to file

BOARD OF CONTRACT APPEALS
GENERAL SERVICES ADMINISTRATION

GSBCA No. 1170-C (11616-P)

ELECTRONIC DATA SYSTEMS CORPORATION, et. al.

v.

DEPARTMENT OF THE AIR FORCE, et. al.

AMICUS CURIAE **AMERICAN CORPORATE COUNSEL ASSOCIATION, MEMORANDUM IN SUPPORT OF THE MOTION FOR RECOVERY OF IN-HOUSE ATTORNEYS FEES BY PROTESTER ELECTRONIC DATA SYSTEMS**

The American Corporate Counsel Association files this memorandum in support of the motion by protester Electronic Data Systems to recover its in-house counsel costs as attorneys fees. Attorneys for the protester and the Department of the Air Force have consented to the filing of this memorandum.

The issue before the Board is whether it has authority to grant the protester's petition to recover in-house attorney costs as "attorney's fees" in light of the recent decision in *Sterling Federal Systems, Inc. v. NASA*, GSBCA No. 100000-C (9835-P), Slip Op. (May 22, 1992).

INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the American Corporate Counsel Association ("ACCA"), is composed of approximately 8300 members of the bar who are employed on the legal staffs of corporations and other private sector organizations and who do not hold themselves out to the public for the private practice of law. Formed in 1982, ACCA is the only national bar association devoted exclusively to the professional activities of in-house attorneys. More than 4000 organizations, many of whom are government contractors, employ ACCA members.

The issue of whether in-house attorney costs are reimbursable as attorney's fees in bid protests is of substantial significance to ACCA members and their clients. A denial of reimbursement would be a powerful disincentive against the use of in-house attorneys and could effectively deny their clients the right to counsel of their choice in bid protests heard by the Board of Contract Appeals.

ARGUMENT

1. Artificial Distinctions Based On The Employment Status Of An Attorney Ignore The Plain Meaning Of The Statute.

The Brooks Act makes no artificial distinction between in-house and outside attorneys based on their employment status.[1] It simply states that the Board may reimburse a successful protester for the costs of "filing and pursuing the protest, including reasonable attorney's fees." 40 U.S.C. §759(f)(5)(C) (1988).

Attorneys practicing law as members of legal departments for corporations constitute a significant segment of the legal profession.[2] It has become increasingly common to find corporations and other private sector organizations performing all or a

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[1]Just how artificial such a distinction would be is shown by the fact that the protester would be eligible for reimbursement, if prior to the filing of the protest, it moved its law department across the street and contracted with this new "firm" to represent the protester in this proceeding.

[2]According to a recent report, in-house attorneys constitute approximately 10% of the legal profession. B. CURRAN & C. CARSON, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1988 (American Bar Foundation 1991) at 20.

substantial portion of their own legal work using their in-house attorneys.[3] Many organizations have expanded and continue to expand the role of their law departments to include trial work and government contract related matters. The growth of the corporate legal department and its increasing visibility in the legal community is explained in large part by the fact that corporate managers have come to recognize that high quality legal services frequently can be delivered on a more cost-effective basis by in-house attorneys.

In fact, because in-house counsel deal exclusively with the client's legal problems on a daily basis, the attorney develops an in-depth knowledge of the client and its particular needs that is difficult, if not impossible, for the company to replicate when dealing with an outside law firm. The quality of work provided by in-house counsel is enhanced and streamlined by the in-house counsel's intimate knowledge of the client's business, policies and procedures. By virtue of their familiarity with corporate priorities and decision-making channels, in-house attorneys often are able to speed the progress of litigation and focus issues more efficiently, thus avoiding wasteful and time-consuming matters. In-house counsel are particularly sensitive to litigation costs and can be expected to manage such costs more closely than outside counsel.

The place of employment, whether in-house or in private practice, is irrelevant to the nature of the service provided:

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[3]A 1991 survey of 700 corporate law departments found that 69.3% projected a proportional increase in the amount of work performed by the law department. FOURTEENTH ANNUAL NATIONAL SURVEY OF CORPORATE LAW DEPARTMENT'S COMPENSATION AND ORGANIZATION PRACTICES, Report of Ernst & Young to the Association of the Bar of the City of New York (Oct. 1991) at 182.

> The type of service performed by a house counsel is substantially like that performed by many members of large urban law firms. The distinction is chiefly that house counsel gives advice to one regular client, the outside counsel to several regular clients. *United States v. United Shoe Machinery Corporation*, 89 F. Supp. 357, 360 (D. Mass. 1950).[4]

Additionally, in-house attorneys are subject to the same criteria for admission to practice and the same ethical standards as outside counsel. The Code of Professional Responsibility applies with equal force to all attorneys without regard to their employment status. *U.S. Steel Corporation v. United States*, 730 F. 2d 1465, 1468 (Fed Cir., 1984), ("in-house counsel are officers of the court, are bound by the same Code of Professional Responsibility, and are subject to the same sanctions"); *see also, Merrick v. American Sec. & Trust Co.*, 107 F. 2d 271, 278 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 625 (1940), ("Salaried attorneys and outside counsel are subject to like motives and obligations, public and private, and to like public control"). Further, the Supreme Court recognizes the equal status, obligations and privileges of in-house counsel by according the attorney-client privilege to communications between in-house counsel and their clients. *Upjohn Co. v. United States*, 449 U. S. 383 (1981).

Given the fact that lawyers in corporate legal departments possess equal qualifications, perform the same work and are held to the same professional and ethical standards as their counterparts in law firms, there is no doubt that they are attorneys within every meaning of the term, including the section of the Brooks Act at issue in this proceeding.

