

IN THE MATTER OF

MOTOR TRANSPORT ASSOCIATION OF CONNECTICUT, INC.

*Docket 9186. Interlocutory Order, November 17, 1989*ORDER DENYING REQUEST FOR AN AWARD
UNDER THE EQUAL ACCESS TO JUSTICE ACT

This case was dismissed by the Commission's Final Order dated August 25, 1989. Respondent Motor Transport Association of Connecticut, Inc. (the "Association") now requests attorney's fees and costs under the Equal Access to Justice Act ("the Act"), 5 U.S.C. 504. The Act provides such an award for eligible parties that prevail in a Commission proceeding unless the "Commission's position in the proceeding was substantially justified or special circumstances make the award unjust."¹

On September 18, 1984, the Commission issued a complaint alleging that the Association had violated Section 5 by fixing prices for the intrastate transportation of property in Connecticut. By a Joint Stipulation dated November 17, 1986, the parties stipulated the facts. The Initial Decision to dismiss the complaint was filed on January 9, 1987, and affirmed by the Commission's Final Order.

A. *The Act*

Under the Equal Access to Justice Act, an eligible party that prevails in a Commission proceeding may receive attorney's fees and other expenses unless the Commission's position was "substantially justified." Congress passed the Act "in response to its concern that persons 'may be deterred from seeking review of, or defending against, unreasonable government action because of the expense involved in securing the vindication of their rights.'" *Sullivan v. Hudson*, 109 S.Ct. 2248, 2253 (1989). The government has the burden of proving that its position was substantially justified by a preponderance of the evidence. *Sierra Club v. Secretary of Army*, 820 F.2d 513, 517 (1st Cir. 1987). An award under the Act does not follow automatically in every case where the private party prevails over the government, however, and the fact that the government lost in the underlying litigation does not create a presumption that its position

¹ Docket 9186(a)

was not substantially justified. *Kali v. Bowen*, 854 F.2d 329, 334 (9th Cir. 1988).

B. *The Applicant*

The Association is a prevailing party and a tax-exempt organization with ten employees. It is an eligible applicant. Rule 3.81(d)(2)(iii).

C. *The Commission's Position*

1. "Substantially justified"

Government action is substantially justified "if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood*, 108 S.Ct. 2541, 2550, n.2 (1988). The test is met when there is "such relevant evidence as a reasonable mind might accept adequate to support a conclusion"; "if there is a 'genuine dispute'"; or "if reasonable people could differ as to [the appropriateness of the contested action]." *Id.* at 2550. While the standard requires more than conduct that is "merely undeserving of sanctions for frivolousness," it does not require that the action be "justified to a high degree"; the action need only "satisfy a reasonable person." *Id.*

2. Uncertain law

Novel or difficult issues of law are evidence of a "genuine dispute" and "substantial justification."² "[I]f the governing law is unclear or in flux, it is more likely that the government's position will be substantially justified." *Martinez v. Secretary of Health & Human Services*, 815 F.2d 1381, 1383 (10th Cir. 1987). The existence of important and doubtful questions of law, the fact that the matter represents a case of first impression and the absence of adverse precedent may be considered. *Edwards v. McMahon*, 834 F.2d 796, 802-03 (9th Cir. 1987); see also *Jean v. Nelson*, 863 F.2d 759, 767 (11th Cir. 1988) (clarity of existing law a factor to be considered).³

3. The complaint

At the time the complaint in this case was issued, two circuit courts had held that price fixing pursuant to state statutes such as existed in

² The government "need only show that its theory . . . was a good faith extension of existing law in order to be substantially justified." *S.E.C. v. Kluesner*, 834 F.2d 1438, 1443 (8th Cir. 1987).

³ Complaint counsel's theory in this case would also seem to involve the "special circumstances" standard of the Act and Rule 3.81(a). That provision is a "safety valve" designed to "insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts." *Russell v. National Mediation Board*, 775 F.2d 1284, 1290 (5th Cir. 1985).

Connecticut was *per se* unlawful. *United States v. Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532 (5th Cir. 1983); *United States v. Title Insurance Rating Bureau of Arizona, Inc.*, 700 F.2d 1247 (9th Cir. 1983), *cert. denied*, 467 U.S. 1240 (1984). The state action defense in both instances had been rejected because the price fixing was not required by state law. At the time the complaint was issued here, the Association's conduct would have been considered *per se* unlawful in those circuits. That the Fifth Circuit's opinion in *Southern Motor Carriers* was later reversed by the Supreme Court, 471 U.S. 48 (1985),⁴ does not affect the reasonableness of the issuance of the complaint. *Smith by Smith v. Bowen*, 867 F.2d 731, 735 (2d Cir. 1989).

4. "Active supervision"

During the course of the adjudication of this case, the law at issue was unsettled. After *Southern Motor Carriers*, the law with respect to the "active supervision" prong of the state action defense remained unclear. In *Southern Motor Carriers*, because the government had stipulated that active supervision existed based on the implementation of formal state hearing procedures, the Court expressly refused to resolve the issue of what constitutes "active supervision." In this case, in its supplementary brief to the Commission, the Association itself argued that the Supreme Court "did not set forth any boundaries or definition of 'active supervision'" and that each case involved a "judgement call" because "there is no possible, overall description of what constitutes 'active supervision.'" "Answer To Complaint Counsel's Supplementary Brief On The Impact of *Patrick v. Burget*," at 3-4. In formulating its standard for "active supervision," the Commission noted in its opinion that "neither judicial nor Commission precedent precisely establishes how the [active supervision] requirement should apply to the facts of this case." Slip Opinion at 10.

