

Landmark Supreme Court Decision

By Amy Howe, Esq.

EDITOR'S NOTE: Due in large measure to her exemplary work in preparing the *amicus curiae* brief filed by NALA, the Paralyzed Veterans of America, and the National Organization of Social Security Claimants' Representatives, Amy Howe is the recipient of NALA's 2008 Founders Award. This is the Association's highest award for positive and lasting contributions to the paralegal profession.

Although some legal disputes (such as the multi-billion-dollar verdict originally levied by a jury against Exxon for its role in the massive 1989 oil spill) seem destined for the Supreme Court almost from inception, most of the seventy-plus cases in which the Court hears oral argument each year have more modest beginnings.

That was certainly the case in *Richlin Security Service Co. v. Chertoff* (No. 06-1717), which presented the question whether paralegal fees are compensable under the *Equal Access to Justice Act* (EAJA) at prevailing market rates. The case arose from a contract dispute between the now-defunct Immigration and Naturalization Service and Richlin, a small business that provided guard services at a California airport.

After Richlin prevailed in its contract claim against the INS, it sought reimbursement for attorney's fees, including nearly \$7,000 in paralegal fees, from the federal government under EAJA. The Board of Contract Appeals denied the claim for paralegal fees, reasoning that under EAJA such fees were limited to the law firm's cost, rather than the rate billed

to the client. On appeal, the US Court of Appeals for the Federal Circuit affirmed, holding that the "fees" that can be recovered at "prevailing market rates" under the EAJA did not extend to paralegal fees.

The Federal Circuit's decision might have been the end of the road for Richlin had it not been for Brian Wolfman, a veteran Supreme Court advocate and the head of Public Citizen's Litigation Group, who saw a brief summary of the Federal Circuit decision while leafing through a legal newsletter. Based on his experience litigating EAJA cases, Wolfman was convinced that the decision was incorrect and contacted Richlin's counsel to offer his help in seeking to overturn the Federal Circuit's decision.

With the support of an *amicus* brief filed by NALA and the Paralyzed Veterans of America, Wolfman filed a petition seeking Supreme Court review, which was granted in November 2007. After briefing on the merits (including another friend-of-the-court brief by NALA), the Court heard oral argument in March 2008. In June 2008, the Court issued a decision in which it agreed with Wolfman and Richlin. The Court held (for the most

part unanimously) that when the requirements of EAJA are otherwise met, a prevailing party can recover paralegal fees from the federal government at prevailing market rates.

The Court's opinion makes clear that it regarded the question before it as a simple one that could be easily resolved based on the plain language of EAJA. Writing for the Court, Justice Alito explained that in this case, "Richlin 'incurred' 'fees' for paralegal services in connection with its contract action before the Board. Since [the EAJA] awards fees at 'prevailing market rates,' a straightforward reading of the statute leads to the conclusion that Richlin was entitled to recover fees for the paralegal services it purchased at the market rate for such services."

The Court rejected the government's argument that paralegal fees should be regarded as "other expenses" for EAJA purposes, reimbursable at "reasonable cost." The Court explained that there was no reason to believe that Congress intended "expenses" to be reimbursed differently from "fees," and even if it did, "it would hardly follow that amounts billed for paralegal services should be

classified as ‘expenses’ rather than as ‘fees.’” The Court reasoned, “paralegals are more analogous to attorneys, experts, and agents than to studies, analyses, reports, tests, and projects.”

Although the Court saw little ambiguity in the text of EAJA, it emphasized that any remaining uncertainty could be resolved by its 1989 decision in *Missouri v. Jenkins* (another Supreme Court case in which NALA was a friend-of-the-court). In that case, it was held that prevailing litigants under Section 1983 could recover paralegal fees at market rates.

Following the rationale in *Jenkins*, the Court observed, “we take it as ‘self-evident’ that when Congress instructed agencies to award ‘attorney...fees’ to certain parties prevailing against the Government, that term was intended to embrace paralegal fees as well.”

Notably, the Court rejected the government’s argument (on which the Federal Circuit had relied) that allowing paralegal fees to be reimbursed at market rates would create a “perverse incentive” for firms to “shift an inefficient amount of attorney work to paralegals, since paralegal fees could be recovered at a greater percentage of their full market value” under EAJA. Instead, the Court agreed with *Richlin* that the same argument could also apply to fees that are undeniably covered under EAJA, such as “agents” and junior attorneys.

Finally, the Court clearly regarded the market-rate system as far more straightforward than the cost-based rule proposed by the government. The market-rate system has worked well for some time, both in the Section 1983 context and in courts employing the same rule for EAJA cases.

The Court’s decision is significant in two respects. First, as the Court had ruled in *Jenkins* for Section 1983 cases, by confirming that paralegal fees can be reimbursed at prevailing market rates under EAJA, the *Richlin* decision will “make economic sense” by “encouraging



the use of lower cost paralegals rather than attorneys wherever possible...” Permitting market-rate billing of paralegal hours “encourages cost-effective delivery of legal services,” the Court said.

Encouraging cost-effective delivery of legal services creates a doubly beneficial scenario in cases in which reimbursement may be available under EAJA. Not only are initial fees lower for the client, but there is a lower request for reimbursement later. Moreover, as the National Organization of Social Security Claimants’ Representatives (which also appeared as a friend-of-the-court with NALA) explained to the Supreme Court, using paralegals has the benefit of freeing up attorney time, allowing the attorney to provide legal assistance to more clients than she otherwise could.

Secondly, and more broadly, in holding that paralegal fees should be reimbursed under EAJA at the prevailing market rates in the same manner as attorney’s fees, the Court’s opinion effectively recognizes what NALA, its members, and attorneys nationwide have long known—

that paralegals have become an integral part of modern law practice.

Amy Howe, *Esq.*, was counsel to NALA, the Paralyzed Veterans of America, and the National Organization of Social Security Claimants’ Representatives on the amicus curiae brief the groups filed in support of petitioner *Richlin Security Service Co.* She is a partner in the firm of Howe & Russell, PC, in Bethesda, MD.



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