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FACT SHEET

THE IMPACT OF THE *BUCKHANNON* DECISION: FIVE YEARS LATER

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On May 29, 2001, the Supreme Court decided *Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Hum. Servs*., 532 U.S. 598 (2001), in which it eliminated the "catalyst theory" as a basis for obtaining attorneys' fees as a prevailing party in a case brought under the Americans with Disabilities Act (ADA) and Fair Housing Act (FHA). The "catalyst theory" posits that a plaintiff is a "prevailing party" for purposes of fee-shifting statutes if she achieves the result she sought due to a voluntary change in the defendant's conduct that was caused by the litigation.

Plaintiffs' attorneys frequently sought and obtained attorneys fees under the catalyst theory, as defendants have often made changes voluntarily as a result of litigation. In many cases, plaintiffs incurred tremendous litigation expenses over long periods of time, only to see defendants make changes on the eve of trial. Without the ability to obtain attorneys fees for voluntary changes made in response to litigation, many plaintiffs will be unable to take the financial risks of litigating civil rights cases.

In the last five years, it has become apparent that *Buckhannon* did not merely eliminate the catalyst theory as a basis for recovery of fees. The decision has had impact on the right to recover attorneys' fees in cases that result in settlement agreements, in cases that result in some form of interim or partial relief, and those in which post-judgment relief is secured.

This Fact Sheet examines how the lower courts have interpreted and applied *Buckhannon* and suggests strategies to assist plaintiffs' counsel in efforts to obtain fees in cases where there is no court order awarding relief.

I. THE *BUCKHANNON* DECISION

In *Buckhannon,* a corporation that operated assisted living residences and others sued the state asserting that a law that required assisted living facility residents to be capable of "self preservation" violated the ADA and the FHA. The plaintiffs sought an injunction permitting the operation of residences with individuals who did not meet the "self preservation" requirement. After litigation was initiated, the state legislature passed a statute eliminating the "self preservation" requirement, and the lawsuit was dismissed as moot. *Buckhannon*, 532 U.S. at 601. The plaintiffs then requested attorneys' fees, claiming that they were prevailing parties, under the "catalyst theory," on their ADA and FHA claims.

The Supreme Court held that plaintiffs were not prevailing parties, stating that, in order to achieve such status, a party must have been awarded some relief by a court. *Buckhannon*, 532 U.S. at 603. The Court expressly acknowledged two situations in which a plaintiff will be a prevailing party: (1) when the plaintiff receives some judgment on the merits (even if only an award of nominal damages); and (2) when a plaintiff secures a consent decree. *Id.* at 604. The Court explained that enforceable judgments on the merits and court-ordered consent decrees create the "material alteration of the legal relationship of the parties" necessary to permit an award of attorneys fees." *Id.* (quoting *Texas State Teachers Assn v. Garland Independent School Dist.*, 489 U.S. 782, 792-93 (1989)).

In contrast with judgments and consent decrees, the Court determined that cases in which the lawsuit is a mere "catalyst" for voluntary relief by the defendants do not render the plaintiff a "prevailing party" entitled to attorneys' fees. *Buckhannon*, 532 U.S. at 605-10. The Court wrote that the catalyst theory improperly "allows an award where there is no *judicially sanctioned* change in the legal relationship of the parties. ... A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id.* at 605 (former emphasis added; latter emphasis in original).

In holding that the catalyst theory could not justify an award of attorneys' fees, the Court rejected the argument that the catalyst theory is necessary to prevent defendants from unilaterally mooting an action before judgment in order to avoid paying attorneys fees and to ensure that plaintiffs

with meritorious but expensive cases would not be deterred from litigating. *Buckhannon*, 532 U.S. at 608. The Court noted that it was skeptical that its decision would have these effects, as there was no empirical evidence to suggest that it would. *Id.* The Court also noted that the catalyst theory might deter defendants from voluntarily changing their conduct, as their potential liability for fees could be as or more significant than their potential liability on the merits. *Id.*

II. APPLICATION OF *BUCKHANNON* TO OTHER FEE-SHIFTING STATUTES

Buckhannon, as described above, involved a fee claim under the ADA and FHA fee-shifting provisions, which allow a "prevailing party" to recover attorneys' fees. The Supreme Court noted that the "prevailing party" language was common to a number of federal civil rights fee-shifting statutes, such as the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988 (Section 1988), and Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(k). *Buckhannon*, 532 U.S. at 602-03. The Court based its decision, in part, on the "clear meaning" of the term "prevailing party" – not the meaning in the unique context of the ADA or FHA. *Id.* at 603, 607, 610.