5. Complaint counsel's position

Complaint counsel prosecuted this price fixing case vigorously but with a consistent and meticulously designed theory.⁵ They argued

⁴ The Supreme Court granted certiorari before the complaint was issued in this case, 467 U.S. 1240 (June 11, 1984). However, since the Court's opinion on the merits did not resolve the "active supervision" issue, *infra*, this fact is immaterial.

⁵ This is not a case where the government argued inconsistent theories in nearly identical cases or where the government action was inconsistent with and contrary to the agency's own rules. *Ramon-Sepulveda v. I.N.S.*, 863 F.2d 1458, 1460-62 (9th Cir. 1988). Complaint counsel's proposed standard was the same standard proposed in the New England and Ticor cases. *New England Motor Rate Bureau, Inc.*, Docket 9170, Aug. 18, 1989. Slip Opinion, n. 15 n. 14; *Ticor Title Insurance Company*, Docket 9190, Sept. 19, 1989. Slip Opinion, p.

that the Association's collective rate making is not actively supervised unless the state agency acts affirmatively with respect to each proposed rate to ensure that the state has in fact acted to insert its judgment in place of market forces. (Complaint Counsel's Appellate Brief ("CCAB") at 17.) They argued that such active supervision occurred only when the state agency provided notice and an opportunity to be heard to all interested parties, and a written explanation of its decision, in order to provide countervailing information and a reviewable record each time that rates are fixed and filed with the state agency. (CCAB at 21, 24, 26.)

Complaint counsel conceded that, with the exception of the 1983 order, minimum rate orders issued by DPUC for general commodities were the result of active state supervision through notice hearings and reasoned decisions. (CCAB at 39). They argued, however, that similar procedures should have been followed in each joint application for a rate increase above the minimum in general commodities, and in all joint rate filings for household goods, bulk liquids and dump truck tariffs. (CCAB at 37-42.) The Commission commented on this argument (Slip Opinion at p. 13):

In a thoughtful brief, complaint counsel propose that unless the state agency provides public notice of each pending rate proposed and opportunity for interested persons to comment and publishes a reasoned explanation of its decision, active supervision cannot be found.

We conclude that a hearing and a written opinion with respect to every rate proposed are not a necessary precondition for finding active state supervision. . . .

While the Commission in this case chose not to adopt complaint counsel's credible and articulate proposed standard, there was a "genuine dispute" as to the appropriateness of the standard on which reasonable minds could differ.⁶ Accordingly, the position was substantially justified.

D. Conclusion

The Commission's issuance of the complaint and complaint counsel's prosecution of this case (the "Commission's position" under Rule 3.81(a)), were reasonable. The case involved a difficult issue of law on which the decided cases provided no fixed standard. The standard for

11 n. 9. Consistency of the government's position is a factor to be considered. *Jean v. Nelson*, 863 F.2d 759, 767 (11th Cir. 1988).

⁶ As perhaps evidenced by the several opinions concerning this issue in *New England Motor Rate Bureau, Inc. and Tigor Title Insurance Company*, *supra* n. 4.

“active supervision” proposed by complaint counsel was a consistently applied standard about which reasonable minds could differ. The action was “substantially justified,” and the Association’s application for attorney’s fees and other expenses under the Equal Access to Justice Act must be denied.

IN THE MATTER OF
HEILIG-MEYERS COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
TRUTH IN LENDING ACT, REGULATION Z AND
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3269. Complaint, Nov. 20, 1989—Decision, Nov. 20, 1989

This consent order requires, among other things, a Richmond, Va. corporation to calculate and disclose accurately the annual percentage rates (APRs) that it discloses in connection with future extensions of consumer credit subject to the Truth in Lending Act. The order also requires respondents to make adjustments to the accounts of customers to whom it disclosed APRs that were understated by more than 1/4 of one percentage point, except for accounts where the amount of the adjustment is less than one dollar.

Appearances

For the Commission: *Chris M. Couillou.*

For the respondents: *Larry D. Sharp, McGuire, Woods, Battle & Boothe, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Heilig-Meyers Company, Heilig-Meyers Company of Georgia, Heilig-Meyers Company of North Carolina, Heilig-Meyers Company of Tennessee, and Sterchi Brothers Stores, Inc., corporations, ("respondents") have violated Sections 107 and 128 of the Truth in Lending Act, 15 U.S.C. 1606 and 1638, and Sections 226.17, 226.18 and 226.22 of Regulation Z, 12 C.F.R. 226.17, 226.18 and 226.22, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, issues this complaint pursuant to Section 108 of the Truth in Lending Act, 15 U.S.C. 1607, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and alleges:

PARAGRAPH 1. Heilig-Meyers Company is a Virginia corporation, with its principal place of business at 2235 Staples Mill Road, Richmond, Virginia.

PAR. 2. Heilig-Meyers Company of Georgia is a Georgia corporation,