UNEQUAL JUSTICE FOR ALL: INCONSISTENCIES IN THE DEFINITION OF A "SMALL BUSINESS PARTY" UNDER THE FLORIDA EQUAL ACCESS TO JUSTICE ACT

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I. INTRODUCTION

In 1984 the Florida legislature enacted the Florida Equal Access to Justice Act (FEAJA).[1] The purpose of the FEAJA is to allow for parties who have actions brought against them by the State to have a path, in certain circumstances, to collect attorney fees and costs from the State. The adoption of the FEAJA was an attempt to offset the greater resources of the State in litigation with those of small business so that there is not a deterrent effect of "seeking review of, or defending against, unreasonable governmental action because of the expense of civil actions and administrative hearings."[2] The FEAJA provides that attorney fees and costs (of up to $50,000[3]) will be awarded to a prevailing small business party unless the actions of a State agency were substantially justified or special circumstances exist to make the award of fees and costs unjust.[4] Essentially a two-part hearing is held in the tribunal in which the underlying case was brought. First, the Petitioner must prove that it is a "small business party" in accordance with section 57.111(3)(d) Florida Statutes. Then the burden of proof switches to the Department to show substantial justification or special circumstances in order to avoid liability for fees and costs.[5]

This article is an examination of the qualifications necessary to be considered a "small business party" under FEAJA. Inconsistencies arise in the Florida case law as to the definition of a "small business party," which may leave litigants unsure as to whether they could qualify for an FEAJA claim. There are cases in Florida that suggest that a very large business may have the ability to claim attorney fees and costs as a small business party under the statute. The FEAJA is modeled after the Federal Equal Access to Justice Act (EAJA).[6] However, until there was intervention by Congress several years after the initial enactment of the EAJA, there were similar inconsistencies in the Federal cases in determining who could qualify as a small business. Congress amended the EAJA to make clear that only litigants that most would consider to be small businesses could meet the definition of such in federal cases. The Florida Legislature should similarly amend its definition of a "small business party" under the FEAJA so that only small businesses would be able to take advantage of the statute. Amending the FEAJA would bring consistency in the application of this part of the statute and would save unneeded expense to both

[1] Fla. Stat. § 57.111 (2008).

[2] Fla. Stat. § 57.111(2) (2008).

[3] Fla. Stat. § 57.11 l(4)(d)2. (2008).

[4] Fla. Stat. § 57.11 l(4)(a) (2008).

[5] *See* Department of Professional Regulation v. Toledo Realty, 549 So. 2d 715 (Fla. Dist. Ct. App. 1989); State, Dept, of Health and Rehabilitative Services v. South Beach Pharmacy, Inc., 635 So. 2d 117 (Fla. Dist. Ct. App. 1994).

[6] *See* Daniels v. Florida Department of Health, 898 So. 2d 61, 68 (Fla. 2005).

Florida taxpayers, and litigants who cannot rely on the current case law to determine if they qualify under the FEAJA.

II. DEFINING A "SMALL BUSINESS PARTY" UNDER FEAJA

The definition of a small business party, while outwardly appearing to be unambiguous, has been subject to different interpretations depending on the judge or administrative law judge ("ALJ") who has had this matter before him or her. A small business party for the purposes of the FEAJA is defined in section 57.11 l(3)(d) as:

> la. A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees *or* a net worth of not more than $2 million, including both personal and business investments;
>
> b. A partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state agency not more than 25 full-time employees *or* a net worth of not more than $2 million; or
>
> c. An individual whose net worth did not exceed $2 million at the time the action is initiated by a state agency when the action is brought against that individual's license to engage in the practice or operation of a business, profession, or trade.[7]

Of primary concern are sections 57.11 l(3)(d)l.a. and b. Florida Statutes. There is an unresolved issue regarding how this definition[8] should be construed. The only cases interpreting whether this definition should be read conjunctively or disjunctively have been brought before the State of Florida Division of Administrative Hearings ("DOAH"). The DOAH decisions are inconsistent on whether the word *or* in the definition should be literally interpreted to mean *or* or if the word should be interpreted to mean *and.* In addition, each administrative action that decides an issue of material fact before DOAH is brought under *de novo* review.[9] DOAH Final Orders usually only become binding if adopted by the agency that brought the case,[10] but due to the *de novo* review standard, agency final orders are only persuasive authority to other DOAH and agency cases. However, in the case

[7] Fla. Stat. § 57.11 l(3)(d) (2008) (emphasis added).

[8] Because Fla. Stat. § 57.11 l(3)(d)l.a.(2008) and Fla. Stat. § 57.11 l(3)(d)l.b. (2008) are structurally similar, they will collectively be referred to as one definition in this article

[9] Fla. Stat. § 120.57(l)(k) (2008).

[10] Fla. Stat. § 120.57(1)(1) (2008).

of a hearing brought for attorney fees and costs under section 57.111 Florida Statutes, the DOAH Final Order is considered to be the final action and there is no agency review.[11] There are no appellate decisions that interpret this question in the law. Only after a final agency action is a litigant entitled to judicial review in the district court of appeal.[12] This process can be costly and time consuming. Because the statute deals with small business parties and the outcome is uncertain due to differing interpretations of the definition of what is a small business, the risk of bearing the costs of the appellate process may lower the number of appeals. This is true even though if the appeal is won, costs and fees associated with that process would be awarded as a matter of statute.[13]

This leaves ambiguity as to what is considered a small business party for purposes of section 57.111 Florida Statutes. The question is whether the claimant would have to prove that it has a net worth of not more than two million dollars *and* not more than twenty five or more employees. The cases using this interpretation read the clauses before and after the word *or* (hereinafter the clauses) conjunctively. Conversely, other cases would have the claimant prove just one of the two standards (reading the clauses disjunctively). While at first glance the statute seems to allow meeting only one prong of the definition to be considered a small business party, this has not consistently been the case. There are good arguments for either reading. While the Florida Legislature seems to have intended that the clauses are to be read conjunctively the statute is unclear. Therefore, the Florida Legislature should reconsider this statute to remove this ambiguity by making its intent on the issue clearly known.

