

**Court of Appeals
of the
State of New York**

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In the Matter of the Application of
WILLIAM WITTLINGER,

Petitioner-Appellant,

For a Judgment pursuant to Articles 78 and 86 of the C.P.L.R., and 42 U.S.C. §1983,

– against –

BRIAN J. WING, as Commissioner of the Office of Temporary and Disability Assistance
of the New York State Department of Family Assistance, and JAMES J. MCGOWAN,
as Commissioner of the New York State Department of Labor,

Respondents-Respondents,

– and –

JASON A. TURNER, as Commissioner of the New York City Department
of Social Services,

Respondent.

**BRIEF OF THE NEW YORK STATE BAR ASSOCIATION,
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
and THE NEW YORK COUNTY LAWYERS' ASSOCIATION,
AMICI CURIAE, IN SUPPORT OF PETITIONER-APPELLANT**

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STATEMENT OF INTEREST

Amici curiae are the New York State Bar Association, the Association of the Bar of the City of New York and the New York County Lawyers' Association.

The New York State Bar Association (“NYSBA”) is the oldest and largest voluntary state bar association in the United States. With more than 70,000 members representing the full range of activities pursued by the legal profession, the NYSBA has among its foremost purposes the promotion of reforms in the law, the facilitation of the administration of justice in New York State, and the alleviation of barriers which prevent equal access to justice.

The Association of the Bar of the City of New York is a 21,000 member organization, founded in 1870, which addresses issues of law, legal ethics and public policy at the local, national and international levels.

The New York County Lawyers' Association (“NYCLA”), founded in 1908, is a not-for-profit membership organization of approximately 9,000 members, founded and operating specifically for charitable and educational purposes. NYCLA’s Certificate of Incorporation provides that one of the means by which the Association is to fulfill its charitable mission is “by arranging for the provision by its members of free legal services for indigent, low income and other persons in need...” NYCLA sponsors activities including pro bono programs, continuing education and public forums, and has consistently supported initiatives to increase access to justice.

These three bar associations jointly file this brief to express their collective alarm that the opinion below of the First Department, once solidified in precedent, will cripple the ability of poor persons to secure private counsel when they fall victim to the unjustified actions of state

agencies, and will remove a critical financial incentive for state agencies to properly administer essential entitlement programs.

QUESTION PRESENTED

Should an award of reasonable attorney's fees under the New York Equal Access to Justice Act be reserved solely to a litigant who received a favorable final judgment, order or consent decree and be withheld from one whose suit indisputably prompted the State's voluntary corrective conduct, mooted the suit by providing the relief that plaintiff sought?

The court of original jurisdiction did not answer this question. The Appellate Division, First Department answered this question in the affirmative.

STATEMENT OF THE CASE

The Court is respectfully referred to the detailed statement of factual and procedural history set forth in Petitioner-Appellant's Motion for Leave to Appeal to the Court of Appeals, pp. 8-13, which will not be repeated here.

In brief, the Office of Temporary and Disability Assistance of the New York State Department of Family Assistance ("State Agency") issued an administrative fair hearing decision requiring the New York City Department of Social Services ("City Agency") to restore certain public benefits to Petitioner-Appellant William Wittlinger ("Mr. Wittlinger") retroactively to April, 1996. [R53, R61]

After multiple complaints of municipal non-compliance proved futile, Mr. Wittlinger commenced an Article 78 proceeding to enforce the terms of his fair hearing decision. Within weeks, the State Agency compelled the City Agency to issue \$15,071.50 in retroactive benefits to him. [R472, R474-R477]

The lower court dismissed the petition on mootness grounds and denied reargument on the issue of Mr. Wittlinger's entitlement to a State EAJA fee award. [R12-R13, R24] On appeal, the First Department affirmed the denial of a State EAJA fee award because, *inter alia*, "the 'catalyst theory,' upon which [Mr. Wittlinger] relies, is no longer a viable basis for an award of attorney's fees (see, Buckhannon Bd. & Care Home, Inc., *supra* [532 U.S. 598]; Matter of Auguste v Hammons, ___ A.D.2d ___, 727 N.Y.S.2d 880)."

SUMMARY OF ARGUMENT

The State EAJA (CPLR § 8600, *et seq.*) was enacted to enable litigants of modest means to access the courts to contest the unjustified actions of state agencies. Prior to the instant appeal, such litigants generally prevailed for fee purposes if the litigation spurred the state agency's corrective action. Fee eligibility was premised on the "catalytic" effect of the lawsuit and was unaffected by the subsequent dismissal of the action on mootness grounds.

