

# Clearinghouse REVIEW

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# Legal Services Attorney Fees Are Obtainable in Pending Cases

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In 1996, in an omnibus appropriations bill, Congress imposed numerous restrictions on legal services programs—restrictions on, among others, class action litigation,<sup>1</sup> representation of undocumented “aliens,” and litigation involving abortion.<sup>2</sup> This legislation also prohibited the Legal Services Corporation (LSC) from disbursing funds to any program that “claims ... or collects and retains attorneys’ fees pursuant to any Federal or State law permitting or requiring the awarding of such fees.”<sup>3</sup> All the restrictions were included in subsequent appropriations laws through the March 2009 appropriations bill for the 2009 fiscal year.<sup>4</sup> However, the December 2009 appropriations bill for the 2010 fiscal year struck out the paragraph requiring LSC to sanction any program that “claims ... or collects and retains attorneys’ fees.”<sup>5</sup>

The statutory repeal did not address whether legal services programs may claim and collect fees for cases filed and work performed before the revocation. There is a strong legal basis for legal services lawyers to obtain such fees. The LSC interpretation of the statute, which is entitled to deference, provides that these claims for fees are permitted by the statute. Cases regarding restrictions on fee-generating cases demonstrate that the issue of compliance with LSC regulations is between LSC and legal services lawyers; when attacking a fee petition, defendants have no basis for raising the issue.<sup>6</sup>

In *Bradley v. School Board of Richmond*, the U.S. Supreme Court held that, where the statute and legislative history were silent on the issue, unless there was “manifest injustice,” the court should apply the law in effect at the time it rendered its decision on fees.<sup>6</sup> Since defendants’ liability for fees under federal and state law was not altered by the restriction on LSC-funded programs in effect at the time or its recent repeal, there is no manifest injustice in awarding fees to legal services programs for work performed prior to the repeal. Removal of the restriction does not constitute the kind of change in law which the Supreme Court had found cannot be applied retroactively.

<sup>1</sup>Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1996 § 504, Pub. L. No. 104-134, 110 Stat. 1321, 1324-53-59.

<sup>2</sup>*Id.* Section 504(a)(13) states: “(a) None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity (which may be referred to in this section as a ‘recipient’)— ... (13) that claims (or whose employee claims), or collects and retains, attorneys’ fees pursuant to any Federal or State law permitting or requiring the awarding of such fees.”

<sup>3</sup>See, e.g., Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, 123 Stat. 524.

<sup>4</sup>Consolidated Appropriations Act of 2010 § 533, Pub. L. No. 111-117, 123 Stat. 3034 (“Section 504(a) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1996 (as contained in Public Law 104-134) is amended by striking paragraph (13)”). Other restrictions on legal services programs were not repealed.

<sup>5</sup>I use the term “defendants” to refer to any party from whom fees are sought.

<sup>6</sup>*Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974).

States are liable for attorney fees under federal statutes as long as they had clear notice of their liability under the federal law.<sup>7</sup> While states have sovereign immunity against retroactive relief, attorney fees are considered ancillary to prospective relief. Therefore states are liable for fees as long as they had clear notice. Neither the restriction on legal services programs claiming attorney fees nor its revocation altered legal consequences for states, which were liable for the fees at all times. Thus states always had ample and adequate notice that attorney fees, whether incurred before or after the repeal of the fee restriction, were a legal consequence of violating the law.

These arguments serve as a sound basis for amending complaints to seek attorney fees in pending cases.

### The Legislative History Is Silent on Timing

In numerous cases considering the issue of whether new statutes apply to pending cases, courts have looked to legislative history to ascertain congressional intent. For instance, the Civil Rights Attorney's Fees Award Act of 1976 imposed new liability for fees but had no language regarding whether the liability applied to pending cases.<sup>8</sup> Nevertheless, the legislative history stated that the statute was "intended to apply to all cases pending on the date of enactment," and the Supreme Court viewed this as a controlling indication of congressional intent.<sup>9</sup> Using the same reasoning, the Court concluded that a provision of the Antiterrorism and Effective Death Penalty Act of 1996 was not applicable to pending cases based on legislative history.<sup>10</sup>

The legislative intent behind the repeal of the LSC attorney fees restriction is set forth in a paragraph of the House Conference Report:

#### ADMINISTRATIVE PROVISION —LEGAL SERVICES CORPORATION

A general provision in Title V of the bill revises the administrative provision in order to permit grantees to pursue the recovery of attorney's fees when recovery is permitted or required under Federal or State law. The conferees believe that this action will level the playing field between legal aid attorneys and their counterparts in the private sector and provide a potentially crucial source of additional revenue to legal aid providers in a year in which State and private funding sources are decreasing.<sup>11</sup>

While the legislative history elucidates Congress' objectives, it does not address whether the repeal applies to fees for pending cases.