III. Interpreting the Clauses of the FEAJA

The obvious and stated intent of section 57.111 Florida Statutes is to allow for a small business party to recover its attorney fees and costs if the state brings an unwarranted action against it.[14] The purpose of the statute is to protect smaller litigants from the greater power of the state. The obvious inverse of this is that the State legislature believes that a larger business is better able to fend for itself against the actions of the State and can afford to pay its own attorney fees. A larger business, therefore, should not be able to avail itself of the protection built in to section 57.111.

[11] Fla. Stat. § 57.111(d) (2008).

[12] Fla. Stat. § 120.68(2008).

[13] *Id.*

[14] *See* Fla. Stat. § 57.111(2) (2008).

A. *Rules of Statutory Interpretation*

The Florida Supreme Court has explained the rules of statutory construction relevant to interpreting the FEAJA:

> In construing a statute [the court is] to give effect to the Legislature's intent. In attempting to discern legislative intent, [the court] must first look to the actual language used in the statute.
> When the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. In such instance, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent. When the statutory language is clear, courts have no occasion to resort to rules of construction—they must read the statute as written, for to do otherwise would constitute an abrogation of legislative power.[15]

This guidance from the Florida Supreme Court has been interpreted differently by the different tribunals that have judged the eligibility requirements to be considered a small business party under the FEAJA. The statute has been found to be clear on its face by some ALJs (who read the clauses disjunctively) and, therefore, they have not looked to the intent of the Florida Legislature. However, other ALJs have interpreted the clauses conjunctively, so presumably they are giving effect to the intent of the legislature.

B. *Florida Cases Interpreting the Clauses Conjunctively*

Several DOAH cases have interpreted this clause. The petitioner in *March* v. *Department of Business & Professional Regulation, Div. of Pari-Mutual Wagering*,[16] a horse trainer, had an action brought against him for doping horses.[17] He was not provided a urine sample as required by administrative rule so he prevailed in the underlying case.[18] The petitioner then brought an action for attorney fees and costs under section 57.111. In the attorney fee case the ALJ stated "[b]ased on his income tax return for 1992,1 conclude that [Petitioner] had less than 25 full-time employees. No evidence was presented to establish that his net worth, including business and personal assets, was $2 million or less at the time the action was initiated by DBPR.[19]"

[15] Daniels v. Florida Department of Health, 898 So. 2d 61, 64 (Fla. 2005).

[16] March v. Department of Business & Professional Regulation, Div. of Pari-Mutual Wagering No 94- 125IF, 1994 WL 1028195 (Fla. Div. Admin. Hrgs. Dec. 20, 1994)

[17] *Id.* at *2.

[18] *Id.* at *3.

[19] *Id.*

In establishing that he had less than twenty five employees, but not putting forward evidence about his net worth, the petitioner only proved one prong of section 57. Ill (3)(d) 1 .a. The ALJ held that March did not establish that he was a small business party as defined by section 57.111(3) Florida Statutes and, therefore, could not recover his attorney fees and costs. Essentially, the ALJ read the clauses conjunctively and would have required that the respondent exhibit both a net worth of not more than two million dollars *in addition to* not having more than twenty five full-time employees at the date of the initiation of the administrative action to be eligible for attorney fees and costs under section 57.111 Florida Statutes. *March* was affirmed without opinion by the Florida Third District Court of Appeal.[20] This case is the only time that an appellate court had this issue before it. Because it was *per curiam affirmed* opinion, it has no precedential value and cannot be used as authority except to show *res judicata*.[21] Therefore, a lower tribunal (including a DOAH hearing officer) is still free to interpret the clause either way.

In *Birkhead* v. *Department of Business & Professional Regulation*[22] the respondent was seeking attorney fees and costs under section 57.11 l(3)(d) as a sole proprietor of a public lodging establishment.[23] He had prevailed on a previous administrative action against him in which the State had requested an Emergency Order of Suspension of his license and an Order to Show Cause.[24] The ALJ in the section 57.111 hearing for attorney fees and costs opined that a petitioner requiring such relief must not exceed either criterion to establish itself as a small business party pursuant to section 57.111 Florida Statutes.[25] Thus, the ALJ read the clauses conjunctively. The petitioner was found to be a sole practitioner; therefore, he obviously met one prong of the criteria to be considered a small business party. However, the petitioner did not prove that he exhibited a net worth of less than two million dollars, so the ALJ ruled that the petitioner did not establish that he was a small business party and, therefore, could not prevail in his attorney fee claim.

The issue was addressed in *Spector* v. *Agency for Health Care Administration, Board of Medicine,*[26] which is a case in which a doctor was charged with billing violations by the state and a disciplinary action was brought against his medical

[20] March v. Department of Business & Professional Regulation, Div. of Pari-Mutual Wagering, 661 So. 2d 13 (Table) (Fla. 3d DCA 1995)(affirming per curiam).

[21] *See i.e.* Department of Legal Affairs v. District Court of Appeal, 434 So. 2d 310 (Fla. 1983); St. Fort v. Post, Buckley, Schuh and Jemigan, 902 So. 2d 244 (Fla. Dist. Ct. App. 2005); State v. Swartz, 734 So. 2d 448 (Fla. Dist. Ct. App. 1999); Department of Revenue v. Kemper Investors Life Insurance Co., 660 So. 2d 1124 (Fla. Dist. Ct. App. 1995).

[22] Birkhead v. Department of Business & Professional Regulation, No. 99-0679F, 1999 WL 1486497 (Fla. Div. Admin. Hrgs. May 24, 1999).

[23] *Id.* at *1.

