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The *Imprimatur of Buckhannon* on the Prevailing-Party Inquiry

By Gill Deford

> “A defendant’s voluntary change in conduct ... lacks the necessary judicial imprimatur on the change. Our precedents thus counsel against holding that the term ‘prevailing party’ authorizes an award of attorney’s fees without a corresponding alteration in the legal relationship of the parties.”
> 
> —U.S. Supreme Court, in *Buckhannon*

Shortly before the end of its 2000 term, the U.S. Supreme Court redefined the meaning of “prevailing party.” It stated:

>[E]nforceable 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 attorney’s fees .... [But] [a] defendant’s voluntary change in conduct ... lacks the necessary judicial imprimatur on the change. Our precedents thus counsel against holding that the term “prevailing party” authorizes an award of attorney’s fees without a corresponding alteration in the legal relationship of the parties.

The *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources* decision eliminated the catalyst theory, by which a plaintiff was deemed a prevailing party if the lawsuit caused the defendant to change its policy. It established that a judgment on the merits and a consent decree would confer prevailing-party status. Beyond those results, almost nothing was clear. As a consequence, the federal courts have devoted since mid-2001 an extraordinary amount of time and ef-

fort to determining when a plaintiff has prevailed.4

While the lower courts have struggled with applying the Supreme Court’s analysis, the Court itself has largely ignored Buckhannon.3 Until June 2007, the Court had cited the decision only once.4 Last spring, however, the Court dipped its collective toe into the controversy of whether and when obtaining a preliminary injunction was sufficient to meet the prevailing-party definition, but, other than resolving the easiest aspect of that issue, the Court did not provide additional guidance.5

Here I attempt a limited update on Buckhannon’s progeny. Given the number of decisions that have been issued, with the many analytical permutations that have been spawned, only a few issues can be considered. Thus I explain how courts have applied the basic Buckhannon concepts and look more closely at two discrete issues of particular importance in the prevailing-party context: preliminary injunctions and postjudgment efforts.

I. Buckhannon’s “Judicial Imprimatur”

Most of the appellate courts have concluded that an event other than a decision on the merits or a consent decree may confer prevailing-party status.6 The exact parameters of what is required in the absence of one of those two events cause most of the confusion and differing results. A review of appellate decisions, which is necessarily not exhaustive, offers some insight into the varying contours of the analyses.

The D.C. Circuit has gone through a lengthy process to reach its present posture of applying what amounts to a commonsense approach to the issue. Originally, in Oil, Chemical and Atomic Workers International Union v. Department of Energy, the D.C. Circuit took an absolutist approach that only a judgment or court-ordered consent decree could confer prevailing-party status.7 Then, largely ignoring that case, the D.C. Circuit distilled from Buckhannon “three core principles” for establishing prevailing-party status: (i) a court-ordered change in the legal relationship between the parties; (ii) judgment entered for the plaintiff; and (iii) some form of judicial relief beyond a pronouncement that the defendant has violated the Constitution (or, presumably, a law).8

Applying these factors to the facts of the case, Thomas v. National Science Foundation, the D.C. Circuit concluded that the preliminary injunction did not change the legal relationship between the parties.9 Moreover, the partial summary judgment declaring the tax assessment at issue unconstitutional did not afford [the plaintiffs] any concrete relief, beyond this mere legal declaration…. This type of judicial decree is not enough to

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2On one issue, at least, the lower courts have reached a consensus: all the fee-shifting statutes that use “prevailing party” or comparable language are controlled by Buckhannon. See, e.g., Smith v. Fitchburg Public Schools, 401 F.3d 16, 22 n.8 (1st Cir. 2005); Union of Needletrades, Industrial and Textile Employees, AFL-CIO v. Immigration and Naturalization Service, 336 F.3d 200, 205 (2d Cir. 2003); Cody v. Hillard, 304 F.3d 767, 773 n.3 (8th Cir. 2002). This result flowed from the U.S. Supreme Court’s reference to judgments and consent decrees as “examples.” Buckhannon, 532 U.S. at 603 n.4.

3From June 2002, when research was completed for Clearinghouse Review’s original article on Buckhannon (see my The Prevailing Winds After Buckhannon, 36 Clearinghouse Review 313 (Sept.–Oct. 2002)), until late March 2008 Westlaw put more than 800 decisions online in which the federal courts at least mentioned Buckhannon.