In this appeal, the First Department, departing from long-established "prevailing party" jurisprudence, disregarded the catalytic effect of Mr. Wittlinger's litigation, and affirmed the lower court's denial of a State EAJA fee award to him because he failed to acquire a judgment, order or consent decree memorializing his victory.

Under the First Department's newly enunciated "judgment or consent decree" rule, a litigant whose court action indisputably prompted corrective action is not entitled to a State EAJA fee award in the absence of a favorable judicial disposition. As a consequence, the State and other governmental agencies will have every reason to favorably moot such actions before a court decides the merits, and private attorneys and legal service programs that are not barred by their funding sources from seeking attorney's fees, will have little incentive to take such cases and commit the necessary time and resources to induce agency corrective action when the agency can unilaterally escape liability for EAJA fees anytime up to entry of judgment. Eliminating the "catalyst test" also removes a compelling reason for persuading state agencies to obey the law in a timely fashion, namely, the attorney's fee it must pay if a lawsuit is needed to prompt corrective action.

The First Department's disavowal of the "catalyst test" will inevitably dissuade private and eligible legal service attorneys from engaging in entitlement-related and similar litigation precisely when the unmet civil legal needs of the poor have reached crisis proportions and public funding to civil legal service programs is in full retreat. The retention of the "catalyst test" is plainly consistent with the clear purpose of the State EAJA, does not run afoul of a recent decision of the United States Supreme Court,¹ will have a salutary and prophylactic effect by deterring the unjustified actions of state agencies, and will ameliorate the documented and monumental need of the poor to obtain access to justice.

¹ The Court is respectfully referred to Petitioner-Appellant's arguments which distinguish the United States Supreme Court's analysis in Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598 (2001). See Petitioner-Appellant's Memorandum of Law in Support of Motion for Leave to Appeal, Point II.

ARGUMENT

POINT I

AN AWARD OF COUNSEL FEES IN CASES SUCH AS THIS WILL IMPROVE ACCESS TO JUSTICE FOR INDIGENT NEW YORKERS

In her most recent State of the Judiciary address, the Chief Judge of the State of New York, the Honorable Judith S. Kaye, expressed concern that access to justice "[not] be thwarted by lack of money, and surely not by barriers erected by the courts themselves."² Noting that the poor are particularly hard-hit during times of economic downturn, the Chief Judge was "appall[ed]" that "we are meeting only a small percentage of the civil legal needs of the poor," and was troubled that "available services now may dwindle even further."³

² See Chief Judge Judith S. Kaye, The State of the Judiciary 2002 (January 14, 2002), page 6 at <http://www.courts.state.ny.us/ctapps/StofJud2002.pdf> [accessed March 12, 2002].

³ Id. at page 11. The Chief Judge has ample cause for concern. See, e.g., Preliminary Report of Committee to Improve the Availability of Legal Services (June 30, 1989), page 1 ["[I]n New York, there is an imbalance of crisis proportions between the... unmet need for civil legal services among the poor...and the legal resources now available to address it..."]; Final Report to the Chief Judge of the State of New York of the Committee to Improve the Availability of Legal Services (April 27, 1990), page 9 ["[T]he unmet civil legal needs of the poor in New York is a critical problem that has a devastating impact on the lives of vast numbers of poor people who need legal assistance and cannot afford it."]; The Final Report of the Pro Bono Review Committee (April 18, 1994), page 46 ["The inability of the poor to obtain representation in judicial and administrative proceedings of critical importance to their lives is an affront to our system of justice and to the premise that all stand equal before the law, and are equally entitled to vindication of their legal rights."]; Report to the Chief Judge of the Legal Services Project, "Funding Legal Services for the Poor," page 3 (May, 1998)["The unmet need for critical legal services among poor New Yorkers has been thoroughly documented, is very great and is worsening. Poor people in New York State encounter literally millions of problems each year without the assistance of a lawyer."]

This appeal presents a critical opportunity to remove one such court-imposed barrier to access to justice, and to stem any further erosion in available legal services to this woefully underserved population.

The overriding purpose of the State EAJA is "to create a mechanism authorizing the recovery of counsel fees and other reasonable expenses" by low-income litigants "in certain actions against the state of New York..." (CPLR § 8600) Prior to the First Department's opinion in this case, indigent plaintiffs whose lawsuits compelled the State to provide the requested relief qualified for a State EAJA fee award unless the position of the state agency was "substantially justified," or some special circumstance rendered a fee award unjust. See CPLR § 8601(a); Matter of Shvartszayd v. Dowling, 239 A.D.2d 104 (1st Dept. 1997). A review of the empirical studies on the nature and quantity of pro bono work demonstrates that the disavowal of the so-called "catalyst test" will unfairly impede access to justice by discouraging small and mid-sized firms and eligible legal service attorneys from litigating such cases on behalf of the poor.

