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Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources: to the Prevailing Party Goes the Spoils . . . and the Attorney's Fee!

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*BUCKHANNON BOARD AND CARE HOME, INC. V.
WEST VIRGINIA DEPARTMENT OF HEALTH AND
HUMAN RESOURCES:*¹ TO THE PREVAILING
PARTY² GOES THE SPOILS . . . AND THE
ATTORNEY’S FEES!

“He will guard the feet of his saints, but the wicked will be silenced in
darkness. It is not by strength that one prevails;”³

I. INTRODUCTION

In an action for violations of the Fair Housing Amendment Act⁴
and the Americans With Disabilities Act,⁵ as in any fee-shifting statute

1. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 532 U.S. 598 (2001).

2. Prevailing party is defined as: “[a] party in whose favor a judgment is rendered regardless of the amount of damages awarded.” BLACK’S LAW DICTIONARY 1145 (7th ed. 1999).

The dissent in *Buckhannon*, 532 U.S. at 628-29 (Ginsburg, J. dissenting), argued that the *Black’s Law Dictionary* definition should not be treated as definitive. *Id.* They cited several cases where they, the Supreme Court, had interpreted the dictionary’s definition as just a contextual reading, including *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395-96 (1993) where the Supreme Court defined “excusable neglect” as used in Federal Rule Bankruptcy Procedure 9006(b)(1) more broadly than in *Black’s Law Dictionary* and *United States v. Rodgers*, 466 U.S. 475, 479-480 (1984) where the Supreme Court adopted the “natural nontechnical” definition of the word “jurisdiction” used in 18 U.S.C. § 1001 and declined to confine the definition to “narrower, more technical meanings,” found in *Black’s Law Dictionary. Id.*

3. 1 *Samuel* 2:9 (New International Version).

4. FAIR HOUSING AMENDMENT ACT OF 1988, 42 U.S.C. § 3601 (1994). The section authorizing attorney fees under 42 U.S.C. § 3601 is 42 U.S.C. § 3613(c)(2) (1994) which reads:

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States. In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee and costs.

Id.

5. AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. § 12101 (1994). “An Act to establish a clear and comprehensive prohibition of discrimination on the basis of disability.” *Id.* The section authorizing attorney fees under 42 U.S.C. § 12101 is 42 U.S.C. § 12205 (1994) which reads:

In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a

action, the plaintiff must first hire an attorney.⁶ The defendant then has the option of either hiring his or her own attorney to defend against the charges or of voluntarily changing his behavior to comply with the plaintiff's demands.⁷ When the defendant decides that going to trial would not be an adequate solution to the conflict and makes a voluntary change of his behavior, the plaintiff can then try to recover as a prevailing party the attorney fees authorized by a fee-shifting statute.⁸ In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, the Supreme Court decided to deny the attorney fees for the claim brought under the Fair Housing Act and the Americans With Disabilities Act, because the plaintiff did not qualify as a "prevailing party."⁹ This ruling eliminated the use of the catalyst theory as a permissible basis for the prevailing party determination under a fee-shifting statute.¹⁰ Now, even if the plaintiff achieves the result that

reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

Id.

6. See David Shub, Note, *Private Attorneys General, Prevailing Parties, and Public Benefit: Attorney's Fee Awards for Civil Rights Plaintiffs*, 42 DUKE L.J. 706, 706 (1992) (arguing that without an attorney's aid, a victim of a civil rights violation will likely gain no relief).

7. John Leubsdorf, *Recovering Attorney Fees as Damages*, 38 RUTGERS L. REV. 439, 460 (1986) (discussing that it is the parties' inability to agree that causes litigation to occur. Further arguing that in order for litigation to proceed a plaintiff must choose to sue and the defendant then must choose to defend).

8. Shub, *supra* note 6, at 706. Though the plaintiff initially is unable to pay for legal services, an attorney will still be willing to take the case if there is an award of attorney fees "forthcoming if [the plaintiff's] suit is successful." *Id.* Further, the award of attorney fees ensures that an attorney will be willing to represent the plaintiff for a valid civil rights claim where the enforcement of the plaintiff's rights aids the public interest, while it only results in an award of nominal damages. *Id.* at 706-07. *Contra* Leubsdorf, *supra* note 7, at 459 (arguing that "the defendant should not be held liable for lawfully resisting a claim" and lawfully resisting a claim should not be treated as a liability, even if the plaintiff ultimately prevails).

9. 532 U.S. 598 (2001). In *Buckhannon*, the Supreme Court of the United States affirmed the decision of the United States Fourth Circuit Court of Appeals that the term "prevailing party" did not include a party that failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. *Id.* at 600. For examples of cases that *Buckhannon* overruled, see *infra* notes 63, 70, and accompanying text.

10. *Buckhannon*, 532 U.S. at 610. The Court held that the "catalyst theory" is not a permissible basis for the award of attorney's fees under the FHAA, 42 U.S.C. § 3613(c)(2), and the ADA, 42 U.S.C. § 12205. *Id.* at 601-02.

Before the *Buckhannon* decision, the federal district courts used the catalyst rule to determine the qualification of a prevailing party. *Buckhannon*, 532 U.S. at 625-26 (Ginsburg, J., dissenting). The dissent supported the three-part test to determine a "prevailing party" under the catalyst theory. *Id.* at 627-28. The standard generally included three necessary conditions short of a favorable final judgment or consent decree. *Id.* The conditions were: (1) plaintiff had to show that the defendant provided "some of the benefit sought" by the lawsuit, (2) plaintiff must demonstrate that the suit stated a claim that was not "frivolous, unreasonable, or groundless" and (3) plaintiff

she wanted to achieve through the lawsuit, without the judgment on the merits or a court-ordered consent decree, the plaintiff is reimbursed for nothing.¹¹

This Note examines the definition of “prevailing party” as defined by the Supreme Court’s majority in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources* where the case resulted in something short of a judgment on the merits.¹² Part II provides a historical background of fee-shifting statutes, the development of fee-shifting in the United States, and the expansion of the catalyst theory by the district courts for prevailing parties under fee-shifting statutes.¹³ Part III provides a statement of the facts, including the procedural history¹⁴ and the Supreme Court’s decision in *Buckhannon*.¹⁵ Finally, Part IV analyzes the impact of the Supreme Court’s definition of “prevailing party” on fee-shifting statutes and their litigants.¹⁶

II. BACKGROUND

A. *The English and American Rules*

In trying to understand the role of attorney fees and the fee-shifting statutes in American society, one must first look at the origin of fee awards. The United States began its history of awarding attorney’s fees with the method from England commonly known as the English Rule or

must establish that her suit was a “substantial cause” or “a significant catalyst” of the defendant’s action providing relief. *Id.* (quoting *Wheeler v. Towanda Area Sch. Dist.*, 950 F.2d 128, 131 (3d Cir. 1991) (“some of the benefit sought”), *Grano v. Barry*, 783 F.2d 1104, 1110 (D.C. Cir. 1986) (“frivolous, unreasonable or groundless”), and *Williams v. Leatherbury*, 672 F.2d 549, 551 (5th Cir. 1982) (“substantial, significant catalyst”). *But cf.* Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney’s Fees for Unreasonable Government Conduct*, 55 LA. L. REV. 217, 282-83 (1994). The author presented the theory as a two-prong test: (1) whether the lawsuit was a material factor in the particular outcome and (2) whether the government’s voluntary change in approach, even if responsive to the lawsuit, was truly an acknowledgement of the strength of the party’s legal claim rather than a generous gesture. *Id.*

11. *Buckhannon*, 532 U.S. at 606. “We cannot agree that the term prevailing party authorizes federal courts to award attorney’s fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the sought-after destination without obtaining any judicial relief.” *Id.* (internal quotation marks and citations omitted).

12. *See infra* Parts II-IV.

13. *See infra* notes 17-70 and accompanying text.

14. *See infra* notes 71-97 and accompanying text.

15. *See infra* notes 98-134 and accompanying text.

16. *See infra* notes 135-230 and accompanying text.

the “loser pays” rule.¹⁷ In Colonial America, the adopted legislation reflected a desire to control the amount an attorney could charge a client, instead of a desire to award the prevailing party attorney fees.¹⁸ This began to change by the beginning of the formation of the new Union as many states implemented a fee-shifting method that benefited the winner of the litigation.¹⁹ In 1796, just after the country became independent, the United States adopted the method known as the American Rule²⁰ and abandoned the English Rule.²¹ Each litigant must bear her own legal

17. John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1569 (1993). In the English legal system, a “loser pays” rule applied where the successful litigant could collect his or her legal fees from the loser. *Id.* In early English courts of equity, the Chancellor could award attorney’s fees to the prevailing party, but unless the losing party acted in an abusive manner, the Chancellor rarely granted the award. *Id.* at 1570. At common law, statutes were the sole basis for fee awards. *Id.* Only a victorious plaintiff could recover attorney fees in specific actions under the Statutes of Gloucester 1278. *Id.* Finally, two centuries later, a defendant was able to recover attorney fees in isolated cases. *Id.* at 1570-71. Compare Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 851-54 (1929) (examining thoroughly the history of costs in England from 1275 to 1929).