6See, e.g., Rice Services Limited v. United States, 405 F.3d 1017, 1025–26 (Fed. Cir. 2005) (listing decisions with descriptions of holdings on this point). This result is not surprising because the Supreme Court itself referred to judgments and consent decrees as “examples.” Buckhannon, 532 U.S. at 605.


9Id. at 493.
warrant a fee award, because it represents not the end but the means of the litigation. A declaration must require some action (or cessation of action) by the defendant that the judgment produces ….10

Subsequently applying Thomas to Select Milk Producers Incorporated v. Johanns, in which the plaintiff obtained a preliminary injunction preventing the imposition of a new milk-pricing regulation and the parties then stipulated to dismissal, the D.C. Circuit reached the opposite conclusion.11 The legal relationship changed because the regulation was blocked; the preliminary injunction was a judgment in the plaintiff’s favor; and the preliminary injunction was “judicial relief.”12 The court found significant the government’s decision not to appeal and therefore to moot the case, and this led to the stipulated dismissal because “this is not a case in which the Government voluntarily changed its ways before judicial action was taken.”13

Later, in Edmonds v. Federal Bureau of Investigation, the D.C. Circuit explained the difference between Thomas and Select Milk Producers. The preliminary injunction in the former was insufficient to convey prevailing-party status not because it was a preliminary injunction but because it merely preserved the status quo during the litigation; the preliminary injunction in Select Milk Producers, by contrast, effected a change in the legal relationship and provided concrete relief.14 The court thus determined in the case before it that the order requiring expedited release of documents sought in the underlying Freedom of Information Act case by a date certain was sufficient to convey prevailing-party status.15

More recently, however, in Davy v. Central Intelligence Agency, the D.C. Circuit did not even cite Thomas or its factors.16 The decision appears to reflect an implicit recognition of the difficulty of applying hard-and-fast rules to a variety of litigation circumstances and outcomes. In Davy, upon the parties’ stipulation to the production of documents requested under the Freedom of Information Act, the district court approved and memorialized the stipulation in a court order.17 That was enough for the Court of Appeals, which determined that the order had a sufficient “judicial imprimatur”: “That the order is styled ‘order’ as opposed to ‘consent decree’ is of no consequence.”18 Because it contained mandatory language, was entitled “order,” and was signed by the judge, “[t]he order ... is functionally a settlement agreement enforced through a consent decree.”19 The court did everything but repeat the old expression, “If it walks like a duck and quacks like a duck….”

In 2007, in Campaign for Responsible Transplantation v. Food and Drug Administration—a decision relying on Davy—the D.C. Circuit restated the relative importance of an order as opposed to the process by which it was obtained: “The agreement of the defendant to terms that are mandated by a court order, requiring the agency to release documents, is beside the point. Once an order has been adopted by the court, requiring the agency to release documents, the legal relationship between the parties changes.”20 While the D.C. Circuit continues to cite Oil, Chemical and Atomic

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10Id. at 493–94 (internal quotation marks and citation omitted).
12Id. at 947–49.
13Id. at 949.
15Id. at 1322–23.
17Id. at 164.
18Id. at 166.
19Id.
20Campaign for Responsible Transplantation v. Food and Drug Administration, 511 F.3d 187, 197 (D.C. Cir. 2007).
Workers International Union as good law, that decision no longer prevents the prevailing-party designation when a case is not resolved via a document entitled “consent decree.”

In spring 2008 the D.C. Circuit reiterated its holdings in Edmonds, Davy, and Campaign for Responsible Transplantation, effectively establishing them rather than Oil, Chemical and Atomic Workers International Union as the controlling circuit authority. The court reiterated its view from Davy that there is "no functional difference between a joint stipulation and order and a settlement agreement enforced through a consent decree, which the Buckhannon Court held may serve as the basis for an award of attorneys’ fees.”

Other courts reached essentially the same conclusion but in a more expeditious fashion. In Smyth v. Rivero the Fourth Circuit, while rejecting prevailing-party status in the case before it because the settlement agreement was not incorporated into the court's order of dismissal, made this observation less than a year after Buckhannon came down:

We doubt that the Supreme Court’s guidance in Buckhannon was intended to be interpreted so restrictively as to require that the words “consent decree” be used explicitly. Where a settlement agreement is embodied in a court order such that the obligation to comply with its terms is court-ordered, the court’s approval and the attendant judicial oversight (in the form of continuing jurisdiction to enforce the agreement) may be equally apparent. We will assume, then, that an order containing an agreement reached by the parties may be functionally a consent decree for purposes of the inquiry to which Buckhannon directs us, even if not entitled as such.