Some advocates attempted to limit *Buckhannon* to the ADA and FHA, arguing that the ruling is inapplicable to fee-shifting provisions in other statutes that use the "prevailing party" language because Congress did not intend those statutes to have the same meaning as the ADA and FHA. In the past five years, however, the courts have uniformly rejected these arguments.

- Appellate courts have held that *Buckhannon* is applicable in cases under the Individuals with Disabilities Education Act (IDEA). *See A.R. ex rel. R.V. v. New York City Dep't of Educ.*, 407 F.3d 65, 75 (2d Cir. 2005); *Smith v. Fitchburg Public Schools*, 401 F.3d 16, 22 & n.18 (1st Cir. 2005); *Alegria v. District of Columbia*, 391 F.3d 262, 265-69 (D.C. Cir. 2004); *Shapiro ex rel. Shapiro v. Paradise Valley Unified School Dist. No. 69*, 374 F.3d 857, 865 (9th Cir. 2004); *T.D. v. LaGrange School Dist. No. 102*, 349 F.3d 469, 475-77 (7th Cir. 2003); *G. ex rel. R.G. v. Fort Bragg Dependent School*, 343 F.3d 295, 310 (4th Cir. 2003); *John T. ex rel. Paul T. v. Delaware*

County Intermediate Unit, 318 F.3d 545, 556-58 (3d Cir. 2003).

- Appellate courts have held that *Buckhannon* is applicable to claims filed under Section 1988. *See Dupuy v. Samuels*, 423 F.3d 714, 719 (7th Cir. 2005); *Roberson v. Guiliani*, 346 F.3d 75, 79 n.3 (2d Cir. 2003); *Labotest, Inc. v. Bonta*, 297 F.3d 892, 895 (9th Cir. 2002); *Truesdell v. Philadelphia Housing Auth.*, 290 F.3d 159, 164-65 (3d Cir. 2002); *New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9, 30 (1st Cir. 2002).

- Appellate courts have held that *Buckhannon* is applicable to claims filed under the Equal Access to Justice Act (EAJA), which applies to claims filed against the federal government. *See Carbonell v. Immigration and Naturalization Service*, 429 F.3d 894, 898-99 (9th Cir. 2005); *Vacchio v. Ashcroft*, 404 F.3d 663, 672-74 (2d Cir. 2005); *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371, 1377-79 (Fed. Cir. 2002).

III. APPLICATION OF *BUCKHANNON* TO CASES MOOTED BY NON-LEGISLATIVE CHANGES

The *Buckhannon* lawsuit became moot when the state legislature enacted bills to eliminate the "self-preservation" requirement for admission to personal care homes that the plaintiffs alleged violated the ADA and FHA. *Buckhannon*, 532 U.S. at 600-01. Thus, some advocates have attempted to limit *Buckhannon*'s rejection of the catalyst theory only to those cases in which the legislature acts to moot the lawsuit. This argument, too, has failed.

In *Brickwood Contractors, Inc. v. United States*, the Court of Appeals for the Federal Circuit reversed the Court of Federal Claims' decision that limited *Buckhannon* to legislative changes. In that case, a bid protester's challenge to a Navy Request for Proposal was mooted when the Navy – after a hearing on the plaintiff's motion for a temporary restraining order – cancelled the solicitation for proposal. *Brickwood Contractors, Inc.*, 288 F.3d at 1373-74. The plaintiff filed a fee claim under EAJA. *Id.* at 1374.

The lower court rejected the government's argument that *Buckhannon* barred recovery of fees, concluding, *inter alia*, that *Buckhannon* involved a legislative change. *See id.* at 1375, 1380. The appellate court reversed, holding that *Buckhannon* precluded any fee award. *Id.* at 1376-81. With respect to the lower court's limitation of *Buckhannon* to cases mooted by legislative changes, the appellate court explained that such an interpretation was untenable. *Id.* at 1380. The appellate court wrote that such a limitation on *Buckhannon*'s application would mean that "the 'catalyst theory' is alive and well – even under the FHAA and the ADA – if litigation rather than legislative action is found to cause such a change" and "[i]n our view, the Supreme Court in *Buckhannon* unambiguously rejected the 'catalyst theory' .... The Court's holding in *Buckhannon* leaves no room for a distinction to be drawn between whether a change is brought about by the legislature, as in *Buckhannon*, or by the government's cancellation of a solicitation in this case." *Id.*