18. Vargo, *supra* note 17, at 1571 (noting the colonies allowed attorney fee shifting). There were several 17th-century colonial statutes that either totally denied attorney’s fees for services or denied paid attorneys access to the courts. *Id.* This antagonism toward attorneys appears to result from the suspicion and jealousy of the ruling class:

In every one of the Colonies, practically throughout the Seventeenth Century, a lawyer or attorney was a character of disrepute and of suspicion, of whose standing or power in the community the ruling class, where it was the clergy as in New England, or the merchants as in New York, Maryland and Virginia, or the Quakers as in Pennsylvania, was extremely jealous. In many of the Colonies, persons acting as attorneys were forbidden to receive any fee; in some, all paid attorneys were barred from the court; in all, they were subjected to the most rigid restrictions as to fees and procedure.

Id. at 1571-72 (citing Charles Warren, *A History of the American Bar* 4 (1913)).

19. *Id.* at 1574. See John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 11 (1984) (citing 1778 Va. Acts, ch. 14 § 5 in A COLLECTION OF ALL SUCH PUBLIC ACTS OF THE GENERAL ASSEMBLY, AND ORDINANCES OF THE CONVENTIONS OF VIRGINIA PASSED SINCE THE YEAR 1768, AS ARE NOW IN FORCE 84 (Richmond 1785), reprinted in THE FIRST LAWS OF THE STATE OF VIRGINIA 84 (John Cushing comp. Michael Glazier, Inc. 1982)). In 1984, one study estimated that there were at least 1,974 state attorney fee-shifting statutes across the United States. Symposium, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS. 321, 325 (1984) (surveying and analyzing the state fee-shifting statutes).

20. *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796). The Court stated after striking down an award of attorney fees on remittitur:

We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it; and even if the practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.

Id. This case is often cited as the first to recognize the general rule that attorney fees are not recoverable absent specific legislation allowing for the award. Leubsdorf, *supra* note 19, at 15.

21. See Leubsdorf, *supra* note 19, at 12-14 (noting that the colonies did not need, nor could they afford the English system).

expenses under the American Rule.²² Courts continued to follow the American Rule during the 19th century.²³ In the latter half of the century, legislators began recognizing that attorney fees needed to be reasonable in order to aid the plaintiff and not as a means to stop greedy attorneys.²⁴ Exceptions to the American Rule began to evolve in the beginning of the 20th century.²⁵ In *Alyeska Pipeline Serv. Co. v. Wilderness Society*, the Supreme Court reaffirmed the American Rule in 1977, but recognized that exceptions to the American Rule were available with Congressional guidance.²⁶ In 1994, the Supreme Court reaffirmed its application of the American Rule absent explicit

22. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975). There has been much criticism of the American Rule because some scholars believe that it has encouraged people to initiate litigation just to gain discovery or to file frivolous actions to force the defendant to settle for an amount somewhat less than what the potential litigation would cost. See Neal H. Klausner, Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility*, 61 N.Y.U. L. REV. 300 (1986), for a criticism generally of the American Rule and see William Tetley, Q.C., *A Canadian Looks at American Conflict of Law Theory and Practice, Especially in the Light of the American Legal and Social Systems (Corrective vs. Distributive Justice)*, 38 COLUM. J. TRANSNAT’L L. 299 (1999), for a review of the theory and practice of the laws in the United States from a Canadian perspective.

23. Leubsdorf, *supra* note 19, at 22-23 (noting the courts continued to show willingness to apply the American rule). The courts denied awarding attorney’s fees as costs. *Id.* at 23. They struck down statutes that shifted fees because the statutes violated the Due Process or Equal Protection clauses of the Constitution. *Id.*

24. Leubsdorf, *supra* note 19, at 25. The legislators began to make exceptions to the American Rule such as the voting rights legislation of 1870, the Interstate Commerce Act of 1887 and the Sherman Act of 1890. *Id.*

25. Leubsdorf, *supra* note 19, at 29 (recognizing the bad faith and common fund doctrines as exceptions to the American rule); Edward F. Sherman, *From “Loser Pays” to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 TEX. L. REV. 1863, 1864-65 (1998) (noting that several exceptions to the American Rule permit recovery of attorney fees by a plaintiff, such as the bad faith doctrine and the common fund theory). The bad faith doctrine “awards attorney fees against parties who litigate in bad faith.” Leubsdorf, *supra*, at 29. The common-fund doctrine imposes fees on the class that would have had to pay legal fees if the action was brought for the benefit of the individual claimant. 19 AM. JUR. 2D *Corporations* § 2487. For example, in a shareholders’ derivative action, the obligation to reimburse a successful plaintiff falls on the corporation on whose behalf the action was taken if the corporation derived a benefit from the plaintiff’s success. *Id.*

26. *Alyeska Pipeline Serv. Co.*, 421 U.S. at 247. “[W]e are convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation. . . .” *Id.* In this case, an environmental group attempted to prevent the issuance of construction permits by the Secretary of the Interior for the building of the trans-Alaskan oil pipeline. *Id.* at 241. The Court’s decision focused on the legislative and judicial power to authorize attorney’s fee awards under the American Rule. *Id.* at 257-59. Its decision limited the court’s power to award fees pursuant to statutory fees provisions and the federal courts’ use of their equitable powers to award attorney’s fees. *Id.* at 247.

congressional authorization in *Key Tronic Corp. v. United States*.²⁷

B. Fee-shifting Statutes

Congress introduced fee-shifting statutes to encourage individuals to use private enforcement for the implementation of public policies.²⁸ These provisions allow courts to order the losing party to pay the prevailing party's reasonable²⁹ attorney fees.³⁰ The Americans With

27. *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994). In this case, the plaintiffs were partially responsible for contaminating a landfill and they brought an action under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) against the United States to recover a share of its cleanup costs from the other responsible parties. *Id.* at 811. The Court found that precedent established that attorney's fees were generally not a recoverable cost of litigation "absent explicit congressional authorization." *Id.* at 814. They concluded that under the general practice, CERCLA § 107 did not provide for the award of private litigants' attorney's fees associated with bringing a cost recovery action. *Id.* at 819.

28. Vargo, *supra* note 17, at 1588-89. The Civil Rights Attorney's Fees Awards Act of 1976, the Equal Access to Justice Act, the Voting Rights Act of 1965, the Federal Mine Safety and Health Act of 1977, the Truth in Lending Act, the Equal Credit Opportunity Act, the Fair Credit Reporting Act, the Consumer Product Safety Act, the Toxic Substances Control Act, the Endangered Species Act, and the Freedom of Information Act are all examples of fee-shifting statutes adopted by Congress. *Id.* See, e.g., Da-Wai Hu, Comment, *Running the Caucus-Race: Prevailing Parties and Fee Shifting under ERISA*, 67 U. CHI. L. REV. 217, 218 (2000). As part of its remedies, the Employee Retirement Income Security Act of 1974 (ERISA) provides for courts to award attorney's fees to parties litigating employee benefit claims covered by the law. *Id.* at 218. Courts applying the statute have held that only prevailing parties should be awarded attorney's fees. *Id.* See also, Joseph T. Phillips, Comment, *Friends of the Earth v. Laidlaw Environmental Services: Impact, Outcomes, and the Future Viability of Environmental Citizen Suits*, 68 U. CIN. L. REV. 1281, 1307 n.21 (2000). Attorney's fees clauses can be found in the citizen suit provisions of the Clean Air Act, 42 U.S.C. § 7604(d) (1994), the Clean Water Act, 33 U.S.C. § 1365(d) (1994), the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046(f) (1994), the Endangered Species Act, 16 U.S.C. § 1540(g)(4) (1994), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9659(f) (1994), and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(e). *Id.*

29. E.g., WHISTLEBLOWER PROTECTION ACT OF 1989, 5 U.S.C. § 1221(g)(3) (1994) (authorizing that "[i]f an employee, former employee, or applicant for employment is the prevailing party in an appeal . . . the agency involved shall be liable . . . for reasonable attorney's fees and any other reasonable costs incurred, regardless of the basis of the decision") (emphasis added); see *infra* note 33 for further examples of these statutes. Cf. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (stating that it is left for the district courts to determine what is reasonable when awarding attorney fees). See Catherine C. Blake, *Rules and Guidelines For the Management of Attorney's Fees*, 27 U. BALT. L. REV. 1 (1997) (discussing generally the lodestar method of awarding reasonable attorney fees); Jean B. Arnold & Mark Chestnutt, Commentary, *Attorneys' Fees in Special Education Cases under the Individuals with Disabilities Education Act*, 100 EDUC. L. REP. 497, 502 (1995) (defining a lodestar as the prevailing hourly rate of comparable attorneys in the same community multiplied by the hours spent on the case—subject to the numbers of hours being reasonable). Compare Gregory W. Bachmann, Note, *Professional Fees in Bankruptcy: Tailoring the Johnson Factors to Suit Bankruptcy*, 1 AM. BANKR. INST. L. REV. 453, 453 (1993) (advocating and discussing the "Johnson" factors as adopted to determine attorney fees for bankruptcy proceedings). See generally

Disabilities Act³¹ and the Fair Housing Act³² are two such provisions.³³

Lynn S. Branham, *Toothless in Truth? The Ethereal Rational Basis Test and the Prison Litigation Reform Act's Disparate Restrictions*, 89 CAL. L. REV. 999, 999 (2001) (examining the calculations of attorney fees that prisoners can recover under 42 U.S.C. § 1988); ALAN HIRSCH & DIANE SHEEHEY, AWARDING ATTORNEYS' FEES AND MANAGING FEE LITIGATION 95-117 (1994) available at http://www.fjc.gov/newweb/jnetweb.nsf/ism_recent_publications (last visited Nov. 10, 2001) (presenting management strategies for controlling attorney fees).

