000 reported to us by the nine agencies totaled \$3 million and \$0.3 million, respectively. Officials of the Department of Justice and Administrative Conference of the United States attributed the differences in the amounts reported by the two sources to administrative and reporting problems associated with the annual reports. Fiscal year 1994 annual reports were not available at the time of our review. (See app. II for more information on these awards.)

In fiscal year 1993, attorneys' fee awards paid from the Judgment Fund totaled \$11.6 million. Attorneys' fee awards of \$12.2 million were paid from the Fund in fiscal year 1994. (See app. III for more information on these awards.)

¹²This number also represents the number of cases involved.

¹³Two award methods were reported for 8 of the 441 cases, and no award method was reported for 3 cases.

¹⁴The administrative category also includes grievance arbitration and settlements under Merit Systems Protection Board actions that some agencies reported under the category "other."

Scope and Methodology

Because of work we performed in 1992,¹⁵ we were aware of the large number of cases in which the federal government (38 agencies) had paid attorneys' fee awards to prevailing parties; the lack of centralized, computerized data on these cases; and the hardship the agencies or we would face in collecting and reviewing data on these cases. Therefore, as agreed with your office, we limited our data collection efforts to the nine federal agencies that our prior report indicated paid the highest amount of attorneys' fees in fiscal year 1991.

To determine the number of cases, award amounts, highest individual fees, and highest hourly rates of plaintiff attorneys' fees awarded under federal statutes, we attempted to collect data on attorneys' fee awards against these agencies during fiscal years 1993 and 1994. However, the nine agencies' automated records systems did not contain the detailed information we needed. Therefore, we also agreed to limit our work to plaintiff attorneys' fee awards over \$10,000 for the nine agencies during the 2 fiscal years.¹⁶ We arbitrarily selected \$10,000 to limit the number of cases agencies would have to research to satisfy our request. In addition, we did not ask for information on actions where the plaintiff was awarded a total payment in which the attorneys' fees were not separated out. In those cases, it was not possible to identify the specific amount of attorneys' fees awarded.

To obtain detailed information on attorneys' fee awards, we developed a survey instrument. A copy of the instrument is provided in appendix IV. Our survey instructions asked the nine agencies to complete one form for each award. We asked that a contact person in each agency distribute the forms to and collect them from the components involved in attorneys' fee awards. We relied on these contact persons to ensure that the agencies submitted all requested information on all relevant cases. We did not verify the accuracy of the data agencies provided to us.

To obtain broader information on attorneys' fee awards against the federal government, we obtained data on the Equal Access to Justice Act awards and on the Judgment Fund. To determine the Equal Access to Justice Act attorneys' fee awards data for fiscal year 1993, we obtained the fiscal year 1993 annual reports from the Attorney General and the Chairman of the

¹⁵Private Attorneys: Information on the Federal Government's Use of Private Attorneys (GAO/GGD-93-17FS, Oct. 20, 1992).

¹⁶The report data understates the actual amount of money being paid out by the government in private attorneys' fees because of factors such as (1) all agencies were not canvassed and (2) some agencies paid numerous awards of less than \$10,000.

Administrative Conference of the United States. Data from these annual reports are presented in appendix II. (Although the fiscal year 1994 annual report on attorney fees paid under the Equal Access to Justice Act for judicial proceedings was available, the other annual report dealing with attorney fees paid for administrative proceedings was not available at the time of our review. Therefore, we did not include in this report any of the data presented in the fiscal year 1994 annual reports.)

We obtained Judgment Fund disbursement data for fiscal years 1993 and 1994 from our Office of the General Counsel. We are responsible for certifying payments from the Judgment Fund. Data on the Judgment Fund are presented in appendix III.

We did our work between November 1994 and August 1995 in accordance with generally accepted government auditing standards.

Agency Comments

On September 1, 1995, we provided a draft of this report to the Secretaries of Defense, HHS, HUD, the Interior, Transportation, and the Treasury; the Attorney General; the Administrator of GSA; the Postmaster General; and the Chairman of the Administrative Conference of the United States for their comments.

The Postal Service and the Departments of HHS, Justice, the Interior, Transportation, and the Treasury had no comments on the report. The Administrative Conference of the United States and GSA had a few technical comments that we incorporated where appropriate.

Defense and HUD provided written comments on the draft. These comments are presented in appendixes V and VI. These agencies generally agreed with the information presented in this report, and HUD provided technical clarifications that we incorporated where appropriate. HUD commented that the attorneys' fees paid by the Department increased significantly over the past several years because it had successfully settled or is now settling complex public housing and civil rights cases that were initiated in the 1980s. HUD also explained that the highest individual attorney's fee award mentioned in this report, the \$800,000 Equal Access to Justice Act payment that was awarded against it, was negotiated as a lump-sum payment. According to HUD, this litigation was pending for 4 years, and the court could have awarded attorneys' fees in this case for approximately \$1.25 million.

As agreed with your office, we plan no further distribution of this report for 30 days. At that time, we will send copies to other congressional committees and to the Secretaries of Defense, HHS, HUD, the Interior, Transportation, and the Treasury and to the Attorney General, the Administrator of GSA, and the Postmaster General. We will also send copies to other interested parties and make copies available to others upon request.

