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THE EFFECT OF BUCKHANNON ON THE AWARDING OF ATTORNEY FEES

*Leon Friedman*¹

In 2001, the United States Supreme Court decided *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*,² which destroyed the so-called catalyst theory. The catalyst theory refers to the bringing of a lawsuit, but prior to the conclusion of the suit, the defendant settles with the plaintiff according to the plaintiff's basic original demand for relief.³ Every circuit except the Fourth Circuit⁴ had

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² 532 U.S. 598 (2001).

³ *Id.* at 601. See also *Stanton v. S. Berkshire Reg'l Sch. Dist.*, 197 F.3d 574, 577 (1st Cir. 1999); *Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 546-50 (3d Cir. 1994).

⁴ *S-1 By & Through P-1 v. State Bd. Of Educ. of North Carolina*, 21 F.3d 49, 51 (4th Cir. 1994) (holding "[a] person may not be a 'prevailing party' . . . except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought. . . .").

held that if you are a catalyst for a change in the defendant's conduct, you "prevailed" in the suit. Therefore, the plaintiff should be entitled to legal fees.⁵ In *Buckhannon*, the Court confirmed that a party must prevail in order to be entitled to legal fees, and a voluntary change by the defendant does not establish the legal requirement for obtaining fees.⁶ In other words, a party must obtain an enforceable judgment or a consent decree, which is the functional equivalent of a judgment, before it will be considered a prevailing party relative to fees.

The *Buckhannon* case involved the issuance of an injunction. The West Virginia Fire Marshall mandated that as a requirement for consideration for placement in a nursing home, the person had to be physically able to move himself or herself to safety in case of a fire.⁷ A group brought an action on behalf of a 102 year old female resident of the nursing home who was unable to climb down the fire escape unassisted.⁸ In reaction to this

⁵ *Buckhannon*, 532 U.S. at 601.

⁶ *Id.* at 610.

⁷ *Id.* at 600.

⁸ *Id.* at 601. The nursing home filed suit after receiving cease and desist orders requiring closure of its residential care facilities within thirty days, on behalf of itself, other similarly situated homes, and residents. *Id.*

lawsuit, the state legislature amended the law to allow a resident to stay in a nursing home even if unable to exit independently.⁹ Therefore, the amendment allowed her to remain in the nursing home.¹⁰ The group then sought additional relief on her behalf, and the district court dismissed the case using the holding in *S-1 By and Through P-1 v. State Board of Education of North Carolina*¹¹ as its rationale.¹² Consequently, the case became moot because the legislature amended the statute.¹³ Thereafter, the group sought attorney fees.

The Fourth Circuit held that no attorney fees were obtainable because there was not an enforceable judgment.¹⁴ The United States Supreme Court, in a five to four decision, held “[t]he catalyst theory does not exist and a party cannot get fees as a prevailing party unless there is a judgment in their favor or there is a consent decree.”¹⁵ The rationale for the Court’s holding is that a

⁹ *Id.*

¹⁰ *Buckhannon*, 532 U.S. at 601.

¹¹ 21 F.3d at 49.

¹² *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 19 F. Supp. 2d 567 (N.D. W. Va. 1998).

¹³ *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, No. 99-1424, 2000 U.S. App. LEXIS 720, at *3 (4th Cir. Jan. 20, 2000).

¹⁴ *Id.*

¹⁵ *Buckhannon*, 532 U.S. at 610.

consent decree involves a judicial officer approving an agreement. Judges do not sign consent decrees unless they are sure there is merit to the consent decree and, moreover, the consent decree gives sufficient judicial imprimatur providing the court with knowledge that the case had merit from the onset.¹⁶

The question arose regarding what this theory applies to. Does this apply, for example, to a monetary settlement? What happens if a party brings an action for money damages and is awarded money damages, but for one reason or another the money is not embodied either in a judgment, because the case was settled, or in a consent decree? There are many reasons, however, why the amount of money contained in a settlement is excluded from the consent decree. Many government agencies in this district, for example, do not want to list or declare the amount of money that they have settled for in an open court file because everyone will have access to the information. A second reason is that judges do not like to have secrets. There is a whole body of law that states there should not be sealed files that indicate what people have settled for.

¹⁶ *Id.* at 605.

In *Freytes v. New York City Transit Authority*,¹⁷ the Transit Authority settled a pregnancy disability claim. The Transit Authority's practice regarding pregnant employees was to immediately relegate them to a lower paying job that avoided all dangerous activities because of fear of their potential effect on the pregnancy.¹⁸ This resulted in reduced wages for these employees. Consequently, an action was brought seeking five months back pay plus emotional distress damages.¹⁹ After the completion of discovery, the Transit Authority settled with the plaintiff, awarding her the entire five months of back pay plus an additional \$25,000 in emotional distress damages.²⁰

The ways in which settlements occur are very important because the magistrate judge will conduct a settlement conference. In this particular case, the occurrences at the settlement conference were as follows. One person came in and asked, "Well, what is the most you are willing to give?" The other party then responded,

¹⁷Civ. No. 01-9443 (2d Cir.) (pending).