IV. ACHIEVING PREVAILING PARTY STATUS AFTER *BUCKHANNON*

While efforts to limit *Buckhannon* to its statutory and factual context have generally failed, most courts remain open to awarding attorneys' fees to plaintiffs who succeed without necessarily securing a judgment on the merits or a consent decree. In order to be considered a "prevailing party" entitled to attorneys' fees following *Buckhannon*, the plaintiff must establish that (1) the lawsuit achieved some material alteration in the legal relationship of the parties; and (2) the change has been judicially sanctioned in some way. *See Buckhannon*, 532 U.S. at 605; *Texas State Teachers Ass'n. v. Garland Independent School Dist.*, 489 U.S. 782, 792 (1989); *Vacchio v. Ashcroft*, 404 F.3d 663, 674 (2d Cir. 2005); *Shapiro ex rel. Shapiro v. Paradise Valley Unified School Dist. No. 69*, 374 F.3d 857, 865 (9th Cir. 2004). Thus, the key issue in most of these cases becomes what form of judicial sanction or *imprimatur* is sufficient to create prevailing party status.

A. JUDGMENTS MOOTED BEFORE RELIEF

Buckhannon unequivocally states that plaintiffs who secure judgments are prevailing parties. *Buckhannon*, 532 U.S. at 604. If a case is mooted after there has been a substantive ruling on the merits, it should not strip the plaintiff of his prevailing party status (unlike in *Buckhannon*, where the case was mooted prior to any substantive ruling). *See Palmetto Properties, Inc.*

v. County of Dupage, 375 F.3d 542, 549-51 (7th Cir. 2004) (holding that the plaintiff was the prevailing party since the court had granted partial summary judgment in its favor even though the county, after the ruling, mooted the case by amending the ordinance), *cert. denied*, 543 U.S. 1089 (2005); *County of Morris v. Nationalist Movement*, 273 F.3d 527, 536 (3d Cir. 2001) (holding that the counter-claimant was the prevailing party where he had secured a declaratory judgment that the county ordinance was unconstitutional even though, pending appeal, the case became moot).

B. DECLARATORY JUDGMENTS

Although it constitutes a judgment on the merits, a declaratory judgment without any affirmative judicial relief may not be sufficient to award attorneys' fees. In *Buckhannon*, the Court wrote: "[W]e have not awarded attorney's fees where the plaintiff ... acquired a judicial pronouncement that the defendant has violated the Constitution unaccompanied by '*judicial* relief[.]'" *Buckhannon*, 532 U.S. at 605-06 (emphasis in original).

In *Peterson v. Gibson*, 372 F.3d 862 (7th Cir. 2004), the plaintiff filed a civil rights action that resulted in a judgment of liability following trial and an award of nominal damages. *Id.* at 864. After the court ordered a new trial on damages (which vacated the jury's award of nominal damages), the parties entered into a private settlement agreement in which the defendant agreed to pay the plaintiff $10,000. *Id.* The court noted that the jury's initial award of nominal damages would have been sufficient to confer prevailing party status on the plaintiff. *Id.* at 866 (citing *Farrar v. Hobby*, 506 U.S. 103, 115 (1992)). That award, however, was vacated pursuant to the plaintiff's motion and subsequent settlement and, under *Buckhannon*, the private settlement agreement could not confer prevailing party status on the plaintiff. *Id.* The only remaining judgment was the jury's determination that the plaintiff's rights had been violated, but the court determined that – without judicially-awarded relief – that judgment was not sufficient to obtain prevailing party status. *Id. But see County of Morris v. Nationalist Movement*, 273 F.3d at 536 (holding, but with little analysis, that the counter-claimant who secured a declaratory judgment was a prevailing party).

C. PURELY PRIVATE SETTLEMENT AGREEMENTS

In *dicta*, the *Buckhannon* Court wrote: "Private settlements do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal." *Buckhannon*, 532 U.S. at 604 n.7. Thus, it appears that purely private settlements with no judicial approval or oversight will not confer prevailing party status on the plaintiff. *See Peterson v. Gibson*, 372 F.3d at 867.

The Ninth Circuit, however, has suggested that it would not be bound by *Buckhannon*'s statement that plaintiffs who secure private settlement agreements are not prevailing parties. In *Barrios v. California Interscholastic Federation*, 277 F.3d 1128 (9th Cir.), *cert. denied*, 537 U.S. 820 (2002), a Title III ADA case, the parties entered into a settlement agreement pursuant to which the plaintiff would be allowed to continue to coach baseball on the field and would be paid $10,000 in compensatory damages. *Id.* at 1133. The settlement agreement apparently was not approved by the court, and there was no continuing jurisdiction. The agreement, though, reserved the question of attorneys' fees – including whether the plaintiff was the prevailing party – for resolution by the court upon a motion by any party. *See id.* In holding that the plaintiff was the prevailing party, the Ninth Circuit explained that *Buckhannon* rejected the catalyst theory for recovery of fees and that a lawsuit that yields a settlement agreement – even a private settlement – cannot be said to be a mere catalyst for a policy change. *Id.* at 1134 n.5. Rather, a settlement agreement is a "legally enforceable instrument, which under [pre-*Buckhannon* Ninth Circuit authority] makes him a 'prevailing party.'" *Id.*; *accord Richard S. v. Dep't of Developmental Services*, 317 F.3d 1080, 1086 (9th Cir. 2003).