### LSC's Interpretation that Programs May Seek Fees Is Entitled to Deference

LSC issued, in February 2010, an interim final rule setting forth its views on the implementation of the repeal of the attorney fees restriction.<sup>12</sup> LSC considered but rejected the suggestion that legal services attorneys should be limited to collecting fees for work performed subsequent to the date of the statutory change or the effective date of the interim final rule. Instead LSC decided that legal services lawyers were allowed to seek fees

<sup>7</sup>*Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006).

<sup>8</sup>Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988.

<sup>9</sup>*Hutto v. Finney*, 437 U.S. 678, 694 n.23 (1978) (quoting H.R. REP. NO. 94-1558, at 4 n.6 (1976)).

<sup>10</sup>*Lindh v. Murphy*, 521 U.S. 320, 328–30 (1997).

<sup>11</sup>H.R. REP. NO. 111-366, at 769 (2009) (Conf. Rep.).

<sup>12</sup>Attorneys' Fees, 75 Fed. Reg. 6816 (Feb. 11, 2010) (interim final rule and request for comments) (to be codified at 45 C.F.R. pts. 1609–10, 1642).

“without regard to when the legal work for which fees are claimed or awarded was performed.”<sup>13</sup> LSC explained its decision in detail:

[T]he attorneys’ fees prohibition applies to the particular activity of seeking and receiving attorneys’ fees, but is irrelevant to the permissibility of the underlying legal work. Limiting the ability of recipients to seek and receive attorneys’ fees on only future case work would create a distinction between some work and other work performed by a recipient, *all of which was permissible when performed*. LSC finds such a distinction to be artificial and not necessary to effectuate Congress’ intention.

LSC also believes that not limiting the work for which recipients may now seek or obtain attorneys’ fees will best afford recipients the benefits of the lifting of the restriction. There may well be a number of ongoing cases where the newly available option of the potentiality of attorneys’ fees will still be effective to level the playing field and afford recipients additional leverage with respect to opposing counsel in those cases. Likewise, being able to obtain attorneys’ fees in cases in which prior work has been performed would likely help relieve more financial pressure on recipients than a “new work only” implementation choice would because it would increase sources and amount of work for which fees might potentially be awarded.<sup>14</sup>

The reasoning underlying LSC’s conclusion fully comports with the legislative history of the statutory repeal.

LSC’s statutory interpretation is entitled to deference under the Supreme Court’s “principle of deference to administrative interpretations.”<sup>15</sup> Under that principle the Court has “traditionally deferred” to the views of the implementing administrative agency asking whether the agency’s construction is “permissible.”<sup>16</sup> The Court has upheld the agency’s interpretation when it is not “unreasonable.”<sup>17</sup> The Court explains:

[T]he ultimate question is whether *Congress* would have intended, and expected, courts to treat an agency’s rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of “gap-filling” authority. Where an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency’s determination.<sup>18</sup>

The LSC rule meets the criteria for a rule entitled to deference. The rule establishes the right of legal services programs to obtain funding from LSC for work claiming and collecting attorney fees. Clearly LSC focused fully and directly on the issue of whether programs were allowed to seek fees for work prior to the repeal and decided that indeed programs were. LSC used full notice-and-comment procedures to promulgate its ruling. The rule squarely falls within the statutory grant of authority to LSC. And there is nothing “unreasonable” about LSC’s interpreta-

<sup>13</sup>*Id.* at 6817.

<sup>14</sup>*Id.*

<sup>15</sup>*Chevron U.S.A. Incorporated v. Natural Resources Defense Council Incorporated*, 467 U.S. 837, 844 (1984).

