

Recovering Attorneys' Fees for an Improper Federal Investigation

Your company has been the subject of a six-year civil fraud investigation by the Department of Justice (DOJ) that the company has defended vigorously and expensively. The DOJ's efforts to wear the company down and force a settlement failed, and the company decided to take the case to trial. Minutes ago, the jury came back with a verdict in the company's favor. Your excitement is mixed with frustration: Why did DOJ put the company through this? Isn't there something we can do?

There may be.

For years, the Equal Access to Justice Act (EAJA) permitted a party aggrieved by Government legal action to recover attorneys' fees and costs, but in limited amounts and under limited circumstances. Now, based on the Court of Appeals' decision in *Tri-State Hospital Supply Corporation v. United States*, 341 F.3d 571 (D.C. Cir. 2003), attorneys' fees and costs may be recoverable against the U.S. government under the Federal Tort Claims Act (FTCA). The two pertinent statutory schemes, and the implication of the recent *Tri-State* decision, are discussed below.

The Equal Access to Justice Act

The EAJA allows a "prevailing party" in a *civil* action brought by or against the United States to recover attorneys' fees under certain circumstances. The EAJA permits the award of attorneys' fees accrued during the course of a litigation; for example, fees accumulated while defending a breach of contract case by the government where the contract provides that the "prevailing party" may recover attorneys' fees.

Recent decisions¹ have determined that there are two distinct avenues for relief under the EAJA: 1) a discretionary fee award that the Court *may* provide to a prevailing party "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award";² and 2) a mandatory fee award that the Court *must* provide to a prevailing party if a) no other common law fee-shifting or statutory fee provision exists; b) the Government cannot demonstrate that the position(s) it took in the matter were substantially justified;³ and c) no special circumstances would make award of the fee unjust.⁴

¹ See, e.g., *Newmark v. Principi*, 283 F.3d 172 (3d. Cir. 2002).

² 28 U.S.C. §§ 2412(a)(1) – (b).

³ It is the Government's burden to prove that its position(s) were substantially justified. See, e.g., *Cooper v. United States Railroad Retirement Bd.*, 24 F.3d 1414, 1416 (D.C. Cir. 1994); *E.E.O.C. v. Clay Printing Co.*, 13 F.3d 813, 815 (4th Cir. 1994).

⁴ 28 U.S.C. § 2412(d)(1)(A).

However, the EAJA severely limits who may recover attorneys' fees and costs, and in what amount. Individuals with a net worth of over \$2 million at the time the underlying civil action was filed may not proceed under EAJA for either discretionary or mandatory relief. Corporations and partnerships with a net worth of more than \$7 million and/or with more than 500 employees may not proceed under the EAJA.

There are other significant concerns regarding the EAJA. To be a prevailing party, a party must "receive at least some relief on the merits of his claim,"⁵ but the case law is not clear on what, exactly, this encompasses. For instance, in some circumstances (such as eminent domain proceedings) a favorable settlement clearly does *not* translate into prevailing party status under the EAJA.⁶ Moreover, if no common law or statutory right to attorneys' fees exists, a party is at the mercy of the EAJA's mandatory fee-award provision. Under that provision, absent extraordinary circumstances, attorney fees will not be awarded in excess of \$125 per hour.⁷

The FTCA and the Tri-State Decision

Despite its limitations, until this fall, the EAJA was the only option to recover attorneys' fees against the government. The Court of Appeals' decision in *Tri-State* makes the FTCA an alternative and, for larger companies or larger litigations, a more attractive avenue to recover fees and costs against the government. The FTCA allows any person to bring a cause of action against the United States:

For injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.⁸

Unlike the EAJA, the FTCA is not specifically a fee-award statute. It is the codification of the U.S. government's waiver of immunity for certain tort claims, and requires, therefore, that the plaintiff have a viable tort cause of action. *Tri-State* suggests two such causes of action for recovering fees and costs against the United States: wrongful use of civil proceedings (also known as malicious prosecution) and abuse of process. Those legal claims will be discussed below, after the *Tri-State* decision is fleshed out in more detail.

⁵ *Halpern v. Principi*, 313 F.3d 1364, 1369 (Fed. Cir. 2002), quoting *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 603 (2001).

⁶ 28 U.S.C. § 2412(d)(1)(C)(2)(H).