30. *E.g.*, Martha Pacold, Comment, *Attorneys' Fees in Class Actions Governed by Fee-Shifting Statutes*, 68 U. CHI. L. REV. 1007, 1007 (2001) (discussing the fee-shifting methods and the calculations of attorney's fees where the loser must pay the prevailing party).

Vargo, *supra* note 17, at 1589-90. Fee-shifting can be divided into one-way shifts and two-way shifts. A one-way shift occurs when the legislature or the courts have determined that fees are to be shifted in favor of only one party. *Id.* Thus, if the plaintiff were the chosen beneficiary, a successful plaintiff would recover attorney's fees while a successful defendant would not. *Id.* at 1590. The two-way shift is the loser-pays rule commonly attributed to the English system. *Id.* In this system, the loser whether plaintiff or defendant must pay the winner's attorney's fees. *Id.* Many scholars disagree with the notion of the one-way shift. *E.g.*, Note, *Fee Simple: A Proposal to Adapt a Two-way Fee Shift for Low Income Litigants*, 101 HARV. L. REV. 1231 (1988). This Note proposes a two-way shift requiring that courts automatically assess attorney's fees against the losing party's attorney. *Id.* at 1242. Potential litigants would be less likely to sue under a two-way fee shift if they are unsure of the merits of the case because liability will be higher than under the American Rule. *Id.* at 1247. For a general overview of fee-shifting and its effects on different types of claims and litigants, see Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 153-54 (1984) (discussing that the one-way pro-prevailing-plaintiff rule would discourage litigants of modest means to stand on plausible, but not clearly strong defenses, because the rule would have all the negatives of the English rule without any prospect of reimbursement).

31. AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. § 12101 (1994). See *supra* note 5 for text of authorizing fee provision.

32. FAIR HOUSING AMENDMENT ACT OF 1988, 42 U.S.C. § 3601 (1994). See *supra* note 4 for text of authorizing fee provision.

33. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001) (acknowledging that Congress has "authorized the award of attorney's fees to the 'prevailing party' in numerous statutes" in addition to the ADA and the FHAA, and that "these fee-shifting provisions [have been interpreted] consistently"). See, *e.g.*, WHISTLEBLOWER PROTECTION ACT OF 1989, 5 U.S.C. § 1221(g)(3) (1994) (authorizing that "[i]f an employee, former employee, or applicant for employment is the *prevailing party* in an appeal . . . [the] agency involved shall be liable . . . for *reasonable attorney's fees* and any other reasonable costs incurred, regardless of the basis of the decision") (emphasis added); WHISTLEBLOWER PROTECTION ACT OF 1989, 5 U.S.C. § 7701(b)(2)(A) (1994) (stating "[i]f an employee or applicant for employment is the *prevailing party* . . . the employee or applicant shall be granted the relief") (emphasis added); IMMIGRATION REFORM & CONTROL ACT OF 1986, 8 U.S.C. § 1324(b)(h) (1994) (allowing "*in the judge's discretion* . . . *prevailing party* . . . *reasonable attorney's fees* [in a complaint with respect to an unfair immigration related employment practice]) (emphasis added); OMNIBUS CONSOLIDATED RESCISSIONS & APPROPRIATIONS ACT OF 1996, 18 U.S.C. § 1864(e) (1994 ed., Supp. V) (stating in a civil action, "*court may award*, in addition to monetary damages for any injury resulting from an alleged . . . costs of litigation, including *reasonable attorney* and expert witness fees, to any *prevailing or substantially prevailing party*, whenever the court determines such award is appropriate") (emphasis added); THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976, 42 U.S.C. § 1988(b) (1994 ed. & Supp. IV 1998) (stating "[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. §

The Supreme Court held that the lower courts should normally award attorney's fees to the prevailing plaintiff absent special circumstances that would make such an award under 42 U.S.C. § 1988³⁴ unjust.³⁵ The treatment of defendants in receiving an award of attorney fees is different than that of plaintiffs.³⁶

A prevailing defendant usually only receives a payment of attorney fees from a losing plaintiff when the plaintiff's case is "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."³⁷ This difference in application stems from the

2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, *the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . .*) (emphasis added); PRISON LITIGATION REFORM ACT OF 1995, 42 U.S.C. § 1997e(d)(1)(B)(i) (1994 ed., Supp. IV) (authorizing payment to prisoners for any action "in which attorney's fees are authorized" and shall be awarded to the extent "the fee is proportionately related to the court ordered relief for the violation") (emphasis added); CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000a-3 (b) (1994) (stating "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs") (emphasis added); CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e-5 (k) (1994) (stating "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs") (emphasis added); VOTING RIGHTS ACT AMENDMENTS OF 1975, 42 U.S.C. § 1973 l(e) (authorizing that at the court's discretion, it may award the prevailing party reasonable attorney fees). *See generally*, *Marek v. Chesny*, 473 U.S. 1, 43-51 (1985) (Appendix to opinion of Brennan, J., dissenting). In his appendix, Justice Brennan divided over 100 fee-shifting statutes into three broad categories: (A) statutes that refer to attorney fees "as part of the costs," (B) statutes that do not refer to attorney fees as part of the costs, and (C) statutes that may or may not refer to attorney fees as part of the costs. *Id.* at 43-44. He then listed many of the enumerated statutes that authorized court-awarded attorney fees by the time of judgment in 1985. *Id.* at 44-51. *Compare* Gregory C. Sisk, *A Primer on Awards of Attorney Fees Against the Federal Government*, 25 ARIZ. ST. L. J. 733, 769-72 (1993) (examining the fees available under Title VII of the Civil Rights Act of 1964, Americans With Disabilities Act of 1990, and the Fair Housing Amendment Act of 1988).

34. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976, 42 U.S.C. § 1988(b) (1994 ed. & Supp. IV 1998). *See supra* note 33 for the text of the authorizing fee provision.

35. *Hensley*, 461 U.S. at 429 (holding that Congress enacted 42 U.S.C. § 1988 to allow a reasonable attorney fee to a prevailing party). Fees should be awarded for hours that were reasonably expended. *Id.* at 434. "Hours that are not properly billed to one's *client* . . . are not properly billed to one's *adversary* . . ." *Id.* Fees can be adjusted upward or downward based on the results obtained. *Id.*

36. *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421 (1978) (agreeing with the Second Circuit in *Carrion v. Yeshiva Univ.*, 535 F.2d 722, 727 (2d Cir. 1975), that an attorney fees award to a successful defendant should not be permitted when he simply succeeds). Klausner, *supra* note 22, at 311 ("It is a rare occasion . . . when the court invokes its inherent equitable power [against a plaintiff]").

37. *Christiansburg Garment Co.*, 434 U.S. at 421 (holding that in a Title VII case, an award of attorney fees may be given to a prevailing defendant based on the frivolous, unreasonable action brought by the plaintiff). *See*, *Carrion v. Yeshiva Univ.*, 535 F.2d 722 (2d Cir. 1975), for an example of a plaintiff's frivolous suit where the defendant was awarded attorney fees. In *Carrion*, the plaintiff brought a civil rights action against the defendant alleging discrimination in the work place for a suspension and ultimately a discharge for insubordination. *Id.* at 723. The Second

belief that awarding attorney's fees to prevailing plaintiffs would encourage individuals to seek relief from the courts when their rights had been violated compared to a defendant whose rights had not been impinged.³⁸ Additionally, many fee-shifting statutes were enacted to encourage beneficial litigation that would further substantive goals of the underlying statutes including civil rights and environmental laws.³⁹

In *Alyeska Pipeline Serv. Co.*, the Supreme Court held that courts could not award attorney fees for the plaintiff acting as a private attorney general until Congress made specific guidelines for awarding of fees.⁴⁰

Circuit found no evidence to support her claim, but that there was substantial evidence to support the unjustified insubordination by the plaintiff that resulted in her discharge. *Id.* at 726. In deciding the issue of attorney fees, the court found that the plaintiff acted vindictively, deliberately perjured herself and was motivated only by malice. *Id.* at 728. They found the lawsuit completely without merit. *Id.* They affirmed the attorney fees awarded to the defendant. *Id.* at 728-29.