While *Barrios* seems to suggest that the Ninth Circuit will award fees to a plaintiff who secures even a purely private settlement, it should be noted that the court also stressed that the judiciary was involved since the agreement provided that the court "would retain jurisdiction to decide the issue of attorneys' fees, thus providing sufficient judicial oversight to justify an award of attorneys' fees and costs." *Barrios*, 277 F.3d at 1134 n.5. Similarly, in *Richard S.*, the court noted that the settlement was not "purely private" because (1) the parties stated the terms of the agreement on the record before the magistrate judge; (2) the agreement was reduced to writing

and filed with the court, which then dismissed the case "pursuant to" the settlement; and (3) the district court retained jurisdiction to resolve the issue of attorneys' fees. *Richard S.*, 317 F.3d at 1088. Since these Ninth Circuit rulings confirmed the prevailing party status of plaintiffs who reached settlement agreements that required at least some judicial involvement, it is not clear how that court would approach a case in which the plaintiffs resolve their claims through agreements in which the courts had no involvement whatsoever.

D. SETTLEMENT AGREEMENTS WITH JUDICIAL INVOLVEMENT

Between purely private settlement agreements, on the one hand, and consent decrees, on the other hand, are a range of situations in which federal lawsuits are resolved with some sort of judicial involvement, approval, or oversight. The courts have reached varying conclusions on the question of how much judicial involvement is necessary to create prevailing party status.

The Eighth Circuit has taken the most restrictive approach. In *Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990 (8th Cir. 2003), the plaintiffs secured a court-approved class action settlement agreement that required the district court to retain jurisdiction for purposes of enforcement. The Court of Appeals, in a split decision, held that the plaintiffs were not prevailing parties despite the district court's approval of the agreement and retention of jurisdiction. The majority interpreted *Buckhannon* to limit prevailing party status only to those plaintiffs who secure judgments or consent decrees; no lesser level of judicial involvement in a settlement agreement would be sufficient to confer prevailing party status on a plaintiff. *Id.* at 993.

In contrast, the Ninth Circuit has taken the most liberal approach. As described above, in *Barrios v. California Interscholastic Federation*, 277 F.3d at 1134 n.5, and *Richard S. v. Dep't of Developmental Services*, 317 F.3d at 1086-88, the court held that the plaintiffs were prevailing parties when they secured settlement agreements that were neither approved by the court nor required the court to retain continuing jurisdiction to enforce the agreement. The court suggested that the agreements' requirements that the court would decide the issue of attorneys' fees was sufficient to provide the necessary judicial involvement to justify an award of attorneys' fees.

Most other appellate courts have adopted an approach midway between the Eighth and Ninth Circuits. These courts have held that a settlement agreement will be sufficient to confer prevailing party status on the plaintiff if the agreement is somehow incorporated in a court order and there is some form of continuing jurisdiction. *See T.D. v. LaGrange School Dist. No. 102*, 349 F.3d 469, 478 (7th Cir. 2003); *Roberson v. Guiliani*, 346 F.3d 75, 81-83 (2d Cir. 2003); *John T. ex rel. Paul T. v. Delaware County Intermediate Unit*, 318 F.3d 545, 558 (3d Cir. 2003); *American Disability Ass'n v. Chmielarz*, 289 F.3d 1315, 1320-21 (11th Cir. 2002); *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 281-83 (4th Cir.), *cert. denied*, 537 U.S. 825 (2002); *accord Doe v. Hogan*, ___ F. Supp. 2d ___, 2006 WL 758364 at *5-*6 (S.D. Ohio Mar. 27, 2006). In contrast, mere judicial involvement in settlement negotiations or a judicial acknowledgment that a case has been settled will not be sufficient in most jurisdictions to confer prevailing party status on the plaintiff. *See T.D. v. LaGrange School Dist. No. 102*, 349 F.3d at 479; *Smyth ex rel. Smyth v. Rivero*, 282 F.3d at 281-82; *Oil, Chemical & Atomic Workers Internat'l Union v. Dep't of Energy*, 288 F.3d 452, 458 (D.C. Cir. 2002); *Dorfsman v. Law School Admissions Council, Inc.*, Civil Action No. 00-0306, 2001 WL 1754726 (E.D. Pa. Nov. 28, 2001).