[24] *Id.* at *6.

[25] *Id.*

[26] Spector v. Agency for Health Care Administration, Board of Medicine, No. 93-7095F, 1994 WL 1028080 (Fla. Div. Admin. Hrgs. Nov. 30, 1994).

license.[27] It was later found that the probable cause on which the case was based was faulty and the case was dismissed.[2,]* In the petitioner's section 57.111 hearing, it was found that while the he had a net worth of approximately $691,000 at the time that the action was filed (well below the net worth cap in the statute), the petitioner offered no evidence concerning the number of his employees and, therefore, could not prove he was a small business party.[29] Again, the ALJ read the clauses conjunctively and held that not meeting one prong of the definition of small business party automatically disqualified the petitioner from relief under section 57.111 (3)(d).

Kehoe v. Department of Health and Rehabilitative Services[30] is a case that involved licensure violations at a state licensed adult nursing home. In addition to finding that the respondent was not a prevailing party in its attorney fees hearing,[31] the ALJ held that because the business had admitted it had more than twenty five employees and did not meet one prong of the test, that fact alone meant it could not meet its burden of proving that it was a small business party.[32]

C. *Florida Cases Interpreting the Clauses Disjunctively*

There are also in Florida where ALJs have taken the contrary opinion and interpreted the *or* in sections 57.11 l(3)(d)l.a. and b. Florida Statutes to mean *or,* thereby reading the clauses disjunctively.

The issue was raised in *Home Health Care of Bay County* v. *Department of Health and Rehabilitative Services,*[33] where it was held that the state agency could not combine the assets of the owner of petitioner corporation and its owner to reach the two million dollar threshold to disqualify it for attorney fees and costs under section 57.11 l(3)(d)l.b. Florida Statutes.[34] The respondent state agency admitted that there were fewer than twenty five employees.[35] The ALJ stated that having fewer than twenty five employees would have been enough on its own for the respondent to qualify as a small business party. The ALJ opined:

> [Petitioner] need not prove both that it has fewer than 25 employees and that it has a net worth of less than $2 million. The operative word in the statute is or. HRS stipulated that it has and had fewer than 25 full-time employees. Hence there is no need to

[27] *Id.* at *2.

[28] *Id.* at *5.

[29] *Id.* at *7.

[30] Kehoe v. Department of Health and Rehabilitative Services, No. 90-3236F, 1991 WL 832836 (Fla. Div. Admin. Hrgs. Apr. 5, 1991).

[31] *Id.* at *3.

[32] *Id.*

[33] Home Health Care of Bay County v. Department of Health and Rehabilitative Services, No. 88-1353F, 1988 WL 617830 (Fla. Div. Admin. Hrgs. June 29, 1988).

[34] M. at *5.

35 *Id.*

> determine the net worth of [Petitioner] or of [its owner]. Petitioner is a small business party as defined in the Act.[36]

The ALJ in the *Home Health Care* case obviously read the clauses disjunctively and only required that one prong of the definition of small business party would need to be met for a petitioner to be eligible for attorney fees and costs under section 57.111 Florida Statutes.

In *Royce* v. *Agency for Health Care Administration, Board of Medicine*[31] a physician was charged with licensure violations by the State. He was a sole proprietor of a medical practice with less than twenty five employees.[38] In his case for attorney fees and costs under section 57.111 Florida Statutes, the petitioner offered no evidence that his net worth was under the two million dollar limit for eligibility.[39] The ALJ in this case stated:

> It is true that Petitioner has "not established his net worth was less than $2 million at the time the [underlying administrative] proceedings were initiated." This, however, is of no significance given that Petitioner has established (by a preponderance of the evidence) that, at the time of the initiation of the underlying administrative proceeding, his practice had "not more than 25 fulltime employees." In order to qualify as a "small business party," as defined in subsection (3)(d)l.a of Section 57.111, Florida Statutes, a sole proprietor, like Petitioner, need not prove that his practice had both "not more than 25 full-time employees" and "a net worth of not more than $2 million" when the underlying administrative proceeding was initiated.[40]

The ALJ in *Royce* noted *March,* but instead based its decision on case law that established that the word *or* usually requires reading the two clauses immediately before and after the word *or* disjunctively, giving two distinct choices in the clauses separated by the word.[41]

In *Pool People Inc.* v. *Florida Engineers Management Corporation*,[42] a pool contractor had been previously charged by the state for engaging in the unlicensed

[36] *id.*

[37] Royce v. Agency for Health Care Administration, Board of Medicine, No. 95-352IF, 1996 WL 1059930 (Fla. Div. Admin. Hrgs. July 3, 1996).

[38] *Id.* at *29.

[39] *Id.*

[40] *Id.*

[41] *Id. citing* Sparkman v. McClure, 498 So. 2d 892 (Fla. 1986); Telophase Society of Florida v. State Board of Funeral Directors and Embalmers, 334 So. 2d 563 (Fla. 1976); McKenzie Tank Lines, Inc., v. McCauley, 418 So. 2d 1177 (Fla. Dist. Ct. App. 1982).

[42] Pool People v. Florida Engineers Management Corporation, DOAH Case 07-153IF (Fla. DOAH July 18, 2007).

practice of engineering.[43] In the section 57.111 hearing for attorney fees and costs, it was stipulated by the parties that the petitioner had a net worth of less than two million dollars, but that it had more than twenty five employees.[44] The respondent state agency argued that having more than twenty five employees alone disqualified the petitioner for attorney fees and costs under section 57.11 l(3)(d)l.b. Florida Statutes.[45] *Pool People* is the only case with an in depth analysis of whether the statute would require either prong or both prongs of eligibility to be considered a small business under sections 57.11 l(3)(d)(l)a. or b. Florida Statutes [46] The ALJ in this case ultimately found that meeting either prong would be sufficient based on the same rationale as *Royce.*[47]

IV. THE CLAUSES SHOULD BE READ CONJUNCTIVELY

There are arguments for both the conjunctive reading of the clauses as well as the disjunctive reading. There are no appellate cases in Florida to interpret the clauses and the legislative history still leaves the issue unclear. Therefore, there is no mandatory authority on how the clauses must be interpreted. This has led to some cases requiring a two part conjunctive test for eligibility for attorney fees and costs under section 57.111 Florida Statutes. In contrast, some tribunals apply a disjunctive interpretation where only one prong of eligibility needs to be proven. However, the disjunctive interpretation allows for use of the FEAJA by companies that more than likely were not intended by the legislature to benefit under FEAJA.