<sup>16</sup>*Beck v. Pace International Union*, 551 U.S. 96, 104 (2007).

<sup>17</sup>*Id.* at 105.

<sup>18</sup>*Long Island Care at Home Limited v. Coke*, 551 U.S. 158, 173–74 (2007).

tion, which is clearly tied to Congress' express purposes. Thus LSC's determination that legal services programs may claim and collect attorney fees for cases filed and work performed prior to the statutory repeal is entitled to deference.

Defendants may argue that deference to LSC's interpretation of the statute is unwarranted because LSC is not a federal agency.<sup>19</sup> This argument has been soundly rejected. Even though LSC is not a federal agency, the Second Circuit held, LSC's regulations and "interpretations ... are entitled to deference" as long as they are "permissible" under the statute.<sup>20</sup> The D.C. Circuit reached the same conclusion, explaining that "Congress has entrusted LSC with the duty to 'administer' the Act, and ... has delegated to LSC the authority to 'fill any gap left ... by Congress.'"<sup>21</sup>

The December 2009 appropriations bill was silent with regard to whether the repeal of the restriction was intended to permit federally funded legal services programs to seek fees for cases filed and work performed prior to the passage of the law. LSC has filled this gap with a reasonable and permissible interpretation. Courts should defer to LSC's interpretation.

### The Issue Is Outside the Court's Jurisdiction in Awarding Fees

Whether legal services attorneys are complying with LSC regulations is a matter solely between LSC and its grantees

and is not relevant to a determination of fees under federal or state law. Defendants challenging a claim for fees do not have standing to raise the issue of whether LSC should sanction legal services lawyers. Nor may defendants allege lack of compliance with LSC regulations as a shield against fees. The question of LSC sanctions is not within the jurisdiction of a district court reviewing a fee petition.

This issue is similar to one which has already been the subject of litigation: whether defendants may challenge fees on the grounds that LSC limits programs from handling fee-generating cases.<sup>22</sup> The Legal Services Corporation Act prohibits programs from handling fee-generating cases except in accordance with LSC guidelines.<sup>23</sup> The corresponding LSC regulations permit programs to handle fee-generating cases if, in accordance with LSC-designated procedures, the programs determine that private attorneys are unavailable.<sup>24</sup> In response to cases rejecting fee challenges based on this restriction, Congress passed, in 1977, a law preventing challenges regarding the appropriateness of representation from being raised in individual actions.<sup>25</sup> The law states:

No question of whether representation is authorized under this subchapter, or the rules, regulations or guidelines promulgated pursuant to this subchapter, shall be considered in, or affect the final disposition of, any proceeding in which a per-

<sup>19</sup>Legal Services Corporation Act, 42 U.S.C. §§ 2996 *et seq.*, 2996d. The Act establishes the Legal Services Corporation (LSC) as a nonprofit organization with its headquarters in the District of Columbia.

<sup>20</sup>*Velazquez v. Legal Services Corporation*, 164 F.3d 757, 763 (2d Cir. 1999), *aff'd* on other grounds, 531 U.S. 533 (2001); see also *In re New Times Securities Services Incorporated*, 371 F.3d 68, 78 (2d Cir. 2004) (Congress intended for LSC to be treated as government agency).

<sup>21</sup>*Texas Rural Legal Aid Incorporated v. Legal Services Corporation*, 940 F.2d 685, 689–90 (D.C. Cir. 1991) (citing *Chevron U.S.A. Incorporated v. Natural Resources Defense Council*, 467 U.S. 837, 844, 843 (1984)); see also *Peretz v. Legal Aid Foundation of Los Angeles*, 18 Cal. Rptr. 3d 863, 866 (Cal. App. Dep't Super. Ct. 2004) ("Enforcement of the terms of the [Legal Services Corporation Act] and regulations promulgated thereunder is vested in LSC.").

<sup>22</sup>A fee-generating case is "any case or matter which, if undertaken on behalf of an eligible client by an attorney in private practice, reasonably may be expected to result in a fee for legal services from an award to a client, from public funds or from the opposing party" (45 C.F.R. § 1609.2(a) (2010)).

<sup>23</sup>Legal Services Corporation Act, 42 U.S.C. § 2996f(b)(1).