E. PRELIMINARY INJUNCTIONS

Because the legal relationship between the parties must change for the plaintiff to be deemed "prevailing," purely procedural or interim victories (e.g., obtaining a preliminary injunction or successfully defending against a motion to dismiss) have generally been deemed insufficient (both before and after *Buckhannon*) to transform a plaintiff into a prevailing party, even though it effects some judicially sanctioned change in the parties' legal relationship. *See Hewitt v. Helms*, 482 U.S. 755, 760 (1987); *Northern Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1085-86 (8th Cir. 2006); *NAACP Detroit Branch v. Detroit Police Officers Ass'n. (D.P.O.A.)*, 46 F.3d 528, 531 (6th Cir. 1995); *LaRouche v. Kezer*, 20 F.3d 68, 72-76 (2d Cir. 1994). A preliminary injunction that simply maintains the status quo and is not a final ruling on the merits will not confer prevailing party status. *Northern Cheyenne Tribe v. Jackson*, 433 F.3d at 1086; *Dupuy v. Samuels*, 423 F.3d 714, 721-25 (7th Cir. 2005); *Thomas v. National Science Foundation*, 330 F.3d 486, 493 (D.C. Cir. 2003); *John T. ex rel. Paul T. v. Delaware County Intermediate Unit*, 318 F.3d at 558-60; *Dubuc v. Green Oak Township*, 312 F.3d 736, 753-54 (6th Cir. 2002); *Race v. Toledo-Davila*, 291 F.3d 857, 858 (1st Cir. 2002); *Smyth ex rel. Smyth v. Rivero*, 282 F.3d at 276-77.

Yet, even post-*Buckhannon*, courts have recognized that there are circumstances, albeit rare, in which a party who has only secured a preliminary injunction may be a prevailing party. The Eighth Circuit, for instance, has noted that "[m]ost of our sister circuits have concluded that some preliminary injunctions are sufficiently akin to final relief on the merits to confer prevailing party status." *Northern Cheyenne Tribe v. Jackson*, 433 F.3d at 1086 (collecting cases); *accord Dupuy v. Samuels*, 423 F.3d at 719, 723 & n.4; *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 946 (D.C. Cir. 2005); *Richard S. v. Dep't of Developmental Services*, 317 F.3d at 1089. Such a preliminary injunction would be one that is "much like the grant of an irreversible partial summary judgment on the merits." *Northern Cheyenne Tribe*, 433 F.3d at 1083. For example, a case that becomes moot after entry of a preliminary injunction might be the basis for prevailing party status. *Dupuy v. Samuels*, 423 F.3d at 723 & n.4 (collecting cases).

F. OTHER COURT-ORDERED, BUT INTERIM, RELIEF

Aside from certain preliminary injunctions and court-approved settlements, courts have held that certain other orders may be sufficient to confer prevailing party status on the plaintiff, even if he ultimately lost on final judgment or entered into a private settlement agreement. The key is whether there has been substantive involvement by the judge that provides the necessary judicial *imprimatur* on the change in the legal relationship of the parties and conferred at least some of the benefit sought. Each of these decisions tends to be very fact-specific. The following are examples of cases in which the courts have found the plaintiffs to be prevailing parties:

- In *Carbonell v. Immigration and Naturalization Service*, 429 F.3d 894, 899-902 (9th Cir. 2005), the court held that an alien was a prevailing party based on a court order that incorporated a stipulation by the parties to stay his deportation subsequent to which his case was dismissed when the government granted his motion to reconsider his deportation and allowed him to re-open his case. The court concluded that the order had the necessary judicial *imprimatur*, materially altered the legal relationship of the parties, and provided him with the desired relief.

- In *Vacchio v. Ashcroft*, 404 F.3d 663, 674 (2d Cir. 2005), the petitioner was held to be the prevailing party when the court ordered his release on bail pending appeal. The court reasoned that the bail decision involved an assessment of the merits and materially altered the legal relationship of the parties.

- In *Preservation Coalition of Erie County v. Federal Transit Admin.*, 356 F.3d 444, 452 (2d Cir. 2004), the court held that the plaintiff was the prevailing party based on the lower court's ruling that the defendant's challenged environmental impact statement (EIS) was insufficient. The district court ordered the defendant to develop a supplemental EIS, and subsequently the parties resolved the case by a settlement agreement embodied in a stipulation and order.

- The court in *Edmonds v. F.B.I.*, 417 F.3d 1319, 1322-27 (D.C. Cir. 2005), held that the plaintiff in a FOIA case was prevailing party because she secured a partial summary judgment ruling that ordered the FBI to expedite its review of the requested documents and resulted in the FBI's production of some responsive documents – even though the court ultimately held that the FBI need not produce many additional responsive documents. The court based the plaintiff's prevailing party status on the fact that there was a judicial order that resulted in a material change in the parties' legal relationship.