Other appellate courts similarly recognized relatively early on that appropriate settlement agreements could operate to confer prevailing-party status. Citing Smyth, the Eleventh Circuit concluded that the plaintiff had prevailed when the settlement agreement was incorporated into the order of dismissal or the court retained the jurisdiction to enforce it: "Its authority to do so clearly establishes a 'judicially sanctioned change in the legal relationship of the parties,' as required by Buckhannon, because the plaintiff thereafter may return to court to have the settlement enforced.”

The Second Circuit also quickly recognized that an order of dismissal in which the district court retained jurisdiction is not significantly different from a consent decree and entails a level of judicial sanction sufficient to support an award of attorney’s fees. Consent decrees are enforceable in federal

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21See id. at 193–94.


23Id. at 367 (internal quotation marks and citation omitted). The court also sarcastically expressed dissatisfaction with the government’s refusal to recognize the state of the circuit’s law: “Because we recently led interested readers on a thorough tour of this case law, we decline to repeat the exercise here even though, at least as the FBI is concerned, our holdings apparently maintain some aura of mystery.” Id. (emphasis added); see also id. at 370 (“the government’s decision to dust off a thoroughly discredited argument and present it to us anew wastes both our time and the government’s resources”).


25American Disability Association Incorporated v. Chmielarz, 289 F.3d 1315, 1320 (11th Cir. 2002) (Clearinghouse No. 54,899) (citation omitted). Like many other courts undertaking this analysis, the Eleventh Circuit relied on the Supreme Court’s decision in Kokkonen v. Guardian Life Insurance Company of America, 511 U.S. 375, 381 (1994), which distinguished, on the one hand, between orders of dismissal in which the district court retained jurisdiction to enforce or that incorporated the terms of the settlement agreement and, on the other, those orders that were purely private.

26Truesdell v. Philadelphia Housing Authority, 290 F.3d 159, 165 (3d Cir. 2002).
court because they are orders of the court; the Agreement is enforceable in federal court because a violation of the Agreement is a violation of the court’s dismissal Order. Both are, in the terms used by the Buckhannon court, “court-ordered change[s] in the legal relationship between the plaintiff and the defendant.”

The Second Circuit later noted that, by contrast, a private settlement without an order retaining jurisdiction “does not provide prevailing party status to a plaintiff because, by its own terms, it eliminate[s] the ongoing judicial oversight in favor of restarting the review process from scratch.”

The Seventh Circuit also quickly accepted a settlement as establishing prevailing-party status if its terms “were incorporated into the dismissal order and the order was signed by the court rather than the parties, or the order provided that the court would retain jurisdiction to enforce the terms of the settlement.”

The Seventh Circuit, however, embraced an unfortunate position touted by the D.C. Circuit. The Seventh Circuit held that, as the only judgment in this case is a determination that [the plaintiff’s] rights were violated,” there was no judicial relief and thus no prevailing-party status. Terming the “relief requirement [to be] the practical impact of the lawsuit,” the Seventh Circuit apparently read Buckhannon and some of the D.C. Circuit’s interpretations of Buckhannon to mean that declaratory relief alone was not sufficient to establish prevailing-party status. If that approach holds up, it would preclude fee awards in those cases where a district court, in exercising its discretion, declines to order injunctive relief along with a declaratory judgment.

The awards for the most and least surprising analyses go to, respectively, the Eighth and the Ninth Circuits. In Christina A. v. Bloomberg the Eighth Circuit majority stated without equivocation that “Buckhannon ... makes it clear that a party prevails only if it receives either an enforceable judgment on the merits or a consent decree.” Accordingly, although the district court judge retained jurisdiction in the settlement agreement, the agreement not subjecting the defendant to the possibility of a contempt citation precluded the plaintiff from prevailing.

The Eighth Circuit later confirmed its Christina A. approach. In a more recent decision, however, the court may have backed off slightly from that extreme position. Relying on Sierra Club v. City of Little Rock, it observed that Christina A. did not foreclose “the question whether other types of court orders, such as declaratory judgments and preliminary injunctions, may ever result in the requisite judicially sanctioned material alteration in the parties’ legal relationship.” However, the Eighth Circuit apparently has not altered its position that a settlement agreement, regardless of its structure and effect, cannot confer prevailing-party status.

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27Roberson v. Giuliani, 346 F.3d 75, 82–83 (2d Cir. 2003) (Clearinghouse No. 55,458) (citation omitted).