In July, 1990, former Chief Judge Sol Wachtler commissioned the Pro Bono Review Committee (the Marrero Committee) to ascertain:

...the amount of and types of pro bono work being done by New York lawyers, to measure the increase in that activity that results from renewed voluntary efforts, and to determine what effect those efforts are having on the availability of legal services for the poor in New York.⁴

⁴ See Final Report of the Pro Bono Review Committee (April 18, 1994), page 1.

The Marrero Committee conducted a three year survey of the pro bono activities of 10,842 New York attorneys in a variety of professional settings in order to measure changes in the amount and nature of their pro bono activities.⁵

In its final report, the Marrero Committee found that private practitioners in smaller firms were more likely to identify financial concerns as the primary impediment to increased pro bono activity while those in larger firms generally identified a lack of expertise in the legal areas required by poor persons.⁶

Twelve years later, the same central policy issue remains: How can attorneys in private law firms and eligible legal service programs be marshalled to address the unmet civil legal needs of the poor?

We respectfully submit that the answer to this question lies not only in the subjective intentions of the practicing bar, but in the fundamental character of the legal marketplace within which they practice. Consequently, the empirical data suggests that the solution to this crisis may not be to simply exhort more lawyers to commit more time to representing poor persons pro bono.

Reflecting larger societal trends in most other professions, attorneys are increasingly specialized. Although studies confirm that most private attorneys are highly motivated to increase

⁵ The attorneys were private practitioners, corporate counsel, government lawyers, public interest lawyers, judges, law school professors, retired attorneys and those in non-legal employment. Id. at Table 6.

⁶ Id. at page 23. In percentage terms, 41.5% of 1,570 responding private law firms with ten or fewer members cited financial circumstances as the primary impediment to pro bono work, and 48.9% of all responding private law firms (1,556/3,183) cited a lack of legal expertise in the area required by the poor person. Id. at Table 13.

their pro bono output,⁷ many attorneys are reluctant to accept assignments outside their proven field of expertise.⁸ Lack of familiarity with the subject area results in an ethical reluctance to accept assignments "which the lawyer knows or should know that he or she is not competent to handle."⁹ To accept such a case, a lawyer must engage in "preparation adequate in the circumstances."¹⁰

When entitlement-related legal disputes arise (as they do in ever-increasing numbers),¹¹ the "preparation adequate in the circumstances" can be overwhelming. Before venturing into such unfamiliar legal terrain, a private attorney must decide whether the mammoth investment of time and effort carries with it a reasonable chance of fair compensation.

⁷ See, e.g., A Report of The New York State Bar Association's President's Committee on Access to Justice and the Department of Pro Bono Affairs, "New York Efforts To Address the Unmet Legal Needs of the State's Poor: September, 1991 to December, 1993" (February 1994), page 42 ["Attorney motivation does not seem to be a problem. The response to the (pro bono) recruitment brochure... suggests that a large number of New York City attorneys may be looking for an opportunity to volunteer. A New York City attorney was four times more likely as an attorney elsewhere in the state to return the card indicating that he or she wanted to volunteer."].

⁸ As noted in the Marrero Report, a lack of expertise in the legal area required by a poor person was the most frequently cited reason for a private attorney to decline a pro bono case. See Final Report of the Pro Bono Review Committee (April 18, 1994), Table 11.

⁹ 22 N.Y.C.R.R. §1200.30(a)(1).

¹⁰ 22 N.Y.C.R.R. §1200.30(a)(2).

¹¹ The New York State Bar Association has reported that "public benefit problems, despite being a major legal services priority area, remain a substantial unmet legal need among the poor of New York State...Problems in acquiring and maintaining benefits threaten the most basic necessities of life." New York State Bar Association, *The New York Legal Needs Study 1990*, at page 160 (revised 1993).

Federal public assistance legislation has been described as a "tangle" which "now rivals the tax area as a marvel of complexity,"¹² and as a "statutory web almost unintelligible to the uninitiated."¹³ The United States Supreme Court characterized portions of the Social Security Act as "among the most intricate ever drafted by Congress,"¹⁴ and the Second Circuit, in less diplomatic terms, called the same provisions "an aggravated assault on the English language" leaving "those who interpret them with less than robust confidence."¹⁵ One federal district judge, unsure of his own legal footing, lamented that another provision of the Social Security Act was "a virtually impenetrable thicket of legalese and goobledygook."¹⁶

Prior to the decision in the instant case, it was difficult enough for the State EAJA to attract private counsel to engage in the practice of poverty law where the state regulations rival the complexity of their federal counterparts. Still, those who cultivated the requisite expertise had a fair chance of compensation if the lawsuit attained the sought-after relief via favorable mootng, settlement stipulation, court order, judgment or consent decree. Motivated to do good and to do

¹² Mont v. Heintz, 849 F.2d 704, 706 (2d Cir. 1988).