- In *T.D. v. LaGrange School Dist. No. 102*, 349 F.3d at 472-73, 479-80, the Seventh Circuit held that the parents in an IDEA case were prevailing parties based on the court's order that the school evaluate the child to determine his eligibility for IDEA benefits and reimburse the parents for the cost of an aide and transportation to a private school, even though the case ultimately was resolved through a private settlement.

- In *Utility Automation 2000, Inc. v. Choctawhatchee Elec. Cooperative, Inc.*, 298 F.3d 1238, 1248 (11th Cir. 2002), the court held that the plaintiff was the prevailing party based on its acceptance of Rule 68 offer of judgment since it had the judicial *imprimatur* necessary for prevailing party status.

V. *BUCKHANNON* AND IDEA ADMINISTRATIVE PROCEEDINGS

The impact of *Buckhannon* in IDEA cases has been particularly contentious. As noted above, courts have held that *Buckhannon* does apply to IDEA cases. More troublesome has been the actual application of *Buckhannon's* language that seems to require a "judicial" *imprimatur* on relief as a prerequisite to prevailing party status since (1) the IDEA explicitly allows parents to recovery attorneys' fees if they prevail in any "action *or proceeding*," 20 U.S.C. § 1415(i)(3)(B)(i) (emphasis added); and (2) in fact, many IDEA cases are resolved at the administrative level so that the relief has no "judicial" *imprimatur* or sanction even, for example, when the independent hearing officer (IHO) rules in favor of the plaintiffs and requires the defendants to correct the violations.

Most courts have resolved this issue by adapting the principles of *Buckhannon* to the administrative IDEA context, *i.e.*, conferring prevailing party status on those who secure relief through final decisions of IHOs and those who secure relief that has an "administrative *imprimatur*" while denying relief to those whose relief is achieved only through private settlements. Thus, applying *Buckhannon*, courts have concluded that parents are not prevailing parties if they secure relief solely through private settlements. *Smith v. Fitchburg Public Schools*, 401 F.3d at 26-27; *Doe v. Boston Public Schools*, 358 F.3d 20, 30 (1st Cir. 2004); *John T. ex rel. Paul T. v. Delaware County Intermediate Unit*, 318 F.3d at 560-61. In contrast, parents who receive IHO-ordered relief on the merits are prevailing parties. *A.R. ex rel. R.V. v. New York City Dep't of Educ.*, 407 F.3d at 76, 77 ; *T.D. v. LaGrange School Dist. No. 102*, 349 F.3d at 479-80. As the Second Circuit explained: "[A]n IHO's decision on the merits in an IDEA proceeding does constitute '*administrative imprimatur*.' Although not 'judicial,' such an order changes the legal relationship between the parties: Its terms are enforceable, if not by the IHO itself, then by a court, including through an action under 42 U.S.C. § 1983." *A.R. ex rel. R.V. v. New York City Dep't of*

Educ., 407 F.3d at 76 (emphasis in original). "In order to give effect to the IDEA's intent to permit awards to winning parties in administrative proceedings even where there has been no judicial involvement, ... we conclude that the combination of administrative *imprimatur*, the change in the legal relationship of the parties arising from it, and subsequent judicial enforceability, render such a winning party a 'prevailing party' under *Buckhannon*'s principles." *Id.*

Similarly applying *Buckhannon* in the IDEA's administrative context, courts have held that parents are entitled to attorneys' fees if they secure a settlement that in some way has an administrative *imprimatur* or is administratively sanctioned. For example, the Second Circuit held that parents were entitled to attorneys' fees in an IDEA case that resulted in a settlement by the parties that was "so ordered" by the IHO. *A.R. ex rel. R.V. v. New York City Dep't of Educ.*, 407 F.3d at 76-78; *accord P.N. ex rel. M.W. v. Clementon Bd. of Educ.*, ___ F.3d ___ 2006 WL 861191 (3d Cir. Apr. 5, 2006).