⁷ 28 U.S.C. § 2412((d)(1)(C)(2)(A).

⁸ 28 U.S.C. § 1346(b)(1).

Tri-State: The Underlying Investigation and Trial

The plaintiff in *Tri-State* imported hospital supplies from Pakistan and sold them throughout the United States. In 1994, the U.S. Customs Service (“Customs”) instituted an investigation into Tri-State’s reporting practices, even though the practices resulted in no loss of revenue to Customs.⁹ As a result of its investigation, Customs requested that the U.S. Attorney bring criminal charges against Tri-State. The U.S. Attorney declined to proceed.

Customs then turned its focus to alleged civil wrongdoing by Tri-State, contending that Tri-State had falsely overstated the prices it paid for the Pakistani instruments and, as a result, was engaged in an international money laundering scheme.¹⁰ Customs issued penalty notices to Tri-State over Tri-State’s objections, and Tri-State refused to honor the notices or pay the penalties.

Customs referred the matter to DOJ. DOJ sued Tri-State in the U.S. Court of International Trade in 1997, bringing claims of fraud, gross negligence, and negligence. The matter proceeded to trial. At trial, the pertinent evidence confirmed that Tri-State had not engaged in any fraudulent scheme, and DOJ dismissed its fraud claim before verdict.¹¹ Shortly thereafter, the Court dismissed DOJ’s gross negligence claim. Finally, a jury returned a verdict in Tri-State’s favor on the negligence count.

Tri-State’s FTCA Claim

Tri-State incurred \$3.2 million in attorneys’ fees defending itself against the government’s investigation, civil prosecution, and trial. In June 2000, Tri-State sued the United States under the FTCA, the statute which permits certain suits against the federal government. In its FTCA suit, Tri-State sought to recover its \$3.2 million in fees under two tort theories of liability: 1) malicious prosecution; and 2) abuse of process.

The United States moved to dismiss the claims.¹² The District Court granted the motion, noting, among other things, that it was unaware of any precedent authorizing the award of attorneys’ fees under the FTCA, whether for malicious prosecution, abuse of process, or otherwise. The District Court also emphasized that the EAJA, a specific statutory scheme that waives governmental immunity for certain attorneys’ fees awards, is a narrower statute that should control and, accordingly, preclude any action for attorneys’ fees under the FTCA.

The District of Columbia Court of Appeals recently reversed the District Court. First, the Court noted that an FTCA claim is proper when it is:

(1) against the United States;

⁹ 341 F.3d at 572.

¹⁰ Id. at 573.

¹¹ Id.

¹² Id. at 573-74.

- (2) for money damages;
- (3) for injury or loss of property, or personal injury or death;
- (4) caused by the negligent or wrongful act or omission of the government;
- (5) while acting within the scope of his office or employment;
- (6) under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.¹³

The Court determined that Tri-State’s claim for attorneys’ fees expended in defending itself from improper governmental investigation and prosecution met every prerequisite for a viable FTCA claim. Specifically:

- (1) the claim was brought against the United States;
- (2) for the \$3.2 million in money damages that Tri-State suffered;
- (3) as a result of the injuries (indictment, investigation) and/or property loss (loss of money);
- (4) caused by the malicious prosecution and abuse of process engaged in by Customs and the DOJ;
- (5) performed by Customs and DOJ officials acting within the scope of their employment;
- (6) which actions, if engaged in by a private person in the District of Columbia (presumed to be the pertinent tort forum), would be actionable.¹⁴

The Court acknowledged that prior FTCA decisions in other jurisdictions contain general language suggesting that attorneys’ fees are not recoverable under the FTCA, and that no U.S. Court of Appeals had previously addressed the issue presented by Tri-State.¹⁵ In those cases, however, the plaintiff was seeking to recover the attorneys’ fees it incurred *as a corollary to* its FTCA action – for example, attorneys’ fees incurred in pursuing an automobile accident claim against the government under the FTCA. There, the “injuries” are the personal injuries suffered in the accident, while the attorneys’ fees are a necessary byproduct of seeking compensation for those injuries under the FTCA. In *Tri-State*, by contrast, the underlying injuries *are the attorneys’ fees*.¹⁶

The Court distinguished the EAJA on a similar basis. The EAJA provides for the recovery of attorneys’ fees expended as the result of pursuing or defending certain civil actions against the government – “attorney’s fees per se” – as opposed to attorneys’ fees wrongfully incurred due to the torts of abuse of process and malicious prosecution – “attorney’s fees *qua* damages.”¹⁷ In other words, the

¹³ Id. at 575, quoting *FDIC v. Meyer*, 510 U.S. 471, 477 (1994).