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[4] We submit that even this distinction lacks force in today's legal practice, where it is common for some attorneys in law firms to handle only one client's matters.

2. In-House Attorneys Fees Are Compensable.

In addition to the fact that the governing statute authorizes reimbursement, it is well-established that in-house fees are compensable. The earliest reported case appears to be *Pittsburgh Plate Glass Co. v. Fidelity and Casualty*, 281 F. 2d 538 (3d Cir. 1960), where the court awarded inside counsel costs based on a contract concluding:

> ...[T]here is no reason in law or equity why [the party against whom the fees are assessed] should benefit from [the prevailing party's] choice to proceed with some of the work through its own legal department.

281 F. 2d at 542.

Since that time numerous courts have accepted the proposition that clients maybe reimbursed for their in-house fees attorneys fees. *United States v. Meyers*, 363 F.2d 615, 621 (5th Cir. 1966, (award of attorneys fees to government affirmed although it was represented by salaried lawyers); *In re International Systems & Controls Corporations Securities Litigation*, 94 F.R.D. 640, 644-45 (S.D. Tex. 1982) (inside counsel fees awarded on sanction motion); *Scott Paper Co. v. Moore Business Forms*, 604 F.Supp. 835, 837 (D. Del. 1984) (court acknowledged value of awarding in-house counsel fees); *Textor v. Board of Regents of Northern Illinois University*, 711 F. 2d 1387, 1397 (7th Cir. 1983) (rejected distinction between in-house attorneys and outside counsel for purpose of awarding fees).

The fact that the protester must pay the attorneys' salaries irrespective of the bid protest is irrelevant, since the obligation to pay legal fees is not grounded in the principle that fees are to be paid because a client has an obligation to pay fees, but arises from the relationship of lawyer and client. In *Fairley v. Patterson*, 493 F. 2d 598, 607 (5th Cir. 1974), the Fifth Circuit stated that: "...what - and all - that is required is the existence of a relationship of attorney and client, a status which exists wholly

independently of compensation..." *See also, Miller v. Amusement Enterprises, Inc.*, 426 F. 2d 534, 538-39 (5th Circ. 1970); and *Tillman v. Wheaton-Haven Recreation Assoc.*, 517 F. 2d 1141, 1148 (4th Cir. 1975).

Additionally, unless reimbursed, the protester will lose the value of the services provided by the in-house attorneys. As the Seventh Circuit stated in *Textor v. Board of Regents of Northern Illinois University, supra*:

> ...for every hour in-house counsel spent on this case defendants lost an hour of legal services that could have been spent on other matters.... Whether the defendants actually hired additional counsel or went without legal advice on some matters is irrelevant as the value of the loss is the same. An award of reasonable [attorneys'] fees will compensate defendants for this loss.

711 F. 2d at 1397.

In *Textor*, the court rejected any distinction between in-house attorneys and outside counsel, because such a distinction "misperceives the basis for an award [of attorneys' fees] ... and also oversimplifies the effect of a lawsuit on a party represented by in-house counsel." *Id.* at 1396.

3. Denial of Reimbursement For In-House Attorneys Fees Would Effectively Deny Bid Protesters The Right To Counsel Of Their Choice.

The right of a party to representation by counsel of their choice is an important tenet of this country's legal system, and one with which the courts have traditionally been reluctant to interfere. By limiting reimbursement of attorneys fees to costs incurred by outside counsel, the Board would effectively require protesters to rely exclusively upon outside counsel and deny them the right to counsel of their choice. Denial of reimbursement would create a powerful disincentive to the use of the

attorney who may be best suited to the client's interests in favor of counsel whose only clear advantage results from the fact that their fees may be reimbursable.

There is no valid competing interest, public or private, that would justify the deprivation of a protester's right to counsel of its choice. Sound public policy should encourage the most efficient and economic use of resources by a protester, without artificial (and costly) distinctions between attorneys based on their employment status. Indeed, it is in the Government and the public interest to encourage the use of in-house counsel because it can minimize the cost of bid protest proceedings and, ultimately, the burden on the taxpayer.

CONCLUSION

For the foregoing reasons, the American Corporate Counsel Association urges that the motion by protester, Electronic Data Systems, for recovery of in-house counsel costs as attorneys fees be granted.

Respectfully submitted,

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July 31, 1992

Attorneys for *Amicus Curiae*, American Corporate Counsel Association

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by hand or facsimile this _____ day of July, 1992, upon:

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Docket Nos. 92-7125, 92-7155

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KENNETH F. MARSHALL and
BARBARA L. MARSHALL,

Plaintiffs,

v.

ALCAN ALUMINUM CORPORATION,
O'BRIEN & GERE ENGINEERS, INC.,

Defendants.

ALCAN ALUMINUM CORPORATION,

Defendant/Third Party Plaintiff
Appellant/Cross-Appellee

v.

THURSTON BROTHERS, INC.,

Third Party Defendant
Appellee/Cross-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF AMICUS CURIAE OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF AMICUS CURIAE

Amicus Curiae,, the American Corporate Counsel Association (ACCA), is the only national bar association exclusively serving the professional needs and interests of in-house counsel representing corporations and other private sector organizations. Since its founding in 1982, ACCA has grown to nearly 8,000 members representing more than 3,700 business organizations nationwide. ACCA serves its members through various means, including representing the interests of its membership on policy matters.

ACCA has actively promoted the interests of its membership as an important segment of the bar. In-house counsel have now been recognized as the most important factor in permitting most corporations to obtain quality legal services at reasonable costs. As a result of the success and recognition of the in-house lawyer, many corporations have expanded the role of in-house counsel to include handling a business entity's own litigation.