<sup>24</sup>45 C.F.R. § 1609.3. There are also specific exceptions to the prohibition.

<sup>25</sup>42 U.S.C. § 2996e(b)(1)(B); see, e.g., *Rodriguez v. Taylor*, 569 F.2d 1231, 1245–46 (3d Cir. 1977); see also *Dennis v. Chang*, 611 F.2d 1302, 1308 (9th Cir. 1980) (declining to consider argument).

son is represented by a recipient or an employee of a recipient. A litigant in such a proceeding may refer any such question to the Corporation which shall review and dispose of the question promptly, and take appropriate action. This subparagraph shall not preclude judicial review available under applicable law.<sup>26</sup>

The House Report on the bill explained: “The Committee believes that repetitive litigation of this issue is a needless drain on federal funds provided for the representation of poor people, and the section has been added to discourage further frivolous litigation of the issue.”<sup>27</sup>

This provision makes clear that issues concerning compliance of legal services programs with LSC regulations are not relevant to a court’s determination of whether attorneys are entitled to claim fees. In a challenge to the award of fees to legal services attorneys on the grounds that the representation was unauthorized, one court noted that even though the provision regarding representation did not address whether legal services lawyers were permitted to claim fees, the statute “divests this Court of jurisdiction to review in this proceeding the propriety of [legal services lawyers’] representation under the Corporation guidelines.”<sup>28</sup> “[D]efendants do not have standing to complain of any impropriety” with regard to compliance with LSC rules, the court further stated.<sup>29</sup> Similarly the Supreme

Court of Arizona reversed a lower court’s holding that fees could not be awarded because the legal services lawyers had not shown that they followed LSC procedures for taking a fee-generating case.<sup>30</sup> The Arizona court stated that the lower court should not have made an inquiry into the propriety of representation because the matter was “within the primary jurisdiction of the Corporation itself.”<sup>31</sup>

Accordingly whether legal services programs that seek fees for cases filed and work performed prior to the repeal are complying with LSC regulations is a matter for review by LSC. To inquire whether the legal services program is violating LSC’s rules is not within the jurisdiction of a court determining appropriate fees.

### Supreme Court Precedent Strongly Supports Application to Pending Cases

In *Bradley v. School Board of Richmond*, a 1974 school desegregation case, the district court awarded fees to plaintiffs’ counsel based on equitable principles since there was no statutory basis for awarding fees.<sup>32</sup> Congress subsequently passed a statute providing for fees in school desegregation cases. The Fourth Circuit reversed the district court’s fee award and refused to apply the new statute to the pending case. Reversing the Fourth Circuit, the Supreme Court held that the fee-shifting law should be applied to the pending case. The Court stated: “We anchor our holding in this case on

<sup>26</sup>42 U.S.C. § 2996e(b)(1)(B).

<sup>27</sup>H.R. REP. NO. 95-310, at 9 (1977).

<sup>28</sup>*Anderson v. Redman*, 474 F. Supp. 511, 520 (D. Del. 1979); see also *Oregon v. Legal Services Corporation*, 552 F.3d 965, 973 (9th Cir. 2009) (subject-matter jurisdiction lacking as LSC’s regulations are between LSC and recipients of its funding); *Gulf Homes Incorporated v. Gonzales*, 676 P.2d 628, 630 (Ariz. 1984) (“questions of the propriety of legal services representation of clients is within the primary jurisdiction of the Corporation itself”); *Ex parte Mitchell*, 395 So. 2d 51, 52–53 (Ala. 1981) (court lacked jurisdiction due to LSC regulations).

<sup>29</sup>*Anderson*, 474 F. Supp. at 518; see also *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1984) (whether legal services lawyers were improperly representing undocumented “aliens” was “not an issue which is subject to litigation”); *McManama v. Lukhard*, 616 F.2d 727, 730 (4th Cir. 1980) (whether representation was unauthorized was “precisely the sort of question that the Legal Services Corporation Act and its implementing regulations require to be submitted to the Corporation”); *Holland v. Steele*, 92 F.R.D. 58, 60 (D. Ga. 1981) (“the determination of the propriety of grantee representation of specific litigants is within the jurisdiction” of LSC).

