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Is the Equal Access to Justice Act Applicable to Successful Rural Housing Service Appeals?

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Appeals of adverse decisions rendered by the Rural Housing Service (RHS), formerly known as the Farmers Home Administration, are made to the National Appeals Division (NAD), which is an organization within the Department of Agriculture that is independent from all other offices and agencies of the Department, including the RHS.

Ordinarily, pursuant to the Equal Access to Justice Act (EAJA), a party who successfully appeals an adverse RHS decision would be entitled to recover its fees and expenses, including attorney fees, expended in conjunction with the appeal. However, as discussed below, this has not been the case with respect to NAD appeals.

The Equal Access to Justice Act, in essence, specifies that a party who prevails in an appeal of an adverse decision made by an administrative agency such as the RHS, is entitled to recover its fees and expenses, including attorney fees, expended in connection with the appeal, unless it is determined that the position of the agency was substantially justified or special circumstances make an award of such fees and expenses unjust. However, the department of Agriculture, through regulation, has exempted all appeal to the NAD, including appeals of adverse RHS decisions, from the EAJA.

The primary purpose of the EAJA in providing for the recovery of fees and expenses is to ensure that a person will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved in vindication of the person's rights. Therefore, it is probable that without the prospect of being able to recoup the fees and expenses incurred in a successful appeal pursuant to the EAJA, there have been appeals from adverse RHS decisions that were not pursued. As a result, by exempting appeals to the NAD from the EAJA, RHS has been insulated from potential appeals. Moreover, exempting such appeals from the EAJA has, to a certain extent, probably provided a disincentive for RHS personnel to render reasonable decisions since the only consequence of rendering an

arbitrary or unreasonable decision has been the potential reversal of the decision on appeal.

On July 14, 1997, the United States Court of Appeals for the Eighth Circuit issued its decision in the case of *Lane v. United States Department of Agriculture*. In its decision, the Appeals Court affirmed the District Court's decision holding that the plaintiffs were entitled, pursuant to the EAJA, to recover their attorney fees incurred in connection with their successful appeal to the NAD of an adverse RHS decision.

In both the District Court and Court of Appeal, the United States argued that the EAJA does not apply to successful appeals to the NAD from adverse RHS decisions. However, both courts dismissed such arguments and held that the EAJA applies to such appeals.

The ruling by the Court of Appeals applies to any successful appeals of an adverse RHS decision to the NAD that originates from the seven states which are within the Eighth Circuit's jurisdiction. These seven states are Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota.

Unfortunately, the Court of Appeals decision has no binding effect on appeals originated from states outside the Eighth Circuit's jurisdiction. Whether NAD will accede to the holding of the Court of Appeals decision or, for appeals outside the Eighth Circuit's jurisdiction, continue to assert that the EAJA is not applicable to NAD appeals is unknown. However, should NAD refuse to accede to the holding of the Court of Appeals decision outside the Eighth Circuit, that decision can be cited in support of any challenge to NAD's decision. Since I believe the Court of Appeals made the correct decision, there is a good possibility of success in any such challenge.

The EAJA requires that an application for an award of fees and expenses must be submitted within thirty days of the adverse decision. In addition, the EAJA requires that if a party is dissatisfied with the agency's determination of the amount, if any, to which the party is entitled, the party must appeal that determination within thirty days of the decision to the appropriate court. However, it is uncertain whether this thirty day time limit for appealing the agency determination of the amount to which a party is entitled, or the normal six year time limit for bringing actions against the United States, applies to decisions denying a request for fees and expenses on the basis that the EAJA is not applicable at all to appeals of adverse decisions to the NAD.

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Coan & Lyons is a Washington, D.C. law firm which specializes in real estate law, with an emphasis on all aspects of federal housing programs, including those of RHS. On behalf of its clients, who are spread throughout the country, Coan & Lyons has pursued several successful appeals of adverse RHS decisions.

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