28Preservation Coalition of Erie County v. Federal Transit Administration, 356 F.3d 444, 451 (2d Cir. 2004). In that same decision, however, the court held that the plaintiff had prevailed by obtaining a court-ordered Supplemental Environmental Impact Statement because, although the statement was only interlocutory, it “was both judicially sanctioned and effectuated a substantive, material alteration in the legal relationship of the parties.” Id. at 452.

29Petersen v. Gibson, 372 F.3d 862, 866–67 (7th Cir. 2004) (citing T.D. v. LaGrange School District No. 102, 349 F.3d 469, 478–79 (7th Cir. 2003)).

30Id. at 866 (citing Buckhannon, 532 U.S. at 606, and Thomas, 330 F.3d at 488).

31Id. at 865–66. At least one other circuit, the Eighth, explicitly agrees with the view that a declaratory judgment alone is not sufficient to establish prevailing-party status. See Sierra Club v. City of Little Rock, 351 F.3d 840, 845 (8th Cir. 2003).

32Christina A. v. Bloomberg, 315 F.3d 990, 993 (8th Cir. 2003) (Clearinghouse No. 55,120) (citation and footnote omitted; emphasis added).

33Id. at 993–94.

34See Sierra Club, 351 F.3d at 846.

35Northern Cheyenne Tribe v. Jackson, 433 F.3d 1083, 1085 n.2 (8th Cir. 2006).
The Ninth Circuit, of course, continues to operate on its own generator. It quickly concluded after *Buckhannon* that an enforceable settlement agreement rendered the plaintiff prevailing.36 However, it reached this conclusion in *Barrios v. California Interscholastic Federation* not by a careful reading of *Buckhannon* but by relying on pre-*Buckhannon* Ninth Circuit case law and by terming the Supreme Court’s observations about judgments and consent decrees “dictum.”37

Since *Barrios*, the Ninth Circuit has offered more reasoned analyses of *Buckhannon*, noting in *Carbonell v. Immigration and Naturalization Service* that the judgments and consent decrees discussed in *Buckhannon* were “not the only examples of judicial action sufficient to convey prevailing party status.”38 In *Carbonell* the court described *Buckhannon* as establishing a two-part test: there must be “a material alteration in the legal relationship between the parties” that is “stamped with some ‘judicial imprimatur.’”39 Applying that test to a stipulation between the plaintiff and the Immigration and Naturalization Service to delay deportation for forty-five days (the stipulation was incorporated into a district court order), the Ninth Circuit held that the delay worked a material alteration in the parties’ legal relationship and that its incorporation into a court order provided the necessary imprimatur.40

Relying on *Carbonell*, a Ninth Circuit panel last year added a new twist to the concept of “judicial imprimatur.” The panel determined that remand orders to the Board of Immigration Appeals by the court’s circuit mediator “constituted material alterations of the parties’ legal relationships.”41 Because the Ninth Circuit had delegated to certain court staff the right to enter some orders, “an order by a Circuit Mediator granting an unopposed motion to remand a case to the [Board of Immigration Appeals] … bears a sufficient judicial imprimatur to satisfy the prevailing party standard of *Buckhannon*.”42

As time passes, applications of *Buckhannon* have headed off in more and more nuanced directions. In most circuits, however, that prevailing-party status is not dependent on obtaining a consent decree or judgment at least is clear.43 Still, what will suffice in any given situation remains largely uncertain. In the remainder of this article, I discuss two specific aspects of litigation where development has been considerable.

II. *Buckhannon* and Preliminary Injunctions

As the D.C. Circuit’s analyses in *Thomas* and subsequent decisions demonstrate, the lower courts have expended considerable post-*Buckhannon* energy on determining that decision’s applicability in the preliminary-injunction context. Unfortunately the Supreme Court’s recent foray into that area, *Sole v. Wyner*, resolved only one discrete aspect of the overall issue.44

