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Home > Committee Fights for Equal Access to Justice

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Committee Fights for Equal Access to Justice

Jeffrey Campolongo [Special to the Legal](#) [All Articles](#)
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Committee Fights for Equal Access to Justice
 By Jeffrey Campolongo

Special to the Legal

The legal rights of persons with disabilities committee (LRPWDC) is a committee of the public interest section of the Philadelphia Bar Association. The committee's members are a diverse group of practitioners specializing in, and committed to, representing persons with disabilities. The committee tries to meet once a month to discuss emerging trends in the law, developments affecting persons with disabilities, possible resolutions for the Board of Governors, as well as practical pointers in navigating these ever-changing areas of the law.

The LRPWDC was recently successful in authoring a resolution that was passed by the Board of Governors, impacting voter accessibility for persons with disabilities. In recent months, the LRPWDC has been spear-heading the effort to pass a resolution concerning the effects of the Supreme Court's decision in *Buckhannon Board and Care Home v. West Virginia Dep't of Health and Human Services*, 532 U.S. 598 (2001).

Public interest law took on a dramatic new shape on May 29, 2001. It has now been a year since the Supreme Court's landmark decision in *Buckhannon*, and federal courts around the nation are scurrying to determine exactly what the high court meant when it narrowly defined the term "prevailing party" for the purposes of awarding counsel fees.

In its 5-4 decision, the Supreme Court held that plaintiffs may only recover counsel fees from defendants if they have been awarded relief by a court, and not if they prevailed through a voluntary change in the defendants' behavior or a private settlement. The much-anticipated decision came as a surprise to many public interest lawyers inasmuch as every federal court of appeals to address the issue prior to 1994 allowed an award of counsel fees even without a judgment or consent decree.

The Buckhannon company operated assisted care homes in West Virginia and challenged a state safety regulation that would have forced it to evict residents who could not evacuate the building on their own during fires. The company claimed the state law violated the Americans with Disabilities Act and the Fair Housing Act barring discrimination against persons with disabilities. During the litigation, and in apparent response to the litigation, the

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West Virginia legislature repealed the state regulation, effectively allowing the disabled residents to stay. Buckhannon's lawyers filed a fee petition as a "prevailing party" seeking over \$100,000 in fees. The request was denied and ultimately ended up on the steps of the Supreme Court.

In a spirited dissent, Justice Ruth Bader Ginsburg decried the decision, arguing it allowed a defendant to escape a statutory obligation to pay a plaintiff's counsel fees, even though the suit's merit led the defendant to abandon the fray, to switch rather than fight on, to accord plaintiff sooner rather than later the principal redress sought in the complaint. A former civil rights attorney herself, Ginsburg reasoned that fee shifting in favor of prevailing plaintiffs enhances both incentives to comply with legal rules and incentives to settle disputes.

Although it may appear at first blush that *Buckhannon* would have presented an obstacle to settling cases, in practice most defendants are cognizant of the plaintiff's counsel fees, and will consider the fees in settlement negotiations. Civil rights practitioners should nevertheless be cautious when structuring settlements which may include court-imposed relief. This practice is somewhat different from the customary practice in the Eastern District of Pennsylvania whereby district judges routinely issue voluntary dismissal orders pursuant to Local Rule 41(1)(b) upon notice from one of the parties "that the case has been settled."

In the aftermath of *Buckhannon*, practitioners have shown reluctance to settle disputes without some specific provision made for the payment of counsel fees. This would seem to underscore the chilling effect *Buckhannon* has had on civil rights litigation. Nevertheless, the better practice in situations where a defendant has voluntarily brought itself into compliance with the law, is to memorialize the terms of the settlement to be included in a consent decree or in a court-ordered voluntary dismissal.

As one court has pointed out, even absent the entry of a formal consent decree, if the district court either incorporates the terms of the settlement into its final order of dismissal or expressly retains jurisdiction to enforce a settlement, it may thereafter enforce the terms of the parties' agreement. (See *American Disability Ass' . Inc. v. Chmielarz*, 2002 WL 820676 (11th Cir. May 1, 2002).)

Our own 3rd Circuit recently interpreted *Buckhannon* to permit counsel fees where a stipulated settlement between the parties (1) contained mandatory language (e.g. "The [PHA] shall provide . . ."); (2) was entitled "Order"; and (3) bore the signature of the district court judge, not the parties' counsel. (See *Truesdell v. Philadelphia Housing Authority*, 2002 WL 917611 (3rd Cir. May 7, 2002).)

In the end, courts will be looking for some indicia of a change in the legal relationship of the parties to satisfy the *Buckhannon* standard. But as Ginsburg stated, "a lawsuit's ultimate purpose is to achieve actual relief from an opponent [and] at the end of the rainbow lies not a judgment but some action." When it is a lawsuit that brings about the actual action at the end of the rainbow, it should not matter what label we place on the pot of gold awaiting the advocate who fought so vigorously to get there.

- Jeffrey Campolongo specializes in plaintiff's employment discrimination matters. He is the co-chairman of the legal rights of persons with disabilities Committee of the Philadelphia Bar Association.

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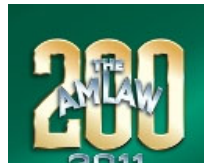
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