The major contributors to this report are listed in appendix VII. Please contact me on (202) 512-8777 if you have any questions concerning this report.

Sincerely yours,

A handwritten signature in black ink that reads "Norman Rabkin". The signature is written in a cursive, flowing style.

Norman J. Rabkin
Director, Administration
of Justice Issues

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Abbreviations

| | |
|-----|---|
| CRS | Congressional Research Service |
| GSA | General Services Administration |
| HHS | Department of Health and Human Services |
| HUD | Department of Housing and Urban Development |

Attorneys' Fees Over \$10,000 Awarded Against Nine Agencies in Fiscal Years 1993 and 1994

The 9 agencies we surveyed reported 441 awards of plaintiff attorneys' fees over \$10,000 during fiscal years 1993 and 1994. These awards were authorized under 19 federal statutes and totaled about \$20 million. The highest individual attorney's fee award was \$800,000, authorized under the Equal Access to Justice Act and awarded against the Department of Housing and Urban Development (HUD). The highest individual hourly rate awarded was \$320. This hourly rate was awarded in separate cases against three agencies: (1) the Department of Health and Human Services (HHS), (2) the Department of the Treasury, and (3) the General Services Administration (GSA).

Total Agency Awards Ranged From About \$90,000 to \$1.9 Million During the 2 Fiscal Years

Awards over \$10,000 reported by the nine agencies totaled \$8.3 million during fiscal year 1993. The total agency awards in fiscal year 1993 ranged from about \$90,000 against HUD to more than \$1.6 million against the Department of the Treasury. The number of awards against the 9 agencies ranged from 4 at HUD to 45 at HHS.

In fiscal year 1994, awards against the nine agencies totaled almost \$11.6 million. Total agency awards ranged from about \$219,000 against GSA to almost \$1.9 million against the Department of Defense. The number of awards in fiscal year 1994 ranged from 7 against GSA to 47 against HHS.

Table I.1 lists the number and amount of awards against the nine agencies for fiscal years 1993 and 1994.

Table I.1: Number and Amount of Attorneys' Fees Over \$10,000 Awarded Against the Nine Agencies During Fiscal Years 1993 and 1994

| Agency | FY 1993 | | FY 1994 | |
|----------------|------------|--------------------|------------|---------------------|
| | Number | Amount | Number | Amount |
| Defense | 21 | \$803,639 | 35 | \$1,862,333 |
| HHS | 45 | 1,451,618 | 47 | 1,647,999 |
| HUD | 4 | 89,801 | 13 | 1,372,121 |
| Interior | 13 | 695,787 | 29 | 1,747,121 |
| Justice | 17 | 1,548,899 | 27 | 1,740,055 |
| Transportation | 10 | 208,566 | 15 | 531,830 |
| Treasury | 30 | 1,649,657 | 38 | 1,357,930 |
| GSA | 5 | 251,387 | 7 | 219,399 |
| Postal Service | 39 | 1,532,471 | 46 | 1,088,331 |
| Total | 184 | \$8,231,825 | 257 | \$11,567,119 |

Note: Totals may not add due to rounding.

Source: GAO analysis of data reported by the nine agencies.

**Appendix I
Attorneys' Fees Over \$10,000 Awarded
Against Nine Agencies in Fiscal Years 1993
and 1994**

Table I.2 lists the number and amount of attorneys' fees over \$10,000 awarded during fiscal years 1993 and 1994 against the nine agency components with the highest aggregate amount of attorneys' fees.

Table I.2: Awards Against Components of the Nine Agencies With the Highest Aggregate Amount of Plaintiff Attorneys' Fees Over \$10,000 During Fiscal Years 1993 and 1994

| Agency/component | Number | Amount |
|---|---------------|---------------|
| Defense | | |
| Army Corps of Engineers | 10 | \$939,814 |
| HHS | | |
| Bureau of Health Professions | 64 | 1,193,625 |
| HUD | | |
| Litigation and Fair Housing Enforcement | 7 | 1,121,092 |
| Interior | | |
| Bureau of Reclamation | 2 | 603,163 |
| Justice | | |
| Immigration and Naturalization Service | 17 | 1,059,176 |
| Transportation | | |
| Federal Aviation Administration | 19 | 492,460 |
| Treasury | | |
| Internal Revenue Service | 43 | 1,573,785 |
| GSA | | |
| Regional Counsel | 3 | 68,827 |
| Postal Service | | |
| Law Department | 22 | \$1,405,896 |

Source: GAO analysis of data reported by the nine agencies.

The Highest Number and Amount of Awards Against the Nine Agencies Were Authorized Under the Equal Access to Justice Act

More than 27 percent (123) of the reported awards over \$10,000 for fiscal years 1993 and 1994 against the nine agencies were authorized under the Equal Access to Justice Act. Title VII of the Civil Rights Act of 1964 and the Civil Service Reform Act of 1978 accounted for the second (108) and third (87) largest number of awards against these agencies. Fewer than 7 awards each against these agencies were authorized under 14 of the 19 statutes.

