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Organization and Functions; Rules of Practice and Procedure; Attorney Fees

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission amends its Rules of Practice and Procedure governing the award of attorney fees in Shipping Act complaint proceedings, and its regulations related to Commissioner terms and vacancies. The regulatory changes implement statutory amendments made by the Howard Coble Coast Guard and Maritime Transportation Act of 2014.

DATES: This final rule is effective: March 1, 2016.

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I. Executive Summary

Title IV of the Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-281 (Coble Act), enacted on December 18, 2014, amended the Shipping Act of 1984 and the statutory provisions governing the general organization of the Commission. Specifically, section 402 of the Coble Act amended the statutory provision governing the award of attorney fees, which may now be awarded to any prevailing party in a complaint proceeding. *See* 46 U.S.C. 41305(e). Section 403 of the Coble Act established term limits for future Commissioners, limited the amount of time that future Commissioners will be permitted to serve beyond the end of their terms, and established conflict-of-interest restrictions for current and future Commissioners. *See* 46 U.S.C. 301(b).

In response to these statutory amendments, the Commission published a Notice of Proposed Rulemaking (NPRM) on July 2, 2015. 80 FR 38153. Specifically, the Commission proposed to amend affected regulations to conform the regulatory language to the revised statutory text.¹ In addition, the Commission sought comment on an appropriate framework for determining attorney fee awards under the amended fee-shifting provision. The Commission

¹ The Coble Act amendments to 46 U.S.C. 301(b) establishing conflict-of-interest restrictions for Commissioners were not addressed in the NPRM and are outside the scope of this rulemaking. The Commission is currently evaluating the need for regulatory action in response to these amendments.

offered to provide additional guidance on this issue and, where appropriate, incorporate that guidance into the Commission Rules of Practice and Procedure. To that end, the NPRM discussed three general questions on which the Commission's guidance would focus:

- Who is eligible to recover attorney fees?
- How will the Commission exercise its discretion to determine whether to award attorney fees to an eligible party?
- How will the Commission apply the new attorney-fee provision to proceedings that were pending before the Commission when the Coble Act was enacted on December 18, 2014?

The Commission received five comments, all of which focused on the framework for determining attorney fee awards and the three general questions described above. None of the comments discussed the conforming edits proposed in the NPRM. Accordingly, this final rule adopts the proposed conforming edits with minor changes, which are explained in detail below.

With respect to the framework for awarding attorney fees under the amended statutory language, this final rule provides the following guidance. Regarding eligibility for fee awards, the Commission interprets § 41305(e) as permitting fee recovery by prevailing parties in any Shipping Act complaint proceeding. The provision does not, however, permit fee recovery in Commission-initiated investigations. In determining whether a party has “prevailed” in a proceeding, the Commission will look to federal case law, to the extent practicable. Based on relevant cases, the Commission initially concludes that a complainant would generally qualify as the “prevailing party” in a Commission proceeding when the presiding officer awards reparations or issues a cease and desist order.

Regarding its discretion to award fees, the Commission is not specifying factors for consideration in determining fee awards. The primary consideration in determining entitlement

to attorney fees will be whether such an award is consistent with the purposes of the Shipping Act, and any factors the Commission relies upon in individual cases should be consistent with these purposes. In identifying relevant factors, the Commission will keep in mind the following general principles:

- there should be no general presumption for or against awarding attorney fees;
- prevailing complainants and prevailing respondents should be treated in an even-handed manner; and
- parties should be encouraged to litigate meritorious claims and defences.

Finally, the Commission has decided to determine the applicability of § 41305(e) to pending cases on a case-by-case basis rather than through a bright-line rule. The preamble includes general guidance regarding several situations that may arise in proceedings going forward.

II. Background

Section 11(a)–(b) of the Shipping Act of 1984, codified at 46 U.S.C. 41301, establishes a procedure by which a person may file a complaint with the Commission alleging a violation of the Shipping Act.² Prior to the enactment of the Coble Act, 46 U.S.C. 41305(b) (section 11(g) of the Shipping Act) provided that “[i]f the complaint was filed within . . . [three years after the claim accrued], the Federal Maritime Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.”

To implement this provision, the Commission added a sentence to Rule 253 of its Rules of Practice and Procedure. Final Rules To Implement the Shipping Act of 1984 and To Correct and Update Regulations, 49 FR 16994 (Apr. 23, 1984). After determining that more

² The Shipping Act also authorizes the Commission to initiate investigations of possible violations of the Shipping Act on its own motion. 46 U.S.C. 41302.

comprehensive regulations were needed, the Commission established Rule 254 (46 CFR 502.254) in 1987. Attorney's Fees in Reparation Proceedings, 52 FR 6330 (Mar. 3, 1987) (1987 Final Rule).

Section 402 of the Coble Act deleted the portion of 46 U.S.C. 41305(b) pertaining to attorney fees and added a new subsection (e), which reads as follows: "ATTORNEY FEES.—In any action brought under section 41301, the prevailing party may be awarded reasonable attorney fees." These amendments affect the award of attorney fees in three significant ways. First, the revised language expands the categories of persons eligible to recover attorney fees to include any "prevailing party," not merely prevailing complainants. Second, the award of attorney fees is no longer conditioned on an award of reparations; under the amended language, attorney fees are recoverable "[i]n any action brought under section 41301." Finally, whereas 46 U.S.C. 41305(b) previously directed the Commission to award reasonable attorney fees to an eligible party, the new provision in subsection (e) states that such fees "may be awarded," thereby granting the Commission discretion to determine the circumstances under which eligible parties are entitled to attorney fees.

The statutory provisions governing the general organization of the Commission are codified at 46 U.S.C. 301. Prior to the enactment of the Coble Act, there was no statutory limit on the number of terms a Commissioner could serve. In addition, when a Commissioner's term ended, the Commissioner could continue to serve until a successor was appointed, without any prescribed time limitation. The Commission's regulations at 46 CFR 501.2(c) reflect these statutory provisions. Section 403 of the Coble Act amended 46 U.S.C. 301(b) and established term limits for Commissioners appointed and confirmed by the Senate on or after the date of enactment, i.e., December 18, 2014. Specifically, future Commissioners will be limited to two

terms, in addition to the remainder of any term for which the Commissioner's predecessor was appointed. *See* 46 U.S.C. 301(b)(2)–(3). Section 403 also limited the amount of time future Commissioners will be permitted to serve beyond the end of their terms to a period not to exceed one year. *See* 46 U.S.C. 301(b)(2).

III. Summary of July 2, 2015, Notice of Proposed Rulemaking

A. Conforming Amendments

Given the amendments made by the Coble Act to 46 U.S.C. 301 and 41305, the NPRM proposed amendments to 46 CFR 502.254 and 46 CFR 501.2(c) to implement the revised statutory text. The proposed amendments to 46 CFR 502.254 included:

- replacing references to “complainant” with “prevailing party”;
- replacing references to “respondent” with “opposing party”;
- replacing references to reparations awards with references to complaint proceedings more generally; and
- amending the language to clarify that the Commission now has discretion regarding the award of fees, and that fee petitions may be denied.

The Commission also proposed deleting the clause stating that recoverable attorney fees include compensation for services in related federal court proceedings.

In addition to these substantive amendments, the Commission proposed making a number of minor changes to improve the clarity and organization of Rule 254, including: adding cross-references to relevant provisions governing formal and informal small claims; and replacing the term “presiding officer” in Rule 254 with the phrase, “administrative law judge or small claims officer.”

With respect to 46 CFR 501.2(c), the Commission proposed dividing the paragraph into several subparagraphs addressing the length of Commissioner terms, removal of Commissioners, vacancies on the Commission, and term limits for both current and future Commissioners.

B. Implementing the Amended Attorney-Fee Provision

The NPRM discussed three main areas that the Commission wanted to provide guidance on: (1) eligibility; (2) entitlement; and (3) applicability. With respect to eligibility, the NPRM noted that the Commission had interpreted the original attorney-fee provision at § 41305(b) as providing for attorney fees only to *prevailing complainants* in reparation proceedings, and that Rule 254 reflects this limitation. *See* Attorney’s Fees in Reparation Proceedings, 51 FR 37917, 37918 (Oct. 27, 1986) (1986 NPRM); 46 CFR 502.254 (2015). In subsequent decisions, the Commission specified three conditions for recovering attorney fees pursuant to Rule 254: “(1) a violation of the 1984 Act; (2) actual injury caused by such violation; and (3) payment of reparations to compensate for such injury.” *A/S Ivarans Rederi v. Companhia de Navegacao Lloyd Brasileiro*, 25 S.R.R. 1061, 1063 (FMC 1990). Complainants who prevailed on the merits of the complaint, but who did not obtain a reparations award, were not eligible to recover attorney fees. *See id.* at 1064; 1986 NPRM, 51 FR at 37918.