ACCA believes that the interests of corporate counsel, their clients, and the legal community as a whole are enhanced by encouraging the use of in-house trial lawyers because of their ability to deliver high-quality legal services in a cost-effective manner. Decisions which discriminate against in-house trial lawyers, without a rational basis, discourage the use of in-house trial counsel. ACCA believes that the decision in this case is an example of such discrimination and should be reversed.

ARGUMENT

I. In-House Compensation For Legal Services Rendered Should Be The Market Rate For Comparable Services.

Law departments have grown both in size and stature in the last two decades. Inevitably this has led to an increase in the participation by in-house counsel in litigation. In a number of cases this has led to in-house law departments actually trying these cases in-house. Alcan, the appellant in this case, is one of the corporations which has been a leader in this movement.[1]

With the increase of in-house legal departments actually handling cases, the question arises as to what the proper standard should be for compensation for in-house time. This issue arises in situations, *inter alia*, such as contractual indemnifications, as in this case, or fee awards for frivolous cases.

Although this Court does not appear to have addressed the issue, it is well established that in-house legal fees are compensable. The earliest reported case appears to be *Pittsburgh Plate Glass Co. v. Fidelity and Casualty Co.*, 281 F.2d 538 (3d Cir. 1960), where the court awarded inside counsel costs based on a contract concluding:

> . . .[T]here is no reason in law or equity why [the party against whom the fees are assessed] should benefit from [the prevailing party's] choice to proceed with some of the work through its own legal department.

281 F. 2d at 542.

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[1] The fact that Alcan had leased outside counsel to provide supplemental assistance due to limitations on staff size did not detract from the fact that the case was handled in-house. The Arter & Hadden associate was on short-term lease from a law firm to temporarily fill-in for an attorney who had left the company until one could be hired as a replacement. Transcript of Trial Before the Honorable David J. Hurd, United States Magistrate Judge, Docket 83 ("Tr."), pp. 63-65. The role of the firm of Bond, Schoneck & King was limited to assistance as local counsel. Tr. 64-65

Since that time numerous courts have accepted the proposition that in-house fees are compensable. *See, e.g.*, *United States v. Meyers*, 363 F.2d 615, 621 (5th Cir. 1966), (award of attorneys' fees to government affirmed although it was represented by salaried lawyers); *United States v. State Farm Mutual Automobile Association Insurance, Inc.*, 245 F. Supp. 58, 59-60 (D. Ore. 1965), (*dictum* to the effect that fees of in-house counsel are entitled to an award); *In re International Systems & Controls Corporation Securities Litigation*, 94 F.R.D. 640, 644-45 (S.D. Tex. 1982) (inside counsel fees awarded on sanction motion); *Scott Paper Co. v. Moore Business Forms, Inc.*, 604 F. Supp. 835, 837 (D. Del. 1984) (court acknowledged value of awarding in-house counsel fees); *Textor v. Board of Regents of Northern Illinois University*, 711 F.2d 1387, 1397 (7th Cir. 1983) (rejecting distinction between in-house attorneys and private practice attorneys for the purpose of awarding fees).

Judge Hurd correctly acknowledged these principles in holding that the value of a contractual obligation would be subverted if Thurston was immune from liability simply because Alcan decided to defend the case in-house:

> . . . it would mean that despite its contractual obligation to defend Alcan, once it learned that Alcan's in-house counsel was handling the defense, it could just sit back, secure in the knowledge that notwithstanding the outcome of the litigation, it would not incur those legal expenses it would have incurred had it undertaken Alcan's defense. Any incentive to defend Alcan at any date prior to that judgment would be lost.

Memorandum Decision and Order of Magistrate David N. Hurd, December 18, 1991 ("Opinion and Order"), p.12.[2]

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[2] A copy of Magistrate Hurd's Opinion and Order is attached as pp. 21-35 to Appellant Alcan's Appendix.

Having correctly concluded that attorneys' fees are awardable even for services performed by in-house counsel, Judge Hurd failed to apply a proper standard in determining the amount of the fees to be awarded.

ACCA submits that the appropriate rate to compensate in-house service is the fair value of those services, which should be determined by the market rate for similar services performed by like-level professionals. Judge Hurd appears to have totally disregarded the undisputed evidence as to the applicable market rate for a comparably-experienced lawyer for in-house lawyer time while accepting it without question for a subordinate lawyer who was leased from an outside firm.[3]

The obligation to pay legal fees is not grounded in the principle that fees are to be paid because the client has an obligation to pay fees, but arises from the relationship of lawyer and client. This principle was clearly enunciated by the Eleventh Circuit in *Duncan v. Poythress*, 777 F.2d 1508, 1515 (11th Cir. 1985), where the court held that even a lawyer who represents himself and therefore has incurred no actual fees is entitled to be compensated on the fair value of his services. This reasoning was previously adopted by the Ninth Circuit in *Ellis v. Cassidy*, 625 F.2d 227, 230-31 (9th Cir. 1980), where the court allowed attorneys to collect fees for representing themselves. *See also, Fairley v. Patterson*, 493 F. 2d 598 (5th Cir. 1974) (entitlement to attorneys' fees unrelated to whether compensated by salary or from client's private pocket). In *Fairley*, the Fifth Circuit noted:

> What is required is not an obligation to pay attorneys' fees. Rather, what - and all - that is required is the existence of a relationship of attorney and client, a status which exists wholly independently of compensation...

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[3] In fact, it appears that Judge Hurd merely adopted the billing rate of the junior associate assigned to assist Alcan's in-house counsel.