A. *The Plain Meaning of the Statute*

Perhaps the best argument against reading the clauses conjunctively is the "plain meaning of the statute" approach. The language of this statute contains the word *or*, and the word *or* normally is read in the disjunctive.[48] At first glance, when reading the FEAJA, it is easy to understand how the ALJ in *Home Health Care* found that the clauses should be read disjunctively, stating that the "operative word is or."[49] This is the position that has been taken by several other ALJ's[50] and scholarly writers[51] who ended their interpretation of the clauses under the FEAJA there.

[43] *id.* at 28.

44 Id. at 7.

[45] *Id.* at 39.

[46] *Id.* at 39-52.

[47] *Id.* at 41.

[48] *See* Royce v. Agency for Health Care Administration, Board of Medicine, No. 95-3521F, 1996 WL 1059930 (Fla. Div. Admin. Hrgs. July 3, 1996); Pool People v. Florida Engineers Management Corporation, DOAH Case 07-153IF (Fla. DOAH July 18, 2007).

[49] Home Health Care of Bay County v. Department of Health and Rehabilitative Services, No. 88-1353F, 1988 WL 617830, at *5 (Fla. Div. Admin. Hrgs. June 29, 1988).

[50] *See* Section III C., *supra.*

[51] *See* Mary W. Chaisson, *Comment: Florida's Equal Access to Justice Act: How the Courts and DOAH Have Interpreted It.* 19 Fla. St. U. L. Rev. 901, 911 (1992); Steven Wisotsky, *Practice and Procedure under the FEAJA*, 70 Fla. B. J. 24, 28 (April 1996).

Certainly if a statute is clear on its face and does not lead to an absurd result, the plain meaning of the statute should control.[52] Clearly the statute could be read disjunctively and plain meaning would allow a judge to go no further. This would even be true if the judge thought the legislative history showed that the legislature made an error in drafting the statute.[53]

In some other tribunals, however, the attorney fees clauses are read as conjunctive without much language interpreting the FEAJA.[54] One rationale for this could be that while the notion that *or* is typically read as a disjunctive clause,[55] it could be interpreted differently under the relevant sections of section 57.111 Florida Statutes. Because the statute is written in a negative grammatical tense, there may be some confusion. The statute could be read to break at the disjunctive clause *(or).* To *wit:* The term "small business party" means a partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state agency not more than twenty five full-time employees *or* the term "small business party" means a partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state agency a net worth of not more than two million dollars.[56]

Section 57.111, Florida Statutes operates as a waiver of the sovereign immunity of the state. The basic principle in Florida is that sovereign immunity is the rule, rather than the exception and that a waiver of sovereign immunity should be strictly construed in favor of the state and against the claimant.[57] This principle would require the clauses to be read conjunctively because this interpretation would limit the state of Florida's exposure by making the test to obtain attorney fees and costs more restrictive. This reading would then allow the legislative history to help determine the meaning of the statute, which also may have been a factor in the decision of some ALJ's to read the clauses conjunctively. A disjunctive interpretation of the clauses allows a court to use net worth alone as a determining factor for eligibility. Net worth is determined simply by the value of a company's assets less the value of its liabilities. A very large company that is having financial problems may have a negative net worth when its liabilities are greater than its assets. An examination of the history behind the FEAJA shows that this result was not intended by the Florida Legislature when the statute was enacted.

[52] State v. Sousa, 903 So. 2d 923, 928 (Fla. 2005).

[53] *See* Lee v. Johnson, 799 F.2d 31, 36 (1986); Grab Inc. v. United States, 599 F. Supp 47, 50 (D. Wis. 1984).

[54] *See* Section III B., *supra.*

[55] *See* Royce v. Agency for Health Care Administration, Board of Medicine, No. 95-3521F, 1996 WL 1059930 (Fla. Div. Admin. Hrgs. July 3, 1996).; Pool People v. Florida Engineers Management Corporation, DOAH Case 07-1531F (Fla. DOAH July 18, 2007).

[56] *See* Fla. Stat. § 57.11 l(3)(d)l., 2. (2008) (emphasis added).

[57] Windham v. Florida Dept, of Transp., 476 So. 2d 735 (Fla. Dist. Ct. App. 1985).

B. *Legislative History and the Case Law under the EAJA*

The legislative history behind the creation of the FEAJA by the Florida Legislature in 1984 shows that it is modeled after the EAJA.[58] When required to interpret Florida statutes that have been modeled after federal law on the same subject, the courts have recognized that such a law would take the same construction in Florida courts as its prototype has taken in federal court if such a construct is in harmony with the Florida legislation.[59] As such, it may be inferred that the Florida Legislature did not seek to make the twin threshold criteria of net worth and number of full time employees to be mutually exclusive but rather twin components, with a litigant exceeding either requirement not a "small business party" for section 57.111 purposes. However, because the federal case law in this area is not consistent, the argument for a disjunctive reading of the clauses can also be made by examining the federal case law interpreting the EAJA.