The NPRM noted that the new attorney-fee provision provides for the award of attorney fees to the prevailing party in any action brought under section 41301. The Commission proposed to interpret this language as permitting recovery of attorney fees in all complaint proceedings, not just those in which reparations were awarded. The Commission further proposed using the definition of “party” described in Rule 41 (46 CFR 502.41) when applying the attorney-fee provision, and proposed to rely on relevant federal case law, to the extent practicable, in determining whether a party “prevailed” in a particular proceeding.

With respect to entitlement, the Commission noted in the NPRM that the new attorney-fee provision is silent as to how the Commission should exercise its discretion in awarding fees to an eligible party. Therefore, the Commission discussed two standards used by federal courts in determining entitlement to attorney fees under provisions with language similar to 46 U.S.C. 41305(e), i.e., those provisions that allow for, but do not require, the award of attorney fees to the prevailing party in an action.

The first standard, used by federal courts applying the fee-shifting provision in the Copyright Act, treats prevailing plaintiffs and prevailing defendants similarly when making fee-award determinations, and the Supreme Court has cited with approval a nonexclusive list of factors for courts to consider when determining entitlement under this standard, including “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994) (quoting *Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 156 (3rd Cir. 1986)) (internal quotation marks omitted).

The second standard, used by federal courts in applying various fee-shifting provisions in the Civil Rights Act, treats prevailing plaintiffs more favorably than prevailing respondents when determining entitlement to attorney fees. While prevailing plaintiffs “ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust,” *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam), prevailing defendants are awarded attorney fees only “upon a finding that the plaintiff’s action was frivolous, unreasonable, or without foundation.” *Christiansburg Garment Co. v. Equal Emp’t Opportunity Comm’n*, 434 U.S. 412, 421 (1978). The NPRM highlighted the differences between the two

standards and requested comment on them. The NPRM also requested comment on any other standards the Commission should consider, as well as any other criteria that the Commission should apply in determining entitlement to fee awards.

Finally, the NPRM discussed the applicability of the new attorney fee provision to complaint proceedings initiated prior to December 18, 2014, the Coble Act's effective date, that were pending before the Commission on that date. The NPRM presented two options: (1) the Commission could resolve the applicability issue on a case-by-case basis in accordance with the framework established by federal courts; or (2) the Commission could establish a bright-line rule clearly defining when the old or new attorney-fee provision would apply to a case, e.g., based on the date the proceeding was initiated.

IV. Overview of Comments

The Commission received five comments in response to the NPRM from the following organizations: the World Shipping Council (WSC), an organization comprising many of the major ocean common carriers; the American Association of Port Authorities (AAPA); Cozen O'Connor (Cozen), a law firm that has represented both complainants and respondents in Commission proceedings; Maher Terminals, LLC (Maher); and the Port Authority of New York and New Jersey (PANYNJ). The comments focused on the Commission's policy going forward with respect to attorney fee awards, particularly how the Commission will exercise its discretion to award fees. The commenters generally supported the Commission's proposal to rely on federal court case law, to the extent practicable, in determining whether a party "prevailed" in a proceeding, though Maher recommended that the Commission look to its own case law first. All of the commenters except Maher recommended that the Commission treat prevailing complainants and prevailing respondents in an even-handed manner with respect to attorney fee

awards. Maher, on the other hand, recommended that the Commission treat prevailing complainants more favorably than prevailing respondents. Only two commenters, PANYNJ and Maher, commented on the applicability of the new attorney-fee provision to pending Commission cases. PANYNJ urged the Commission to apply the new provision to all pending proceedings, while Maher argued that the new provision should not be applied to any pending proceedings.

V. Final Rule and Response to Comments

A. Conforming Amendments

None of the commenters discussed the proposed conforming amendments to 46 CFR 501.2(c) and 46 CFR 502.254. For the reasons described in the NPRM, the final rule adopts these conforming amendments, with the following minor changes.

First, in the newly created § 501.2(c)(4), the Commission has clarified that the applicability of the Coble Act's new term limits for Commissioners depends on a Commissioner's *initial* appointment date. This language more accurately reflects the Commission's interpretation, as stated in the NPRM, that the new term limits apply only to future Commissioners. The proposed rule, which referred only to a Commissioner's appointment date, could have been misconstrued to mean that the term limits apply not only to future Commissioners but also to current Commissioners appointed to a new term on or after the Coble Act's effective date.

Second, the Commission has reorganized the fee petition content requirements in § 502.254(d) in order to make them easier to read, and has specified that petitions must explain why fees should be awarded in the relevant proceeding. The latter amendment clarifies Rule 254's

current requirement that petitioners explain the reasonableness of their claim in light of the discretionary nature of fee awards under § 41305(e).

Finally, the Commission has revised § 502.254(h), which governs appeals of orders issued by administrative law judges (ALJs) and small claims officers, to include references to the formal and informal procedures governing small claims. As the Commission noted in the NPRM, Rule 254 currently applies to small claims but does not reference the relevant procedural rules governing such claims.³ The Commission proposed including cross-references in proposed paragraphs § 502.254(c)(2)(i) and (ii), but inadvertently failed to include similar cross-references in proposed paragraph (h). The final rule corrects this error.

B. Implementing the Amended Attorney-Fee Provision

1. Who is Eligible to Recover Attorney Fees?

a. Proceedings

Comments

Maier asserts that § 41305(e) applies only to complaint proceedings authorized under 46 U.S.C. 41301 (i.e., private party complaint proceedings alleging violations of the Shipping Act (whether seeking reparations or a cease and desist order)) but not “other complaint proceedings, actions or investigations authorized under the Shipping Act or described in the Rules, such as complaints or proceedings under 46 U.S.C. § 41302 and Rule 502.66.” Maier Comments at 2.

Discussion

The Commission agrees with Maier that the recovery of attorney fees under § 41305(e) is limited to proceedings initiated under § 41301, i.e., private party complaint proceedings, and

³ The proposed regulatory text for § 502.305(b) inadvertently failed to include amendments made to that paragraph by a March 19, 2015, direct final rule (80 FR 14318), which went into effect on June 24, 2015. The final rule reflects these amendments.

that § 41305(e) does not apply to investigation proceedings initiated by the Commission under 46 U.S.C. 41302(a)⁴ and 46 CFR 502.63.⁵

b. Parties

Comments

Maier contends that the existing definition of “party” in 46 CFR 502.41 is only appropriate to the extent that the entities eligible for attorney fees are parties in complaint proceedings under § 41301 and 46 CFR 502.62 (e.g., complainants and respondents) and parties in proceedings under “Section 502.66”⁶ would not be covered. Maier Comments at 2. Maier also asserts that while intervenors may in certain circumstances be a “party” for the purposes of attorney fee recovery under federal case law, the standards applicable to specific types of parties may differ depending on the circumstances. *Id.* Maier cautioned that the definition of “party” in § 502.41 should not be applied in any manner suggesting an expansion of eligibility to attorney fees beyond those parties participating in complaint proceeding authorized under § 41301. *Id.*

Regarding the question of whether a party is a “prevailing party” eligible to recover attorney fees, WSC, AAPA, and Cozen support the Commission’s proposal to rely on federal case law, to the extent practicable, in making such determinations. WSC Comments at 1; AAPA Comments at 2; Cozen Comments at 2. Cozen agrees with the Commission’s interpretation that attorney fees are available to any prevailing party under the amended statutory language, not just to complainants that obtain a reparations award. Cozen Comments at 2.

⁴ Subsections 41302(c)–(e) apply to both complaint proceedings under § 41301 and Commission investigations under § 41302(a).

⁵ The Commission assumes that Maier meant to cite § 502.63, which governs Commission enforcement actions, rather than § 502.66, which governs amendments and supplements to pleadings.

⁶ *See supra* n.4.