VI. IMPACT OF *BUCKHANNON* ON FEES FOR POST-JUDGMENT MONITORING AND ENFORCEMENT

Prior to *Buckhannon*, it was well-settled that courts have authority to award attorneys' fees for work to monitor, implement, and enforce a consent decree or settlement agreement. *See Joseph A. v. New Mexico Dep't. of Human Services*, 28 F.3d 1056, 1059 (10th Cir. 1994); *Eirhart v. Libbey-Owens-Ford Co.*, 996 F.2d 846, 850 (7th Cir. 1993); *Duran v. Carruthers*, 885 F.2d 1492, 1495 (10th Cir. 1989); *McDonald v. Armontrout*, 860 F.2d 1456, 1461 (8th Cir. 1988); *Norman v. Housing Authority of Montgomery*, 836 F.2d 1292, 1305 (11th Cir. 1988). Courts held that, if the post-judgment work was to preserve the fruits of the original judgment or settlement and is "'inextricably intermingled with the original claims in the lawsuit,'" then there is no need for the court to assess whether the plaintiff prevailed in the later activities. *Plyler v. Evatt*, 902 F.2d 273, 280, 281 (4th Cir. 1990); *Turner v. Orr*, 785 F.2d 1498, 1503-04 (11th Cir. 1986). *Cf. Joseph A. v. New Mexico Dep't. of Human Services*, 28 F.3d at 1058 (degree of success in post-judgment work is consideration, but more important factor is whether work done was necessary to achieve final result). *But see Brewster v. Dukakis*, 3 F.3d 488, 492 (1st Cir. 1993) (upholding ban on fees for "routine monitoring" of a consent decree many years into the litigation).

Buckhannon has called into question whether these standards for compensation for post-judgment or post-decree work remain sound law or whether, instead, a plaintiff will only be entitled to fees for post-judgment or post-decree monitoring and enforcement if such post-judgment or post-decree work results in a new, judicially sanctioned order or agreement. The few post-*Buckhannon* cases on this issue have yielded mixed results.

In *Alliance to End Repression v. City of Chicago*, 356 F.3d 767 (7th Cir. 2004), the court rejected the plaintiffs' request for $1 million for monitoring enforcement of a decades-old consent decree, including compensation for failed contempt motions, failed opposition to the defendants' efforts to modify the decree, and efforts to monitor compliance with the decree "which also bore no fruit." *Id.* at 771-73. Judge Posner, writing for the court, questioned whether pre-*Buckhannon* cases that allowed fees for post-decree monitoring that does not result in post-decree orders remained good law. *Id.* at 770-71. "Monitoring may reduce the incidence of violations of a decree, but if it does not produce a judgment or order, then under the rule of *Buckhannon* it is not compensable." *Id.* at 771. Thus, post-judgment litigation must be treated as a discrete phase analogous to a freestanding lawsuit; if there is no judgment or new order, there can be no fees. *Id.* at 773. The court distinguished cases in which the consent decree itself required the plaintiffs to monitor, so that the plaintiffs' counsel is expected to enforce the decree and the decree creates a contractual entitlement to fees. *Id.* at 770, 771, 772. Absent such an obligation to monitor or enforce that is required by the decree, the court suggested that there was no obligation – statutory, contractual, or ethical – to monitor the decree or oppose the defendant's proposed modification of the decree. *Id.* at 772-73. Without an obligation to monitor or enforce the decree, the court suggested that the attorneys "could not appropriate for themselves a guaranteed lifetime income by bringing and losing a series of actions to enforce the decree and charging the expense to the City and thus to the taxpayers. The class-action device is not intended to be a lawyers' gravy train." *Id.* at 773.

The Eighth Circuit in a post-*Buckhannon* ruling, however, did not deviate from prior law that allowed fees for post-judgment or post-decree monitoring and enforcement without requiring that the plaintiff meet *Buckhannon*'s standards after the initial judgment or decree. In *Cody v. Hillard*, 304 F.3d 767 (8th Cir. 2002), the plaintiffs sought fees in a long-running prison conditions lawsuit that resulted in a consent decree entered in

1985. *Id.* at 771. In 1996, the state moved to dissolve the consent decree on the basis that it was in substantial compliance with the decree. *Id.* at 772. After a ruling, appeal, and remand, the parties entered into a new agreement approved by the court in 2000. *Id.* The plaintiffs then moved for attorneys' fees for work performed since 1995. *Id.* The court noted that the initial consent decree in 1985 made the plaintiffs the prevailing party under *Buckhannon*. *Id.* at 773. It then examined whether the plaintiffs were entitled to post-decree fees under pre-*Buckhannon* standards, holding that they should be awarded fees for post-judgment monitoring, work to contest the state's motion to dissolve the consent decree, and work to negotiation and secure approval of the subsequent settlement agreement since the work was "inextricably intertwined" with the issues in the consent decree. *Id.* at 773-75. The court specifically rejected the state's assertion that, under *Buckhannon*, the plaintiffs should be denied fees for their work to contest the motion to dissolve the consent decree because they did not prevail, but only secured a remand from the appellate court. *Id.* at 775-75. In contrast with the Seventh Circuit's statement in *Alliance to End Repression* that attorneys have no duty to contest a defendant's effort to undo a consent decree, the Eighth Circuit wrote that "[w]hen a remedial consent decree is threatened, 'plaintiffs' counsel [are] under clear obligation to make the defensive effort.'" *Id.* at 775.