The EAJA was passed in 1980 and included several parts to protect certain individuals, partnerships, corporations, and labor and other organizations from being deterred from seeking review of, or defending against unreasonable governmental action because of the expense involved in securing the vindication of rights in civil actions and in administrative proceedings.[60] To be eligible for the attorney fees and costs under the EAJA, certain criteria similar to those of the FEAJA must be met to show that an entity is a small business that needed protection. The pertinent sections were codified into 5 U.S.C. Section 504 and 28 U.S.C. Section 2412, with the former dealing with agency adjudications and the latter dealing with civil actions. Also similar to the FEAJA, for either provision to be used, filing the underlying federal action must be shown not to have been substantially justified. At the time of adoption of the FEAJA, 28 U.S.C. Section 2412 contained the provision that defined which entities were small enough to qualify for attorneys fees in a civil action under the EAJA. To be eligible one must fit the definition of party that was:

> (i) an individual whose net worth did not exceed $1,000,000 at the time the civil action was filed, (ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed $5,000,000 at the time the civil action was filed ... **or** (iii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed ... .[61]

58 *See also* Daniels v. Florida Department of Health, 898 So. 2d 61, 68 (Fla. 2005). *Daniels* stated that the Florida Statutes were modeled after the EAJA, but alludes to the definition for small businesses being defined by 5 U.S.C. § 504(b)(1)(B) only. For a discussion, *see* note 63, *infra.*

[59] Gentele v. Florida Board of Professional Regulation, 513 So. 2d 672,673 (Fla Dist Ct App 1987)

60 Pub. L. 96-481 1980.

[61] 28 U.S.C. § 2412(d)(2)(B) (1982)(emphasis added).

This is written in language similar to the FEAJA's eligibility clauses for attorney fees. The clause in 28 U.S.C. Section 2412(d)(2)(B), which was in effect at the time of the adoption of the FEAJA, had two prongs separated by the word *or.* This meant that there was both a net worth requirement and a limit of employees to be eligible, similar to the requirements of the FEAJA. The issue was litigated in several federal cases as to whether qualification under either provision would allow recovery or if qualification under both prongs was necessary. Cases in the federal courts interpreting the EAJA, similarly to Florida cases, were inconsistent as to whether the clauses in 28 U.S.C. Section 2412(d)(2)(B) (hereinafter the federal clauses) should be read disjunctively (as *or)* or conjunctively (as *and).* The eligibility clauses in 5 U.S.C. Section 504 were always written conjunctively.

i. The application of 28 U.S.C. Section 2412(d)(2)(B) to Administrative Cases:

An argument could be made that looking at federal case law on 28 U.S.C. Section 2412(d)(2)(B) is not instructive in interpreting previous cases under FEAJA. This argument would be based on the fact that 28 U.S.C. Section 2412(d)(2)(B) is only used in civil actions and all of the Florida case law has been in the administrative arena. Title 5 U.S.C. Section 504(b)(1)(B) is the part of the EAJA that is used to decide eligibility for attorney fees and costs in federal administrative cases. Since its inception, title 5 U.S.C. Section 504(b)(1)(B) has always had the word *and* between the clauses for employee limits and net worth, defining "party" as:

> (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, 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... ."[62]

It could be argued that because there are separate attorney fee statutes for civil cases and administrative cases, only the federal code section for administrative cases should be instructive to these previous Florida administrative cases (and the issue would be undecided if an interpretation of the clauses of the FEAJA were to come in a civil case).[63] Because the language has always been conjunctive and

[62] 5 U.S.C. § 504(b)(1)(B) (2008)(emphasis added).

[63] This argument could be bolstered by the Florida Supreme Court in Daniels v. Florida Department of Health, 898 So. 2d 61, 68 (Fla. 2005) alluding to the FEAJA definition of "small business party" being based on 5 U.S.C. section 504; however, the court appeared to base this on a narrow interpretation of whether individual owners of partnerships or corporations were able to recover attorney fees and costs under FEAJA. This issue led to the creation of Section 57.1 ll(3)(d)l.c., Florida Statutes to allow such individuals to recover. Because there are multiple definitions of a small business in the EAJA, it is likely

straightforward in 5 U.S.C. Section 504(b)(1)(B), none of the federal cases would be instructive for Florida administrative cases. This argument would seem to fail, however, since the D.C. Circuit in *Unification Church v. Immigration and Naturalization Service* took up the issue of whether 28 U.S.C. Section 2412(d)(2)(B) (in its 1982 version) should be read to have different intent than 5 U.S.C. Section 504(b)(1)(B).[64] The court concluded that the legislative history determines that they are both to be read as *and*, and that the difference in the language does not make a difference in the analysis.[65] (Even if this were not true, because there is ambiguity in the interpretation of the FEAJA, these cases would still have persuasive authority on the Florida courts when interpreting the FEAJA.) The court further states that the intent of Congress was proven when Congress tried to change the language from *or* to *and* in 1984. This was an attempt to correct an error in the law as it was written.[66] The court held that:

> The Senate report accompanying an earlier version of the bill was quite specific as to the rationale behind this change: ... "Congress' intent was that in order for an organization or business to recover under the EAJA it must meet both net worth and employee limitation requirements. This is accurately portrayed in Section 504 and the change clarified the previously confused situation." . . . Although the bill was vetoed, Congress's action obviously supports a conjunctive reading of subsections (ii) and (iii) to the limited extent that such material is relevant.[67]

ii. Federal Court Guidance:

The issue of statutory interpretation was first ruled upon in *American Academy of Pediatrics* v. *Heckler*.When interpreting the federal clauses, the District Court of Washington D.C. held:

> At first blush [an] interpretation of the statute [requiring either a limit of net worth or a limit of employees] would appear to be correct by sheer dint of its logical simplicity.
> Such an approach, however, would do grave violence to the *content* of Section 2412(d)(2)(B), and would largely emasculate that provision of its intended effect. "The

that, if the issue came before the Florida Supreme Court, it would give meaning to the history of all relevant sections including 28 U.S.C. Section 2412(d)(2)(B).