<sup>30</sup>*Gulf Homes Incorporated v. Gonzales*, 676 P.2d 628, 630–31 (Ariz. 1984).

<sup>31</sup>*Id.* Accord *Lindquist v. Bangor Mental Health Institute*, 770 A.2d 616, 619 (Me. 2001) (questions regarding eligibility for legal services representation “should not have been reached” by lower court).

<sup>32</sup>*Bradley v. School Board of Richmond*, 416 U.S. 696 (1974).

the principle that a court is to apply the law in effect at the time it renders its decision unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.”<sup>33</sup>

*Bradley* strongly supports applying the revocation of the attorney fees restriction to pending cases. There is no “manifest injustice” in awarding fees to legal services attorneys pursuant to federal and state fee-shifting statutes in effect at the time the suits were filed even though fee requests are filed after the December 2009 revocation.

The Supreme Court revisited *Bradley* in *Martin v. Hadix*, a 1999 case regarding whether the Prison Litigation Reform Act’s reduction in the hourly rate that attorneys were allowed to charge in prison litigation cases should be applied to pending cases. *Martin* took care to note the continuing vitality of *Bradley* while distinguishing it from the facts in *Martin*. After concluding that the Prison Litigation Reform Act did not state whether it should be applied to pending cases, the Court explained:

[W]e must determine whether application of this section in this case would have retroactive effects inconsistent with the usual rule that legislation is deemed to be prospective. The inquiry into whether a statute operates retroactively demands a common-sense, functional judgment about “whether the new provision attaches new legal consequences to events completed before its enactment.” This judgment should be informed and guided by “familiar considerations of fair notice, reasonable reliance, and settled expectations.”<sup>34</sup>

Even if the statutory change is “procedural” or “collateral,” the Court must still determine whether it has a retroactive effect.<sup>35</sup>

The Court held that it would upset lawyers’ reasonable reliance on the fee schedule in existence prior to the Prison Litigation Reform Act to impose the lower rates on postjudgment monitoring performed before the enactment of the Act. However, since lawyers had fair notice of the change in the fee schedule after enactment of the Act, the lower rate would apply in pending cases for work performed after the Act became effective.<sup>36</sup> *Martin* distinguished *Bradley* as follows:

Because attorney’s fees were available, albeit under different principles, before passage of the statute, and because the District Court had in fact already awarded fees invoking these different principles, there was no manifest injustice in allowing the fee statute to apply in that case. We held that the award of statutory attorney’s fees did not upset any reasonable expectations of the parties.<sup>37</sup>

Similarly legal services lawyers were entitled to obtain attorney fees under fee-shifting statutes prior to the December 2009 repeal, although they would have risked the loss of LSC funds. Indeed, any lawyer who handled these cases—even lawyers in the private bar—was entitled to seek fees. The repeal did not change defendants’ ongoing liability for fees. As in *Bradley*, the fees were available under fee-shifting statutes both before and after Congress repealed the legal services restriction, and therefore there is no manifest injustice in allowing fees for pending cases.<sup>38</sup>

<sup>33</sup>*Id.* at 711.

<sup>34</sup>*Martin v. Hadix*, 527 U.S. 343, 357–58 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994)).

<sup>35</sup>*Id.* at 359.

<sup>36</sup>*Id.* at 361–62.

<sup>37</sup>*Id.* at 360.

<sup>38</sup>See *Zarcon Incorporated v. National Labor Relations Board*, 578 F.3d 892, 896 (8th Cir. 2009) (“The availability of attorney’s fees under pre-existing principles, more than the collateral nature of attorney’s fees, demonstrates why *Bradley* does not undermine the presumption against retroactivity.”).

Because liability for attorney fees was unaltered by the December 2009 appropriations bill, court decisions refusing to apply other statutes to pending cases are clearly distinguishable.<sup>39</sup> For example, a statute creating the right to damages for civil rights violations does impose new liability, therefore preventing retroactive application.<sup>40</sup> The repeal of the restriction on the collection of fees by legal services attorneys does not. Likewise, a statutory repeal of the right to discretionary relief from deportation for individuals who enter into plea agreements changed the immigration consequences of a conviction.<sup>41</sup> Here the repeal of the attorney fees restriction does not change the consequences for defendants since it did not alter federal or state law permitting fee shifting.