38. *Christiansburg Garment Co.*, 434 U.S. at 418-19 (holding plaintiff is the chosen instrument by Congress to vindicate rights and when a district court awards counsel fees to a prevailing party, it is awarding them against a violator of federal law). *See also*, *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968) (noting that a plaintiff bringing a suit under Title II is vindicating a right not only for himself but as a private attorney general and is vindicating that right, a policy that Congress considered of the highest priority) (internal quotations omitted); Jean R. Sternlight, *The Supreme Court's Denial of Reasonable Attorney's Fees to Prevailing Civil Rights Plaintiffs*, 17 N.Y.U. REV. L. & SOC. CHANGE. 535, 538 (1989) (arguing that through several decisions, the Supreme Court has overridden the intent of Congress in fee-shifting statutes to allow the prevailing plaintiff to recover fees). Attorneys have been forced to withdraw from the civil rights practice for financial reasons and therefore, many civil rights plaintiffs cannot find counsel to represent them. Sternlight, *supra*, at 538. Even when the plaintiff's counsel is successful, they cannot be certain of receiving full compensation for all the hours expended in the litigation. *Id.* at 549.

39. *See, e.g.*, Walter B. Russell, III & Paul Thomas Gregory, Note, *Awards of Attorney's Fees in Environmental Litigation: Citizen Suits and the "Appropriate" Standard*, 18 GA. L. REV. 307, 318-20 (1984) (discussing that the statutes were enacted to encourage beneficial litigation); Monica Dias, Note, *Morris-Smith v. Moulton Niguel Water District: The Double Standard for Attorney Fees under the Clean Water Act*, 27 N. KY. L. REV. 549, 572 (2000) (noting that civil rights and environmental laws have the common purpose of promoting citizen enforcement of important federal policies).

40. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 262 (1977) (holding that without Congressional guidance, the judiciary could not determine the attorney's fees to be awarded or the range of discretion given to the judiciary in making the attorney's fees awards). The private attorney general doctrine occurred when a plaintiff brought a suit for the private enforcement of a Congressional policy under a fee-shifting act. Ann K. Wooster, Annotation, *Award of Attorney's Fees to Prevailing Parties in Actions under Fair Housing Act*, 42 U.S.C.A. § 3613(C), 159 A.L.R. FED. 279 (2001). Many scholars disagree with the Court's holding in *Alyeska* for policy reasons. *See* Carl Cheng, Comment, *Important Rights and the Private Attorney General Doctrine*, 73 CAL. L. REV. 1929, 1929-35 (1985). The private attorney general doctrine gave courts the discretion to award attorney's fees to a party who vindicated a right that (1) benefited a large number of people, (2) required private enforcement, and (3) was of societal value. *Id.* California failed to follow the Supreme Court's lead in rejecting the private attorney general doctrine. *Id.* at 1935. Even in California, though, the use of the doctrine left its application unpredictable because of vague and subjective inquiries. *Id.* at 1929. *See also*, Shub, *supra* note 6, at 710 (arguing the legislative

The Court reasoned “the circumstances under which attorneys’ fees [were] to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.”⁴¹ Congress responded by enacting § 1988 of the Civil Rights Attorney’s Fees Act that authorized fee awards to a “prevailing party.”⁴²

C. Prior Influential Supreme Court Cases

The Supreme Court has addressed the issue of who is the prevailing party in a lawsuit under a fee-shifting statute many times.⁴³ In *Maher v. Gagne*,⁴⁴ the Supreme Court held that a party did not need to go to trial and receive a favorable judgment.⁴⁵ A consent decree⁴⁶ or favorable settlement⁴⁷ was enough to prevail.⁴⁸ When a plaintiff wins a judgment

history clearly indicates that Congress responded and authorized the award of attorney fees in the Civil Rights Attorney’s Fees Act of 1976, 42 U.S.C. § 1988, to counteract the effects of the Supreme Court’s holding in *Alyeska*).

41. *Alyeska Pipeline Serv. Co.*, 421 U.S. at 262. The Court compared the antitrust laws where attorney fee awards were mandatory and patent litigation where attorney fee awards may be awarded at the court’s discretion. *Id.* at 261. Because the statutory allowances of fees were available in a variety of circumstances and these circumstances differed, Congress needed to determine what justifies an award of attorney fees for the private attorney general. *Id.* at 261-63.

42. P.G. Szczepanski, Note, *For a Few Dollars Less: Equity Rides Again in the Denial of Section 1988 Attorney’s Fees to a Prevailing Plaintiff* in Farrar v. Hobby, 5 TEMP. POL. & CIV. RTS. L. REV. 219, 228 (1996) (recognizing that Congress reacted within two months of the *Alyeska* decision by introducing § 1988); Cheng, *supra* note 40, at 1934 (noting “[t]he reaction to the *Alyeska* decision was immediate”).

43. See ALAN HIRSCH & DIANE SHEEHEY, *supra* note 29, at 7-13 (discussing generally the cases decided through 1994, by the Supreme Court relating to attorney fees and the issue of who is the prevailing party).

44. 448 U.S. 122 (1980). In this case, the respondent filed a complaint alleging that Connecticut’s Aid to Families with Dependent Children regulations denied her credit for substantial portions of her actual work-related expenses. Respondent also alleged the regulations violated 42 U.S.C. § 602(a)(7) and § 402(a)(7), as well as the Equal Protection and Due Process Clauses of the Fourteenth Amendment. She then argued relief was authorized under 42 U.S.C. § 1983. *Id.* at 124-25. The Court held that the fact the respondent prevailed through a settlement, rather than through litigation, did not weaken her claim to fees. *Id.* at 129. They found that nothing in the language of § 1988 that conditions the district court’s power to award fees on full litigation of the issues or on a judicial determination that the plaintiff’s rights have been violated. *Id.* They followed the wording of the S.Rep. No. 94-1011, at 5 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5912, that “for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.” *Id.*

45. *Id.* at 129.

46. BLACK’S LAW DICTIONARY 419 (7th ed. 1999). A consent decree is defined as: “a court decree that all parties agree to.” *Id.*

47. *Id.* at 1377. A settlement is “an agreement ending a dispute or lawsuit.” *Id.*

48. *Maher*, 448 U.S. at 129. See also, *Evans v. Jeff D.*, 475 U.S. 717, 719 (1986). The issue in *Evans* was whether attorney’s fees *must* be assessed when the case has been settled by a consent decree that granted protective relief to the plaintiff class but provided the defendants should not pay any part of the prevailing party’s fees or costs. *Id.* at 720. The plaintiff was a class of children that

on at least some of the merits of his claims, he is a “prevailing party” according to the Supreme Court’s holding in *Hewitt v. Helms*.⁴⁹

Following *Hewitt*,⁵⁰ the Supreme Court in *Rhodes v. Stewart*⁵¹ held that a declaratory judgment was no different from any other judgment and would constitute relief, for purposes of § 1988, if, and only if, it affected the behavior of the defendant towards the plaintiff.⁵² In *Texas*

suffered from emotional and mental handicaps who would have been placed in the care of the defendant for education and treatment. *Id.* They alleged violations of the United States Constitution, the Idaho Constitution, four federal statutes, and provisions of the Idaho Code. *Id.* at 720-21. The Court found that Congress expected fee shifting to attract competent counsel to represent citizens deprived of their civil rights and Congress neither bestowed fees upon attorneys nor rendered them nonwaivable or nonnegotiable; instead, it added Congress to the arsenal of remedies available to combat violations of civil rights, a goal not inconsistent with conditioning settlement on the merits on a waiver of statutory attorney’s fees. *Id.* at 731-32. The Supreme Court then held that the district court had the power, in its sound discretion, to refuse to award fees. *Id.* at 719. Scholars have since argued that this decision would work against potential plaintiffs with civil rights claims that could not afford to engage a competent attorney to represent them. *See, e.g.,* Randy M. Stedman, Note, *Evans v. Jeff D.: Putting Private Attorneys General on Waiver*, 41 VAND. L. REV. 1273, 1289 (1988) (arguing that the majority of the Supreme Court did not take notice that Congress intended fees to act as an incentive to members of the private bar to undertake civil rights cases).

49. 482 U.S. 755, 760-61 (1987). This case addressed whether a party who litigated to judgment and lost on all claims can nonetheless be a “prevailing party” for purposes of an award of attorney fees. *Id.* at 757. An inmate at the Pennsylvania State Correctional Institute brought a 42 U.S.C. § 1988 action alleging a violation of Due Process rights. *Id.* Before any decision was rendered, the plaintiff was released from prison on parole. *Id.* Through the lengthy proceedings, the only relief that he obtained was an interlocutory ruling that his claim should not have been dismissed for failure to state a Constitutional claim. *Id.* at 760. The Supreme Court therefore held he was not eligible for fees in the § 1988 action because he was not a prevailing party under the statute as he had not prevailed in his suit. *Id.* at 763-64. Furthermore, the Court held:

A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment—e.g. a monetary settlement or a change in conduct that redresses the plaintiff’s grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

Hewitt, 482 U.S. at 760-61.

This reasoning followed their prior decision in *Hanrahan v. Hampton*, 446 U.S. 754, 754 (1980) (per curiam). In this case, the plaintiffs also sued under 42 U.S.C. § 1988 to recover attorney fees after alleging a violation of their constitutional rights. *Id.* at 754-55. The Court held that the intent of Congress to permit recovery of attorney fees on an interlocutory award should only be given to a party who has established his entitlement to some relief on the merits of his claim, either in the trial court or on appeal. *Id.* at 757. The plaintiffs were not entitled to recovery in this case because the only relief they achieved was that the court of appeals held the respondents were entitled to a trial of their cause but nothing more. *Id.* at 758.