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36Barrios v. California Interscholastic Federation, 277 F.3d 1128, 1134 & n.5 (9th Cir. 2002) (Clearinghouse No. 54,396).
37Id. at 1134 n.5.
38Carbonell v. Immigration and Naturalization Service, 429 F.3d 894, 898 (9th Cir. 2005) (internal quotation marks and citations omitted).
39Id. at 899–900; see also, e.g., Klamath Siskiyou Wildlands Center v. Bureau of Land Management, 522 F. Supp. 2d 1302, 1307 (D. Or. 2007) (referring to the Ninth Circuit’s “pragmatic approach” to applying *Buckhannon*).
40Carbonell, 429 F.3d at 899–901.
41Li v. Keisler, 505 F.3d 913, 918 (9th Cir. 2007).
42Id.
43This review of the case law does not purport to summarize the positions of all the circuits. Although at least one circuit has specifically declined to reach the issue of whether some event other than a consent decree or judgment could confer prevailing-party status (see Smith, 401 F.3d at 23–27 (1st Cir.); Verson v. Braintree Property Associates, No. 04cv12079-NG, 2008 WL 552652, at *5 n.10 (D. Mass. Feb. 26, 2008)), most circuits probably have dealt with the matter by now.
44Sole, 127 S. Ct. 2188.
The details of the underlying case in *Sole* are not critical to understanding the decision. The short of it is that a time-limited preliminary injunction was followed by discovery and cross-motions for summary judgment; the court denied the requested permanent injunction, and the defendants ultimately were victorious. The district court, however, awarded fees for the work on the preliminary injunction because the plaintiff did obtain relief in that phase of the case.

In her opinion for the unanimous Court, Justice Ginsburg did not attempt to establish broad rules about prevailing-party status in the context of preliminary injunctions. Instead she limited her analysis to circumstances in which the preliminary injunction is later “undone by the final decision in the same case.”

The Court observed that the preliminary injunction involved only “provisional relief” and had a “tentative character,” but “[o]f controlling importance to our decision [was that] the eventual ruling on the merits for defendants, after both sides considered the case fit for final adjudication, superseded the preliminary ruling.” In the end Wyner did not prevail because “her initial victory was ephemeral. A plaintiff who ‘secures[a] a preliminary injunction, then loses on the merits as the case plays out and judgment is entered against [her],’ has ‘won] a battle but lost[t] the war.’”

*Sole* thus resolved only one discrete circumstance involving preliminary injunctions. Indeed, the Court went to great lengths to isolate its holding from other situations that might arise:

We express no view on whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees. We decide only that a plaintiff who gains a preliminary injunction does not qualify for an award of counsel fees … if the merits of the case are ultimately decided against her.

*Sole* throws little additional light on the larger issues devolving from *Buckhannon*. Citing *Buckhannon* only once, *Sole* places considerably more emphasis on those decisions on which the Supreme Court had premised its *Buckhannon* analysis.

For all practical purposes, the Court’s first attempt to explicate the contours of *Buckhannon* ignores *Buckhannon*. Because of its limitations, *Sole* has not produced an abundance of analysis. The Eighth Circuit relied on it in a First Amendment case brought by a billboard company challenging a city ordinance.

Although the company obtained a preliminary injunction against the ordinance, the company never erected the signs, and the subsequent jury trial resulted in victory for the city.

Deciding the appeal of the fee denial, the Eighth

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45They are sufficiently unusual, however, to warrant a brief recitation. A performance artist sought to arrange nude individuals to create a peace sign on a Florida beach on Valentine’s Day, but an administrative rule prohibited nudity on Florida beaches. *Id.* at 2192. The artist filed a complaint two days before the event to allow it to proceed as planned. *Id.* The next day the district court held an emergency hearing at which the court issued a preliminary injunction allowing the performers to participate in the nude but with a screen separating them from the rest of the beach. *Id.* at 2193. The performers ignored the screen, however, and created their peace sign outside its protective cover. *Id.* After the performance and looking to the next year’s Valentine’s Day event, the artist sought a permanent injunction. *Id.* Rejecting the plaintiff’s First Amendment claim, the district court upheld the validity of the rule barring nudity. *Id.*

46*Id.*

47*Id.* at 2195 (footnote omitted).

48*Id.* at 2195–96.

49*Id.* at 2196 (citation omitted).

50*Id.*

51*Id.* at 2194.

52*Advantage Media Limited Liability Company v. City of Hopkins*, Minnesota, 511 F.3d 833 (8th Cir. 2008).

53*Id.* at 837–38.
Circuit cited *Buckhannon* to conclude that there had been no material alteration in the parties’ legal relationship.\(^{54}\) The court then found further support in *Sole* for its decision: “In both this case and *Sole*, the final judgment reversed the effect of the preliminary injunction as to the plaintiff.”\(^{55}\)

The upshot is that the area remains hazy. The Ninth Circuit previously recognized that a preliminary injunction that mooted the need for a permanent injunction was sufficient to confer prevailing-party status.\(^{56}\) And, as noted, the D.C. Circuit reached a similar conclusion when it held that prevailing-party status was not precluded by the mooting of the case after the preliminary injunction had changed the legal relationship between the parties.\(^{57}\) At the other end of the spectrum, the Fourth Circuit long held that a preliminary injunction, because of its focus on factors other than the merits of the legal claim, did not provide a basis for establishing prevailing-party status.\(^{58}\)