Defendants may argue that they actually or reasonably relied upon the funding restriction to insulate them from liability for fees. Such an argument is not relevant to the analysis of retroactivity, as the Third Circuit explained:

The likelihood that the party before the court did or did not in fact rely on the prior state of the law is not germane to the question of retroactivity. Rather, courts are to *concentrate on the group to whose conduct the statute*

*is addressed* ... with a view to determining whether reliance was reasonable.<sup>42</sup>

The group to whose conduct the legal funding restriction was aimed is clearly legal services lawyers. Since the restriction did not change the legal liability of parties sued by legal services programs, their alleged reliance is not relevant.<sup>43</sup>

### State Defendants Had Clear Notice of Liability for Fees

Protected by the Eleventh Amendment's grant of sovereign immunity, states are not liable for retroactive relief, such as the payment of retroactive welfare benefits.<sup>44</sup> Nevertheless, the Eleventh Amendment does not insulate states from payment of attorney fees. "[T]he Eleventh Amendment d[oes] not apply to an award of attorney's fees ancillary to a grant of prospective relief," the Supreme Court held.<sup>45</sup> In a unanimous opinion regarding the enforceability of consent decrees, Justice Kennedy recently described the "award of attorneys' fees" against the state as a "penalty imposed to enforce a prospective injunction."<sup>46</sup>

In a case concerning the Individuals with Disabilities Education Act, the Supreme Court held that states must have "clear notice" of their cost-shifting obligations

<sup>39</sup>See *Kellermann v. Holder*, 592 F.3d 700, 707 (6th Cir. 2010) (no impermissible retroactive effect because examined statute did not cause subject to "abandon any rights or admit guilt").

<sup>40</sup>*Landgraf v. USI Film Products*, 511 U.S. 244 (1994); see also *Summers v. Department of Justice*, 569 F.3d 500, 504 (D.C. Cir. 2009) (application of fee-shifting amendment retroactively to case in which defendant had settled "would impose an 'unforeseeable obligation' upon the defendant by exposing it to liability for attorneys' fees for which it clearly was not liable before the passage of the [amendment]"); *Taylor P. v. Missouri Department of Elementary and Secondary Education*, No. 06-4254, 2007 WL 2360061, at \*2 (W.D. Mo. 2007) (would be manifestly unjust to apply new fee-shifting provision retroactively).

<sup>41</sup>*Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 575–76 (2006) (statute stripping courts of jurisdiction over habeas corpus petitions could not be applied to pending cases).

<sup>42</sup>*Ponnappula v. Ashcroft*, 373 F.3d 480, 493 (3d Cir. 2004) (citations omitted) (emphasis added); see also *Hem v. Maurer*, 458 F.3d 1185, 1200 (10th Cir. 2006) ("appropriate focus in retroactivity analysis is on whether the class of persons affected by retroactive application of a statute had an objectively reasonable interest in the previous state of the law").

<sup>43</sup>See *Judicial Watch Incorporated v. Bureau of Land Management*, 562 F. Supp. 2d 159, 171 (D.D.C. 2008) (fee-shifting amendments could be applied retroactively even where defendant did not "expect" to be liable for attorney fees); *Olatunji v. Ashcroft*, 387 F.3d 383, 391 (4th Cir. 2004) ("subjective reliance" is not properly consideration in retroactivity analysis).

<sup>44</sup>*Edelman v. Jordan*, 415 U.S. 651 (1974); see also *Papasan v. Allain*, 478 U.S. 265, 280–81 (1986) ("breach of a continuing obligation to comply with ... trust obligations" held to be impermissible retroactive relief).

<sup>45</sup>*Missouri v. Jenkins*, 491 U.S. 274, 280 (1989).

<sup>46</sup>*Frew v. Hawkins*, 540 U.S. 431, 440 (2004) (quoting *Hutto v. Finney*, 437 U.S. 678, 691–92).



pursuant to Spending Clause statutes.<sup>47</sup> The Court set aside legislative history and ruled that states did not have to pay expert fees as part of attorney fees where the statute did not explicitly mention expert fees.<sup>48</sup>

States may claim that they did not have clear notice of the applicability of the attorney fees revocation to pending cases. However, as noted above, the restriction on legal services attorneys collecting attorney fees never altered states' liability for fees. States have had clear notice of their liability under fee-shifting statutes and, like any other defendant, have no basis to raise the issue of LSC sanctions in the context of the court's decision on a fee petition.