WSC and AAPA urge the Commission to adopt the standard stated by the Supreme Court in *Farrar v. Hobby*, 506 U.S. 103 (1992), namely that a “in order to be a prevailing party, the party seeking an attorney fee award ‘must obtain an enforceable judgment against the [party] from whom fees are sought.’” WSC Comments at 1 (quoting *Farrar*, 506 U.S. at 111); AAPA Comments at 2. The two organizations differ, however, on the application of this standard to Commission proceedings. WSC disagrees with the Commission’s assertion in the NPRM that under the amended statutory language, the award of attorney fees is no longer conditioned on an award of reparations. WSC Comments at 2. WSC argues that the placement of the attorney fee provision in § 41305(e) was likely meant to reflect the expansion of attorney-fee recovery to any prevailing party, not just prevailing complainants, and that the new language does not compel or support the Commission abandoning its interpretation that the award of reparations is a prerequisite for a complainant’s eligibility to recover attorney fees. *Id.* AAPA, on the other hand, argues that “[t]o the extent the Commission might consider the statute to allow an award of fees where nonmonetary relief is awarded . . . , it would be required that an underlying Commission order mandate ‘some action (or cessation of action) by the defendant,’” AAPA Comments at 2 (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987)), “and ‘materially alter the legal relationship between the parties.’” AAPA Comments at 2 (quoting *Lefemine v. Wideman*, 133 S. Ct. 9, 11 (2012) (per curiam)).

Maher urges the Commission to apply and conform its own body of authority regarding the attorney-fee eligibility of complainants under the Shipping Act, as applicable, before looking to federal case law for guidance. Maher Comments at 3. Specifically, Maher states that “prevailing on the merits of the complaint should be the sole consideration for the threshold determination of whether a complainant ‘prevailed’” and that “additional factors concerning

actual injury and/or reparation awards or cease and desist orders are not appropriate or necessary.” *Id.* at 3 & n.2. Regarding whether a respondent has prevailed under relevant federal case law, Maher asserts that the determination depends on which federal case law is considered relevant. *Id.* at 3. Maher argues that the Commission should adopt the standard used for other remedial statutes with similar “prevailing party” provisions, under which “a defendant successfully defending against an otherwise colorable complaint (absent a finding that the plaintiff’s complaint was frivolous, unreasonable, or without foundation) would not constitute ‘prevailing’ for the purposes of the attorney-fee provision.” *Id.*

Discussion

The Commission agrees with Maher that “parties” eligible for attorney awards are only those parties to complaint proceedings brought under § 41301. With that caveat, the Commission sees no reason to deviate from the definition of “party” in Rule 41 when determining eligibility for attorney fees.

With respect to whether a party has “prevailed,” the Commission notes that the same standards “are generally applicable in all cases in which Congress has authorized an award of fees to a ‘prevailing party.’” *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983). “The term ‘prevailing party’ . . . is a ‘legal term of art,’ and is ‘interpreted . . . consistently’ – that is, without distinctions based on the particular statutory context in which it appears.” *Smyth v. Rivero*, 282 F.3d 268, 274 (4th Cir. 2002) (quoting *Buckhannon Bd. & Care Home v. W. Va. Dep’t of Health and Human Res.*, 532 U.S. 598, 603 & n.4 (2001)) (citation omitted). Nonetheless, some courts have left open the possibility that the “text, structure, or legislative history” of a particular fee-shifting statute may indicate that the term “prevailing party” in that

statute is not meant to have its “usual meaning.” See *T.D. v. La Grange Sch. Dist. No. 102*, 349 F.3d 469, 475 (7th Cir. 2003).

Nothing in the text, structure, or legislative history of section 402 of the Coble Act suggests Congressional intent to depart from the consistently applied standards for determining whether a party has prevailed in a proceeding. The text of § 41305(e) does not define “prevailing party,” and there is limited legislative history for section 402. An informational brochure issued by the House Transportation and Infrastructure Committee states only that section 402 “clarifies that in actions filed with the FMC alleging a violation of law pertaining to ocean shipping, the prevailing party in the proceeding may be awarded reasonable attorney fees.”⁷ In the absence of any evidence that the term “prevailing party” in § 41305(e) is meant to have something other than its usual meaning, the Commission will apply the standards used by federal courts in determining whether a party has prevailed in complaint proceedings under the Shipping Act.⁸

“The touchstone of the prevailing party inquiry” is “the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.” *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989); *Cadkin v. Loose*, 569 F.3d 1142, 1148–49 (9th Cir. 2009) (applying the same test in a copyright case). In particular, the plaintiff in the proceeding “must obtain at least some relief on the merits” to qualify as the prevailing party. *Farrar*, 506 U.S. at 111. An award of damages, declaratory

⁷ House Committee on Transportation & Infrastructure, *The Howard Coble Coast Guard & Maritime Transportation Act of 2014*, at 20 (2014). senateagreement.pdf.

⁸ We disagree with Maher’s assertion that the courts use different standards for determining whether a defendant has prevailed. The cases cited by Maher illustrate that the courts have developed different standards for determining when a prevailing defendant is entitled to attorney fees under various statutes; they do not indicate different standards as to whether a defendant has, in fact, prevailed in the proceeding.

judgment, or injunction usually satisfies this test. *Lefemine*, 133 S. Ct. at 11 (citing *Rhodes v. Stewart*, 588 U.S. 1, 4 (1988) (per curiam)).

Complainants in Commission proceedings generally seek reparations (damages) or a cease and desist order (order directing the respondent not to engage in proscribed behavior)⁹ or both. Applying the test used in other statutes, the Commission concludes that a complainant would generally qualify as the “prevailing party” in a Commission proceeding when the presiding officer awards reparations or issues a cease and desist order.¹⁰

WSC and Maher disagree with this approach. WSC argues that a reparation award should continue to be a prerequisite for attorney fee awards and downplays the importance of the placement and language of § 41305(e). Given that the Commission’s interpretation of the original attorney fee provision was based on the structure, language, and legislative history of that provision, *see A/S Ivarans Rederi*, 25 S.R.R. at 1063, we reject the notion that those elements should be ignored with respect to § 41305(e). As noted above, Congress replaced the original attorney-fee provision with one that incorporates language (i.e., “prevailing party”) that is interpreted uniformly across different statutes, and WSC fails to offer any convincing justification to explain why the Commission should diverge from that interpretation with respect to § 41305(e). For similar reasons, the Commission rejects Maher’s suggestion that a complainant’s eligibility for attorney fees should not depend on whether the complainant has been awarded some form of relief.¹¹

⁹ *Brewer v. Maralan*, 29 S.R.R. 6, 9 (FMC 2001).

¹⁰ We offer no opinion at this time as to whether a complainant obtaining relief other than a reparations award or cease and desist order would be considered the prevailing party under § 41305(e).

¹¹ Maher’s comments on this issue are somewhat confusing. Maher argues that we should apply existing Commission case law when interpreting § 41305(e) but then argues that, based on the new language, we should ignore one of the prerequisites for attorney fees described in those cases: the award of reparations. Moreover, Maher’s proposed standard represents a greater departure from the Commission’s eligibility standard under the old

2. How Will the Commission Exercise Its Discretion?

a. General

Comments

Maher recommends that the Commission establish a framework for determining fees as part of this rulemaking rather than taking a piecemeal approach through adjudicatory decisions, noting that the Commission “has the unique opportunity to address the scope and manner of discretion to be applied in matters pending before [it] (including before Administrative Law Judges) in a forthright and consistent manner.” Maher Comments at 6.

AAPA recommends that the Commission provide direction on two broad issues related to attorney fee awards: (1) treatment of prevailing complainants and prevailing respondents; and (2) whether the award of fees will be the rule or the exception in Shipping Act proceedings. AAPA Comments at 6–7. AAPA urges the Commission to clarify that attorney fee awards should be the exception and not the rule. *Id.* AAPA states that one of the justifications for awarding attorney fees under the Copyright Act is that “many copyright violations do not lead to significant or easily provable damages, and that fee awards are thus necessary to provide sufficient deterrence of violations.” *Id.* at 6 (citing *Magnuson v Video Yesteryear*, 85 F.3d 1424, 1432 (9th Cir. 1996); *Gonzalez v. Transfer Technologies, Inc.*, 301 F.3d 601, 609–10 (7th Cir. 2002)). AAPA argues that this type of situation is not generally present in Shipping Act claims. *Id.* Accordingly, AAPA argues that the general rule should be that each party bears its own attorney fees (i.e., the American Rule) and that fee-shifting should only be imposed when the particular facts of a case warrant such an award. *Id.*

Discussion

attorney fee provision (requiring that complainants obtain a reparations award) than the prevailing party standard used by federal courts (requiring that plaintiffs obtain some relief on the merits).