493 F.2d at 607, *quoting, Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534, 538-539 (5th Cir. 1970).

Essentially, where compensation for in-house time charges has been sought, the courts have determined that compensation shall be based on the "fair value" of services. To determine "fair-value," courts have generally focused on the market rate for comparable experience. For example, in *Rodriguez v. Taylor*, 569 F.2d 1231 (3d Cir. 1977), the Third Circuit held that the district court abused its discretion by emphasizing the factor of absolute salaries paid to legal aid attorneys in deriving an hourly rate of compensation. *Id.* at 1248. The court in *Rodriguez* reasoned that the relative compensation of private firm attorneys and legal aid lawyers does not necessarily reflect differences in the reasonable value of their time, and concluded that courts should not consider these market disparities in fixing reasonable hourly rates. *Id.* The *Rodriguez* court noted that the basis for an objective calculation of the reasonable value of attorneys' services involves multiplying the number of compensable hours by a "reasonable hourly rate." *Id.* at 1247. The resulting market value figure may then be adjusted to reflect the quality of work, the contingency of success and the benefit conferred. *Id.* (citations omitted). The court in *Rodriguez* further held that "[t]o the extent salary levels are relevant, the appropriate referent would be comparable salaries earned by private attorneys with similar experience and expertise in equivalent litigation." *Id.* at 1248. *See also, Donaldson v. O'Conner*, 454 F. Supp. 311, 313 (N.D. Fla. 1978) (hourly rate for computation of attorney's fees under 42 U.S.C. § 1988 not limited to the hourly rate at which attorneys were compensated by nonprofit corporation).

Based on the doctrine underlying entitlement to legal fees and the case law that has developed, ACCA submits that the proper standard for compensation of

legal fees for in-house counsel is the market value of *comparable* services available from the private sector. ACCA believes this general rule is supported by sound economic considerations. First, in-house efficiency develops through the expertise a lawyer gains from dedicated service to his employer. Employers therefore expend considerable resources in developing an in-house lawyer's expertise about the corporate organization and business. This expertise inures to the benefit of the employer since the in-house lawyer can usually defend his client in a particular case without the learning curve that is customary for outside counsel. If the responsible party was to pay less than the market rate as well as get the benefit of the company subsidized learning curve, the result would be a windfall.

The second economic justification for using the market standard is the fact that the client would lose the value of the service which, if replaced, would be paid for at the market rate. This principle was recognized by the Seventh Circuit in *Textor v. Board of Regents of Northern Illinois University, supra*, where the Seventh Circuit stated:

> . . . for every hour in-house counsel spent on this case defendants lost an hour of legal services that could have been spent on other matters. The value to defendants of this lost time is, of course, the amount it would require to hire additional counsel to do the neglected work. Whether defendants actually hired additional counsel or went without legal advice on some matters is irrelevant as the value of the loss is the same. An award of reasonable [attorneys'] fees will compensate defendants for this loss.

711 F.2d at 1397.

In *Textor*, the court rejected any distinction between in-house attorneys and private practice attorneys for the purpose of awarding fees. Such distinction, the court reasoned, "misperceives the basis for an award [of attorney's fees] . . . and

also oversimplifies the effect of a lawsuit on a party represented by in-house counsel." *Id.* at 1396.

The facts in this case illustrate that normal in-house staffing levels are seldom set to perform 100% of the client's legal work. On the contrary, even very large in-house staffs make use of significant amounts of outside services. Alcan's use of outside legal support in this case illustrates this reality. Thus, to the extent that Alcan's counsel was occupied in defending this case, the company was obliged to buy comparable legal services for other projects, and it paid the market rate for those services.

Thus, for both practical and economic reasons as well as reasons of legal theory and policy, ACCA believes that the general rule for awarding in-house legal fees should be the market rate for comparable services.

II. The District Court Did Not Apply The Market Rate For Comparable Legal Services In This Case In Arriving At Alcan's House Counsel Hourly Rate And The Court Appears To Have Reduced Counsel's Hourly Rate Simply Because He Was House Counsel

There are numerous factors which go into determining the billing rate for an individual attorney. A key factor, however, is experience. One objective standard is simply the number of years that the lawyer has been in practice. Others involve the types of cases, and the nature of courts before which the attorney has practiced.

The record demonstrates that Alcan undertook to establish the hourly billing rate for its in-house counsel by starting with years of practice. Alcan determined that the hourly rate for persons with comparable time in practice in the types of private firms at which it generally employed private counsel was

$200.00 per hour. This rate appeared to be the same both for Cleveland and upstate New York. Tr. pp. 77, 104.

Alcan then undertook to compare its in-house counsel's experience with that of private firms and found that there was a considerable distinction. In particular, Alcan found that its in-house counsel had far greater experience both in the types of cases and courts than the attorneys in his age group in private practice. Tr. 77.[4] Because Alcan was unable to locate anyone in the private bar it surveyed with comparable experience, it conservatively settled on the $200.00 per hour rate, for its in-house counsel.

Notwithstanding counsel's undisputed range of experience, the trial court reduced the hourly rate of Alcan's house counsel to the same level as a subordinate associate without any explanation. Tr. p. 64. ACCA believes that this rate reduction was unjustified[5] and clearly discriminates against house counsel. This is exemplified by the district court's explicit finding that in-house time was not duplicative:

> Moreover, the Court does not find Alcan's in-house counsel's efforts to be duplicative with that of outside counsel.

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[4] Alcan's in-house counsel had tried jury as well as non-jury cases in tribunals as diverse as Puerto Rico; Remona, California; the Iranian Claims Tribunal at The Hague; Belgium; and the London Court of International Arbitration. Alcan's counsel had also argued before numerous Appellate Courts, including the United States Supreme Court, on issues ranging from the constitutional propriety of Unitary Taxation to issues of statutory interpretation under the Clean Air Act.