¹⁸ Brief for Appellee at 32, *Freytes v. New York City Transit Auth.*, Civ. No. 01-9443 (2d Cir.) (pending).

¹⁹ *Id.*

²⁰ *Id.* at 34.

“What is the least you will take?” All of the parties were not in the magistrate’s chambers at the same time. At the end of the conference, the magistrate said, “Okay, we will settle for five months back pay.” Then there was a dispute over whether five months back pay consisted of twenty-one or twenty-two weeks.²¹ The reason for this dispute was a question of which five months the parties were talking about. For example, the month of February has fewer days than the month of August. The parties then wrote to the magistrate judge and she stated, “The parties have agreed to abide by my decision, and I say it is twenty-one weeks,” and the magistrate judge signed at the bottom of the attorney’s letter.²² It was very important that the magistrate signed the document.

Arguing this case in the Second Circuit, my first argument was that *Buckhannon* does not apply to monetary settlements. If a government agency awards a significant amount of money, which was substantially similar to what was originally requested, that alone should indicate that the case has merit. If judicial approval is

²¹ *Id.*

²² *Id.*

required, the fact that the magistrate judge arranged the settlement should suffice for the judicial approval requirement. In addition, the magistrate's signature was on the letter explaining what the parties stipulated. This, in effect, gives credence to the presumption that the letter was intended as a settlement, and is, therefore, the functional equivalent of a consent decree.

My opponent, Richard Schoolman, stated that the magistrate judge is not a judicial officer. This statement did not receive a lot of acceptance by the Second Circuit. Thus, the question arose as to how formal this procedure must be. The Supreme Court's decision held that a consent decree is sufficient.²³

The first question that arises is whether or not *Buckhannon* applies to monetary settlements. There are a couple of cases that discuss a Rule 68²⁴ offer of judgment.²⁵ If a Rule 68 offer of

²³ *Buckhannon*, 532 U.S. at 604.

²⁴ Rule 68 provides:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not

judgment is made and the opposing party accepts, the district court must sign that judgment.²⁶ Under Rule 68, the clerk enters the judgment. Therefore, the judge has no discretion over Rule 68 matters. A judge never gets involved. However, does this procedure satisfy the Supreme Court's concern that the case had merit? The Eleventh Circuit, in *American Disability Association v. Chmielarz*,²⁷ held that a Rule 68 judgment that is accepted by the

accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

FED. R. CIV. P. 68.

²⁵ See, e.g., *Webb v. James*, 147 F.3d 617, 623 (7th Cir. 1998) (holding the district court did not abuse its discretion in awarding plaintiff attorney fees on his Americans with Disabilities Act claim); *Haworth v. Nevada*, 56 F.3d 1048, 1052 (9th Cir. 1995) (holding Rule 68 did not preclude plaintiffs from recovering attorney fees on their claim under the Fair Labor Standards Act; however, they were precluded from recovering any fees incurred after the Rule 68 settlement offer); *Lang v. Gates*, 36 F.3d 73, 76 (9th Cir. 1994) (holding that plaintiff was not entitled to recover reasonable attorney fees after rejecting the settlement offer).

²⁶ FED. R. CIV. P. 68.

²⁷ 289 F.3d 1315 (11th Cir. 2002).

opposing side is the functional equivalent of either a consent decree or a judgment for purposes of satisfying *Buckhannon*.²⁸

The second issue arising out of *Buckhannon* is the impact of its holding on other areas. *Buckhannon* applies to civil rights cases where money is given to a prevailing party, and the party does not prevail unless it receives a judgment or a consent decree.²⁹ Judge Pauley just gave me his decision in *Laprade v. Blackrock Financial Management, Inc.*³⁰ a securities fraud case. In *Laprade*, two parties announced a merger. A security fraud caseworker came in and said that the merger would be bad for the shareholders.³¹ On the basis of this information, they did not follow through with the merger.³² Milberg Weiss, who brought the action and filed the complaint, came in and stated, "Okay, we want our attorney fees, we blocked the merger." Does *Buckhannon* apply in the securities fraud area? In *Laprade*, the court held that

²⁸ *Id.* at 1317.

²⁹ See *Johnson v. City of Aiken*, 278 F.3d 333 (4th Cir. 2002) (holding plaintiffs' success in their § 1988 claim for the "storming" of their home by police officers without warning or identifying themselves as officers of the law was not significant enough to justify the granting of an award of attorney fees).