In addition, the highest amount of attorneys' fee awards against the nine agencies were authorized under the Equal Access to Justice Act for both fiscal years, totaling over \$9.4 million. The second and third largest total award amounts against these agencies were authorized under title VII of the Civil Rights Act of 1964 (\$3.7 million) and the Civil Service Reform Act

**Appendix I
Attorneys' Fees Over \$10,000 Awarded
Against Nine Agencies in Fiscal Years 1993
and 1994**

of 1978 (\$2.4 million). The smallest total award amounts against these agencies were authorized under the Age Discrimination in Employment Act, Civil Rights Attorney's Fees Awards Act, Contract Disputes Act, and Postal Reorganization Act. These award amounts totaled less than \$27,000 per act.

Table I.3 lists the federal statutes authorizing attorneys' fee awards over \$10,000 for the cases as reported by the nine agencies during these 2 fiscal years.

Table I.3: Number and Amount of Attorneys' Fee Awards Over \$10,000 Authorized by Statute Against the Nine Agencies, Fiscal Years 1993 and 1994

| Authorizing federal statute | FY 1993 | | FY 1994 | |
|------------------------------------|---------|-----------|---------|-----------|
| | Number | Amount | Number | Amount |
| Equal Access to Justice Act | | | | |
| 5 U.S.C. section 504(a)(1) | 15 | \$437,700 | 21 | \$907,052 |
| 28 U.S.C. section 2412 | 36 | 2,832,642 | 51 | 5,268,533 |
| Privacy Act | | | | |
| 5 U.S.C. section 552a | 0 | 0 | 1 | 51,813 |
| Freedom of Information Act | | | | |
| 5 U.S.C. section 552(a)(4)(E) | 1 | 19,515 | 2 | 55,401 |
| Whistleblower Protection Act | | | | |
| 5 U.S.C. section 1221(g) | 0 | 0 | 1 | 92,625 |
| Civil Service Reform Act | | | | |
| 5 U.S.C. section 5596(b)(1) | 4 | 107,016 | 10 | 303,516 |
| 5 U.S.C. section 7701(g) | 25 | 758,160 | 48 | 1,190,931 |
| National Historic Preservation Act | | | | |
| 16 U.S.C. section 470w-4 | 0 | 0 | 1 | 180,000 |
| Endangered Species Act | | | | |
| 16 U.S.C. section 1540(g)(4) | 2 | 287,500 | 2 | 71,000 |
| Internal Revenue Code | | | | |
| 26 U.S.C. section 7430 | 15 | 661,963 | 11 | 482,455 |
| Fair Labor Standards Act | | | | |
| 29 U.S.C. section 216(b) | 2 | 711,166 | 1 | 12,000 |

(continued)

**Appendix I
Attorneys' Fees Over \$10,000 Awarded
Against Nine Agencies in Fiscal Years 1993
and 1994**

| Authorizing federal statute | FY 1993 | | FY 1994 | |
|--|------------|--------------------|------------|---------------------|
| | Number | Amount | Number | Amount |
| Age Discrimination in Employment Act of 1967 | | | | |
| 29 U.S.C. section 626(b) | 1 | 11,400 | 1 | 15,000 |
| Rehabilitation Act of 1973 | | | | |
| 29 U.S.C. section 794a | 1 | 12,857 | 3 | 64,800 |
| Surface Mining Control and Reclamation Act | | | | |
| 30 U.S.C. section 1275(e) | 1 | 45,000 | 5 | 123,941 |
| Water Pollution Prevention and Control Act | | | | |
| 33 U.S.C. section 1365(d) | 1 | 53,000 | 1 | 16,000 |
| Postal Reorganization Act ^a | | | | |
| 39 U.S.C. section 1208(b) | 0 | 0 | 1 | 22,750 |
| Federal Property and Administrative Services Act | | | | |
| 40 U.S.C. section 759(f)(5)(C) | 1 | 57,016 | 1 | 42,043 |
| Contract Disputes Act | | | | |
| 41 U.S.C. section 607 | 0 | 0 | 1 | 17,858 |
| National Childhood Vaccine Injury Act | | | | |
| 42 U.S.C. section 300aa-15(b) | 32 | 560,433 | 32 | 633,192 |
| Civil Rights Attorneys' Fees Awards Act | | | | |
| 42 U.S.C. section 1988 | 0 | 0 | 2 | 22,679 |
| Civil Rights Act of 1964, title VII | | | | |
| 42 U.S.C. section 2000e-5(k) | 47 | 1,676,456 | 61 | 1,993,529 |
| Total | 184 | \$8,231,824 | 257 | \$11,567,118 |

(Table notes on next page)

Appendix I
Attorneys' Fees Over \$10,000 Awarded
Against Nine Agencies in Fiscal Years 1993
and 1994

Note: Totals may not add due to rounding.

^aAccording to a U.S. Postal Service official, plaintiff's award was made under 39 U.S.C. 1208(b). Although the statute does not specifically authorize attorneys' fee awards, the official stated that the Postal Service interprets case law under this statute as giving it the authority to pay attorneys' fees.