As described in detail below, the Commission is setting out general guidance on some of the major issues associated with determining entitlement to fee awards under § 41305(e). When interpreting fee-shifting provisions, courts look to the text of the statute, as well as its purpose, structure, and legislative history, *see, e.g., Bd. of Trs. of the Hotel & Rest. Emps. Local 25 v. JPR, Inc.*, 136 F.3d 794, 802 (D.C. Cir. 1998), and the Commission has carefully considered these elements in crafting its guidance. Regarding the statutory history, it should be noted that the American rule concerning attorney fees prevailed at Commission-level proceedings from 1916 until 1984. Section 30 of the Shipping Act of 1916 provided that fees and costs could be provided to the petitioner beginning with and only in the event that the petitioner was required to seek a federal district court order to effectuate enforcement of his successful Commission order of award for reparations.

Regarding whether attorney fee awards will be the rule or the exception in Commission proceedings, the Commission notes that, in general, discretionary fee-shifting provisions in statutes protecting economic interests, like the Shipping Act, do not create a presumption that a prevailing party will be awarded fees. *See Eddy v. Colonial Life Ins. Co. of Am.*, 59 F.3d 201, 205 (D.C. Cir. 1995) (citing *Fogerty*, 510 U.S. at 525 n.12 (1994)) (discussing a fee-shifting provision in the Employee Retirement Income Security Act (ERISA)). In addition, Congress's decision to amend § 41305 so that the award of attorney fees is now discretionary instead of mandatory indicates an intent to eliminate the automatic award of attorney fees, *see Fogerty*, 510 U.S. at 533, and the Commission believes that any general presumption in favor of fee awards would frustrate that intent. The Commission disagrees with AAPA's contention, however, that fee awards should be "the exception and not the rule," which would suggest a presumption *against* the award of fees not supported by the statutory text. The Commission believes that

there should be no presumption in favor of or against attorney fee awards, entitlement to which will be determined based on factors that are consistent with the purposes of the Shipping Act.

b. Treatment of Prevailing Complainants vs. Prevailing Respondents

Comments

WSC, AAPA, Cozen, and PANYNJ support the Commission treating prevailing complainants and respondents even-handedly when determining entitlement to attorney fees. WSC Comments at 2; AAPA Comments at 1, 5; Cozen Comments at 2; PANYNJ Comments at 5–6. Comparing the Shipping Act with the Copyright Act and Civil Rights Act, WSC argues that the Shipping Act is much more similar to the Copyright Act. WSC Comments at 3. AAPA and Cozen argue that the policies underlying the Shipping Act do not rise to the same level of importance as those underlying the Civil Rights Act, i.e., the elimination of discrimination and the protection of fundamental personal rights. Cozen Comments at 3; AAPA Comments at 3–4.

WSC, AAPA, and Cozen distinguish the Civil Rights Act as the only one of the three statutes to make use of “private attorneys general” to implement the statute’s public policy goals, with Cozen and AAPA observing that, unlike complainants in Shipping Act proceedings, plaintiffs initiating actions under the Civil Rights Act often recover small amounts or only obtain injunctive relief. WSC Comments at 3; AAPA at 3–6; Cozen Comments at 3. AAPA argues that “there is no reason to encourage Shipping Act claims by parties who do not have a financial incentive in filing the claim,” and that “[t]o the contrary, wise policy would counsel *disfavoring* such claims.” AAPA Comments at 4–5. AAPA further asserts that the Act’s stated purpose of providing “a non-discriminatory regulatory process” is best served by a non-discriminatory standard for awarding attorney fees. *Id.* at 6.

WSC, AAPA, and PANYNJ further assert that proceedings under the Civil Rights Act, unlike the Shipping Act, generally involve a mismatch of resources between individuals litigating against more powerful businesses and organizations. WSC Comments at 3; AAPA Comments at 5; PANYNJ Comments at 2. In contrast, AAPA and PANYNJ state that both complainants and respondents in Shipping Act proceedings are often sophisticated businesses, and WSC posits that parties on either side “run the gamut from individuals and small businesses to very large corporations and public port agencies.” WSC Comments at 3; AAPA Comments at 5; PANYNJ Comments at 2.

WSC, AAPA, Cozen, and PANYNJ also point to the fact that Congress discarded the provision granting complainants a preference with respect to attorney-fee recovery and replaced it with a facially neutral “prevailing party” provision, and they argue that the purpose of the amendment would be subverted if applied in a less than even-handed manner. WSC Comments at 3; AAPA Comments at 2–3, 5–6; Cozen Comments at 2–3; PANYNJ Comments at 1–2. Finally, PANYNJ theorizes that adopting a standard that is less favorable to prevailing respondents may only encourage the filing of meritless complaints. PANYNJ Comments at 2.

Maher asserts that, based on Supreme Court case law, “the relevant analysis to determine the most appropriate standard to use in applying the new attorney-fees provision in Shipping Act complaint proceedings is to look to the comparative Congressional ‘large objectives’ and ‘equitable considerations’ pertaining to private party proceedings under the Shipping Act.” Maher Comments at 4 (citing *Martin v. Franklin County Capital Corp.*, 546 U.S. 132 (2005)). Under this analysis, Maher argues that the standard most applicable to § 41305(e) is the standard applied under other remedial statutes with similar provisions, such as the Civil Rights Act, rather than the Copyright Act. *Id.* at 4. In support, Maher states that the Shipping Act regulates

common carriage and grants immunity from the antitrust statutes, with the primary purpose to foster and maintain a non-discriminatory transportation system. *Id.* (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 622–23 (1966)). Maher further asserts that the Supreme Court has identified two statutory factors warranting the “ordinary recovery” standard for prevailing plaintiffs: “(1) complainants vindicating public rights and acting as ‘private attorneys general’ in private party rights of action and (2) statutes where a defendant that is required to pay attorney’s fees violates federal law,” and argues that the private enforcement of the Shipping Act through the complaint process under § 41301 meets this test. *Id.* at 4–5. Maher notes that any person can bring a complaint under § 41301, even if the complainant has not been directly injured by the alleged violation, and that when a complainant establishes a violation, the respondent has necessarily violated federal law. *Id.* at 5.

Based on the asserted similarities between the Shipping Act and statutes like the Civil Rights Act, Maher argues that the dual standard of entitlement under those statutes should apply. Maher Comments at 5–6. Specifically, Maher asserts that prevailing complainants should ordinarily recover fees while prevailing respondents should only recover fees when the complainant’s action was frivolous, unreasonable, or without foundation. *Id.* Maher argues that to treat prevailing complainants and respondents in an even-handed manner with respect to awarding attorney fees could “discourage all but the most airtight claims,” and neither the text of the Coble Act nor the differences between the text of § 41305(e) and the earlier fee-shifting provision in § 41305(b) indicate that this was Congress’s intent. *Id.* at 6 (citing *Franklin County Capital Corp*, 546 U.S. at 140).

Discussion

Upon consideration of the text, legislative history, and purposes of the Shipping Act, as well as the relevant comments, the Commission concludes that prevailing complainants and prevailing respondents should be treated in an even-handed manner in determining whether to award attorney fees. Looking first at the plain text of § 41305(e), there is no indication that successful complainants should be treated differently than successful respondents. *See Fogerty*, 510 U.S. at 522. The provision refers only to the “prevailing party” in an action. Moreover, Congress’s decision to remove the previous fee-shifting provision, which limited eligibility for fee recovery to prevailing complainants, and replace it with a new fee-shifting provision that allows any prevailing party to recover fees, strongly suggests an intent to eliminate any preference for prevailing complainants in fee determinations.