³⁰ No. 99 Civ. 9288, 2002 U.S. Dist. LEXIS 24418 (S.D.N.Y. Mar. 28, 2002).

³¹ *Id.* at **5-6.

³² *Id.* at *6.

Buckhannon does apply, and there were no recoverable fees.³³ The judge further stated that even if he were to look at the merits of the fee application, he would decide that it had no merit because, in fact, it was not a catalyst. There were other reasons why the merger did not go through.³⁴

There are also cases involving the Endangered Species Act.³⁵ Although the Endangered Species Act does not have a prevailing party provision, it has a clause that allows a person to achieve a certain result while not being totally successful in an Endangered Species Act case.³⁶ The Ninth Circuit recently held that *Buckhannon* does not apply to the Endangered Species Act.³⁷

One issue raised by Judge Meskill in our case was regarding what happens to the nuisance value. Looking only at monetary cases, suppose a party brings a case for \$1,000,000 and

³³ *Id.* at *10.

³⁴ *Id.* at **16-17.

³⁵ Endangered Species Act of 1973, 16 U.S.C. §§ 1531- 1543 (2000).

³⁶ See *RESTORE: The North Woods v. United States Dep't of the Interior*, No. 95-37-JD, 1995 U.S. Dist. LEXIS 12154, at **11-12 (D.N.H. Aug. 4, 1995) (holding that the environmentalists were entitled to the recovery of reasonable attorney fees because they assisted the government in implementing and complying with the Endangered Species Act, thus serving the public interest).

³⁷ *Oro Vaca, Inc. v. Norton*, 55 Fed. Appx. 433, 436 (9th Cir. 2003) ("The stipulations between the parties cannot, by their own terms, fulfill the merit requirement required by the Court in *Buckhannon*.").

settles for \$1,000, is this merely nuisance value? My answer was, “Well, if the \$1,000 was in a consent decree, if it was actually in the final settlement decree, the party is not bound by *Buckhannon*.” At that point, the district court judge must weigh the worth of the legal services on a fee petition.³⁸ For example, the court awards you \$1. Even though you are the prevailing party, what is a reasonable fee for someone who gets only \$1? The reasonable fee is nothing. Accordingly, this provides the defendant, regardless of whether the defendant is a city or not, with fallback protection, even where the monetary award settled for is minimal. Thus, the defendant is allowed to assert that the plaintiff did not prevail or there was limited success when the plaintiff submitted the fee petition. The fee may be reduced on this basis.

However, plaintiff’s attorney may deal with this issue by providing for the fee in a retainer agreement.³⁹ The Supreme Court has stated that this is the correct way to alleviate the problem, so long as the hourly rate does not extend beyond the forty percent

³⁸ See, e.g., *Gisbrecht v. Earnhart*, 535 U.S. 789, 794 (2002); *Cody v. Hillard* 304 F.3d 767, 779 (8th Cir. 2002).

³⁹ See, e.g., Merrick T. Rossein, *Attorney Fees and Litigation Expenses*, C780 ALI-ABA 515, 546-47 (1993).

mark.⁴⁰ However, this will not stop an attorney if a case is settled for \$1,000. This will ordinarily allow an attorney to receive \$400 out of that amount. An attorney may want a larger fee. Therefore, in those cases where there is not a lot of money in the settlement, an attorney may require a lump sum settlement. This leads us back to the problem in *Evans v. Jeff D.*,⁴¹ where the whole question of whether to give a lump sum to be split up any way the party wants was thought to create an ethical problem before the Supreme Court acted.⁴²

Providing a private retainer agreement that discusses the amount of fees to be paid is one alternative for dealing with this situation. However, it will not solve the problem if the recovery was for a low amount. Therefore, attorneys, and in particular plaintiffs' attorneys, must have the money recorded in the final consent decree with the judge's signature. Furthermore, the consent decree should include a clause that this court retains

⁴⁰ *Id.*

⁴¹ 475 U.S. 717 (1986).

⁴² *Id.* at 727-28. The Court stated that although the attorney for the class faced an "ethical dilemma" – waiving his statutory fee award as requested by the defendant and getting the best relief for the class, when the defendant offered a settlement higher than the attorney reasonably expected, the attorney's decision to recommend accepting the settlement was the "highest standards of our profession." *Id.*

jurisdiction to enforce the terms of the agreement.⁴³ In *Kokkonen v. Guardian Life Insurance Co.*, the Supreme Court held that if there is a settlement agreement that is not part of a decree where the court retains jurisdiction, the parties merely have a contract.⁴⁴ If the city, or whomever it is that the parties are dealing with, does not assign, it is necessary to go to state court on a contract action rather than return to the federal court.⁴⁵ Thus, a plaintiff's solution to this problem is to include everything in the consent decree and have the presiding judge sign the decree.