50. 482 U.S. 755.

51. 488 U.S. 1 (1988).

52. *Id.* at 4. In *Rhodes*, the plaintiffs while in custody of the Ohio Department of Rehabilitation and Correction, brought a complaint alleging violations of their First and Fourteenth Amendment rights by officials who refused to allow them to subscribe to a magazine. *Id.* at 2. The court ordered that the correction officers had not applied the proper procedural and substantive

State Teachers Ass'n v. Garland Independent School District,⁵³ the Supreme Court rejected a test for prevailing party status that required a party to prevail on a central issue in the litigation and not merely upon significant secondary issues.⁵⁴

Later in *Farrar v. Hobby*,⁵⁵ the Supreme Court held that a plaintiff

standards in denying the inmates their request and ordered compliance with those standards. *Id.* After entry of a judgment for the plaintiffs in a suit under 42 U.S.C. § 1983, the District Court for the Southern District of Ohio, Eastern Division, ordered the defendants to pay the plaintiffs' attorney's fees pursuant to 42 U.S.C. § 1988. *Id.* The Supreme Court held that there was "no entitlement to attorney's fees, however, unless the requesting party prevails; and by the time the District Court entered its judgment in the underlying suit one of the plaintiffs had died and the other was no longer in custody." *Id.* The Court then found that the plaintiffs were not prevailing parties under the rule set forth in *Hewitt. Rhodes*, 488 U.S. at 2. The Court added quoting *Hewitt*:

The real value of the judicial pronouncement—what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion—is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff."

Rhodes, 488 U.S. at 1 (quoting *Hewitt*, 482 U.S. at 761).

53. 489 U.S. 782 (1989).

54. *Id.* at 789-90. In *Garland*, the petitioners brought their lawsuit under 42 U.S.C. § 1983 alleging violations of their First and Fourteenth Amendment rights because of the school district's policy prohibiting communication by or with teachers during the school day concerning employee organizations. *Id.* at 785. The district court found for the petitioner on one issue of only minor significance and found against the petitioners on their other claims. *Id.* at 785-86. The petitioners then filed for an award of attorney's fees pursuant to 42 U.S.C. § 1988. *Id.* at 787. The district court recognized that the petitioners had achieved partial success, but indicated that "in this circuit the test for prevailing parties is whether the plaintiff prevailed on the central issue by acquiring the primary relief sought." *Id.* at 787. The Court held that it was clear that the central issue test applied by the lower courts was contrary to the holding of *Hensley. Garland*, 489 U.S. at 790. The Supreme Court reaffirmed the wording that they adopted in *Hensley*, 461 U.S. at 433, from *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978): If the plaintiff has succeeded on "any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit," the plaintiff had crossed the threshold to a fee award of some kind, not just an issue central to the litigation. *Id.* at 792. They affirmed *Hewitt* that a plaintiff must be able to point to a resolution of the dispute that changes the legal relationship between itself and the defendant in order to be considered a prevailing party under § 1988. *Id.* The Court then held that the touchstone of the prevailing party inquiry must be a material alteration of the legal relationship of the parties in a manner that Congress sought to promote in the fee-shifting statute. *Id.* at 792-93. Therefore, the Supreme Court decided that by looking at the facts, the petitioners had obtained a judgment vindicating the First Amendment right of public employees in the workplace and therefore qualified as a prevailing party. *Id.* at 793.

55. 506 U.S. 103 (1992). In *Farrar*, the plaintiff sued for monetary and injunctive relief under 42 U.S.C. § 1983 and § 1985. *Id.* at 106. The jury in the district court found that while all of the defendants except Hobby had conspired against the plaintiffs, this conspiracy was not a proximate cause of any injury suffered by the plaintiffs. *Id.* The jury then found that Hobby had committed an act or acts under color of state law that deprived plaintiff of a civil right, and yet, Hobby's conduct was not a proximate cause of any damages suffered by the plaintiff and that each party bear their own costs. *Id.* at 106-07. Because Hobby had deprived Farrar of a civil right, Farrar was entitled to nominal damages. *Id.* at 107. The plaintiffs then sought attorney's fees under 42 U.S.C. § 1988. *Id.* The Supreme Court held that to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim and the plaintiff must obtain an

who wins nominal damages is a prevailing party under § 1988.⁵⁶ The Court further held that while the mere attainment of damages was enough to alter the legal relationships between the parties, the amount attained had bearing on the amount of attorney fees and costs awarded under a fee-shifting statute.⁵⁷ In dicta, the Court noted that to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits such as an enforceable judgment or comparable relief through a consent decree or settlement.⁵⁸

D. Prevailing Party under the Catalyst Theory

Before 1994, there was one other option that a plaintiff could exercise to receive an award of attorney fees as a prevailing party.⁵⁹ The

enforceable judgment against the defendant from whom the fees were sought or comparable relief through a consent decree or settlement. *Farrar*, 506 U.S. at 111. In civil rights litigation, only those circumstances that materially affect the legal relationship of the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff, can transform the plaintiff into a prevailing party. *Id.* at 111-12 (internal quotations omitted). "[A] technical victory may be so insignificant . . . as to be insufficient to support prevailing party status." *Id.* at 113 (quoting *Garland*, 489 U.S. 782, 792 (1989)). "Once civil rights litigation materially alters the legal relationship between the parties, the degree of the plaintiff's overall success goes to the reasonableness of a fee award." *Id.* at 114 (internal quotations omitted). When a plaintiff recovers only nominal damages because of a failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all as "fee awards under § 1988 were never intended to produce [a] windfall[] to attorneys." *Id.* at 115 (internal quotations and citations omitted).

56. *Id.* at 112.

57. 506 U.S. at 114. See Gregory C. Sisk, *A Primer on Awards of Attorney Fees Against the Federal Government*, 25 ARIZ. ST. L.J. 733 (1993) (arguing that *Farrar* lowered the threshold to qualify as a prevailing party but that "even a party who had prevailed may be denied a fee award").

58. *Farrar*, 506 U.S. at 113.

[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. Otherwise, the judgment or settlement cannot be said to "affect[] the behavior of the defendant toward the plaintiff." Only under these circumstances can civil rights litigation effect the material alteration of the legal relationship of the parties and thereby transform the plaintiff into a prevailing party. In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Id. at 111-12.

59. E.g., Russell & Gregory, *supra* note 39, at 318-20 (acknowledging Congress enactment of 100 statutory provisions authorizing courts to award fees to prevailing parties under the catalyst theory); Sisk, *supra* note 10, at 277-89 (stating that a plaintiff may recover attorney fees when its lawsuit acts as a catalyst in prompting the defendant to take favorable action that results in mooting the lawsuit).

courts of appeals adopted the catalyst theory⁶⁰ that even if they did not obtain a judgment on the merits, plaintiffs could obtain a fee award if their suit acted as a “catalyst” for the change in the defendants’ behavior that was sought in bringing the lawsuit.⁶¹

Leading the way in these decisions was the First Circuit Court of Appeals, which in 1978, concluded that plaintiffs might be considered to have prevailed for attorney’s fee purposes if they had succeeded on any significant issue in the litigation, which achieved some of the benefit the party sought in bringing the lawsuit.⁶² Twelve additional circuit courts followed their lead over the next eleven years, which allowed prevailing plaintiffs awards of attorney fees without a judgment on the merits or

60. See *supra* note 10 (describing the catalyst theory).

61. *Nadeau v. Helgemoe*, 581 F.2d 275, 279-81 (1st Cir. 1978) (recognizing that attorney fees are justified when the plaintiff’s lawsuit acts as a catalyst in prompting the defendant to take action to meet the plaintiff’s claims even though there was not judicial involvement in reaching that result). Compare Joel H. Trotter, Note, *The Catalyst Theory of Civil Rights Fee Shifting After Farrar v. Hobby*, 80 VA. L. REV. 1429, 1431 (1999) (arguing to foreclose the catalyst theory but allow an exception to the mootness doctrine to enable a plaintiff to obtain an enforceable judgment and recover fees).