Source: GAO analysis of data reported by the nine agencies.

HUD Reported the Highest Individual Attorneys' Fee Award

The highest individual plaintiff attorney's fee award was a lump-sum, negotiated fee settlement of \$800,000 against HUD's Office of Litigation and Fair Housing Enforcement. The Department of the Interior reported the second highest fee award (\$575,000), the Postal Service reported the third highest (\$541,000), and the lowest fee award reported was \$119,111 by the Department of Transportation. Table I.4 shows the three highest individual attorneys' fees over \$10,000 awarded against each agency during fiscal years 1993 and 1994.

Table I.4: Highest Three Attorneys' Fee Awards Amounts Reported by the Nine Agencies During Fiscal Years 1993 and 1994

| Agency | Highest fee award | Second highest fee award | Third highest fee award |
|----------------|-------------------|--------------------------|-------------------------|
| Defense | \$401,531 | \$235,000 | \$140,000 |
| HHS | 349,737 | 255,614 | 160,000 |
| HUD | 800,000 | 134,721 | 100,000 |
| Interior | 575,000 | 220,000 | 180,000 |
| Justice | 400,000 | 400,000 | 335,553 |
| Transportation | 119,111 | 92,625 | 50,000 |
| Treasury | 327,123 | 195,000 | 187,017 |
| GSA | 128,858 | 55,160 | 49,000 |
| Postal Service | \$541,166 | \$190,000 | \$185,669 |

Source: GAO analysis of data reported by the nine agencies.

Highest Hourly Attorneys' Fee Rate Awarded

As reported by the nine agencies, of the attorneys' fee awards over \$10,000, the highest hourly attorney's fee rate was \$320 per hour. This fee was awarded to plaintiff attorneys in actions against HHS, the Treasury, and GSA.

Of the 179 cases in which attorneys' fees were awarded on the basis of an hourly rate, 153 were awarded as billed by the plaintiff attorneys. More

**Appendix I
Attorneys' Fees Over \$10,000 Awarded
Against Nine Agencies in Fiscal Years 1993
and 1994**

than one hourly rate was reported in 52 of these cases. For example, a case may have included several rates for multiple attorneys and for paralegals and clerks. A total of 310 hourly rates was reported in the 153 cases. Table I.5 shows the three highest hourly rates that were awarded by the plaintiff attorney for all nine agencies.¹

Table I.5: Highest Three Hourly Attorneys' Fee Awards Against the Nine Agencies, Fiscal Years 1993 and 1994

| Agency | Highest hourly fee award | | Second highest hourly fee award | | Third highest hourly fee award | |
|----------------|--------------------------|-----------------|---------------------------------|-----------------|--------------------------------|-----------------|
| | Amount | Number of cases | Amount | Number of cases | Amount | Number of cases |
| Defense | \$300 | 1 | \$250 | 2 | \$225 | 1 |
| HHS | 320 | 1 | 265 | 2 | 250 | 3 |
| HUD | 225 | 1 | 210 | 1 | 165 | 1 |
| Interior | 225 | 1 | 200 | 1 | 185 | 1 |
| Justice | 250 | 1 | 205 | 1 | 200 | 1 |
| Transportation | 205 | 1 | 200 | 1 | 195 | 1 |
| Treasury | 320 | 1 | 305 | 1 | 295 | 1 |
| GSA | 320 | 1 | 225 | 2 | 185 | 2 |
| Postal Service | \$200 | 6 | \$185 | 2 | \$175 | 1 |

Source: GAO analysis of data reported by the nine agencies.

Table I.6 shows the distribution of the 310 hourly attorney rates by hourly rate range awarded against the nine agencies. The lowest range was \$99 or less, and the highest range was \$300 or more. Included in the table are hourly rates that were actually awarded to the plaintiffs' attorneys. We excluded billed rates that were later negotiated down by the agency.

Table I.6: Distribution of Hourly Rates by Hourly Rate Range Reported by the Nine Agencies, Fiscal Years 1993 and 1994

| Hourly rate range | Number of awards | |
|-------------------|------------------|---------|
| | FY 1993 | FY 1994 |
| \$99 or less | 43 | 39 |
| \$100 to \$199 | 83 | 83 |
| \$200 to \$299 | 25 | 32 |
| \$300 or more | 2 | 3 |

Source: GAO analysis of data reported by the nine agencies.

¹We asked the nine agencies to indicate whether each attorney fee award was based on a percentage of the plaintiff's award, a lump-sum payment, or an hourly rate. Some cases that were billed using an hourly rate were later negotiated for a different fee award amount. In these instances, some agencies indicated that the award was based on a lump-sum payment, while others reported an hourly rate. Consequently, the hourly rate fees provided did not always add to the negotiated fee.

**Appendix I
Attorneys' Fees Over \$10,000 Awarded
Against Nine Agencies in Fiscal Years 1993
and 1994**

Table I.7 shows the highest and lowest hourly attorney rate range reported by the nine agencies, set out by statute, for fiscal years 1993 and 1994.

