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Shifting Winds

Court whittles away at plaintiffs' recovery of attorney fees

BY MARGARET SANNER
AND CARL TOBIAS

A Supreme Court ruling in a case brought by an assisted-living home doesn't offer much assistance to civil rights lawyers.

The ruling in *Buckhannon Board & Care Home v. West Virginia*, 121 S. Ct. 1835 (2001), will frustrate plaintiffs' efforts to recover attorney fees in litigation seeking to vindicate important societal values, such as the prevention of discrimination.

But it shouldn't come as a big surprise. *Buckhannon* is only the most recent of numerous High Court decisions since the 1980s that can complicate attempts by plaintiffs lawyers to secure attorney fees.

The Court in *Buckhannon* held 5-4 that a litigant seeking attorney fees as a prevailing party may recover only when a court awards some affirmative relief. Some 200 federal fee-shifting statutes authorize fee awards to prevailing parties.

The opinion by Chief Justice William H. Rehnquist rejected the "catalyst theory," which posited that a plaintiff whose lawsuit causes a voluntary change in defendant's behavior is a prevailing party.

Justice Ruth Bader Ginsburg dissented, saying the majority's constricted definition of prevailing party was "unsupported by precedent and unaided by history or logic." She stated that 11 of the 12 regional circuits had accepted the catalyst theory.

The suit by an assisted-living home and some of its elderly occupants challenged a state law requiring such residents to be capable of reaching a fire escape.

The plaintiffs had sought de-

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claratory and injunctive relief, arguing that the legislation violated the federal Americans With Disabilities Act and the Fair Housing Act. A judge declared the case moot after the state legislature repealed the allegedly offensive provisions.

A Restrictive Majority

In the last two decades, the Court has often taken a narrow view of attorney fees, although a few cases



have gone the other way.

The Court's restrictive stance seems unlikely to change soon. A formidable group comprising Chief Justice Rehnquist and Justices Anthony M. Kennedy, Antonin Scalia and Clarence Thomas have joined all the cases that restricted fee-shifting in their tenure. A fifth vote will likely be provided by Justice Sandra Day O'Connor, who has concurred in some of their opinions.

One of the early cases, *Marek v. Chesny*, 473 U.S. 1 (1985), held that a plaintiff suing police for the shooting death of his son could not recover attorney fees incurred after defendants made a settlement offer more favorable than the verdict that followed.

At issue was whether Federal Rule 68 barring recovery of "costs" after such an offer barred attorney fees as well.

The Court, looking to the statute that was the basis for the suit, ruled that fees were part of the

costs that could not be collected.

Justice William Brennan's dissent claimed that this construction would produce skewed settlement incentives by exposing plaintiffs to greater risk of attorney fees. Such a result, he said, would conflict with congressional intent that private attorneys general rigorously enforce civil rights laws.

Evans v. Jeff D., 475 U.S. 717 (1986), empowered District judges to approve settlements of Rule 23 class actions that are conditioned on plaintiffs' agreement to waive attorney fees.

Brennan again dissented, asserting that negotiation of fee waivers would contravene Congress' purpose to encourage competent lawyers to represent penniless civil rights plaintiffs.

The Court has issued subsequent, analogous opinions. For example, a 1989 decision allowed civil rights plaintiffs to secure attorney fees from losing intervenors only when their litigation behavior was frivolous, unreasonable or without foundation.

And a 1991 ruling proscribed expert witness fee awards against losing parties.

The justices similarly held in two separate cases that an environmental law's fee-shifting proviso did not authorize attorney fee enhancements for counsel's superior performance or for the risk of taking a case on a contingent fee basis.

These rulings arguably frustrate congressional intent in fee-shifting statutes to encourage plaintiffs to act as private attorneys general and pursue litigation that vindicates substantive laws' goals, such as reducing pollution.

Of course, Congress could overrule the Court's decisions. However, that prospect is improbable. Nowadays, Congress is clearly more divided and seems less concerned about court access than it was when most of the fee-shifting statutes were passed. ■