The circuits generally decline to find a plaintiff to be prevailing when the preliminary injunction merely preserves the status quo temporarily; they require that the injunction reflect a merits-based decision on an issue in the case.\(^{59}\) By contrast, prevailing-party status is conferred when the relief embodied in the preliminary injunction is comparable to final relief. The Eighth Circuit explained that point in these words:

> Most of our sister circuits have concluded that some preliminary injunctions are sufficiently akin to final relief on the merits to confer prevailing party status … For example, the grant of a preliminary injunction should confer prevailing party status if it alters the course of a pending administrative proceeding and the party's claim for a permanent injunction is rendered moot by the impact of the preliminary injunction. That type of preliminary injunction functions much like the grant of an irreversible partial summary judgment on the merits.\(^{60}\)

### III. Postjudgment Work in the Post-*Buckhannon* Era

Another discrete area in which *Buckhannon* has generated attention is in postjudgment work. One might reasonably surmise that the decision would have had no effect on prevailing-party status at that stage of litigation for the simple reason that, as one judge put it, “*Buckhannon* does not discuss post-judgment or post-consent-decree litigation.”\(^{61}\) Nevertheless, defendants have been quick to raise *Buckhannon* in the postjudgment context.

*Buckhannon*’s impact on postjudgment work might have been less except that the second appellate court to consider the issue, the Seventh Circuit—or, rather, Judge Richard Posner of the Seventh Circuit—was incensed over a request for postdecr
cree fees from plaintiffs’ attorneys who,
in his view, were seeking “a guaranteed lifetime income” on “a lawyers’ gravy train.”62 Determined to derail that out-of-control locomotive, Judge Posner settled on Buckhannon as the centerpiece of his effort. Although the decision hinges on its unusual facts and most courts have either found a way around it or rejected it, the mere fact of its existence requires explication.

The fee award at issue was for more than $1 million for work done from 1994 to 2001 on contempt motions, on an opposition to a motion for modification, and on monitoring compliance with the decree—a smorgasbord of postjudgment activities at which, as Judge Posner repeatedly informs us, plaintiffs’ attorneys were completely unsuccessful.63 Regardless of the rationale on which the decision was purportedly based, its underlying themes were the continuation of the case for years after the 1981 consent decree and the plaintiffs’ attorneys’ repeated failure to alter the course of events: “[I]n the present case there has for a decade now been nothing but loss—a million dollars’ worth of legal services poured down the drain.”64

The Seventh Circuit’s focus on the failure of counsel’s postjudgment efforts allowed that court, first, to distinguish the situation from that in the Supreme Court decision allowing for fees after judgment, Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air, in which the plaintiffs were partially successful.65 Having ducked around that problem, the Seventh Circuit noted that, in the absence of postdecree relief, only two types of situations made fees available: those cases in which the consent decree specifically allowed for fees for disputes brought to the court and those for postjudgment monitoring.66 Because all the decisions involving postjudgment monitoring either were pre-Buckhannon or did not result in an actual fee award, the court concluded that they “are inconsistent with the Supreme Court’s rejection in Buckhannon of the ‘catalyst’ theory of fee-shifting. 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.”67

Judge Posner also fired some dictum at the general rule that postdecree proceedings that are “inextricably intertwined” with the original decree should be considered part of the same case for fee purposes, but he ultimately relied on the timing of the postdecree work in the Alliance to End Repression v. City of Chicago case as the determinative factor: “In any event, the postjudgment proceedings here, coming as they did so many years after the consent decree went into effect, are clearly separable from the proceeding that led up to the entry of the decree.”68 Furthermore, because the decree included a provision for monitoring by a separate entity, the lawyers had no obligation to continue to represent the class, and, although they could maintain their efforts, they had no right to endless fees in the face of repeated losses.69

Judge Posner’s bottom line is that fees generally may not be awarded for unsuccessful postjudgment work. Because that work is probably segregable from the case on the merits, and is certainly so when a considerable (but undefined) “time” period has passed, concluding that the plaintiff prevailed would violate Buckhannon.