**Appendix I
Attorneys' Fees Over \$10,000 Awarded
Against Nine Agencies in Fiscal Years 1993
and 1994**

Table I.7: Range of Hourly Attorneys' Fee Rates Reported by the Nine Agencies for Fiscal Years 1993 and 1994, Set Out by Statute

| Authorizing federal statute | FY 1993 | | FY 1994 | |
|--|-----------------------|------------------------|-----------------------|------------------------|
| | Hourly rate low range | Hourly rate high range | Hourly rate low range | Hourly rate high range |
| Equal Access to Justice Act | | | | |
| 5 U.S.C. section 504(a)(1) | \$45 | \$150 | \$10 | \$150 |
| 28 U.S.C. section 2412 | 60 | 320 | 50 | 320 |
| Privacy Act | | | | |
| 5 U.S.C. section 552a | 0 | 0 | 130 | 130 |
| Freedom of Information Act | | | | |
| 5 U.S.C. section 552(a)(4)(E) | 150 | 150 | 0 | 0 |
| Civil Service Reform Act | | | | |
| 5 U.S.C. section 5596(b)(1) | 45 | 200 | 69 | 225 |
| 5 U.S.C. section 7701(g) | 75 | 225 | 45 | 250 |
| Internal Revenue Code | | | | |
| 26 U.S.C. section 7430 | 79 | 100 | 20 | 270 |
| Federal Property & Administrative Services Act | | | | |
| 40 U.S.C. section 759 (f)(5)(C) | 50 | 175 | 0 | 0 |
| Contract Disputes Act | | | | |
| 41 U.S.C. section 607 | 0 | 0 | 75 | 75 |
| National Childhood Vaccine Injury Act | | | | |
| 42 U.S.C. section 300aa-15(b) | 25 | 250 | 55 | 190 |
| Civil Rights Attorney Fees Awards Act | | | | |
| 42 U.S.C. section 1988 | 0 | 0 | 225 | 225 |
| Civil Rights Act of 1964, title VII | | | | |
| 42 U.S.C. section 2000e-5(k) | 10 | 225 | 45 | 320 |

Note: Some rates reflect paralegal and clerk hourly rates.

Source: GAO analysis of data reported by the nine agencies.

**Appendix I
Attorneys' Fees Over \$10,000 Awarded
Against Nine Agencies in Fiscal Years 1993
and 1994**

Basis for Attorneys' Fee Awards Decisions

Overall, the nine agencies reported that the majority of the attorneys' fee awards were based on a lump-sum payment. Table I.8 shows the basis for the agencies' fee awards. Two award methods were reported for 8 of the 441 cases, and no award method was reported for 3 cases.

Table I.8: Basis for Plaintiff Attorneys' Fee Awards Over \$10,000 Against the Nine Agencies, Fiscal Years 1993 and 1994

| Agency | Award basis | | |
|----------------|---------------------------------|------------------|-------------|
| | Percentage of plaintiff's award | Lump-sum payment | Hourly rate |
| Defense | 1 | 21 | 35 |
| HHS | 0 | 64 | 27 |
| HUD | 0 | 11 | 6 |
| Interior | 1 | 31 | 11 |
| Justice | 0 | 24 | 21 |
| Transportation | 1 | 12 | 13 |
| Treasury | 0 | 36 | 32 |
| GSA | 0 | 2 | 10 |
| Postal Service | 1 | 62 | 24 |
| Total | 4 | 263 | 179 |

Source: GAO analysis of data reported by the nine agencies.

Type of Proceeding

The 441 attorneys' fee awards cases reported by the 9 agencies were almost equally distributed between administrative and judicial proceedings. Almost two-thirds of the 441 cases were closed as a result of a settlement. Table I.9 shows the breakdown of the type of proceeding by agency. The administrative category also includes grievance arbitration and settlements under Merit Systems Protection Board actions that some agencies reported under the category "other."

Appendix I
Attorneys' Fees Over \$10,000 Awarded
Against Nine Agencies in Fiscal Years 1993
and 1994

Table I.9: Number of Plaintiff Attorneys' Fee Awards Over \$10,000 Against the Nine Agencies by Type of Proceeding, Fiscal Years 1993 and 1994

| Agency | Type of proceeding | |
|----------------|--------------------|------------|
| | Administrative | Judicial |
| Defense | 43 | 13 |
| HHS | 3 | 89 |
| HUD | 4 | 13 |
| Interior | 13 | 29 |
| Justice | 15 | 29 |
| Transportation | 19 | 6 |
| Treasury | 29 | 39 |
| GSA | 10 | 2 |
| Postal Service | 74 | 11 |
| Total | 210 | 231 |

Source: GAO analysis of data reported by the nine agencies.

The 9 agencies reported that of the 441 awards, 276 awards were the result of settlement agreements of which 153 awards were from administrative proceedings and 123 were from judicial proceedings.

The fee awards under the Equal Access to Justice Act of over \$10,000 reported to us by the nine agencies totaled \$3.3 million in fiscal year 1993, \$3 million from judicial proceedings, and \$0.3 million from administrative proceedings.