### Amend Complaints to Seek Fees in Pending Cases

In order to obtain fees in pending cases, counsel must amend the prayer for relief in the complaint to seek fees, possibly also seeking amendment of a scheduling order.<sup>49</sup> Leave to amend is usually given freely.<sup>50</sup> If the time for amending the complaint has passed, plaintiffs may need to show good cause for the amendment.<sup>51</sup> Attorneys should seek to amend the complaint as soon as possible so as not to be accused of undue delay.<sup>52</sup>

Counsel should take care in framing the issue so as not to undermine the arguments laid out herein. For instance, the motion to amend should avoid suggesting that fees were not permissible prior to the change in the law. Instead the motion should make clear that attorney fees were permissible under cost-shifting statutes and that the legal services program did not request a fee in the complaint only because of a restriction wholly independent of the law providing for the recovery of attorney fees.

Both the legislative history and the LSC interpretation of the statute are ample bases for seeking to amend the complaint. The expressed desire of both Congress and LSC to "level the playing field between legal aid attorneys and their counterparts in the private sector and provide a potentially crucial source of additional revenue to legal aid providers" satisfies good cause for amending the complaint.<sup>53</sup>

Legal services programs should take full advantage of the recent statutory change not only for new litigation but also for cases pending before the change in law. Fees should be sought where permitted by federal or state law regardless of whether the work took place before or after the repeal of the attorney fees restriction.<sup>54</sup>

<sup>47</sup>*Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291, 296 (2006).

<sup>48</sup>*Id.* at 304.

<sup>49</sup>For suits against state actors, some fee-shifting statutes provide relief only when parties are sued in their official, and not individual, capacity (see, e.g., *Balas v. Taylor*, 567 F. Supp. 2d 654, 666 (D. Del. 2008); *Schisler v. State*, 938 A.2d 57, 68 (Md. Ct. Spec. App. 2007); *D'Aguanno v. Gallagher*, 50 F.3d 877, 882 (11th Cir. 1995); *Kreines v. United States*, 33 F.3d 1105, 1107 (9th Cir. 1994); *Kolar v. Sangamon County*, 756 F.2d 564, 567-68 (7th Cir. 1985)).

<sup>50</sup>The federal rules state that the "court should freely give leave [to amend the complaint] when justice so requires" (Fed. R. Civ. P. 15(a)(2)). See *National Liberty Corporation v. Wal-Mart Stores Incorporated*, 120 F.3d 913, 916 (8th Cir. 1997); see also *Capital Asset Research Corporation v. Finnegan*, 216 F.3d 1268, 1270 (11th Cir. 2000).

<sup>51</sup>See, e.g., *Hamilton v. Water Whole International Corporation*, 302 F. App'x 789, 798 (10th Cir. 2008); *Boyer v. Gildea*, No. 1:05-CV-129-TS, 2008 WL 5156661 (N.D. Ind. 2008).

<sup>52</sup>See, e.g., *Romero v. Drummond Company*, 552 F.3d 1303, 1319 (11th Cir. 2008); *Leary v. Daeschner*, 349 F.3d 888, 907 (6th Cir. 2003).

<sup>53</sup>H.R. REP. NO. 111-366, at 769 (2009) (Conf. Rep.).

<sup>54</sup>The Federal Rights Project of the National Senior Citizens Law Center hosted two webinars regarding claiming and collecting attorney fees. Both the recordings and the materials for those webinars can be accessed at [www.nslc.org](http://www.nslc.org). The Federal Rights Project also maintains an e-mail list with information about federal rights cases. To join the list, e-mail [rbobroff@nslc.org](mailto:rbobroff@nslc.org). The Sargent Shriver National Center on Poverty Law's FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS § 9.4 (Jeffrey S. Gutman ed., 2004) (with updates online at <http://federalpracticemannual.org>) takes attorneys through how to qualify as a prevailing party, entitlement to fees, calculating fees, motions for fees, and the problem of defendants seeking a waiver of fee claims as a condition of settlement.



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