In addition, the various rationales justifying preferential treatment of plaintiffs in civil rights proceedings do not apply to Shipping Act complainants. Nothing in the Shipping Act’s purposes or legislative history suggests that the role of a complainant is equivalent to that of a Civil Rights Act plaintiff, i.e., “the chosen instrument of Congress to vindicate ‘a policy that Congress considered of the highest priority.’” *Christiansburg Garment Co.*, 434 U.S. at 418 (quoting *Newman*, 390 U.S. at 402). Looking first at the Shipping Act’s purposes, the Commission reiterates that the Act’s focus is on commercial interests rather than “dignitary rights.” *See Eddy*, 59 F.3d at 204–05 (comparing the legislative histories of ERISA and the civil rights statutes). The purposes of the Shipping Act are to:

- establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs;

- provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices;
- encourage the development of an economically sound and efficient liner fleet of vessels of the United States capable of meeting national security needs; and
- promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.

46 U.S.C. 40101. Although these purposes are important, they do not involve the type of rights that the courts have found justify disparate treatment of prevailing plaintiffs and prevailing defendants under fee-shifting statutes.

In fact, the Shipping Act's several purposes provide support for treating prevailing complainants and prevailing respondents in an even-handed manner. The Shipping Act is intended not only to ensure a non-discriminatory process for the common carriage of goods, but also to provide and promote an efficient, competitive, and economic ocean transportation system. *See* 46 U.S.C. 40101(2), (4). These latter goals are furthered by encouraging the industry to continue to develop new ways of improving ocean transportation. In order to promote such improvements and assist the industry in evaluating potential options, it is important that the boundary between legal and illegal conduct be demarcated as clearly as possible. To that end, respondents who seek to advance meritorious defenses of their actions should be encouraged to litigate them to the same extent that complainants are encouraged to litigate meritorious claims of violations. *Cf. Fogerty*, 510 U.S. at 526–27 (making similar arguments in the context of the Copyright Act).

In addition, although complaint proceedings assist the Commission in enforcing the Shipping Act, there is no indication that Congress intended complainants to serve as “private attorneys general.”¹² As the Supreme Court discussed in *Newman*:

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a “private attorney general,” vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys’ fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees -- not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

390 U.S. at 401–02 (footnotes omitted).

As noted by some of the commenters, the remedies and incentives under the Shipping Act are quite different. Prevailing complainants in Shipping Act proceedings are entitled to reparations for the injuries resulting from violations of the Act, and, if the injury is caused by certain prohibited activities, the complainant can recover up to twice the amount of the actual injury. 46 U.S.C. § 41305(b)–(c). Accordingly, complainants have an incentive to bring claims even in the absence of fee recovery.¹³ In addition, the Commission itself may investigate any

¹² The Commission also disagrees with the comments suggesting that because losing respondents may have violated “federal law,” prevailing complainants should be treated more favorably in attorney fee determinations. As the *Fogerty* case amply demonstrates, this factor is not dispositive, and, even under the previous attorney-fee provision mandating fees, a violation alone was insufficient to justify an attorney-fee award; the complainant had to show injury and be awarded reparations. See *A/S Ivarans Rederi*, 25 S.R.R. at 1063.

¹³ The mere fact that anyone can file a complaint, even if the person has not been injured by a Shipping Act violation, does not support the conclusion that Congress intended complainants to assume the role of “private attorneys general,” as Maher appears to suggest. As noted throughout the notice, fee recovery under the original attorney-fee provision was limited to injured complainants who were awarded reparations. Although § 41305(e) is broader in scope and may apply in proceedings in which no reparations are awarded, given the limited legislative history, reading this change as indicating Congressional intent to elevate the role of complainants would be a bridge too far.

conduct or agreement that it believes may be in violation of the Act, reducing the need for private action. See 46 U.S.C. § 41302; *Aacon Auto Transp., Inc. v. Medlin*, 575 F.2d 1102, 1106 (5th Cir. 1978).¹⁴

Finally, we agree with the majority of commenters that whereas “[o]ftentimes, in the civil rights context, impecunious ‘private attorney general’ plaintiffs can ill afford to litigate their claims against defendants with more resources,” *Fogerty*, 510 U.S. at 524, entities of all sizes, from small shippers to large carriers and marine terminal operators (MTOs), appear as complainants in Shipping Act complaint proceedings, and, similarly, respondents range from small ocean transportation intermediaries to large carriers and MTOs. Accordingly, there is not the same disparity in resources between complainants and respondents that exist generally in civil rights cases.

Based on the foregoing, the Commission will treat prevailing complainants and prevailing respondents in an even-handed manner when applying § 41305(e).

c. Factors for Consideration When Determining Entitlement

Comments

WSC asserts that if the Commission determines that complainants may be considered prevailing parties eligible for attorney fees even if they have not been awarded reparations, the Commission should still consider whether reparations were awarded, and the amount, when determining whether and in what amount to award such fees. WSC comments at 2.

¹⁴ Congress did not wish to provide the same encouragement for private claimants under the Interstate Commerce Act as it has for Title VII litigants. . . . The private attorneys general concept, which underlies the allowance of attorneys’ fees in Title VII cases, is notably absent from [the fee-shifting provision] since any required vindication of public rights in such matters as these can be accomplished by the [Interstate Commerce] Commission itself.

Cozen recommends that the Commission adopt the Copyright Act standard and apply the criteria used by courts under that statute, and PANYNJ asserts that the Copyright Act factors are just as relevant in Shipping Act proceedings. Cozen Comments at 2; PANYNJ Comments at 1. Cozen also urges the Commission to consider the following factors in evaluating petitions for attorney fees: the degree to which the prevailing party has prevailed, i.e., did it prevail on all or only some of its claims; the relief sought versus the relief obtained; and the relationship of the attorney fees sought to those two foregoing factors. *Id.* at 3–4. In particular, Cozen asserts that the Commission should avoid situations in which the fees awarded far exceed the relief obtained, particularly when the relief awarded is far less than the amount sought by the complainant. *Id.* at 4–5.

AAPA believes that the specific factors listed in the *Fogerty* case are useful guideposts for the exercise of discretion but cautions that “it would seem impracticable for the Commission to identify *a priori* each factor that might prove relevant to a case in the future, or that might prove necessary to fulfil the purposes of the Act.” AAPA Comments at 6–7. AAPA therefore discourages the Commission from codifying a comprehensive list of factors in the regulation. *Id.* at 7.

Maher argues that the Copyright Act factors discussed in the NPRM are not appropriate authority or guidance to use in applying § 41305 because they are premised on the unique goals, objectives, and policies of that Act, as opposed to the goals, objectives, and policies at issue in federal remedial statutes. Maher Comments at 5 n.3. Instead, as discussed above, Maher recommends that the Commission adopt the party-specific standards used in Civil Rights Act cases. *Id.* at 5–6.

Discussion

The Commission agrees with AAPA and has elected not to codify a list of factors for consideration in determining entitlement to attorney fees. The Commission cannot predict the types of cases that may arise in the future, and specifying factors at this time unnecessarily risks restricting the discretion granted by § 41305(e).¹⁵ The primary consideration in determining entitlement to attorney fees is whether such an award is consistent with the purposes of the Shipping Act, and any factors the Commission relies upon in individual cases should be consistent with these purposes. *See Fogerty*, 510 U.S. at 534 n.19. In identifying relevant factors, the Commission will keep in mind the following general principles discussed above:

- there should be no general presumption for or against awarding attorney fees;
- prevailing complainants and prevailing respondents should be treated in an even-handed manner; and
- parties should be encouraged to litigate meritorious claims and defences.

Several commenters urge the Commission to consider the degree of success obtained by the prevailing party in evaluating fee petitions. Cozen's comments, in particular, cite several Commission orders in which the fees awarded greatly exceeded the reparations and suggest that the Commission use its discretion to avoid such results in the future.

The degree of success obtained is a relevant factor when determining the amount of an attorney fee award, *see Hensley v. Eckerhart*, 461 U.S. 424, 434–36 (1983), and the Commission, relying on relevant federal case law, has considered this a relevant factor when determining reasonable attorney fee awards. *See Bernard & Weldcraft Welding Equip. v. Supertrans Intermodal, Inc.*, 29 S.R.R. 1348, 1358–59 (ALJ 2002) (finding that although

¹⁵ Although the Commission declines to identify generally applicable factors for consideration in fee determinations, the Commission has identified below one specific factor for consideration with respect to pending cases: the status of the proceedings on Coble Act's effective date.

proposed fee award based on lodestar method was far in excess of the reparations awarded, it was reasonable given other factors); *Transworld Shipping (USA), Inc. v. FMI Forwarding (San Francisco), Inc.*, 29 S.R.R. 876, 878–79 (FMC 2002) (affirming ALJ’s reduction in compensable hours because complainant obtained only partial success); *see also* 1987 Final Rule, 52 FR at 6331.