Equal Access to Justice Act Annual Reports Data for Fiscal Year 1993

On the basis of information contained in the Equal Access to Justice Act annual reports, we determined that during fiscal year 1993, 257 attorneys' fee awards totaling \$1.3 million were authorized under the Equal Access to Justice Act provisions covered by the reports. Of these awards, 232 awards totaling \$988,060 resulted from judicial proceedings, and 25 awards totaling \$317,893 resulted from administrative proceedings. The Attorney General is responsible for issuing an annual report to Congress on certain judicial awards under this act, and the Chairman of the Administrative Conference of the United States is responsible for issuing an annual report to Congress on administrative awards under this act. Table II.1 shows the awards reported in the two annual reports for fiscal year 1993.

**Table II.1: Attorneys' Fee Awards
Reported in the Fiscal Year 1993 Equal
Access to Justice Act Annual Reports**

| Agency | Administrative awards | | Judicial awards | |
|---------------------------|-----------------------|------------------|-----------------|------------------|
| | Number | Amount | Number | Amount |
| Defense | 6 | \$104,823 | 2 | \$76,412 |
| Commerce | 1 | 9,228 | 0 | 0 |
| Energy | 0 | 0 | 1 | 23,875 |
| GSA | 3 | 24,024 | 0 | 0 |
| HHS | 0 | 0 | 215 | 769,500 |
| Interior | 0 | 0 | 1 | 8,500 |
| Labor | 2 | 38,152 | 1 | 20,317 |
| Railroad Retirement Board | 0 | 0 | 1 | 14,018 |
| Transportation | 11 | 100,083 | 0 | 0 |
| Treasury | 0 | 0 | 1 | 14,846 |
| Postal Service | 2 | 41,583 | 1 | 22,387 |
| Not Specified | 0 | 0 | 9 | 38,205 |
| Totals | 25 | \$317,893 | 232 | \$988,060 |

Source: GAO analysis of the Department of Justice and the Administrative Conference of the United States annual reports on the Equal Access to Justice Act.

The total fiscal year 1993 attorneys' fee awards over \$10,000 authorized under the Equal Access to Justice Act that the agencies provided to us (see table I.3) differed from the data reported in the Equal Access to Justice Act annual reports for that year. A Department of Justice official, who is responsible for compiling the data, attributed the differences in part to administrative problems involving the recent transfer of the act's reporting responsibility from the U.S. Courts to the Department of Justice. In addition, an official of the Administrative Conference of the United States said agency data reported to this agency occasionally includes case

Appendix II
Equal Access to Justice Act Annual Reports
Data for Fiscal Year 1993

information with no amount of attorneys' fees specified because the amount of the fee is to be determined in settlement negotiations. Subsequently, an amount may have been determined and reported to us by the nine agencies involved in our review.

Judgment Fund Attorneys' Fee Awards in Fiscal Years 1993 and 1994

In 1992, we reported on attorneys' fees awarded to prevailing parties in actions against the federal government. We found that for fiscal year 1991, \$1.8 million in attorneys' fee awards, or about 7 percent of all attorneys' fee awards, were paid from the Judgment Fund. Most of the awards that year were paid from agency funds.

The Department of Justice and other agencies notify us of awards owed under certain judgments and settlements that are to be paid by the Judgment Fund. We are responsible for certifying payments from the Judgment Fund. Some judgments and settlements combine the attorneys' fee awards with the basic award to the plaintiff and do not specify the amount of attorneys' fees. In these instances, because it is not possible to identify the specific amount awarded for attorneys' fees and the Judgment Fund reports all money paid in the basic award record, no money is shown in the attorney fee record. Therefore, table III.1 understates the actual attorneys' fee award amounts.

In fiscal year 1993, the Judgment Fund's attorneys' fee record showed payments of \$11.6 million. In fiscal year 1994, the Fund's attorneys' fee record showed payments of \$12.2 million. Details of Judgment Fund attorneys' fee payments during fiscal years 1993 and 1994 are shown in table III.1.

Table III.1: Attorneys' Fee Awards Paid From the Judgment Fund, Fiscal Years 1993 and 1994

| Agency | Attorneys' fees paid | |
|--|----------------------|----------|
| | FY 1993 | FY 1994 |
| Administrative Office of the U.S. Courts | \$0 | \$45,000 |
| Bureau of Alcohol, Tobacco, and Firearms | 1,784 | 4,685 |
| Army Corps of Engineers | 0 | 302,160 |
| Bureau of Indian Affairs | 13,425 | 192,320 |
| Bureau of Reclamation | 0 | 186,000 |
| Bureau of Prisons | 0 | 22,575 |
| Central Intelligence Agency | 0 | 10,576 |
| Customs Service | 750 | 11,079 |
| Defense Logistics Agency | 7,806 | 0 |
| Department of the Air Force | 932,056 | 594,944 |
| Department of the Interior | 31,500 | 997,959 |
| Department of State | 204,000 | 669,078 |
| Department of Agriculture | 35,373 | 15,244 |
| Department of Commerce | 300,000 | 18,700 |

(continued)