62. *Nadeau*, 581 F.2d at 278-79. In *Nadeau*, the plaintiffs were inmates in protective custody who brought a § 1983 suit alleging that their conditions of confinement violated various provisions of the Constitution. *Id.* at 277. The district court concluded that the allegations were supported and awarded significant injunctive relief to the plaintiff. *Id.* After a reversal by the First Circuit Court of Appeals, the parties entered into a consent decree upon which the plaintiffs moved for an award of attorney’s fees pursuant to 42 U.S.C. § 1988. *Id.* The district court denied the fees because they were not a prevailing party. *Id.* The district court agreed that the consent decree entered into resulted in considerable improvement for the plaintiff class as compared to the conditions that they were subjected to prior to the institution of the suit. The court, however, concluded that fees were inappropriate because the improvement reflected not only the intensive work and effort of the plaintiffs’ attorneys, but also a good faith effort on the part of the defendants to improve the conditions at the New Hampshire State Prison. *Nadeau*, 581 F.2d at 277-78 (internal quotations omitted). After examining the legislative history, the court of appeals concluded that plaintiffs may be considered prevailing parties for attorney’s fees purposes if they succeeded on any significant issue in the litigation that achieved some of the benefit the parties sought in bringing the suit. *Id.* at 278-79. They continued, “it is often explained that when plaintiff’s lawsuit acts as a ‘catalyst’ in prompting defendants to take action to meet plaintiff’s claims, attorney’s fees are justified despite the lack of judicial involvement in the result.” *Id.* at 279. The court found that good faith of the defendants was not a controlling factor in determining whether or not plaintiffs merit an award. *Id.* at 280. They considered the chronological sequence of events to be an important, though not definitive, factor in determining whether or not the defendant could reasonably be inferred to have guided his actions in response to the plaintiff’s lawsuit. *Id.* at 281. If the plaintiff established that their suit was causally related to the defendants’ actions that improved their condition, they have merely passed the factual test; they must still pass the legal test. *Id.* If it has been judicially determined that defendant’s conduct, however beneficial it may be to the plaintiff’s interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense. *Nadeau*, 581 F.2d at 281. See also *supra* note 10 and accompanying text for additional discussion on the catalyst theory.

obtaining a consent decree.⁶³ This added additional support to the catalyst theory.⁶⁴

E. The Fourth Circuit Breaks Away

In 1994, the Fourth Circuit Court of Appeals, in a divided en banc

63. *E.g.*, *Bonnes v. Long*, 599 F.2d 1316, 1318 (4th Cir. 1979) (noting that “while a fee award may be predicated on a consent judgment, the facts of each case must be examined to determine whether the plaintiff is the prevailing party” and “[a] plaintiff need not prevail on all issues if a significant one is resolved so [as] to achieve some of the benefit sought through the litigation”); *Williams v. Miller*, 620 F.2d 199, 202-03 (8th Cir. 1980) (per curiam) (holding that based on the facts of the case, the plaintiffs may be prevailing parties for purposes of attorney’s fees awards if their suit was the catalyst that brought about compliance by the defendants despite the fact that judicial relief may no longer be necessary); *Robinson v. Kimbrough*, 652 F.2d 458, 465-66 (5th Cir. 1981) (recognizing the legislative intent to award attorney’s fees even when no formal judicial relief was obtained and no final judicial determination was made on any Constitutional claim). Plaintiffs are entitled to attorney’s fees in cases in which constitutional claims are mooted by defendant’s remedial action subsequent to the filing of a lawsuit, if the plaintiff’s lawsuit is a substantial factor or a significant catalyst in motivating the defendant to end their unconstitutional behavior. *Id.* *American Constitutional Party v. Munro*, 650 F.2d 184, 187-88 (9th Cir. 1981) (holding that the efforts by the prevailing party must establish clear, causal relationship between the litigation sought and practical outcome realized as long as it is a material factor in bringing about the defendant’s action and as contributing in a significant way); *Stewart v. Hannon*, 675 F.2d 846, 851 (7th Cir. 1982) (deciding one of the factors in determining an award of attorney fees was whether the lawsuit acted as a catalyst or was a material factor in the defendant’s decision to change the disputed practices and therefore provide, in substantial part, the relief sought); *Doe v. Busbee*, 684 F.2d 1375, 1381 (11th Cir. 1982) (holding that in order to be a prevailing party, a plaintiff must have achieved significant relief to which he was entitled under the civil rights laws through his success on the merits, favorable settlement, or voluntary actions by the defendants); *Gerena-Valentin v. Koch*, 739 F.2d 755, 758-59 (2d Cir. 1984) (holding attorney’s fees were available under the Voting Rights Act to the prevailing party if the plaintiff showed there was a causal connection between the relief obtained and the litigation in which fees were sought, and that a causal connection existed if the plaintiff’s lawsuit was a catalytic, necessary, or substantial factor in attaining the relief); *Institutionalized Juveniles v. Sec’y of Public Welfare*, 758 F.2d 897, 910 (3d Cir. 1985) (holding a court must decide whether plaintiffs were prevailing parties and whether there was a causal connection between the litigation and the relief obtained from the defendant); *J & J Anderson, Inc. v. Erie*, 767 F.2d 1469, 1475 (10th Cir. 1985) (holding that under § 1983, to prevail and receive attorney fees, the plaintiff must show that the lawsuit was a substantial factor or significant catalyst in motivating the defendants to end their unconstitutional behavior, the plaintiff’s action was causally linked to the relief obtained, and the defendant’s conduct was in response to the lawsuit); *Grano v. Barry*, 783 F.2d 1104, 1110 (D.C. Cir. 1986) (holding that “[w]hen a party’s success in achieving his goal results from a settlement, or some other event occurring before there has been a judicial ruling on the merits of the civil rights claims, it is necessary under the attorney’s fees provision of § 1988 to determine whether there were colorable civil rights claims involved in the case and whether they served as catalysts in securing the result”); *Citizens Against Tax Waste v. Westerville City Sch.*, 985 F.2d 255, 258 (6th Cir. 1993) (holding the issue for the district court to address is whether plaintiffs have accomplished a “material alteration of the legal relationship of the parties”) (quoting *Farrar*, 506 U.S. at 113).

64. For examples of the use of the catalyst theory, see *supra* note 63 and *infra* note 70.

decision rendered on rehearing, decided *S-1 & S-2 by & through P-1 & P-2 v. State Board of Education*,⁶⁵ and held that the catalyst theory was no longer a viable legal basis for determining prevailing party status based on the Supreme Court's decision in *Farrar v. Hobby*.⁶⁶ The main problem with using *Farrar* to reject the catalyst theory was that the case involved no catalytic effect.⁶⁷ The only question was whether an actual judgment awarding only nominal damages was sufficient to qualify the plaintiff as a prevailing party.⁶⁸ Many scholars did not believe that the Fourth Circuit's decision would have any effect on the Supreme Court's view on the catalyst theory.⁶⁹ Even after the Fourth Circuit's ruling,

65. 21 F.3d 49 (4th Cir. 1994) (per curiam). In this case, the parents of handicapped students brought an action under § 1983 seeking tuition reimbursement and alleging that the defendants had violated the Education of the Handicapped Act, 20 U.S.C. § 1400. *Id.* at 50. The district court granted summary judgment to the plaintiff and the defendants appealed. *Id.* While the appeal was pending, the plaintiff and one of the defendants reached a settlement. *Id.* The other defendants, the State Board and the chairman of the State Board, C.D. Spangler, Jr., were not parties to the settlement and the parents did not dismiss any of their claims against the state defendants. *Id.* On appeal, a panel of the Fourth Circuit Court of Appeals held for prudential reasons that the settlement mooted the appeal because it gave the plaintiffs the reimbursement they sought. *Id.* at 50-51. They remanded the case for a determination regarding attorney fees available to the plaintiffs. *S-1 & S-2*, 21 F.3d at 51. After the decision by the court, the Office of Special Education and Rehabilitative Services of the United States Department of Education informed the State that federal education funds would be withdrawn if the State did not amend its law to authorize hearing officers to decide parents' reimbursement claims. *Id.* at 51. Three years after the plaintiff's claims had been declared moot, the State responded and enacted legislation giving administrative law judges the authority to make binding decisions subject to appeal regarding a child's special education needs. *Id.* at 51. After the amendment, the district court considered the propriety of awarding attorney's fees against the state defendants and assessed fees against the defendants. *Id.* On appeal, a panel of the court affirmed the district court's award of attorney's fees. *Id.* (citing *S-1 & S-2 v. State Bd. of Educ.*, 6 F.3d 160 (4th Cir. 1993)). The court then granted the state defendants' petition for rehearing en banc. *Id.* On rehearing, the court held (1) a person may not be a prevailing party plaintiff except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought, and (2) the fact that a lawsuit may operate as a catalyst for post-litigation changes in a defendant's conduct cannot suffice to establish plaintiff as a prevailing party and the catalyst theory is no longer available for that purpose. *S-1 & S-2*, 21 F.3d at 51.

66. 506 U.S. 103 (1992). The United States Court of Appeals for the Fourth Circuit in *S-1 & S-2*, cited *Farrar*, 506 U.S. at 111, but did not point to any specific language for their basis in rejecting the catalyst theory. 21 F.3d at 51. See further discussion *supra* note 58 and *infra* note 115.

67. 506 U.S. 103 (1992); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 194-95 (2000). The Supreme Court noted that "*Farrar*, 506 U.S. 103, 112-13 (1992), acknowledged that a civil rights plaintiff awarded nominal damages may be a 'prevailing party' under 42 U.S.C. § 1988," but the case involved no catalytic effect. *Id.* at 194. "It would be premature, however, for us to address the continuing validity of the catalyst theory in the context of this case." *Id.* at 195.

68. *Farrar*, 506 U.S. at 105 (holding that although the plaintiff was found to be a prevailing party, he was not entitled to attorney fees because only nominal damages were awarded).