Cozen’s comments fail to explain how the changes made by the Coble Act justify changing the Commission’s approach to adjusting fee awards. Congress granted the Commission discretion to determine *when* to award fees; it did not alter the standard for determining the *amount* of fees to be awarded after such a determination has been made. Section 41305(e), like the previous fee-shifting provision, allows for the award of “reasonable” attorney fees, and the Commission will continue to be guided by its own precedent and relevant federal case law in deciding when to adjust fee awards based on the degree of success obtained by the prevailing party.

d. Different Entitlement Standards Depending on Type of Proceeding

Comments

In response to the Commission’s request for comment on whether to apply different fee entitlement standards for different proceedings (e.g., small claims proceedings), Maher stated that the interests of complainants are similar regardless of the type of proceeding or the different financial capacity of complainants because all types of complaint proceeding present financial barriers to complainants. Maher Comments at 7. With respect to *pro se* complainants and small claims generally, Maher suggests that effective management of the small claims process could be a means to promote adjudication in the face of limited or imbalanced resources, e.g., the

Commission could consider limiting the ability of respondents to elect to remove a small claims complaint to a “full proceeding.” *Id.*

Discussion

The Commission agrees with Maher and has determined to apply the same standard of entitlement regardless of the type of proceeding. The Commission believes that the statute provides sufficient flexibility to address fee-award determinations in both formal and small claims proceedings.¹⁶

3. How Will the Commission Apply the Provision to Pending Proceedings?

Comments

PANYNJ argues that the Commission “should have the discretion to award attorney fees in a fully retrospective manner whenever it finds that an unsuccessful action or defense had been conducted in a vexatious and wasteful fashion.” PANYNJ Comments at 2. PANYNJ cites Congress’s intent to make attorney fees available in Commission proceedings, Congressional policy to reimburse litigants for costs incurred due to vexatious and abusive litigation, and the inherent power of the federal courts to award attorney fees for abusive litigation conduct even in the absence of express statutory authorization or advance notice. *Id.* PANYNJ asserts that such a policy would not give the Coble Act impermissible retrospective effect because “[n]o litigant could have had a reasonable and legitimate expectation that it could engage in abusive, vexatious and wasteful litigation conduct without consequence” given the courts’ ability to sanction such conduct. *Id.* at 3.

Maher urges the Commission to adopt a bright-line rule and not apply § 41305(e) to any claims initiated prior to the effective date of the Coble Act. Maher Comments at 7, 9. Maher asserts that analyzing the applicability of § 41305(e) on a case-by-case basis would be

¹⁶ Maher’s suggestions regarding ways to improve the small claims process are outside the scope of this rulemaking.

administratively burdensome and “would unnecessarily extend the period of uncertainty in individual cases and it could result in inconsistent decisions and therefore engender continued uncertainty.” *Id.* at 7.

Maier contends that there is no clear Congressional or express statutory language indicating that § 41305(e) should be applied retroactively, and, therefore, the general presumption against such an application of the statute applies. Maier Comments at 7–8 (citing *Landgraf v. USI Film Products*, 511 U.S. 244 (1994)). Maier goes on to argue that any application of § 41305(e) would have retroactive effect on parties to pending proceedings, and therefore should not be applied to those proceedings. *Id.* at 8. Specifically, Maier asserts that for complainants to such proceedings, retroactive application of § 41305(e) would impair the rights they had when filing their complaints, i.e., the statutory right to recover attorney fees, and increase their liability for past conduct and/or impose a new duty by expanding attorney-fee eligibility to prevailing respondents. *Id.* Maier further asserts that the expansion of attorney-fee liability to cease and desist complaints would potentially increase respondents’ liability for past conduct and/or impose a new duty on them. *Id.* Finally, Maier contends that the potential expansion of attorney-fee recovery to intervenors or other parties would likewise increase liability and/or impose new duties on non-prevailing complainants and respondents. *Id.* at 8–9.

Discussion

As the Commission discussed in the NPRM, in determining the applicability of a newly enacted statute to pending cases, the courts first look to “whether Congress has expressly prescribed the statute’s proper reach.” *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (quoting *Landgraf*, 511 U.S. at 280) (internal quotation marks omitted). If the statute’s reach cannot be determined from the text and the application of the normal rules of statutory

construction, the court must “determine whether the application of the statute to the conduct at issue would result in a retroactive effect,” *Martin v. Hadix*, 527 U.S. 343, 352 (1999), i.e., “whether it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” *Landgraf*, 511 U.S. at 280; *see also Fernandez-Vargas*, 548 U.S. at 37. “If the answer is yes,” the courts then apply the traditional “presumption against retroactivity by construing the statute as inapplicable to the event or act in question owing to the ‘absen[ce of] a clear indication from Congress that it intended such a result.’” *Fernandez-Vargas*, 548 U.S. at 37–38 (quoting *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 316 (2001)); *see also Landgraf*, 511 U.S. at 280. In cases in which the statute would not have a “genuinely ‘retroactive’ effect,” the general rule is that “a court should ‘apply the law in effect at the time it renders its decision,’ even though that law was enacted after the events that gave rise to the suit.” *Landgraf*, 511 U.S. at 273, 277 (quoting *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (1974)) (citation omitted).

The Commission agrees with Maher that there is no indication from either the language of the Coble Act or its legislative history to suggest Congressional intent to apply the statute retroactively. Section 402 of the Coble Act is silent as to the scope of § 41305(e)’s applicability to proceedings pending before the Commission. Although an argument could be made that the use of the broad term “any action” in conjunction with the verb “brought” demonstrates congressional intent to apply the amended attorney fee provisions to all proceedings initiated under 46 U.S.C. 41301, even if those proceedings were commenced prior to the effective date of the Coble Act, the Supreme Court expressly rejected such an interpretation when examining similar language in an amended attorney-fee provision in the Prison Litigation Reform Act of

1995 (PLRA). *See Martin*, 527 U.S. at 353–55 (stating that the language “falls short . . . of the ‘unambiguous directive’ or ‘express command’ that the statute is to be applied retroactively”) (quoting *Landgraf*, 511 U.S. at 263, 280).

Accordingly, the relevant question is whether the application of § 41305(e) to pending proceedings would have retroactive effect, i.e., whether the amended attorney-fee provision “would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” *Landgraf*, 511 U.S. at 280. “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.’” *Martin*, 527 U.S. at 357–58 (quoting *Landgraf*, 511 U.S. at 270) (citation omitted). On the other hand, “[a] statute does not operate ‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute’s enactment, or upsets expectations based in prior law.” *Landgraf*, 511 U.S. at 269 & 270 n.24 (citing *Republic Nat’l Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring in part and concurring in judgment)) (internal citation omitted).

The Commission has determined that the applicability of § 41305(e) to pending cases should be examined on a case-by-case basis rather than set through a bright-line rule. As explained below, the Commission disagrees with Maher’s assertion that the application of § 41305(e) would have a retroactive effect in *all* pending cases. Analyzing this issue on a case-by-case basis will allow the Commission to consider the facts of each case, including the status of individual proceedings on the effective date of the Coble Act. The Commission also disagrees

with Maher's contention that case-by-case consideration would be administratively burdensome, given the limited number of proceedings pending on the Coble Act's effective date and the unlikelihood that fee petitions will be filed in every proceeding.

The Commission offers the following general guidance on determining the applicability of § 41305(e) in the two most likely scenarios in which this issue would arise: (1) pending proceedings in which the complainant prevails and is awarded reparations after the Coble Act went into effect (Scenario 1); and (2) pending proceedings in which the respondent prevails after the Coble Act went into effect (Scenario 2).¹⁷ For purposes of this discussion, we assume that the proceedings in each scenario were in their early stages when the Coble Act went into effect. In Scenario 1, the Commission does not believe that applying § 41305(e) would, as a general matter, have a retroactive effect. In Scenario 2, the Commission believes that application of § 41305(e) would not generally result in a retroactive effect so long as any fees awarded were limited to compensation for legal services performed on or after the effective date of the Coble Act, December 18, 2014. The Commission cautions that retroactivity determinations in individual proceedings will depend on the specific facts of each case, including the status of the proceedings on December 18, 2014. The Commission has further determined that, even in pending cases where application of § 41305(e) would not have a retroactive effect, the Commission may, in determining whether to award fees under the new provision, consider the status of the proceedings on the Coble Act's effective date.