**Appendix III
Judgment Fund Attorneys' Fee Awards in
Fiscal Years 1993 and 1994**

| Agency | Attorneys' fees paid | |
|--|-----------------------------|----------------|
| | FY 1993 | FY 1994 |
| Department of Defense | 48,200 | 299,136 |
| Department of Education | 3,030 | 0 |
| Department of Energy | 7,000 | 152,015 |
| Department of Health and Human Services | 28,104 | 48,673 |
| Department of Housing and Urban Development | 167,596 | 863,811 |
| Department of Justice | 156,059 | 201,871 |
| Department of Labor | 105,528 | 0 |
| Department of Transportation | 0 | 48,642 |
| Department of Veterans Affairs | 500,123 | 284,399 |
| Department of the Army | 481,685 | 568,519 |
| Department of the Navy | 2,976,875 | 1,517,483 |
| Department of the Treasury | 10,929 | 112,338 |
| Drug Enforcement Administration | 2,313 | 123,020 |
| Environmental Protection Agency | 861,687 | 685,494 |
| Equal Employment Opportunity Commission | 697,378 | 6,961 |
| Farmers Home Administration | 44,522 | 0 |
| Federal Aviation Administration | 126,274 | 1,020,592 |
| Federal Bureau of Investigation | 26,070 | 44,216 |
| Federal Energy Regulatory Commission | 0 | 40,000 |
| Fish and Wildlife Service | 179,466 | 254,649 |
| Forest Service | 411,822 | 47,410 |
| General Services Administration | 102,253 | 219,792 |
| Government Printing Office | 2,588 | 0 |
| Health Care Finance Administration | 0 | 3,500 |
| Immigration and Naturalization Service | 38,465 | 23,840 |
| Indian Health Service | 50,000 | 0 |
| Internal Revenue Service | 738,011 | 836,611 |
| Merit Systems Protection Board | 0 | 10,000 |
| Minerals Management Service | 0 | 39,000 |
| National Aeronautics and Space Administration | 517,436 | 8,122 |
| National Highway Traffic Safety Administration | 7,000 | 0 |
| National Labor Relations Board | 6,666 | 0 |
| National Park Service | 2,500 | 0 |

(continued)

**Appendix III
Judgment Fund Attorneys' Fee Awards in
Fiscal Years 1993 and 1994**

| Agency | Attorneys' fees paid | |
|------------------------------------|-----------------------------|---------------------|
| | FY 1993 | FY 1994 |
| Office of Personnel Management | 0 | 4,325 |
| Office of Surface Mining | 98,823 | 0 |
| Peace Corps | 0 | 40,000 |
| Securities and Exchange Commission | 0 | 4,750 |
| Small Business Administration | 144,941 | 6,250 |
| Smithsonian Institution | 0 | 1,328 |
| Social Security Administration | 1,300 | 4,858 |
| Secret Service | 0 | 201,000 |
| U. S. Information Agency | 0 | 43,500 |
| Marshals Service | 2,500 | 110,710 |
| Other ^a | 1,555,122 | 1,214,524 |
| Total | \$11,628,959 | \$12,161,657 |

^aMiscellaneous, multiple, or unknown agencies.

Source: GAO analysis of Judgment Fund data.

Survey of Nine Federal Agencies on Attorneys' Fees Over \$10,000 Awarded During Fiscal Years 1993 and 1994

United States General Accounting Office

2/13/95



Survey on Fees Awarded to Plaintiff Attorneys

The Congress has requested the General Accounting Office obtain information on legal actions against the federal government, particularly plaintiff attorney award fees. These legal actions comprise both administrative and judicial proceedings, including settlements, but do not include bid protests.

As part of this review, we are seeking information on all non-bid protest legal actions brought against your department/agency ...

- that had the attorney fee awarded in fiscal years 1993 or 1994 and
- where the plaintiff attorney fee award, excluding expenses, exceeded \$10,000.

Do not include legal actions where your department/agency represented another department/agency. For example, the Department of Justice should not include data on legal actions where it represented the government for another department/agency.

We are interested in obtaining a separate response for each of these actions. Please make copies of this questionnaire as needed and distribute to the appropriate agency components.

We request that the questionnaires for your agency be returned as a group. Please complete and return these questionnaires as soon as possible or by no later than March 31, 1995, to

Mr. Jerry Aiello
U.S. General Accounting Office
Suite 865
477 Michigan Avenue
Detroit, MI 48226

If there are any questions, contact Jerry Aiello on (313) 256-8060.

Thank you for your cooperation.

**Appendix IV
Survey of Nine Federal Agencies on
Attorneys' Fees Over \$10,000 Awarded
During Fiscal Years 1993 and 1994**

GAO SURVEY ON FEES AWARDED TO PLAINTIFF ATTORNEYS

Department/agency: _____ Bureau/Major program component: _____

Please answer these questions for each legal action brought against your bureau/major program component: **a)** that were non-bid protests, **b)** that had the attorney fee awarded during fiscal years 1993 or 1994, and **c)** where the plaintiff attorney fee award, excluding expenses, exceeded \$10,000. Copy this page and complete it for each legal action. Exclude actions where the plaintiff was awarded a lump sum and the attorney fee award was not separate.