62 Alliance to End Repression v. City of Chicago, 356 F.3d 767, 773 (7th Cir. 2004).
63 Id. at 769, 770–71.
64 Id. at 770.
65 Id. at 769 (distinguishing Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air, 478 U.S. 546, 557–61 (1986)).
66 Id. at 770–71.
67 Id. at 771.
68 Id.
69 Id. at 772–73.
Courts within and without the Seventh Circuit have scrambled to distinguish the *Alliance* decision. A Chicago district court judge, ruling in a case in which the work at issue took place even longer after the decree than in *Alliance*, determined that the work was “not ‘clearly separable’ from the original judgment order” because “this case involves post-judgment work and proceedings that are all part of one active equitable case ....”  

The Seventh Circuit, while affirming, felt more constrained by the *Alliance* decision’s emphasis on postjudgment work as generally representing an autonomous event and rejected the district judge’s “not-clearly-separable” standard: “Normally, postjudgment litigation in a complex equitable proceeding is better viewed as largely free-standing from the underlying case.”

On the assumption that the postjudgment proceedings at issue were independent of the original litigation, the Seventh Circuit concluded that, in that phase, the plaintiffs “achieved substantial results, embodied in court orders, and that is enough.” That the parties had agreed on those orders was irrelevant, the court added, because “*Buckhannon* makes it clear that a judicially sanctioned consent decree is a firm basis for a fee award.”

Two other appellate courts and several district courts have considered postjudgment work post-*Buckhannon*. The Eighth Circuit repeated its prior determination that, as a general rule, “an earlier established prevailing party status extends to postjudgment work only if it is a necessary adjunct to the initial litigation.” With that overall approach, the court then divided the postjudgment work into three phases: monitoring (without a resulting order); opposition to defendant’s effort to dissolve the decree; and remand to negotiate a private settlement.

Without discussing *Buckhannon*, the Eighth Circuit concluded—and the defendants did not dispute—that fees for monitoring were appropriate. The state raised *Buckhannon* and the need for prevailing-party status with respect to opposing the motion to vacate and negotiating the settlement after remand. The Eighth Circuit, however, continued to follow circuit precedent that defending the relief was (apparently always) “inextricably intertwined with the litigation that yielded that remedy” and thus was not controlled by *Buckhannon* and did not require a new prevailing-party determination. “Similar reasoning” dictated the award of fees for negotiating the postremand settlement.

The Tenth Circuit expressly disavowed the Seventh Circuit’s take on the Supreme Court’s *Buckhannon* analysis. Ruling in a case that involved monitoring, contempt motions, and motions to modify, the Tenth Circuit reviewed Supreme Court and Tenth Circuit case law to conclude that *Buckhannon* had not overruled them and that *Alliance* was not persuasive.

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70 *Gautreaux v. Chicago Housing Authority*, No. 66 C 1459, 2005 WL 1910849, at *2 (N.D. Ill. Aug. 9, 2005) (quoting *Gautreaux v. Chicago Housing Authority*, 690 F.2d 601, 604 (7th Cir. 1982)), aff’d, 491 F.3d 649 (7th Cir. 2007).

71 *Gautreaux v. Chicago Housing Authority*, 491 F.3d 649, 656 (7th Cir. 2007).

72 Id. at 659.

73 Id.

74 *Cody*, 304 F.3d at 773 (citing *Jenkins v. Missouri*, 127 F.3d 709, 716 (8th Cir. 1997) (internal quotation marks omitted)).

75 Id.

76 Id. at 773–74.

77 Id. at 774.

78 Id. at 774–75.

79 Id. at 775.

80 *Johnson v. City of Tulsa, Oklahoma*, 489 F.3d 1089, 1138 (10th Cir. 2007).
The Tenth Circuit stated:

[W]e cannot accept the proposition that attorney fees for post-decree efforts are compensable only if they result in a judicially sanctioned change in the parties’ legal relationship. The Decree itself was such a change, and attorney fees incurred for reasonable efforts to enforce that change—that is, protect the fruits of the Decree—are compensable.81

Although the Tenth Circuit declined to view protecting “the fruits of the Decree” to include all efforts “directed at the same problem that the decree was directed at,” it reiterated the overall validity of its pre- Buckhannon view that “predicated postdecree attorney fees on the necessity of the actions to ‘preserve the plaintiffs’ prior success in achieving a consent decree….’”82 Because of an incomplete record, the court remanded the case without resolving the specific issues before it but did further advise the district court that, “though counsel’s efforts may be compensable despite the absence of a court order, the effort must still be effective…. [F]ailed efforts could rarely justify attorney fees.”83