¹³ Sherman v. Griepentrog, 775 F.Supp. 1383, 1390 (D.Nev. 1991), citing Friedman v. Berger, 547 F.2d 724 n. 7 (2d Cir.1976), cert. denied, 430 U.S. 984 (1977).

¹⁴ Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981), citing Friedman v. Berger, 547 F.2d 724, 727 n.7 (2d Cir. 1976), cert. denied, 430 U.S. 984 (1977).

¹⁵ Lynch v. Philbrook, 550 F.2d 793, 795 (2d Cir. 1977).

¹⁶ Lamore v. Ives, 1991 WL 193601 *2, fn.2. (D.Maine 1991), aff'd, 977 F.2d 713 (1st Cir. 1992).

well, attorneys accepted the challenge and willingly ventured into the "murky muddle of a regulatory no-man's land"¹⁷ of entitlement law.

The First Department's disavowal of the "catalyst test" now upends this cost-benefit analysis completely, and may well be the straw that breaks the back of this laudable (if under-utilized) statute. If the offending state agency can avoid fee liability simply by mooting the litigation before a judge issues a favorable judgment, then private attorneys and eligible legal services programs will have little reason to grapple with an entitlement case assignment, and the poor who require such attorneys will largely go without them.

Indeed, it can be expected that no rational, financially-motivated state agency will do anything but wait until the last minute. Indeed, an agency might even wait longer, not bothering to moot until after the state court has issued its (adverse) decision but before judgment is entered. This judicially-endorsed wait-and-see approach can have severe implications for the efficiency of the judicial system, since the agency has no motivation to resolve the case before the court expends substantial time and resource. Also eliminated will be the threat of having to pay attorney's fees, which is one of the few incentives (besides doing right) that might persuade an agency to obey the law in a timely fashion.

In its final report, the Marrero Committee acknowledged that bar associations throughout New York State have introduced and administered many laudable pro bono initiatives. Despite best efforts of bar associations across this state, recent studies confirm that "the unmet need

¹⁷Furlong v. Shalala, 156 F.3d 384, 386 (2d Cir. 1998).

for critical legal services among poor New Yorkers...is very great and is worsening."¹⁸ Although the vast majority of attorneys want to help, many who practice in urban and suburban areas simply cannot afford to do so without a prospect of a fee, however modest, if successful.

If the "judgment or consent decree" rule prevails, then state agencies will simply capitulate when the bright glare of litigation forces corrective action before a judicial disposition is rendered. If such litigants are disqualified from a State EAJA fee award for want of a court order, judgment or consent decree, then this worthy statute will trumpet its good intentions in the legal texts, but actualize few of them in the real world.

In an earlier State of the Judiciary address, Chief Judge Kaye, lamenting the paucity of legal representation for poor persons in matters of "shelter, income, food and health services," aptly noted that "the scales of justice balance best when both sides have equal access to justice."¹⁹ The State EAJA cannot unilaterally recalibrate the scales of justice. However this statute, once freed of this most unwelcome court-imposed barrier, has the potential to ameliorate the problem one case (and one attorney) at a time.

¹⁸ Report to the Chief Judge of the Legal Services Project, "Funding Legal Services for the Poor," page 3 (May, 1998).

¹⁹ See Chief Judge Judith S. Kaye, State of the Judiciary Address (February 8, 1999) at <http://www.courts.state.ny.us/ctapps/state99.htm> [last updated April 18, 2000; accessed March 12, 2002].

POINT II

AN AWARD OF COUNSEL FEES IN CASES SUCH AS THIS WILL DETER AGENCY MISCONDUCT

For more than 14 years, the New York State Bar Association has reported that the most profound problem confronting the indigent in the adjudication of their rights is the inadequate performance of local social services districts and the inadequate supervision of those districts by the very state agency identified in this appeal.