CASE NUMBER: _____ **CASE TITLE :** _____

1. What is the statute name and U.S. Code citation authorizing this plaintiff's attorney fee award?

Statute name: _____

U.S. Code citation: _____

2. In what fiscal year was the attorney fee awarded?

1993 1

1994 2

3. Excluding expenses (such as courier services, xeroxing, technical assistance, etc.), what was the total amount of the attorney fee award in this legal action?

\$ _____

4. On which of the following was the attorney fee award decision based? (*Check one.*)

Percentage of plaintiff award . 1 --> 4a. What was the percentage rate?

Lump sum payment 2 _____ %

Hourly rate . . . 3 --> 4b. What was/were the attorney fee hourly rate(s), the number of attorney hours approved, and the total amount awarded at the rate? (*The grand total should equal the amount reported above in Question 3.*)

5. At the time this legal action was closed, was it in ... (*Check one.*)

an administrative proceeding, . . . 1

a judicial proceeding, or 2

other? 3

Please explain _____

6. Was this legal action closed as a result of a settlement?

Yes 1

No 2

Please write any comments about this action on the back of this page.

Contact person if we have questions about information provided in this action.

Name: _____

Phone number: _____

| Hourly rate | Number of hours | Total amount awarded at this rate |
|---------------------------------------|-----------------|-----------------------------------|
| \$____ / hr | _____ hours | \$_____ |
| \$____ / hr | _____ hours | \$_____ |
| \$____ / hr | _____ hours | \$_____ |
| \$____ / hr | _____ hours | \$_____ |
| \$____ / hr | _____ hours | \$_____ |
| \$____ / hr | _____ hours | \$_____ |
| \$____ / hr | _____ hours | \$_____ |
| \$____ / hr | _____ hours | \$_____ |
| Grand Total Attorney Fee Award | | \$_____ |

Comments From the Department of Defense



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
WASHINGTON, D.C. 20301-1600

September 8, 1995

Mr. Norman J. Rabkin
Director, Administration of Justice Issues
General Government Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Rabkin:

This is the Department of Defense (DoD) response to the General Accounting Office (GAO) draft report "PRIVATE ATTORNEYS: Selected Attorneys' Fee Awards against Nine Federal Agencies in 1993 and 1994," dated September 1, 1995 (GAO Code 182009), OSD Case 9991.

The DoD has reviewed the draft report and concurs without further comment. The Department appreciates the opportunity to review the report in draft form.

Sincerely,

A handwritten signature in cursive script that reads "Tom G. Morgan".

TOM G. MORGAN
Associate Deputy General Counsel
(Appropriations and Authorization Matters)
Office, Deputy General Counsel (Fiscal)

Comments From the Department of Housing and Urban Development



U. S. Department of Housing and Urban Development
Washington, D.C. 20410-0500

September 11, 1995

OFFICE OF GENERAL COUNSEL

Mr. Norman J. Rabkin
Director, Administration of
Justice Issues
United States General Accounting Office
Washington, DC 20548

Dear Mr. Rabkin:

Thank you for the opportunity to comment on the draft report, "Private Attorneys: Selected Attorneys' Fee Awards Against Nine Federal Agencies in 1993 and 1994."

I am pleased to submit the following paragraphs which address the concerns expressed by Sara Manzano, Acting Deputy General Counsel for Civil Rights and Litigation, during an August 4, 1995, meeting with Jerry Aiello from your Detroit office:

"The Office of General Counsel at the U.S. Department of Housing and Urban Development ("HUD" or "the Department") has successfully settled or is in the process of settling complex public housing and civil rights cases that had been long languishing from want of action. Some of the cases had been filed in the 1980s. These cases had not taken significant movement toward resolution until Secretary Cisneros and General Counsel Díaz determined to negotiate with plaintiffs to settle the cases. As a result of the settlements, the attorneys' fees paid by the Department increased significantly over the past several years.

The EAJA payment in the Velez case was negotiated as an aggregate lump-sum, based upon total billable hours and expenses for the Legal Aid lawyers and additional private attorneys who had been appointed by the court to assist Legal Aid in preparing for and conducting this trial and post-trial settlement negotiations. This litigation was pending for four years and included mediation, in-depth discovery and trial preparation (including several dozen witness depositions and development of a 45,000 page administrative record), trial and post-trial settlement negotiations. The court strongly urged the parties to settle all plaintiffs' attorneys' fees and costs claims. The \$800,000 EAJA payment which was negotiated reduced an aggregate claim for approximately 1.25 million dollars, which may well have been awarded by the court."

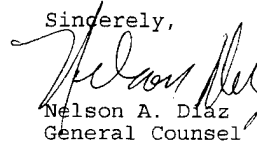
**Appendix VI
Comments From the Department of Housing
and Urban Development**

2

We would like to see these paragraphs included either in the first paragraph of Appendix I on page 14 or as a footnote to that paragraph.

Your assistance in ensuring that our comments are incorporated into this report is greatly appreciated.

Sincerely,



Nelson A. Diaz
General Counsel

cc:
Jerry Aiello

Major Contributors to This Report

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D.C.**

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