69. *E.g.*, Sisk, *supra* note 10, at 289.

nine circuit courts reaffirmed their interpretation of prevailing party status under the catalyst theory.⁷⁰

Although the *S-1 & S-2* en banc decision sets the stage for Supreme Court review of this issue, the Court is unlikely to discard the catalyst theory outright and require every lawsuit to be driven through a judgment before a checkered flag can be waved. Nevertheless, the *S-1 & S-2* decision may have the salutary effect of prompting reconsideration of the parameters of the theory. The Supreme Court may well emphasize that the theory may be applied only when the causal connection between the filing of the lawsuit and the change in conduct or policy is close and unattenuated. In that way the Court may find a middle ground between allowing defendants to deprive plaintiffs of attorney fees by unilaterally mooted the underlying case by conceding to plaintiffs' demands and discouraging public officials from policy initiatives for fear that worthwhile changes may be retroactively linked to a lawsuit and result in a hefty bill for attorneys' fees.

Id. (citations omitted). *Contra* Pacold, *supra* note 30, at 1013-14 (discussing that *Farrar* casts doubt on the theory and the theory might not last much longer); Laura E. Flenniken, Comment, *No More Plain Meaning: Farrar v. Hobby*, 71 DENV. U. L. REV. 477, 501 (1994) (arguing that *Farrar's* description of prevailing party raises questions of the continuing vitality of the catalyst doctrine).

70. *See, e.g.*, *Paris v. United States Dep't of Hous. & Urban Dev.*, 988 F.2d 236, 238 (1st Cir. 1993). "In general, the court looks for some 'material alteration of the legal relationship of the parties' and this may occur through a bottom-line success in the litigation or acting as a catalyst in causing the desired alteration." *Id.* at 238. The First Circuit reaffirmed its holding in *Stanton v. Southern Berkshire Reg'l Sch. Dist.*, 197 F.3d 574, 576-78 (1st Cir. 1999) (noting "a plaintiff may achieve such ends through litigation, and deserve attorney's fees, even without a formal victory; for example, the so-called 'catalyst' theory might justify an award where the defendant abandoned an unlawful practice after the case was brought, as a direct result of the lawsuit, but without the need for a decree" and the analysis is "whether [the lawsuit] was a catalyst for an outcome favorable to [the plaintiff]"). Eight of the other circuit courts held the same way. *See Morris v. City of West Palm Beach*, 194 F.3d 1203, 1204 (11th Cir. 1999) (holding that the catalyst test remains available in this circuit); *Payne v. Bd. of Ed.*, 88 F.3d 392, 397 (6th Cir. 1996) (noting that "where no direct relief is obtained and a plaintiff is claiming he or she 'prevailed' because the defendant made significant changes in its past practices, the plaintiff's lawsuit must have been the 'catalyst' that caused the defendant to make the changes"); *Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995) ("*Farrar* does not eviscerate the long-standing doctrine that a plaintiff who has obtained at least some part of what he sought in bringing the suit may be considered a prevailing party and may therefore seek an award of attorney fees," and for the plaintiff to be considered a prevailing party, there must be a causal connection; that is, the suit must be a catalytic, necessary, or substantial factor in attaining relief.); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995) (following and adopting the authority that *Farrar* did not preclude the catalyst test as an alternate theory for determining the prevailing party if no relief on the merits is obtained); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 549 (3d Cir. 1994) (stating that "given the importance that the catalyst theory long has had in prevailing party doctrine under 42 U.S.C. § 1988, we would expect that if the Court intended to hold it no longer a viable theory it would address the issue head-on in a case which it was dispositive. That was not so in *Farrar*."); *Zinn by Blankenship v. Shalala*, 35 F.3d 273, 274 (7th Cir. 1994) (holding the catalyst rule is the test in the circuit, the plaintiff's lawsuit must be causally linked to the achievement of the relief obtained and the defendant must not have acted wholly gratuitously); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., #1*, 17 F.3d 260, 262 (8th Cir. 1994) (holding "[w]here a defendant voluntarily complies with a plaintiff's requested relief, thereby rendering the plaintiff's lawsuit moot, the plaintiff is a 'prevailing party' under section 1988 if his suit is a catalyst for the defendant's voluntary compliance and the defendant's compliance was not gratuitous, meaning the plaintiff's suit was neither 'frivolous,

III. STATEMENT OF THE CASE

A. Statement of Facts and Procedural History

Before 1997, Buckhannon Board and Care Home, Inc. (Buckhannon) operated care homes that provided assisted living to their residents.⁷¹ On January 4, 1996, Buckhannon applied to the Office of Health Facility Licensure and Certification (OHFLC) to renew their licensure,⁷² but Buckhannon failed an inspection by the West Virginia Office of the State Fire Marshal, because some of the residents, including 102 year old Dorsey Pierce,⁷³ were incapable of “self-preservation.”⁷⁴ As a result, OHFLC issued to Buckhannon statements of deficiency, and then conducted a second inspection on September 3, 1996.⁷⁵ They found that Buckhannon was still in non-compliance with the fire safety requirements.⁷⁶ On October 18, 1996, the West Virginia Department of Health and Human Resources issued three orders commanding Buckhannon to cease-and-desist operations and requiring the closure of the resident care facilities within 30 days.⁷⁷ This required

unreasonable [n]or groundless”); *Beard v. Teska*, 31 F.3d 942, 951 (10th Cir. 1994) (holding a plaintiff may prevail in the absence of a judicial determination on the merits under the continued use of the catalyst test to determine the prevailing party status for attorneys fees).

71. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 532 U.S. 598, 600 (2001). W. VA. CODE § 16-5H-1, 16-5H-2 (1998) (encouraging the effective care and treatment of persons who are dependent on the services of others by reason of physical or mental impairment or who may require limited and intermittent nursing care, also defining a residential board and care home as any residence or place which advertised, offered, maintained or operated for the purposes as providing such services).

72. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 19 F. Supp. 2d 567, 570 (N.D. W. Va. 1998).

73. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 532 U.S. 598, 623 (2001) (Ginsburg, J., dissenting). Pierce, a party initially to the lawsuit, had resided at Buckhannon for some four years and her daughter lived nearby. *Id.*

74. W. VA. CODE § 16-5H-1 (b) (WESTLAW through 1987) (defining self preservation as “a person that is, at least, capable of removing his or her physical self from situations involving imminent danger, such as fire”); W. VA. CODE ST. R. § 87-1-14.07 (1995) (repealed 1997) (including self-preservation as a requirement for residential board and care occupancies as: A person is capable of removing his or her physical self from situations involving imminent danger, such as fire); *Buckhannon*, 532 U.S. at 600 (noting that Buckhannon failed the inspection by the West Virginia Office of the State Fire Marshal because several residents were incapable of self-preservation). Pierce and two other Buckhannon residents could not get to a fire exit without aid. *Buckhannon*, 532 U.S. at 623 (Ginsburg, J., dissenting).

75. *Buckhannon*, 19 F. Supp.2d at 570.

76. *Id.*

77. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 532 U.S. 598, 600 (2001). The West Virginia Office of the State Fire Marshall gave the cease-and-desist order to the care center for failing the inspection, because several of the residents were

the relocation of all the residents in the home.⁷⁸

On October 28, 1997, after receiving the cease-and-desist orders, Buckhannon, on behalf of itself and other similarly situated homes and residents (Petitioners), brought suit in the District Court for the Northern District of West Virginia against the State of West Virginia, two of its agencies, and 18 individuals (Respondents).⁷⁹ Petitioners sought declaratory and injunctive relief, claiming that the cease-and-desist orders, and the “self preservation” rule on which it rested, violated the Fair Housing Amendments Act of 1988 (FHAA) and the Americans With Disabilities Act of 1990 (ADA).⁸⁰ Respondents agreed to stay enforcement of the cease-and-desist orders pending resolution of the case and the parties began discovery.⁸¹ This allowed Ms. Pierce to continue living at the Buckhannon home until her death.⁸²

On January 2, 1998, Petitioners stipulated to a dismissal of their demands for damages after facing the Respondents’ sovereign immunity pleas.⁸³ In February 1998, the district court faced a summary judgment motion by the Respondents, but the court found that Petitioners had presented discrimination claims under the FHAA and ADA.⁸⁴

In late February 1997, the State Fire Marshall and the Fire Commission began steps to repeal the self-preservation code.⁸⁵ Their proposals to remove the self-preservation requirements were placed on file with the Secretary of State’s Office and the Legislative Rule-Making

incapable of “self-preservation.” *Id.*

78. *Buckhannon*, 19 F. Supp. 2d at 570 (noting that according to the law, the State Fire Marshall and the Office of Health Facility Licensure and Certification both found Buckhannon in non-compliance).

79. *Buckhannon*, 532 U.S. at 600-01.

80. FAIR HOUSING AMENDMENT ACT OF 1988, 42 U.S.C. § 3601 (1994). See *supra* note 4 for text of authorizing fee provision. AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. § 12101 (1994). See *supra* note 5 for text of authorizing fee provision. *Buckhannon*, 532 U.S. at 600-01.

The family of Dorsey Pierce argued that forcing her to leave her home would be very traumatic. Brief for Petitioner at *3, *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 121 S. Ct. 1835 (2001) (No. 99-1848) (recognizing that Ms. Pierce’s son-in-law testified that he was happy with the care that his mother-in-law received at the facility).

81. *Buckhannon*, 532 U.S. at 601.

82. Brief for Petitioner at *3 n.1, *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 121 S. Ct. 1835 (2001) (No. 99-1848). Ms. Pierce died on January 3, 1999, at the age of 105. *Id.* She was dismissed as a party in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 121 S.Ct. 510 (2000) (writ of cert dismissed).