In fact, Alcan's in-house counsel has also represented ACCA before the United States Supreme Court, and most recently in oral argument before the Florida Supreme Court where ACCA was successful in defeating a rule proposed by the Florida State Bar Association which would have restricted practice of in-house counsel resident in Florida.

[5] It is undisputed that Alcan's counsel played the "senior partner" role on the litigation. Thus to set his hourly rate at the same level as the junior associate he supervised is per se suspect -- and when done without any stated rationale, clearly violates the principle of "fair value."

Opinion and Order, p.12.

By arbitrarily reducing the rate of in-house counsel's time, the district court undercut the logic that the Seventh Circuit found so compelling in *Textor supra*, when it recognized that the in-house system replaced a system that was more inefficient. *Id. at* 1396. The efficiency of in-house litigation is well-illustrated in this case by the total amount of fees sought. Although ACCA takes no position on the issue of the appropriate allocation of fees as between the third party action and the defense of the main claim, it feels compelled to note that preparing a complete defense to a million dollar personal injury lawsuit would normally cost much more than the $38,000 sought by Alcan. Considering, in addition, that Alcan's defense avoided liability altogether, the cost efficiency alluded to by the Seventh Circuit should not be under-estimated and ACCA respectfully submits that this Court should do everything it can to encourage such efficiencies.

III. The Appropriate Standard

ACCA urges that this Court adopt the "fair-value" standard for compensation of in-house counsel where such fees are awardable. In determining the appropriate rate, the Court should take into account the following factors:

(1) The experience level of the in-house counsel involved.

(2) The billing rates of counsel with similar levels of experience in the area where in-house counsel practices and tries the case.

(3) Where other counsel are used, whether the services for other counsel (for whom reimbursement was sought) and of in-house counsel were duplicative and the extent of the duplication.

(4) The efficiency with which counsel handled the matter.

(5) The degree of complexity of the case and the need for specialized legal skills.

(6) The level of responsibility in the case exercised by in-house counsel.

CONCLUSION

For the foregoing reasons, the decision of the district court to reduce the amount of in-house hourly rates should be reversed and the case remanded to determine the amount of in-house counsel fees which should be reimbursed pursuant to the standard set forth above.

Dated: March 16, 1992

Respectfully Submitted,

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CERTIFICATE OF MEMBERSHIP

I, Carl D. Liggio, counsel for Amicus Curiae American Corporate Counsel Association, hereby certify that I am admitted to practice in the United States Court of Appeals for the Second Circuit.

Carl D. Liggio

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that I caused true copies of ACCA's Brief Amicus Curiae to be served by mail upon:

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and upon

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(TJM)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of May , one thousand nine hundred and ninety-two.

P r e s e n t:

HONORABLE THOMAS J. MESKILL,

HONORABLE AMALYA L. KEARSE,

HONORABLE LAWRENCE W. PIERCE,

Circuit Judges.

ALCAN ALUMINUM CORP.,

Third-Party-Plaintiff-Appellant,
Cross-Appellee,

v.

THURSTON BROTHERS, INC.,

Third-Party-Defendant-Appellee-
Cross-Appellant.

Docket Nos. 92-7125
92-7155

* * * * * * * * * * * * *

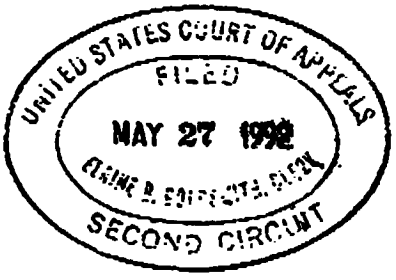
KENNETH F. MARSHALL, BARBARA L. MARSHALL,

Plaintiffs,

v.

ALCAN ALUMINUM CORP., O'BRIEN & GERE ENGINEERS,

Defendants.



This is an appeal from a judgment of the United States District Court for the Northern District of New York after a bench trial before United States Magistrate Judge Hurd upon consent of the parties.

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This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of the district court be and it hereby is AFFIRMED.

We affirm the award of attorneys fees because it was a reasonable estimate of the cost of legal services in this action. See Peter Fabrics v. S.S. Hermes, 765 F.2d 306, 319 (2d Cir. 1985). We do not believe that the magistrate judge's calculation of the appropriate hourly rate was unreasonable, especially in light of the limited evidence on the issue. Nor did the magistrate judge err in reducing the total amount of reimburseable fees by half where Alcan Aluminum Corporation failed to delineate the number of hours devoted to the third-party action.

We affirm the finding that Alcan Aluminum Corporation was not negligent substantially for the reasons set forth in Magistrate Judge Hurd's Memorandum Decision and Order dated December 18, 1991.

We have considered the parties' other arguments and find them to be without merit.

Thomas J. Meskill, U.S.C.J.

Amalya L. Kearse, U.S.C.J.

Lawrence W. Pierce, U.S.C.J.

ORIGINAL 77

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DEC 26 199

U. S. DISTRICT COURT
N. D. OF N. Y.
FILED
DEC 20 1991
AT ____ O'CLOCK ____ M.
GEORGE A. RAY, Clerk
BY/DS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

KENNETH F. MARSHALL and BARBARA L. MARSHALL,

Plaintiff,

vs

ALCAN ALUMINUM CORPORATION,

Defendant.

86-CV-1210

ALCAN ALUMINUM CORPORATION,

Defendant and
Third-party Plaintiff,

vs

THURSTON BROS., INC.,

Third-party Defendant.

APPEARANCES:

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GEORGE M. MOSCARINO, ESQ.