Maher argues that in Scenario 1, application of § 41305(e) would have a retroactive effect because it would upset the complainant's statutory right to attorney fees that existed when

¹⁷ Maher discusses retroactivity concerns in other situations (i.e., proceedings in which a cease-and-desist order is issued but no reparations are awarded; proceedings in which parties other than the complainant or respondent might be considered a prevailing party). The Commission does not believe that the same type of prospective guidance is warranted or necessary for these types of scenarios, which are less likely to occur.

the complaint was filed. The Commission disagrees. Attorney fee determinations are generally considered “‘collateral to the main cause of action’ and ‘uniquely separable from the cause of action to be proved at trial.’” *Landgraf*, 511 U.S. at 277 (quoting *White v. N.H. Dep’t of Emp’t Sec.*, 455 U.S. 445, 451–452 (1982)). Unlike other types of relief, attorney fees are not compensation for the injury giving rise to the action. *White*, 455 U.S. at 452. Attorney fees under the Shipping Act are no different.

The structure of the Act does not support the contention that the “right” to recover attorney fees under the old fee-shifting provision vested with the complainant upon the filing of a complaint. The section governing the filing of complaints, 46 U.S.C. 41301, provides that if the complaint is filed within three years after the claim accrues, the complainant may seek *reparations for injuries* caused by the Shipping Act violation. 46 U.S.C. 41301(a). Attorney fees are not mentioned in this section; instead, they are referenced in 46 U.S.C. 41305, the section governing relief to be awarded by the Commission after notice and hearing, and this section has always made clear that attorney fees are a separate form of relief from reparations. *See* 46 U.S.C. 41305(b) (2013). Accordingly, the Commission viewed attorney fees under the old provision as “available only as an adjunct to an award of damages” and conditioned upon *the Commission awarding reparations*. *See A/S Ivarans Rederi*, 25 S.R.R. at 1063. Because there was no reparations award in Scenario 1 prior to the Coble Act’s effective date, the complainant was not entitled to attorney fees. The mere possibility of recovering attorney fees under the old provision cannot be considered the type of “matured or unconditional right” whose impairment would constitute a retroactive effect. *See Bradley*, 416 U.S. at 720. Application of § 41305(e) might upset the complainant’s expectations under prior law, but, as noted above, this does not equate to a retroactive effect. *See Landgraf*, 511 U.S. at 269 & 270 n.24.

With respect to Scenario 2, Maher asserts that § 41305(e) would have a retroactive effect because allowing the respondent to potentially recover attorney fees would increase the complainant's liability for past conduct and impose a new duty. PANYNJ, on the other hand, asserts that application of the new provision would not have a retroactive effect because courts have always had the inherent authority to sanction abusive, vexatious, and wasteful litigation conduct, and no litigant could have a reasonable expectation that it could engage in such conduct without consequence.

The Commission agrees with Maher to the extent that, prior to the Coble Act, complainants reasonably expected that they would not be liable for respondents' attorney fees, even if they did not prevail. The old attorney-fee statutory provision and Rule 254 made clear that respondents were not eligible for attorney fee awards. *See* 1986 NPRM, 51 FR at 37918. The Commission disagrees with PANYNJ's contention that the inherent power of the courts to penalize certain litigation conduct has some bearing on the parties' expectations in Commission proceedings; administrative agencies, like the Commission, "may not award attorney's fees without express statutory authority." *Trapp v. United States*, 668 F.2d 1114, 1115 (10th Cir. 1977) (citing *Turner v. Fed. Comm'n Comm'n*, 514 F.2d 1354 (D.C. Cir. 1975)). Awarding attorney fees to the respondent in Scenario 2 for legal services rendered prior to December 18, 2014, would thus upset the parties' reasonable expectations and would attach new legal consequences to actions undertaken by the complainant prior to the passage of the Coble Act, i.e., the filing of the complaint and initial prosecution of the claim. *See Taylor P. v. Mo. Dep't of Elementary & Secondary Educ.*, No. 06-4254-CV-C-NKL, 2007 U.S. Dist. LEXIS 59570, at *8 (W.D. Mo. Aug. 14, 2007) (finding that application of statutory provision allowing attorney fee

recovery for defendants, which was enacted after proceeding was initiated, would have retroactive effect if applied to date of filing of complaint).

Following the passage of the Coble Act, however, complainants were on notice that any prevailing party, including a prevailing respondent, was eligible for attorney fees. After that date, any expectation of continued immunity from liability for such fees would be unreasonable. *See Martin*, 527 U.S. at 360. Accordingly, in Scenario 2, awarding attorney fees for services performed by respondent's counsel on or after December 18, 2014, would not, as a general matter, attach new legal consequences to conduct completed before enactment and would not present a retroactivity problem. *See id.* at 360–61; *Taylor*, 2007 U.S. Dist. LEXIS 59570, at *8 (denying plaintiff's motion to dismiss defendant's counterclaim for attorney fees after the effective date of the attorney fee provision).

On or after December 18, 2014, complainants were on notice that they should consider the status of petitions and matters then pending before the Commission and then make reasoned decisions on how to proceed. If the complainant did not wish to be subjected to the potential liability for such fees, the complainant could have, for example, requested dismissal of the claim without prejudice under Rule 72 of the Commission's Rules of Practice and Procedure (46 CFR 502.72). *See Martin*, 527 U.S. at 361 (rejecting the assumption that the initial decision to file a claim is an irrevocable one).

The Commission reemphasizes that the above discussions represent general guidance and the conclusions reached are not necessarily binding in individual proceedings. The specific facts of each case, including the status of the proceeding on the Coble Act's effective date, may materially alter the considerations discussed above in the retroactivity analysis.

VI. Rulemaking Analyses and Notices

Effective Date

The Administrative Procedure Act (APA) generally requires a 30-day period between the publication of a final rule and its effective date. 5 U.S.C. 553(d). This requirement does not apply, however, to: (1) rules granting an exemption or relieving a restriction; (2) interpretative rules and statements of policy; and (3) when the agency finds good cause to shorten the period between publication and the effective date. *Id.*

This final rule is effective upon publication. The final rule consists of three main components: amendments to the term and vacancy provisions in 46 CFR 501.2(c) to reflect the changes made to 46 U.S.C. 301; amendments to 46 CFR 502.254 to reflect the changes made to 46 U.S.C. 41305; and a statement of the Commission's policy with respect to the disposition of attorney-fee petitions under the amended statutory language. Accordingly, this final rule consists of an interpretative rule and a statement of policy and is therefore not subject to the 30-day requirement.

In addition, the Commission has determined that there is good cause to make this rule effective immediately. The statutory amendments made by the Coble Act went into effect on December 18, 2014, and there is an immediate need to update the Commission's regulations (particularly the procedural regulations governing attorney-fee petitions) to reflect these changes. Further, interested parties have been provided with the opportunity to comment on the rulemaking, and none commented on the proposed amendments to the Commission's regulations, instead focusing entirely on the Commission's policy guidance with respect to attorney-fee petitions.

Congressional Review Act

The rule is not a “major rule” as defined by the Congressional Review Act, codified at 5 U.S.C. 801 *et seq.* The rule will not result in: (1) an annual effect on the economy of \$100,000,000 or more; (2) a major increase in costs or prices; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies. 5 U.S.C. 804(2).

Regulatory Flexibility Act

The Regulatory Flexibility Act (codified as amended at 5 U.S.C. 601–612) provides that whenever an agency promulgates a final rule after being required to publish a notice of proposed rulemaking under the Administrative Procedure Act (APA) (5 U.S.C. 553), the agency must prepare and make available a final regulatory flexibility analysis (FRFA) describing the impact of the rule on small entities. 5 U.S.C. 604. An agency is not required to publish an FRFA, however, for the following types of rules, which are excluded from the APA’s notice-and-comment requirement: interpretative rules; general statements of policy; rules of agency organization, procedure, or practice; and rules for which the agency for good cause finds that notice and comment is impracticable, unnecessary, or contrary to public interest. *See* 5 U.S.C. 553(b).