In its 1988 report, the New York State Bar Association rendered the following salient findings:

- More than half of all fair hearings conducted by the [State Agency] involve the City of New York. However, in those hearings, the decision of the New York City Agency was affirmed in only 11% of the cases in 1986.
- It is manifest that local agencies are simply not following law in a substantial percentage of cases.
- In large numbers, clients have their benefits erroneously denied, reduced, or terminated. The same errors occur repeatedly.
- Most of the [appellants] appear pro se and often are persons least able to competently represent themselves, many not having the ability to speak or write English, let alone the ability to comprehend the often technical requirements of laws governing their entitlement to public assistance.
- Because of inadequate screening and misinformation among agency caseworkers, many cases needlessly go to the fair hearing stage, where clients often must have a lawyer in order to gain access to justice.²⁰

²⁰ New York State Bar Association, *The New York Legal Needs Study 1990*, at page 160 (revised 1993), citing "The Report of the Task Force on Administrative Adjudication of the New York State Bar Association" (July 14, 1988), pages 175, 177-178. The serious inadequacies of the social services fair hearings process were also addressed by the Association of the Bar of the City of New York. See Committee on Administrative Law, Dispute Resolution in the Welfare System: Toward

In October, 1998, the New York State Bar Association revisited the same issues, found little or no improvement, and cited delays in the implementation of fair hearing decisions as another "chronic problem." As set forth in its updated report,

... Attorneys claim that the State exercises little oversight in [the enforcement of fair hearing decisions], and that claimants who prevail at the hearing often cannot get the decision implemented.

A 1998 [New York State] Comptroller's Audit found:

... that [the State Agency] needs to implement better monitoring procedures and control techniques, and to exercise greater oversight when decisions are not implemented. The Comptroller's report found rates of non-timely compliance ranging from 10% to 24%. Consequently, there have been a number of class actions filed in federal and state courts challenging the failure of New York City to comply on time with [fair hearing] decisions and the failure of the State [Agency] to oversee compliance.

In light of this sorry record, the Committee recommends immediate adoption of an agency-wide oversight mechanism to assure prompt implementation of [fair hearing] decisions.²¹

an End to the Fair Hearing Overload, 48 The Record of the Association of the Bar of the City of New York 411 (1993).

²¹ See The Report of the Special Committee on Administrative Adjudication of the New York State Bar Association (October 20, 1999), page 25, available online at www.nysba.org/whatsnew/admin.html [last updated November 6, 2001; accessed March 12, 2002].

Given this dismal track record, it is not surprising that seventy-five percent (75%) of all State EAJA awards over the last 12 years have been paid to attorneys who litigated cases against this particular State Agency.²²

The facts of the instant appeal mirror the bleak scenario portrayed in the two NYSBA reports. An award of State EAJA fees in such cases may be the only way to effectively remedy such a debilitating and systemic condition. An award of counsel fees should be prophylactic regarding the State Agency's failure to compel local fair hearing compliance. If attorney's fees are available, more indigent persons will have the opportunity to have their rights redressed. And if state agencies become aware that citizens, no matter how poor, will have access to legal assistance in seeking such redress, a closer adherence to statutory obligations may be expected.

Moreover, in view of the proportions of the extraordinary crisis in the availability of legal services to the poor, it would be unwise public policy to limit the statutory EAJA funds. In the absence of attorneys' fees awarded under the "catalyst test", government agencies might well be encouraged to be recalcitrant for a long time and then moot the case after many resources have been spent in seeking redress.

When the State EAJA was enacted, then-Governor Mario Cuomo hoped that the statute would provide the financial impetus to engage the private bar, and thus "improve access to justice for individuals and businesses who may not have the resources to sustain a long legal battle

²²See Office of the State Comptroller, Summary of Awards Made Pursuant to Article 86 for FY 1990-2001.

against an agency acting without justification."²³ It is neither justifiable nor humane for a state agency to bolster the hopes of indigent New Yorkers with favorable fair hearing directives only to dash those hopes when localities ignore them with impunity.

Left undisturbed, the opinion of the First Department will unintentionally sanction governmental misbehavior by removing any financial penalty for it and will dissuade private and eligible legal service attorneys from challenging such misconduct by allowing government counsel to choke off fee liability at the eleventh hour. If state agencies can defeat such awards simply by mooting actions prior to final judgment, then the EAJA will be spurned as an enticement to represent poor persons, the unjustified actions of state agencies will go unchallenged, and the laudable intent of the State EAJA will be thwarted.

²³ See Governor's Approval Mem., Bill Jacket, L.1989, ch.770, reprinted in 1989 NYLegisAnn at 336.

CONCLUSION

For all of the above reasons, it is respectfully requested that this Court grant this motion for leave to appear amici curiae, that Mr. Wittlinger's motion for leave to appeal the First Department's Decision and Order be granted, that the aforesaid Decision and Order, upon full review, be reversed on the law, and that the matter be remanded to the lower court to determine the amount of State EAJA fees payable.

Dated: New York, New York
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Respectfully submitted,

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