DAVID N. HURD
United States Magistrate Judge

MEMORANDUM DECISION and ORDER

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I. **BACKGROUND.**

This diversity action arises from an accident that occurred on November 26, 1984, when plaintiff, Kenneth Marshall (Marshall), fell and injured himself on property owned by the defendant and Third-party plaintiff, Alcan Aluminum Corporation (Alcan). Alcan contracted with the third-party defendant, Thurston Bros., Inc. (Thurston), to construct a nitro facility gas distribution system. During the construction of this system, Marshall, an employee of Thurston, was injured while installing a pipe in a ditch.

Marshall commenced this action against Alcan as the owner of the property, alleging that Alcan violated the New York State Labor Law, Section 240 for failing to provide a ladder, Section 241 for not properly shoring the trench where he was working, and Section 200 for not providing a safe place to work. Alcan filed an answer to the complaint and commenced a third-party action against Thurston asserting causes of action for common law contribution and indemnification, contractual indemnification, breach of contract for failing to provide a safe place to work, and failure to have a liability insurance policy in effect.

In a decision dated December 27, 1988, U.S. District Court Judge Con G. Cholakis declared a portion of the indemnification agreement in Alcan and Thurston's contract to be void and unenforceable. He held that New York law prohibits an indemnification provision in a construction contract that imposes liability on a contractor for the negligence of the landowner. He

went on further to hold that the remaining portions of the indemnification agreement in the parties' contract would remain enforceable, and that Thurston was obligated to indemnify Alcan for any amount due Marshall which was not directly traceable to any alleged negligent acts of Alcan.

On May 22, 1989, Thurston settled the lawsuit Marshall brought against Alcan for $400,000. Alcan, however, did not contribute to the settlement, and has steadfastly maintained throughout this litigation that it was in no way responsible for Marshall's injuries. In a decision dated December 1, 1989, Judge Cholakis, in addressing a motion brought by Alcan for summary judgment on its third party complaint against Thurston, ruled that there was a question of fact regarding whether Alcan was negligent and responsible for the injuries Marshall sustained. Judge Cholakis ruled that before it could be decided whether Alcan could recover its attorney's fees and expenses expended in defending the action brought by Marshall, the resolution of whether it was negligent must be decided first.

The parties, pursuant to 28 U.S.C 636(c) and Federal Rules Civil Procedure 73, consented to proceed before a United States Magistrate Judge, and an order of reference to the undersigned was duly signed by United States District Judge Leo Gagliardi, and filed on May 22, 1991. On October 29, 1991, the Court held a one day bench trial. Although Alcan initially requested that this matter be resolved by a jury, both parties

stipulated in open court, to waive their right to a jury and have the issues decided by the Court.

II. DISCUSSION.

The threshold issue for the Court to determine is whether Alcan was in any way negligent for the injuries Marshall sustained, since the resolution of which will ultimately resolve whether Alcan recovers its attorney's fees in this action. Thurston alleges that because Alcan had employees present at the work site and actively supervised the work, it was negligent in failing to discover and correct any violations of the Labor Law which may have occurred. Alcan contends that the wording in the parties' contract clearly supports its position that all relevant safety concerns were the responsibility of Thurston.

A. Standard of Negligence

In Judge Cholakis' memorandum decision of December 27, 1988, he stated:

> The Court hereby declares void and unenforceable that portion of the indemnification agreement that places liability on Thurston for Alcan's negligence. The remaining portion of the agreement shall stand, and Thurston shall be under a duty to indemnify Alcan for any amount due plaintiff not resulting in any respect from Alcan's negligence. (Emphasis added.)

It logically follows from Judge Cholakis' decision, that if Alcan is found to be even 1% negligent, then it may not recover from Thurston, its legal fees or expenses incurred in defending the action brought against it by Marshall. Support for this conclusion is based on the fact that if Alcan was found to be negligent, then

it was required to appear and defend itself in the action brought by Marshall. In no way can Alcan be indemnified for legal fees and expenses in a lawsuit that it is ultimately found to have been negligent since it would have been required to have defended itself, notwithstanding Thurston's negligence.

The specific clause in the contract at the center of this controversy reads as follows:

> Paragraph 11(1) The contractor [Thurston] hereby assumes the sole responsibility for, and agrees to indemnify and save the Owner [Alcan] . . . harmless from any and all loss and expense . . . by reason of the liability imposed by law . . . for damages because of bodily injuries . . . sustained by any person . . . arising out of, or in consequence of the performance of the work under this Agreement, howsoever such injuries . . . may have been caused, and whether or not the same may have been caused or may be claimed to have been caused by negligence of the Contractor [Thurston], the latter's Subcontractor or their employees, agents, or any other persons and/or the Owner . . . its or their employees or agents, or any other persons.

In view of Judge Cholakis' decision of December 27, 1988, Alcan's argument that its legal fees and expenses should be reduced by the percentage of its negligence, misses the point. First, Judge Cholakis, by having ruled that Alcan can not be indemnified if it is found to be negligent, the awarding to it of legal fees and expenses is precluded since the indemnification portion of the parties' contract that required Thurston to indemnify Alcan for Alcan's negligence, was declared void, it therefore follows that Alcan may not be compensated for its fees and expenses expended in defending a lawsuit that its found to be negligent. Second, if

Alcan were found to be negligent, and its legal fees and expenses were reduced by its percentage of negligence, this would result in an amount being awarded that was speculative and having no relationship to the legal fees and expenses Alcan actually incurred unrelated to its negligence. Third, for the Court to reduce Alcan's fees and expenses by the percentage it is found negligent, is not indemnification, but rather the application of contribution which is not provided for in Paragraph 11(1) of the parties' contract. Finally, Alcan's suggestion that legal fees and expenses should be reduced by the amount of its total percentage of negligence, is contrary to the well accepted principle of American Jurisprudence that each litigant, absent a statute or contractual provision to the contrary, bears the burden of paying its own legal fees and expenses. See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247-250 (1975). Therefore, based on the above, if the Court concludes that Alcan is even 1% negligent, it may not recover any of its legal fees or expenses.