⁴³ *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994). The Court explained that in order for the parties to comply with the terms of the settlement agreement, that agreement should be made "part of the order of dismissal – either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order." *Id.*

⁴⁴ *Id.* at 381. The Court stated that:

The suit involves a claim for breach of a contract, part of the consideration for which was dismissal of an earlier federal suit. No federal statute makes that connection (if it constitutionally could) the basis for federal court jurisdiction over the contract dispute. The facts to be determined with regard to such alleged breaches of contract are quite separate from the facts to be determined in the principal suit, and automatic jurisdiction over such contracts is in no way essential to the conduct of federal court business.

Id.

⁴⁵ *Id.* at 381-82 ("[W]e think the court is authorized to embody the settlement contract in its dismissal order . . . or retain jurisdiction over the settlement contract, if the parties agree. Absent such action, however, enforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction.").

DISCUSSION BETWEEN PARTICIPANTS

AUDIENCE MEMBER: What if there is a private settlement in a class action that needs to be approved by the judge? Can the judge approve such a private settlement agreement and dismiss the substantive claim?

PROFESSOR FRIEDMAN: In class actions, the judge has extremely broad discretion to decide who a prevailing party is and to determine the appropriate fee.⁴⁶ In the *In re "Agent Orange" Product Liability Litigation*,⁴⁷ the Second Circuit held explicitly that the district court has very broad power to decide what a reasonable fee is in a class action, common fund case.⁴⁸ Recently,

⁴⁶ See *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) where the Court noted: The court may attempt to identify specific hours that should be eliminated, or it may simply reduce the [fee] award to account for the limited success. The court necessarily has discretion in making this equitable judgment. . . . We emphasize that the district court has discretion in determining the amount of a fee award.

Id.

⁴⁷ 818 F.2d 226 (2d Cir. 1987).

⁴⁸ *Id.* at 232 ("[T]he district court then may, in its discretion, upwardly or downwardly adjust this figure by considering such factors as the quality of counsel's work, the probability of success of the litigation and the complexity of the issue.") (citing *Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1098 (2d Cir. 1977)).

Judge Pauley held in *Laprade* that “the balance of equities militates against awarding her attorneys’ fees.”⁴⁹ A district court judge under the governing law is provided with much more discretion to decide when the case is a common fund case. Thus, the district court judge decides how much the attorneys really deserve out of the common fund. Even if it is not a common fund case, a district court judge is provided with a vast amount of discretion under Rule 23 of the Federal Rules of Civil Procedure.

PROFESSOR SCHWARTZ: How do you distinguish between the government giving the plaintiff something of value, such as a public benefit or a license, and the defendant giving the plaintiff money? I agree with you that there is language in *Buckhannon* that may allow you to argue that it is limited to claims for prospective relief, but in principle it would seem to present the same type of problem.

⁴⁹*Laprade*, 2002 U.S. Dist. LEXIS 24418, at *12.

PROFESSOR FRIEDMAN: It is a lot easier to figure out the economic value of money as opposed to the economic value of a path to the river. Under these circumstances, it is much easier to apply the normal rules for determining attorney fees. In determining attorney fees, the following questions are asked: how much did you receive; how do you measure that amount of money; how does this compare to what you were looking for; and was it limited success or was it unlimited success? In other words, there are some measures or criteria that allow you to use the normal attorney fee criteria for determining a fee.

JUDGE PRATT: Apart from calculating the amount, I believe that the problem in *Buckhannon* was that they were trying to get the government to act in a certain manner and the government went ahead and did it. Presumably the government was supposed to carry out these activities. However, when paying money, the government is not supposed to pay money to private citizens unless they have a real obligation to do so that comes from the outside.

PROFESSOR FRIEDMAN: However, this is not how the Supreme Court concluded the issue.

PROFESSOR SCHWARTZ: The reason for their conclusion may be that the government might owe the plaintiff money.

PROFESSOR FRIEDMAN: The Supreme Court stated that it does not want meritless lawsuits brought where a government, in order to avoid paying a substantial amount of attorney fees at its conclusion, just settles the lawsuit.⁵⁰ This is why a consent decree, which is the judicial imprimatur that the case had merit, is necessary. When monetary compensation is involved, it is easier to figure out the outcome. The prevailing plaintiff is allowed to file the fee application, and then it is determined whether the value is merely a nuisance. If it is found to be nuisance value, the criteria of *Hensley v. Eckerhart*⁵¹ and its progeny should be

⁵⁰ *Buckhannon*, 532 U.S. at 605-06.

⁵¹ 461 U.S. 424 (1983).

applied. Therefore, the attorney receives a nominal amount in fees.⁵²

⁵² *Id.* at 440.