[64] Unification Church v. Immigration and Naturalization Service, 762 F.2d 1077, 1088 (D C Cir 1985)

[65] *Id.*

[66] *Id.*

[67] *Id.* at 1088-89 (quoting S.Rep. No. 586, 98th Cong. 2d Sess. 20 (1984))(footnote omitted).

[68] American Academy of Pediatrics v. Heckler, 594 F. Supp. 69 (D.D.C. 1984).

> central objective of the EAJA, and of Section 2412(d)(1)(A) in particular, was to encourage *relatively impecunious* private parties to challenge unreasonable or oppressive governmental behavior by relieving such parties of the fear of incurring large litigation expenses."[69]
>
> Section 2412(d)(2)(B) serves as the mechanism for limiting attorney fee awards to those private parties which are "relatively impecunious." [That] interpretation of that subsection would prevent it from fulfilling its function. For example, subsection B (i) is designed to make very wealthy individuals ineligible to recover fees.
> Under [that] interpretation of subsection (B), however, such an individual could recover fees if he or she *also* owned a business with less than 500 employees, since that person would meet the description of subsection (iii). If that person did *not* own any such business, however, he or she could not recover fees since the description in (iii) would not apply. Such an interpretation of the statute is both nonsensical and contrary to its clear purpose of limiting recoveries to those individuals and organizations who might not otherwise be able to afford to litigate their rights against the government.[70]

The *Heckler* court partially based its decision on the legislative history of the EAJA. The court stated that the legislative history made it "clear that the 500- employee ceiling operates as an independent bar to an award of fees in addition to the net worth restrictions in subsections (i) and (ii) [of 28 U.S.C. Section 2412(d)(2)(B)]."[71]

On two different occasions, the United States Circuit Courts of Appeals agreed with the position of the District Court for the district of Washington D.C. The issue was before the United States Court of Appeals for the Federal Circuit in *Missouri Pacific Truck Lines, Inc.* v. *U.S.*[72] In this case, the appellee tried to assert in an action to claim attorney fees under the EAJA that he was eligible because he had a net worth of less than $5 million. The appellee company, however, had more than 500 employees. The court stated:

> [although it is possible to read the statute as providing for three categories of parties entitled to receive awards, the statutory

[69] *Id.* at 70, (quoting Spencer v. NLRB, 712 F.2d 539, 549 (D.C.Cir.l983))(alteration in original).

[70] *Id.* at 71.

[71] *Id.*

[72] Missouri Pacific Truck Lines, Inc. v. United States, 746 F.2d 796 (Fed. Cir. 1984).

> language is not so unambiguous as to preclude resort to the legislative history. The legislative history shows that Congress intended the 500 employees limit to be an additional eligibility requirement for corporations.[73]

The court did a careful analysis of the legislative history to reach this result. The court noted when speaking of the history of 28 U.S.C. Section 2412(d)(2)(B):

> The Senate version of the legislation contained the limit of 500 employees, which the House Committee and the House Conference Committee both approved....[74]
>
> The House Report described the Senate definition of "party" as follows: "[N]o party which is involved in an administrative proceeding or civil court action in its capacity as a business can be included under this provision of the bill if it has more than 500 employees at the time the ... civil action was initiated."...[75]
>
> A later section of the House Report explained: "The definition thus establishes financial criteria which limit the bill's applications to those persons and small businesses for whom costs may be a deterrent to vindicating their rights."[76]

It is important to note that the last paragraph of the cited history of the EAJA is similar to the stated purpose written into the statute in the FEAJA.[77]

The Federal Circuit dealt with the issue of interpreting the eligibility for attorney fees under the EAJA in *Unification Church.*[1]* When interpreting the eligibility clause in 28 U.S.C. Section 2412(d) the court found it was the clear intent of Congress to have the term *or* standing between subsections (ii) and (iii) of 28 U.S.C. Section 2412(d)(2)(B) to be read as a conjunctive *and* rather than a disjunctive *or*, requiring that both a net worth ceiling not be met and a number of employees not be reached for attorneys fees to be recovered in a government action.[79] The court

[73] *Id.* at 797.

[74] *Id.*

[75] *Id.* (quoting H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9, *reprinted* ¿«1980 U.S. Code Cong. & Ad News 4984,4988).

[76] *Id.* (quoting H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9, *reprinted* ml980 U.S. Code Cong. & Ad News 4994).

[77] *See* Fla. Stat. § 57.111(2) (2008).

[78] Unification Church v. Immigration and Naturalization Service, 762 F.2d 1077 1081-91 (D.C. Cir. 1985).

[79] *Id.*

emphasized that any other result could lead to consequences not intended by Congress by noting:

> "Ordinarily, of course, one expects companies with low net worths to have only a small number of employees. This need not be the case, however. "'Net worth' is calculated by subtracting total liabilities from total assets.'"[80] General Motors, a company with a great deal of total assets, might nonetheless have a very low net worth if its total liabilities were suddenly to skyrocket-because of, say, antitrust judgments against them-to the point where its liabilities approached its assets."[81]

The court added this footnote for emphasis to show how it would be anomalous to have one of the largest companies in the United States able to qualify under the EAJA as a small business for the recovery of attorney fees.