B. Alcan was not negligent

Paragraph 10.2.1 of the parties' agreement states:

> The Contractor [Thurston] shall take all of the necessary precautions for the safety of, and shall provide all necessary protection to prevent damage, injury and loss to: (1) all employees on the work [sic] and all other persons who may be affected thereby, (2) all the work and all materials and equipment to be incorporated therein, whether in storage on or off the site, and, (3) other property at the site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for

> removal, relocation or replacement in the course of construction.

Paragraph 10.2.5 states, "The Contractor [Thurston] shall designate a responsible member of his organization at the site whose duty shall be the prevention of accidents." It is certainly permissible, and not uncommon, for a landowner to delegate safety responsibilities to a contractor. Presumably, the contract price reflects the contractor's willingness to assume these responsibilities. Of course, the fact that the owner has delegated such safety responsibilities to the contractor, does not relieve it of its duty to third parties, such as employees of the contractor. See Vause v. New York, New York Congregation of Jehovah's Witnesses, Inc., Flatbush Unit, 97 A.D.2d 513 (2d Dep't 1983). Although these are non-delegable duties under Labor Law Sections 240 and 241, a landowner may, by contract, require a contractor to indemnify it for a judgment a plaintiff recovers against it which is not directly attributable to its negligence. See N.Y. General Obligation Law § 5-322.1.

In the present case, if Alcan was found to be liable to Marshall as a result of Thurston's violations of Sections 240 and 241, and for independent acts of negligence to Marshall which were a proximate cause of the accident and injuries he suffered, then Alcan would not only be responsible for that percentage of Marshall's settlement that was attributable to its negligence, but it could not recover any of its legal fees and expenses from Thurston since a landowner may not be indemnified for its own

negligence. See N.Y. General Obligations Law § 5-322.1; see also, Lufkin v. Star Technologies, Inc., 150 Misc.2d 126, 567 N.Y.S.2d 1002 (1991).

Thurston contends that the evidence shows the accident plaintiff was involved in was caused by a failure to shore the ditch, and/or by the lack of a ladder. Thurston further contends that Alcan had two inspectors at the work site on a daily basis, and that they failed to observe these violations or direct that they be corrected. According to Thurston, had Alcan's employees properly inspected the work site, they would have seen the violations and directed to have them corrected and Marshall would not have been injured. Thurston argues that this failure by Alcan inspectors to supervise, inspect, and take some affirmative action to correct the dangerous condition, was a violation of its duty to Marshall which was separate and distinct from Thurston's admitted violations of Sections 240 and 241. Thurston also implies that Alcan's failures made Alcan liable to Marshall directly, as opposed to vicariously, for the violations of Sections 240 and 241.

In examining the deposition and statements of Marshall, the testimony of his fellow employee, Joseph Arena, photographs, diagrams, blueprints, and other documents and depositions admitted into evidence, this Court has serious doubts as to whether the failure to shore or to provide a ladder, in fact, was a proximate cause of Marshall's accident and resulting injuries. From the evidence before the Court, the conditions that existed at the work site Marshall was injured at were not so open or obvious that the

employees of Alcan would have been under a duty to notify Thurston. Assuming that the lack of a ladder and/or shoring, actually caused Marshall's injuries, these conditions were created by Thurston while working on the project, and it was Thurston who had the direct responsibility to prevent, discover, and correct them. See Carmody v. ADM Milling Co., 665 F.Supp. 147, 151-52 (N.D.N.Y. 1987); Menorah Nursing Home, Inc. v. Zukov, 153 A.D.2d 13, 548 N.Y.S.2d 702 (2d Dept. 1989); Walsh v. Morse Diesel, Inc., 143 A.D.2d 653, 655-56, 533 N.Y.S.2d 80 (2d Dept. 1988). The alleged dangerous conditions were not apparent, conspicuous, or of the nature which would have placed a duty upon Alcan employees to correct. See Miller v. Perrillo, 71 A.D.2d 389, 391, 422 N.Y.S.2d 424 (1st Dept. 1979) app dismd., 49 N.Y.2d 1044, 429 N.Y.S.2d 637, 407 N.E.2d 794 (1980). These were hidden circumstances within the exclusive control and obligation of Thurston. See Schwalm v. County of Monroe, 158 A.D. 2d 994, 550 N.Y.S.2d 970 (4th Dept. 1991); Pietsch v. Moog, Inc., 156 A.D.2d 1019, 549 N.Y.S.2d 301 (4th Dept. 1989). This was not a situation where the alleged danger was detectable, such as a huge uncovered ten foot hole without shoring or a ladder, or an elevated platform without guardrails or scaffolding. The ditch where Marshall's accident occurred was less than five feet deep; and it is questionable whether it was required to be shored or if a ladder was necessary for the type of work he was performing. A mere violation of the Labor Law by a contractor does not mean that the owner is on notice

of said violation, this is true regardless of whether the owner has employees present on the job site.

It's this Court's opinion that had Marshall been successful in his action against Alcan, it would have been solely because of Thurston's violations of Sections 240 and 241 of the Labor Law in failing to provide a ladder or shoring. The alleged conditions which Thurston argues subjects Alcan to liability were not of such a nature that as landowner it would be considered to be on notice and have required it to take some immediate action to correct. Moreover, since Alcan did not exercise supervision or control over the work performed by Thurston employees, and it did not have actual or constructive notice of the alleged unsafe condition which caused Marshall's accident, then Alcan can not be liable under Section 200 of the Labor Law. See Dabolt v. Bethlehem Steel Corp., 92 A.D.2d 70, 72, 459 N.Y.S.2d 503 (4th Dept.) app dismd., 60 N.Y.2d 554, 467 N.Y.S.2d 1029, 454 N.E.2d 1318 (1983). Therefore, the Court concludes that Alcan was not negligent for the injuries suffered by Marshall, and is entitled to full indemnification for reasonable attorney's fees and expenses in defending the main action.