¹⁴ Id. at 575-77.

¹⁵ Id. at 577.

¹⁶ Id. at 577-78.

¹⁷ Id. at 581.

EAJA is concerned with awarding attorneys' fees adjunct to a civil action, while the FTCA is the proper vehicle to recover attorneys' *as damages*.

Malicious Prosecution / Abuse of Process

In sum, *Tri-State* renders the FTCA a viable alternative for pursuing recovery of attorneys' fees and costs against the Government by filing claims for malicious prosecution (also known as "wrongful use of civil proceedings") and abuse of process. The question that necessarily follows is: How do I know if I have such a claim? The answer, as the *Tri-State* court indicated, will be forum-specific. By way of illustration, below is a summary of those causes of action as they exist in the District of Columbia and Pennsylvania.

Malicious Prosecution / Wrongful Use of Civil Proceedings

In the District of Columbia, a plaintiff may prevail on a claim for malicious prosecution when: a) the original action was instituted maliciously and without probable cause; and b) the action terminated in favor of the malicious prosecution plaintiff.¹⁸ "Maliciously" means with a wicked intent, an evil purpose, or with a willful, wanton, reckless, or oppressive disregard for the aggrieved party's rights.¹⁹ "Without probable cause" means that no cautious person would believe that his/her action "and the means taken in prosecuting it are legally just and proper."²⁰ Finally, the tort of malicious prosecution in the District of Columbia requires that the aggrieved party has followed the matter through to a favorable termination.

The Pennsylvania equivalent of malicious prosecution is a statutory scheme commonly known as the "The Dragonetti Act."²¹ Under the Dragonetti Act:

A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings [if]: (1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and (2) The proceedings have terminated in favor of the person against whom they are brought.²²

As in the District of Columbia, the key elements of this claim are lack of probable cause and a final result, of some sort, in the aggrieved party's favor.

¹⁸ *Ammerman v. Newman*, 384 A.2d 637, 639 (D.C. 1978).

¹⁹ *Id.* at 640-41.

²⁰ *Id.* at 640.

²¹ 42 Pa. C.S.A. §§ 8351 et seq.

²² *Id.* at § 8351.

Importantly, although the Dragonetti Act speaks of “civil proceedings”, malicious prosecution claims have been maintained in Pennsylvania (pre-Dragonetti) for wrongful *criminal* investigations and complaints.²³ In the District of Columbia, it is well-settled that a malicious prosecution claim may be brought for improper criminal, as well as civil, legal actions.²⁴

In both forums, whether the termination of the underlying matter was sufficiently favorable to the aggrieved party is a critical inquiry, and one that is a question of law for the Court.²⁵ Favorable termination does not mean that the party must win after a trial on the merits, but it does require some favorable result “reflecting on the merits of the underlying action.”²⁶ A settlement or compromise of the matter, even if a positive one for the aggrieved party, generally does *not* constitute the favorable termination required to bring a malicious prosecution claim.²⁷

Abuse of Process

The tort of abuse of process is essentially the same in the District of Columbia and Pennsylvania. This tort focuses not on the filing or underlying merits of a legal action, but, rather, on whether the action is being used to “compel the party against whom it is used to do some collateral thing which he could not legally and regularly be required to do.”²⁸ Abuse of process is, “in essence, the use of legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process.”²⁹ It requires an ulterior motive in pursuing the legal action, and an affirmative act in support of that ulterior motive.³⁰ For example, pursuing litigation primarily to harass and cause financial injury to the adverse party supports an abuse of process claim.³¹ As opposed to malicious prosecution, the termination of proceedings in the aggrieved party’s favor is not an essential element of an abuse of process claim.³²

²³ See, e.g., *Junod v. Bader*, 458 A.2d 251, 253-54 (Pa. Super. 1983).

²⁴ See, e.g., *Gabrou v. May Department Stores Co.*, 462 A.2d 1102, 1104-05 (D.C. 1983).