Notably, the Seventh Circuit's opinion in *Alliance to End Repression* has faced resistance – both within and outside of the Seventh Circuit. In *Gautreaux v. Chicago Housing Auth.*, No. 66 C 1459, 2005 WL 1910849 (N.D. Ill. Aug. 9, 2005), the court awarded plaintiffs fees for post-decree work on the basis that the post-decree proceedings were not "clearly separable" from the original judgment order, but, rather, were "all part of one active equitable case, in which compliance has always been at issue, and modifications and clarifications of the original judgment order must continuously be made to account for changing circumstances." *Id.* at *2. While the court claimed that this distinguished the case from *Alliance to End Repression*, much the same description could have been used to describe the post-decree proceedings in *Alliance to End Repression* that the Seventh Circuit held to be non-compensable.

Recently, *Alliance to End Repression*, was both distinguished and criticized in *Grier v. Goetz*, ___ F. Supp. 2d ___, 2006 WL 572314 (M.D. Tenn. Mar. 7, 2006). In that case, the court held that the plaintiffs were entitled to fees for their partially successful defense of the defendants' effort to modify the

decree since they secured a judicial determination that forced the defendant to maintain the original change in the parties' legal relationship . *Id.* at *8-*11. The court distinguished *Alliance to End Repression* because, in that case, the plaintiffs had completely failed on the merits of their effort to defend the consent decree. *Id.* at *11-*12. The court also held that the plaintiffs were entitled to fees for post-decree monitoring. *Id.* at *14-*17. The court rejected the assertion that *Buckhannon*'s rationale precluded fees for such work. *Id.* at *15. Criticizing the analysis in *Alliance to End Repression*, the court wrote that the "Seventh Circuit wholly ignores the fact that post-decree monitoring also assists in implementing a consent decree" so that "changes in a defendant's conduct as result of plaintiff's post-decree monitoring are not 'voluntary,' as the term is used in *Buckhannon*, but are 'required' by a previously-issued court-approved decree. Therefore, when plaintiff's monitoring efforts are successful, they should be rewarded." *Id.* Finding that the plaintiffs' monitoring "was essential in preserving their initial success" in the consent decree and was helpful to the state in its implementation of the decree, the court ruled that the plaintiffs were entitled to fees for monitoring. *Id.* at *17 ; *see also Barcia v. Sitkin*, No. 79 Civ. 5831, 2005 WL 1606038 at *3 (S.D.N.Y. July 7, 2005) (allowing fees for post-judgment monitoring); *Burt v. County of Contra Costa*, No. C-73-0906 MHP, 2001 WL 1135433 at *9 n.11 (N.D. Cal. Aug. 20, 2001) (same).

VII. PRACTICE TIPS

Five years after *Buckhannon*, it is increasingly obvious that efforts to restrict that ruling to the ADA and FHA or to cases that are mooted by legislative action are unlikely to succeed. As such, you may wish to consider the following:

- Do not assume that the defendant's efforts to fix the problem have mooted the case. If the issue is one that is capable of repetition, yet evading review, it will not be moot. Also, there is a solid body of case law holding that, if a government entity is the defendant, voluntary cessation of its wrongful conduct will not necessarily moot the action. If the action is not moot, you can proceed with the case and, if successful, secure attorneys' fees as well as declaratory and injunctive relief.

- If part of your case can be decided early, you should try to secure at least a limited ruling. Even if the case is subsequently privately resolved, such an interim ruling may be sufficient to justify an award of fees.

- If you are negotiating a settlement, your first goal should be to secure a consent decree. In many cases, of course, defendants will not want to use that mechanism.

- If it is not possible to resolve the case by a consent decree, the next best solution would be to have the agreement submitted to the court for its approval and to have the court retain jurisdiction for the purposes of enforcement.

- Do not assume, simply because a case will be resolved using a settlement agreement or some mechanism other than a consent decree, that a defendant will be unwilling to pay attorneys' fees and costs. A defendant also has an incentive to end litigation and in certain circumstances will be willing to pay some amount of fees to resolve the case, even if the settlement does not result in any judicial approval or oversight. Of course, in these circumstances, you will probably need to be fairly flexible in agreeing to a fee amount.

- If you secure a consent decree or settlement with continuing jurisdiction, you should try to include provisions in the agreement that require the plaintiffs to monitor implementation and, even better, that provide for periodic fee petitions during the implementation period.