Finally, Thurston contends that the contract only provides recovery to Alcan for "loss or damage", and that since there has been no "loss or damage" to Alcan by reason of its settlement with Marshall for the sum of $400,000, Alcan can not recover its legal fees and expenses. Thurston admits that had the contract provided recovery as the result of "liability", Alcan

would be able to recover its legal fees and expenses. The Court finds this argument to be unpersuasive since the contract, in fact, provides recovery for "loss and expense" for "liability imposed by law". See Breed, Abbott & Morgan v. Hulko, 139 A.D.2d 71, 531 N.Y.S.2d 240 (1st Dept. 1988), aff'd mem ctfd. ques. ans. 74 N.Y.2d 688, 543 N.Y.S.2d 373, 341 N.E.2d 402 (1989). Alcan was required to assert a defense in the action brought by Marshall because Thurston's negligence imposed liability upon it as a matter of law. In defending the main action, Alcan sustained "loss and expense" in the form of legal fees and expenses. See Zissu v. Bear, Stearns & Co., 627 F.Supp. 687 (S.D.N.Y.), aff'd 805 F.2d 75, 79-80 (2d Cir. 1986). Although Thurston elected to settle the case prior to trial, this in no way relieves it of its contractual obligation to indemnify Alcan for its legal fees and expenses.

C. Damages.

Alcan has submitted vouchers, affidavits, testimony, time slips and bills for attorneys' fees and expenses in the following amounts:

In-house ($200 per hour)	$14,100.00
Arter & Hadden ($120.00 per hour)	18,317.00
Expenses	1,695.44
Bond, Schoeneck & King ($85.00 per hour)	4,100.00
Total	$38,212.44

In the first place, Thurston contends that Alcan is not entitled to its in-house counsel fees because such fees are ongoing daily expenses incurred by Alcan which are entirely unrelated to any litigation with which the corporation might be involved. The Court rejects this argument since Alcan's in-house counsel has specifically set forth the time it spent on this litigation. If the Court were to accept Thurston's argument, it would mean that despite its contractual obligation to defend Alcan, once it learned that Alcan's in-house counsel was handling the defense, it could just sit back, secure in the knowledge that notwithstanding the outcome of the litigation, it would not incur those legal expenses it would have if it had undertaken Alcan's defense. Any incentive to defend Alcan at any date prior to judgment would be lost. Moreover, the Court does not find Alcan's in-house counsel's efforts to be duplicative with that of outside counsel. Therefore, the Court holds that Alcan's in-house reasonable attorney's fees on an hourly basis are recoverable.

Under the circumstances, the Court finds that the reasonable rate for in-house counsel fees should be $120.00 per hour; Arter & Hadden - $120.00 per hour; and Bond, Schoeneck and King - $85.00 per hour. The Court finds the total hours submitted to be reasonable. This means that the total reasonable legal fees and expenses are:

In-house	$ 8,460.00
Arter & Hadden	18,317.00
Expenses	1,695.44

Bond Schoeneck & King 4,100.00

Total $32,572.44

However, this is not the end of the inquiry. Alcan agrees, and the law is clear, that it is not entitled to any legal fees or expenses for prosecuting the third-party action. See Peter Fabrics, Inc. v. S.S. "Hermes", 765 F.2d 306 (2d Cir. 1988). However, its proof completely failed to delineate which hours were related to the main action, and which hours were related to the third-party action. It is understandable that such delineation may be difficult, but the Court notes that Alcan made no effort to do so. After agreeing that it was not entitled to be reimbursed for legal fees and expenses incurred for the third-party action, it then went on to assert that all of the legal activity was, in fact, related to, and part of, defending the main action. Under the circumstances, the Court is left to make "its best guess as to what the paying party actually would have had to pay". Peter Fabrics, Inc., 765 F.2d at 319. Therefore, the Court will divide the total legal fees and expenses of $32,572.44 equally between the main action and third-party action, to wit, $16,286.22.

CONCLUSION

The clerk is directed to enter judgment in favor of Alcan and against Thurston in the sum of $16,286.22, with interest from June 1, 1989.

IT IS SO ORDERED.

David N. Hurd
United States Magistrate Judge

Dated: December 18, 1991
Utica, New York.

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

Northern DISTRICT OF New York

ALCAN ALUMINUM CORPORATION,
Defendant/3rd party plaintiff,

V.

THURSTON BROS., INC.,
3rd party defendant.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 86-CV-1210

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED That judgment on attorney fees is entered in favor of Alcan and against Thurston in the sum of $16,286.22, pursuant to the Memorandum-Decision and Order of the Honorable David N. Hurd, United States Magistrate Judge, filed December 20, 1991.

December 20, 1991
Date

GEORGE A. RAY
Clerk

Christine Mayenthaler
(By) Deputy Clerk

NOTICE TO LITIGANTS

FILING NOTICE OF APPEAL

This notice is to inform you of the time limitations for filing a Notice of Appeal under Federal Rules of Appellate Procedure 4 (see below) and of the necessity of filing a timely motion for extension within the thirty-day extension period if the Notice of Appeal is untimely.

George A. Ray
Clerk of the Court

Rule 4. Appeal as of Right—When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

(b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by any defendant. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7111, 102 Stat. 4419.)