Congress ended all speculation as to its intent as to who was eligible under the EAJA. In 1985, it amended the federal clauses to be read conjunctively. Title 28 U.S.C. Section 2412 (d)(2)(B)(ii) was changed, in relevant part, to its current form (and was conformed to 5 U.S.C. Section 504(b)(1)(B)). The 1985 version of 28 U.S.C. Section 2412 (d)(2)(B)(ii) changed the federal clauses to a conjunctive wording, to *wit:*

> 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 ... .[82]

Hi. Federal Decisions Reading the EAJA Disjunctively:

Prior to the Federal and the D.C. Circuits, the United States Court of Appeals for the Fifth Circuit twice ruled on the issue of how to interpret 28 U.S.C. Section 2412 (d)(2)(B). The first of these cases was the *Knights of the Ku Klux Klan Realm of Louisiana v. East Baton Rouge Parrish School Board*,[83] The Fifth Circuit stated that to qualify for recovery of attorney fees in a civil case:

> [T]he KKK faces two...hurdles. First, it must demonstrate that it meets the financial eligibility requirement set forth in section 2412(d)(2)(B), which requires that the organization's net worth did not "exceed $5,000,000 at the time the civil action was filed ... *(or*

[80] *Id.* at 1087 n.4 (quoting H R. Rep. No. 1418, at 15, U.S. Code Cong. & Admin.News 1980, at 4994).

[81] *Id.*

[82] Pub. L. 99-80, sec. 2(c)(1)(B), 1985 (emphasis added).

[83] Knights of the Ku Klux Klan Realm of Louisiana v. East Baton Rouge Parrish School Board, 679 F.2d 64(5th Cir. 1982).

> that the organization had) not more than 500 employees at the time the civil action was filed."[84]

While not giving much analysis, the court did distinguish 28 U.S.C. Section 2412 (d)(2)(B) from 5 U.S.C. Section 504(b)(1)(B) by noting "[ujnder 5 U.S.C. s 504(b)(1)(B), parties in 'adversary adjudications' before government agencies are only excluded from eligibility for mandatory attorneys' fees awards if they have a net worth exceeding $5,000,000 *and* have more than 500 employees."[85]

The Fifth Circuit had the issue before it again in *S&H Riggers and Erectors, Inc. v. Occupational Safety and Health Review Commission*,[86] In this case, when looking at the definition of the word "party" under 28 U.S.C. Section 2412 (d)(2)(B) the court again stated that there was a difference between the eligibility standards for civil and administrative actions under the EAJA. The court stated:

> "Party" is defined to exclude larger companies and wealthier individuals: A "party" [under 28 USC Section 2412 (d)(2)(B)] is an individual with a net worth of $1 million or less, a company with a net worth of $5 million or less, or a company with 500 employees or less. "Party" appears to be defined differently in the legislative history and in the companion provision, 5 U.S.C. s 504(a) ... to include only companies with net worth of $1 million or less and 500 employees or less.[87]

The Third Circuit Court of Appeals took up the issue of how to interpret 28 U.S.C. Section 2412 (d)(2)(B) in *Lee* v. *Johnson*,[88] The government asked that the clauses be read conjunctively, but the court held:

> To construe the provisions as suggested by the government, we would have to read them as if they were written as follows:
>
> > (i) an individual whose net worth did not exceed $1,000,000 at the time the civil action was filed,
> > *[or*] (ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed $5,000,000 at the time the civil action was filed ...
> > *[and*] (iii) a sole owner of an unincorporated business, or a partnership,

[84] *Id.* at 68 (emphasis added).

[85] *Id.* at 68 n. 11 (emphasis added).

[86] S&H Riggers and Erectors, Inc. v. Occupational Safety and Health Review Commission, 672 F 2d 426 (5th Cir. 1982).

[87] *Id.* at 427 n.l.

[88] Lee v. Johnson, 799 F 2d. 31, 36 (3d Cir. 1986).

> corporation, association, or organization, having not more than 500 employees at the time the civil action was filed....
>
> The addition of the disjunction "or" after the first clause and the substitution of the conjunction "and" after the second clause both would be required if the section were to retain any meaning.[89]

The Third Circuit did allude to the possibility that Congress made an error while drafting the statute, but held that "courts are not free to resort to such extensive statutory revision to cure claimed congressional drafting errors."[90] In doing so, the court specifically disagreed with the analysis of *Unification Church* and *Missouri Pacific Truck_Lines* stating "[w]e acknowledge that two other Courts of Appeals have interpreted the qualifying provisions in the manner suggested by the government here.... We choose not to embark on so bold a venture."[91]

iv. The Florida Legislature Should Follow Congress' Example and Modify the FEAJA:

The federal courts that read the statute to be disjunctive based its analysis on the notion that the statute is clear on its face. If a statute is clear on its face then a court need not further analyze the statute's intent. The Florida tribunals that used that analysis on the FEAJA ended up with the same result. It seems logical that if you have a state statute that is based on a federal statute and the federal statute is changed, then the state should reexamine its statute. It would seem especially important for the State to do so when the federal statute caused a split in the federal circuits, and there are differing interpretations of the statute by varying tribunals. Congress, by changing one word *(or* to *and)* ended all speculation as to its intent and ended the split within the federal circuit courts. The Florida Legislature could easily do the same thing and ensure a consistent interpretation of eligibility under the FEAJA.

C. *Other States' Versions of the EAJA*

Many other states have adopted their own versions of the EAJA to help small business parties collect attorney fees when the State takes action against them that is not substantially justified. Most states have both a net worth limit and a cap

[89] *Id.*

[90] *Id. See Also*, Grob Inc. v. United States, 599 F. Supp 47 (D. Wis. 1984)(agreeing that there may have been an error in drafting the statute, but if so, Congress should fix its own mistake); Citizen's Bank of Valley Head, Ala. v. United States, 558 F. Supp. 1301 (D. Ala. 1983)(in *dicta*, alluding to the Federal clauses being read disjunctively).

[91] 799 F. 2d. at 36, n.5.

on the number of employees in order to qualify for relief under their version of the EAJA. Most states, however, separate the clauses conjunctively, therefore foreclosing any possibility of the interpretation that the federal courts made prior to congress amending 28 U.S.C. Section 2412 (d)(2)(B) to become conjunctive.[92]

Washington is the only other state that leaves itself open for the sort of anomalous result that Florida might (having a high asset company with a low net worth qualify as a small business as was discussed in *Unification Church*[93] and *Heckler*[94]). To be a qualified party for eligibility to claim attorney fees under Washington's version of the EAJA, a litigant need only prove that it meets the requisite net worth requirement.[95] There is no limit on the number of employees that the party has. This issue however has yet to be litigated in Washington.