A comprehensive evaluation of the application of Buckhannon to postjudgment fees appears in the district court decision in Grier v. Goetz.84 The district court rejected the contention that the plaintiffs’ successful defense against a requested modification of a consent decree did not alter the parties’ legal relationship; in doing so the court determined that Buckhannon did not speak to this post-judgment issue and did not undercut circuit case law.85 Further, Alliance was not on point because that decision analyzed only unsuccessful postjudgment work.86 The district court discussed several post- Buckhannon decisions that “demonstrate the continuing validity of pre- Buckhannon cases … for the proposition that the successful defense of a consent decree can form the basis of an award of attorney’s fees.”87

With respect to fees for monitoring, the Grier court—dismissive of the Alliance analysis—noted that “[t]he Seventh Circuit unnecessarily imposes the requirement of obtaining supplementary court-ordered relief after a party has obtained a consent decree.”88 Furthermore, the district court explained at length that Judge Posner’s analogizing of the “deterrence rationale” in monitoring to the catalyst theory did not hold up because “changes in a defendant’s conduct as a result of plaintiff’s postdecree monitoring are not ‘voluntary,’ as the term is used in Buckhannon, but are ‘required’ by a previously-issued-court-approved decree.”89 The district court further took

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81Id. at 1108; see also Laube v. Allen, 506 F. Supp. 2d 969, 998 (M.D. Ala. 2007) (“it is not a statutory requirement that those enforcement efforts result in another judicially sanctioned change in the legal relationship between the parties”) (footnote omitted).

82Johnson, 489 F.3d at 1109, 1109 n.6.

83Id. at 1111. In a decision shortly before Johnson, a district judge in the Tenth Circuit, relying on circuit precedent, also rejected the proposition that Buckhannon precludes the award of fees for postjudgment monitoring. Jackson v. Los Lunas Center, 489 F. Supp. 2d 1267, 1271 (D.N.M. 2007). The Jackson court declined to follow the Alliance holding that the existence of a decree-appointed monitor precludes an award of fees to plaintiffs’ attorneys for their monitoring efforts. Id.

84Grier, 421 F. Supp. 2d 1061.

85Id. at 1070–73; see also, e.g., Barcia v. Sitkin, No. 79 Civ. 5831, 2005 WL 1606038, at *2 (S.D.N.Y. July 7, 2005) (Clearinghouse No. 55,742) (“The judgment, and the ability to enforce it, has [sic] altered the legal relationship between the parties ….”).

86Grier, 421 F. Supp. 2d at 1073–74.

87Id. at 1075 (footnote omitted).

88Id. at 1077. But see Laube, 506 F. Supp. 2d at 996 (with only a passing reference to Buckhannon and none to Alliance, court still concludes that fees are available for monitoring only “when it directly and reasonably leads to enforcing the judgment”).

the Seventh Circuit to task for repudiating eight circuits’ fee decisions in the postjudgment context as inconsistent with Buckhannon while remaining “curiously silent about the pre-Buckhannon Supreme Court case Delaware Valley..., which explicitly granted post-judgment monitoring fees.”

The courts are obviously struggling with applying Buckhannon—or even whether it is applicable—in the postjudgment context. Although most reject the extreme positions adopted by the Seventh Circuit in Alliance, little consensus has emerged as to when fees are appropriate and as to how Buckhannon affects the three main phases of postjudgment work—monitoring, enforcement, and opposing terminations or modifications. The case law is building in this area, however, and, except in those circuits where specific issues have been resolved, plaintiffs’ counsel have a range of authorities to rely on.

With Buckhannon cited in almost a thousand federal court decisions during its seven–year history, and with the Supreme Court doing little to give additional guidance in the area, the lower courts are expending considerable energy in simply examining whether the plaintiff has prevailed and thus has met the first condition for a fee award. Some circuits have set out clear-cut rules in some areas, while others have left gaping holes in their analyses. Until those holes are plugged, defendants will continue to raise Buckhannon in every circumstance where its application has even the remotest chance of preventing a fee award. For now, no easy end to Buckhannon’s imprimatur on the world of fee shifting is in sight.

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90Grier, 421 F. Supp. 2d at 1077–78; see also Barcia, 2005 WL 1606038, at *3 (citing decisions from several circuits for the proposition that “attorney’s fees can be awarded for post-judgment monitoring and other efforts to ensure compliance with court orders in a civil rights case”); Burt v. County of Contra Costa, No. C-73-0906 MHP, 2001 WL 1135433, at *9 (N.D. Cal. Aug. 20, 2001) (“the cases holding that a prevailing party may be awarded fees for reasonable monitoring of a court-approved consent decree—with or without subsequent judicial intervention—remain good law”).
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