Although the Commission elected to seek public comment on its proposed regulatory amendments and the application of the Coble Act’s new attorney-fee provision, these matters concern the organization of the Commission, its practices and procedures, and its interpretation of statutory provisions. Therefore, the APA did not require publication of a notice of proposed rulemaking in this instance, and the Commission is not required to prepare an FRFA in conjunction with this final rule.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) requires an agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public. 44 U.S.C. 3507. The agency must submit collections of information in rules to OMB in conjunction with the publication of the notice of proposed rulemaking. 5 CFR 1320.11. This final rule does not contain any collections of information, as defined by 44 U.S.C. 3502(3) and 5 CFR 1320.3(c).

Regulation Identifier Number

The Commission assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda). The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda, available at <http://www.reginfo.gov/public/do/eAgendaMain>.

List of Subjects

46 CFR part 501

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies), Seals and insignia.

46 CFR part 502

Administrative practice and procedure, Claims, Equal access to justice, Investigations, Lawyers, Maritime carriers, Penalties, Reporting and recordkeeping requirements.

Regulatory Text

For the reasons stated in the preamble, the Commission amends 46 CFR parts 501 and 502 as follows:

PART 501—THE FEDERAL MARITIME COMMISSION—GENERAL

1. The authority citation for part 501 continues to read as follows:

Authority: 5 U.S.C. 551-557, 701-706, 2903 and 6304; 31 U.S.C. 3721; 41 U.S.C. 414 and 418; 44 U.S.C. 501-520 and 3501-3520; 46 U.S.C. 301-307, 40101-41309, 42101-42109, 44101-44106; Pub. L. 89-56, 70 Stat. 195; 5 CFR Part 2638; Pub. L. 104-320, 110 Stat. 3870.

2. Amend § 501.2 by revising paragraph (c) to read as follows:

§ 501.2 General.

* * * * *

(c) *Terms and vacancies.* (1) *Length of terms.* The term of each member of the Commission is five years and begins when the term of the predecessor of that member ends (i.e., on June 30 of each successive year).

(2) *Removal.* The President may remove a Commissioner for inefficiency, neglect of duty, or malfeasance in office.

(3) *Vacancies.* A vacancy in the office of any Commissioner is filled in the same manner as the original appointment. An individual appointed to fill a vacancy is appointed only for the unexpired term of the individual being succeeded.

(4) *Term Limits.* (i) *Commissioners initially appointed and confirmed before December 18, 2014.* When a Commissioner's term ends, the Commissioner may continue to serve until a successor is appointed and qualified.

(ii) *Commissioners initially appointed and confirmed on or after December 18, 2014.*
(A) When a Commissioner's term ends, the Commissioner may continue to serve until a successor is appointed and qualified, limited to a period not to exceed one year.

(B) No individual may serve more than two terms, except that an individual appointed to fill a vacancy may serve two terms in addition to the remainder of the term for which the predecessor of that individual was appointed.

* * * * *

PART 502—RULES OF PRACTICE AND PROCEDURE

3. The authority citation for part 502 continues to read as follows:

Authority: 5 U.S.C. 504, 551, 552, 553, 556(c), 559, 561-569, 571-596; 5 U.S.C. 571-584; 18 U.S.C. 207; 28 U.S.C. 2112(a); 31 U.S.C. 9701; 46 U.S.C. 305, 40103-40104, 40304, 40306, 40501-40503, 40701-40706, 41101-41109, 41301-41309, 44101-44106; E.O. 11222 of May 8, 1965.

Subpart O—Reparation; Attorney Fees

4. Revise the heading of Subpart O to read as set forth above.

5. Revise § 502.254 to read as follows:

§ 502.254 Attorney fees in complaint proceedings.

(a) *General.* In any complaint proceeding brought under 46 U.S.C. 41301 (sections 11(a)–(b) of the Shipping Act of 1984), the Commission may, upon petition, award the prevailing party reasonable attorney fees.

(b) *Definitions.*

Attorney fees means the fair market value of the services of any person permitted to appear and practice before the Commission in accordance with subpart B of this part.

Decision means:

- (1) An initial decision or dismissal order issued by an administrative law judge;
- (2) A final decision issued by a small claims officer; or

(3) A final decision issued by the Commission.

(c) *Filing petitions for attorney fees.* (1) In order to recover attorney fees, the prevailing party must file a petition within 30 days after a decision becomes final. For purposes of this section, a decision is considered final when the time for seeking judicial review has expired or when a court appeal has terminated.

(2) The prevailing party must file the petition with either:

(i) The administrative law judge or small claims officer, if that official's decision became administratively final under § 502.227(a)(3), § 502.227(c), § 502.304(g), or § 502.318(a); or

(ii) The Commission, if the Commission reviewed the decision of the administrative law judge or small claims officer under § 502.227, § 502.304, or § 502.318.

(d) *Content of petitions.* (1) The petition must:

(i) Explain why attorney fees should be awarded in the proceeding;

(ii) Specify the number of hours claimed by each person representing the prevailing party at each identifiable stage of the proceeding; and

(iii) Include supporting evidence of the reasonableness of the hours claimed and the customary rates charged by attorneys and associated legal representatives in the community where the person practices.

(2) The petition may request additional compensation, but any such request must be supported by evidence that the customary rates for the hours reasonably expended on the case would result in an unreasonably low fee award.

(e) *Replies to petitions.* The opposing party may file a reply to the petition within 20 days of the service date of the petition. The reply may address the reasonableness of any aspect

of the prevailing party's claim and may suggest adjustments to the claim under the criteria stated in paragraph (d) of this section.

(f) *Rulings on petitions.* (1) Upon consideration of a petition and any reply thereto, the Commission, administrative law judge, or small claims officer will issue an order granting or denying the petition.

(i) If the order awards the prevailing party attorney fees, the order will state the total amount of attorney fees awarded, specify the compensable hours and appropriate rate of compensation, and explain the basis for any additional adjustments.

(ii) If the order denies the prevailing party attorney fees, the order will explain the reasons for the denial.

(2) The Commission, administrative law judge, or small claims officer may adopt a stipulated settlement of attorney fees.

(g) *Timing of rulings.* An order granting or denying a petition for attorney fees will be served within 60 days of the date of the filing of the reply to the petition or expiration of the reply period, except that in cases involving a substantial dispute of facts critical to the determination of an award, the Commission, administrative law judge, or small claims officer may hold a hearing on such issues and extend the time for issuing an order by an additional 30 days.

(h) *Appealing rulings by administrative law judge or small claims officer.* The relevant rules governing appeal and Commission review of decisions by administrative law judges (§§ 502.227; 502.318) and small claims officers (§ 502.304) apply to orders issued by those officers under this section. [Rule 254.]

6. Amend § 502.305 by revising paragraph (b) to read as follows:

§ 502.305 Applicability of other rules of this part.

* * * * *

(b) The following sections in subparts A through Q of this part apply to situations covered by this subpart: §§ 502.2(a) (Requirement for filing); 502.2(f)(1) (E-mail transmission of filings); 502.2(i) (Continuing obligation to provide contact information); 502.7 (Documents in foreign languages); 502.21 through 502.23 (Appearance, Authority for representation, Notice of appearance; substitution and withdrawal of representative); 502.43 (Substitution of parties); 502.101 (Computation); 502.113 (Service of private party complaints); 502.117 (Certificate of service); 502.253 (Interest in reparation proceedings); and 502.254 (Attorney fees in complaint proceedings). [Rule 305.]

7. Amend § 502.318 by revising paragraph (b) to read as follows:

§ 502.318 Decision.

* * * * *

(b) Attorney fees may be awarded to the prevailing party in accordance with § 502.254. [Rule 318.]

8. Amend § 502.321 by revising paragraph (b) to read as follows:

§ 502.321 Applicability of other rules of this part.

* * * * *

(b) The following sections in subparts A through Q apply to situations covered by this subpart: §§ 502.2(a) (Requirement for filing); 502.2(f)(1) (E-mail transmission of filings); 502.2(i) (Continuing obligation to provide contact information); 502.7 (Documents in foreign languages); 502.21-502.23 (Appearance, Authority for representation, Notice of appearance;

substitution and withdrawal of representative); 502.43 (Substitution of parties); 502.253 (Interest in reparation proceedings); and 502.254 (Attorney fees in complaint proceedings). [Rule 321.]

By the Commission.

Karen V. Gregory
Secretary
Billing code: 6731-AA

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