All of the other states that have statutes based on the EAJA are unambiguous. The statutes are written in ways that avoid litigation to determine if a party is qualified under the statute. Utah simply has a cap on the number of employees and does not look at net worth at all.[96] Wisconsin instead uses a gross sales standard instead of net worth, defining a small business for its version of the EAJA as "a business entity, including its affiliates, which is independently owned and operated, and which employs 25 or fewer full-time employees or which has gross annual sales of less than $5,000,000."[97] Wisconsin also has a provision in its statute that "the legislature intends that the courts in this state, when interpreting this section, be guided by federal case law, as of November 20, 1985, interpreting substantially provisions under the federal equal access to justice act, 5 USC 504."[98]

Rhode Island not only has a two prong conjunctive test with a net worth and employee maximum, but also states that the party must "not [be] dominant in its field."[99] This would be another hurdle that may exclude large companies from claiming to be a small business.

Because other state statutes, with the exception of Washington (which has had no litigation as to the determination of a qualifying party) are unambiguous, the issue is currently limited to Florida.

[92] *See i.e.* Cal. [Civ. Proc.] § 1028.5 (c) (2008); Minn. Stat. Ann. § 15.471 Subd. 6 (a) (2008); Mo. Ann. Stat. § 536.085(2) (2008); Ohio Rev. Code Ann. §2335.39(A)(2) (2008); R.I. Gen. Laws § 42-92-2 (5) (2008); Tenn. Code Ann. § 29-37-103 (2008).

[93] Unification Church v. Immigration and Naturalization Service, 762 F.2d 1077, 1081-91 (D.C. Cir. 1985).

[94] American Academy of Pediatrics v. Heckler, 594 F. Supp. 69, 70 (D.C. Cir. 1984).

[95] Wash. Rev. Code Ann. §4.84.340(5) (2008).

[96] Utah Code Ann. § 78b-8-503 (3) (2008).

[97] Wis. Stat. Ann. § 227.485(2)(b) (2007); Wis. Stat. Ann. §814.245(2)(b) (2007).

[98] Wis. Stat. Ann. § 227.485(1) (2007); Wis. Stat. Ann. §814.245(1) (2007). This approach however leaves open the possibility of unintended interpretation of the Wisconsin statute if there is a substantial change to the federal statute.

[99] R.I. Gen. Laws § 42-92-2 (5) (2008).

V. CONCLUSION

As it stands, a litigant who has had an unwarranted action brought against it by the State of Florida and attempts to recover attorney fees and costs may not know whether it qualifies as a small business party under the FEAJA. While a party certainly deserves sympathy for having to defend against an unjustified action, the rationale behind the enactment of the statute must be kept in mind. Awarding attorney fees is an exception to the sovereign immunity of the State of Florida. As such, the exception should be narrowly construed to ensure that the financial exposure to the taxpayers of the State is limited. A disjunctive interpretation of the clauses of the FEAJA allows for abuse in the eligibility determination. The FEAJA was likely enacted "to encourage *relatively impecunious* private parties to challenge unreasonable or oppressive governmental behavior by relieving such parties of the fear of incurring large litigation expenses"[100] as the purpose of the EAJA was described in *Heckler.* The Florida Legislature should amend the eligibility requirements of the FEAJA to ensure that this purpose is achieved.

Certainly, the determination of whether a party is eligible for relief under the FEAJA should not be left open for interpretation by judges. Cases may be won or lost based on whether the petitioner was lucky to have his or her case heard by a specific judge. Without any mandatory authority of how to interpret the clauses by the courts, the legislature should rewrite the language to make sure that there is a clear interpretation of the language for the courts to follow. The legislature could simply change the clauses in the statute from disjunctive to conjunctive as Congress did in 28 U.S.C. Section 2412 (d)(2)(B). Simply changing the word *or* to *and* in the relevant portions of section 57.111 Florida Statutes would prevent the anomalous result allowing a net worth calculation alone to determine whether a company is a small business party. Using net worth as a disjunctive determining factor may allow for a company the size of General Motors, which may have large amounts of assets, but also large liabilities to be considered a small business party.[101] Certainly this is not the relatively impecunious party the statute was designed to protect. The legislature could go a step further and add language similar to Wisconsin's (making a gross sales requirement) or Rhode Island's (adding a requirement that the company not be dominant in its field) to ensure a small business party is actually a small business.

Statutes should be clear and not invite unwarranted interpretation. It is incumbent upon the Florida Legislature to revise the eligibility requirements for a small business party under the FEAJA. This would insure uniformity and clarity in determinations of who is eligible to benefit from this statute. The ALJ in *Pool People* ruled that the plain meaning of the statute was to be read as disjunctive and stated

[100] American Academy of Pediatrics v. Heckler, 594 F. Supp. 69, 70 (D.C. Cir. 1984)(quoting Spencer v. NLRB, 712 F. 2d 539, 549 (D.C. Cir.1983)) (alteration in original).

[101] *See* Unification Church v. Immigration and Naturalization Service, 762 F.2d 1077, 1087 n.4 (D.C. Cir. 1985).

that he need not provide any further analysis.[102] As it stands now, this is a legitimate analysis of the law. However, it seems to allow parties clearly not envisioned by the Florida Legislature to seek relief under the FEAJA. This was corrected by Congress after anomalous results were allowed under the EAJA. By changing the clauses to be read conjunctively, the Florida Legislature could easily clarify its intent and add consistency to FEAJA eligibility.

102 Pool People v. Florida Engineers Management Corporation, DOAH Case 07-1531f, 48 (Fla. DO AH Case 07-153 IF, 48 (Fla. DO AH