²⁵ *DaimlerChrysler Corp v. Askinazi*, 152 F. Supp. 2d 655, 659 (E.D. Pa. 2001), citing *Miller v. Pennsylvania R.R. Co.*, 89 A.2d 809, 815-16 (1952) (construing Pennsylvania law); *Brown v. Carr*, 503 A.2d 1241, 1245 (D.C. 1986).

²⁶ *Brown*, 503 A.2d at 1245 (internal citation omitted).

²⁷ *Electronic Laboratory Supply Co. v. Cullen*, 712 A.2d 304, 310-11 (Pa. Super. 1998); *Nolan v. Allstate Home Equip. Co.*, 149 A.2d 426, 429 (D.C. 1959).

²⁸ *Bown v. Hamilton*, 601 A.2d 1074, 1079 (D.C. 1992), quoting *Morowitz v. Marvel*, 423 A.2d 196, 198 (D.C. 1980).

²⁹ *IAMA, Inc. v. Law Offices of Peter E. Meltzer*, 2003 WL 1875107 (Pa. Com. Pl. March 17, 2003), quoting *McGee v. Feege*, 517 Pa. 247, 259 (1987).

³⁰ *Hall v. Hollywood Credit Clothing Co.*, 147 A.2d 866, 868 (D.C. 1959).

³¹ *Shiner v. Moriarty*, 706 A.2d 1228, 1236 (Pa. Super. 1998)

³² See, e.g., *Hall v. Field Enterprises, Inc.*, 94 A.2d 479, 481 (D.C. 1953).

So What Does All of This Mean For Me?

Returning to the introductory hypothetical, depending on the size of your company, you have three options: 1) proceed under the EAJA; 2) proceed under the FTCA; or 3) both. In making your determination, you should consider whether the action you were involved with (particularly if statutorily-based) itself provides for the award of attorneys' fees, and consider your particular forum's requirements for malicious prosecution and abuse of process claims.

In performing a cost-benefit analysis, it also bears noting that in the *Tri-State* case, Tri-State, a relatively small corporation, had to endure \$3.2 million in fees before receiving approval to sue the government for malicious prosecution and abuse of process. Moreover, and somewhat ironically, the attorneys' fees Tri-State will now incur in pursuing its abuse of process and malicious prosecution claims under the FTCA are not, themselves, recoverable.³³

Let's change the hypothetical a bit. You are now at the outset of a government investigation where you are certain your company has no liability. What, then, to do? Here is one suggested course of action. If you find your company or client subjected to a dubious investigation, send the government a "*Tri-State* letter" advising that the government will be on the hook for all attorneys' fees expended in defending the investigation and any subsequent actions. If the investigation continues, make sure that all defense counsel keep meticulous time and billing records, as those records will become prime evidence in your FTCA claim. Finally, be sure to build up your malicious prosecution and abuse of process claims as you go. Provide repeated written explanation of why the government's claims are baseless and harassing, and try to get the government to put in writing its intentions to press forward.

This Update was prepared by James A. Keller of Saul Ewing LLP's White Collar/Government Enforcement Litigation Practice Group. For more information on the White Collar/Government Enforcement Litigation Practice Group, please contact Mr. Keller or either of the Co-Chairs of the Group, James M. Becker (215-972-1959; jbecker@saul.com) or Joseph F. O'Dea, Jr. (215-972-7109; jodea@saul.com). The statements contained in this Update are intended for general information and do not constitute, and should not be construed as, legal advice or legal opinion on any specific facts or circumstances.

³³ *Tri-State*, 341 F.3d at 577.

Congratulations to David L. Hackett, an Associate in Saul Ewing's Litigation Department. David was recently appointed chair to U.S. Representative Curt Weldon's (R-Pa.) 2004 re-election campaign. Representative Weldon will run for a tenth consecutive term as Representative of the Seventh Congressional District of Pennsylvania. As Chair of the campaign, Mr. Hackett will be responsible for fundraising, coordinating events, and communicating with constituents and local organizations. Mr. Hackett says that his work at Saul Ewing has prepared him for the challenge. "Through the Firm I've gained valuable experience conducting legal research and interacting with a variety of clients, and I've made strong contacts in the local business and legal communities," he said.

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