83. *Id.* at 624 (Ginsburg, J., dissenting).

84. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 19 F. Supp. 2d 567 (N.D. W. Va. 1998) (holding the plaintiffs had stated claims for facial discrimination under the FHAA and discrimination under ADA).

85. Brief for Petitioner at *7-*8, *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 121 S. Ct. 1835 (2001) (No. 99-1848).

Review Committee by August 1, 1997.⁸⁶ In March, 1998, the West Virginia Legislature enacted two bills eliminating the “self-preservation” requirement under I 1998 W. Va. Acts 983-986⁸⁷ and II 1998 W. Va. Acts 1198-1199,⁸⁸ and Respondents moved to dismiss the case as moot.⁸⁹ Petitioners alleged that their suit triggered the statutory appeal,⁹⁰ but the district court granted the Respondent’s motion and found that the 1998 legislation had eliminated the allegedly offensive provisions, and that there was no indication that the West Virginia legislature would repeal the amendments.⁹¹

Petitioners requested attorney’s fees as the “prevailing party” under FHAA, 42 U.S.C. § 3613(c)(2)⁹² and ADA, 42 U.S.C. § 12205,⁹³ arguing that they were entitled to the fees under the catalyst theory.⁹⁴

86. Brief for Petitioner at *7-*8, *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 121 S. Ct. 1835 (2001) (No. 99-1848). Administrative agencies like the Fire Commission do not have independent legal authority to make rules but they “may promulgate proposed rules.” *Id.* at *8 n.3. The Legislature may amend the rules but most of them are “approved with little discussion or amendment.” *Id.* See Joe Manchin III, *WVSOS—Administrative Law—Detailed Step Procedures for Legislative Rule Making*, (2002), available at <http://www.wvsos.com/adlaw/rulemaking/stepprocedureslegislative.htm> (last visited March 15, 2002) (on file with author), for a step-by-step description of West Virginia’s procedure and the 12 steps that constitute rule making procedures for legislative rules.

87. I 1998 W. Va. Acts 983-986 (amending regulations and removing self-preservation requirement).

88. II 1998 W. Va. Acts 1198-1199 (amending statute and removing self-preservation requirement).

89. *Buckhannon*, 532 U.S. at 601.

E.g., *Powell v. McCormack*, 395 U.S. 486, 496 (1969) (stating that “a case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome”); *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979) (noting that “jurisdiction, properly acquired, may abate if the case becomes moot because (1) it can be said with assurance that ‘there is no reasonable expectation . . .’ that the alleged violation will recur . . . and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.”). A case may become moot if the law underlying the dispute changes in a way that renders the plaintiff’s claim irrelevant or in a case for injunctive relief, when the condition challenged is of limited duration and ceases to exist at the time of final review. Trotter, *supra* note 61, at 1450.

90. *Buckhannon*, 532 U.S. at 624 (Ginsburg, J., dissenting). *Contra* Brief for Respondent, Brief for Respondent at *4, *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 121 S. Ct. 1835 (2001) (No. 99-1848) (arguing that “[t]here is no evidence in the record to support petitioners’ assertion that such changes were caused by the recognition that this lawsuit and persuasive expert discovery convinced the respondents that self preservation rules violated federal law.”).

91. *Buckhannon*, 532 U.S. at 601.

92. 42 U.S.C. § 3613(c)(2) (1994). *See supra* note 4.

93. 42 U.S.C. § 12205 (1994). *See supra* note 5.

94. *Buckhannon*, 532 U.S. at 601; Brief for Petitioner at *9, *Buckhannon Bd. & Care Home*,

The district court denied the motion following the Fourth Circuit's precedent, which required the denial of fees unless termination of the action accompanied a judgment, consent decree, or settlement.⁹⁵ For the same reason, the court of appeals affirmed in an unpublished opinion.⁹⁶ The United States Supreme Court granted writ of certiorari on September 26, 2000.⁹⁷

B. United States Supreme Court Decision

1. Majority Opinion

The Supreme Court, in a five-to-four decision, affirmed the ruling of the United States Fourth Circuit Court of Appeals.⁹⁸ The majority opinion written by Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, and Thomas, held that the catalyst theory was not a permissible basis for awarding attorney's fees under FHAA, 42 U.S.C. § 3613(c)(2), and ADA, 42 U.S.C. § 12205.⁹⁹ Given the "clear meaning of 'prevailing party,'" a prevailing party is a party who has received at least some relief on the merits of his claim by a settlement enforced through a consent decree or a judgment on the merits.¹⁰⁰ Specifically, "[a] defendant's voluntary change in conduct,

Inc. v. West Virginia Dep't of Health & Human Res., 121 S. Ct. 1835 (2001) (No. 99-1848) (noting the Petitioners moved for attorney fees because they had prevailed in their lawsuit and obtained the relief they sought in the eliminating of the self-preservation requirements). Petitioners argued that through their lawsuit, they obtained all the relief that they sought because the Buckhannon home never closed and the residents were not forced to relocate. *Id.* They further urged that there was a causal connection based on the chronology of events between the suit and Respondent's acts to repeal the self-preservation requirements. *Id.*

95. *Buckhannon*, 532 U.S. at 625 (Ginsburg, J., dissenting).

96. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, No. 99-1424, 2000 WL 42250, at **1 (4th Cir. W.Va. Jan. 20, 2000) (stating that "[W]e are bound by our precedent . . . we affirm the judgment of the district court that relied on *S-1* and *S-2* in denying appellant's motion for attorneys fees."). The court also noted that none of the defendants informed the plaintiff, the court, or even their own attorneys of the pending amendments. *Id.*

97. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 530 U.S. 1304 (2000) (granting writ of certiorari).

98. *Id.* at 610.

99. *Buckhannon*, 532 U.S. at 610.

100. *Id.* at 607 (noting that "[i]n addition to judgments on the merits, we have held that settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees."). The majority looked to their cases in *Farrar v. Hobby*, 506 U.S. 103 (1992), *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989), *Rhodes v. Stewart*, 488 U.S. 1 (1988) (per curiam), *Hewitt v. Helms*, 482 U.S. 755 (1987), *Maher v. Gagne*, 448 U.S. 122 (1980), and *Hanrahan v. Hampton*, 446 U.S. 754 (1980) (per curiam), to point out that they had never awarded attorney fees except when plaintiff received a judgment on the merits or obtained a

although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change.”¹⁰¹ A “judicially sanctioned change in the legal relationship of the parties” is a prerequisite for an award of attorney fees.¹⁰² The legislative history of fee-shifting statutes is ambiguous to the availability of the catalyst theory and cannot override the clear meaning of ‘prevailing party.’¹⁰³ Because the meaning was clear, the majority did not look at the dissent’s policy arguments that a rejection of the catalyst theory would deter plaintiffs from bringing expensive but meritorious suits and that there would be disincentive for defendants to voluntarily change their conduct.¹⁰⁴

2. Concurring Opinion

The concurring opinion, written by Justice Scalia and joined by Justice Thomas, agreed with the majority opinion in its entirety but responded to the contentions of the dissent.¹⁰⁵ Justice Scalia delved more deeply into the textual significance of the term ‘prevailing party’ and argued that the term was not something that had been newly “invented for use in late-20th century fee-shifting statutes.”¹⁰⁶ Further, he declared that there was no authority to back up the definition supported by the dissent.¹⁰⁷ Justice Scalia urged that the term

court-ordered consent decree. *Id.* at 1839-41. They reiterated that neither “an interlocutory ruling that reverses a dismissal for failure to state a claim” nor a “reversal of a directed verdict for [the] defendant” was enough to make the plaintiff a prevailing party. *Id.* at 1840. “We cannot agree that the term ‘prevailing party’ authorizes federal courts to award attorney’s fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit . . . has reached the sought-after destination without obtaining any judicial relief.” *Buckhannon*, 532 U.S. at 606 (internal quotations omitted).

101. *Id.* at 605.

102. *Buckhannon*, 532 U.S. at 605 (holding that the catalyst theory allowed an award of fees when there was no judicially sanctioned change in the legal relationship of the parties).

103. *Id.* at 607-08 (concluding that the Senate and House Reports are insufficient to alter the “accepted meaning of the statutory term” because explicit statutory authority is needed to award fees in light of the American Rule that each party pays their own fees).

104. *Id.* at 608 (stating that “[w]e are skeptical of these assertions, which are speculative and unsupported by any empirical evidence.”).

105. *Buckhannon*, 532 U.S. at 610 (Scalia, J., concurring). The concurrence strongly disagreed with the arguments and precedents set forth by the dissent. *Id.* at 610-22.

106. *Id.* at 610-11. J. Scalia stated that the term ‘prevailing party’ had been in the United States Statutes at Large since at least 1867 and was in the current United States Code at least seventy times. *Id.* at 611. See *supra* notes 29 and 33 for examples.

107. *Buckhannon*, 532 U.S. at 614 (Scalia, J., concurring) (arguing that the dissent did not cite a single case where the “prevailing party” was a “litigant who left the courthouse emptyhanded”). He also noted that at the time § 1988 was enacted there were no cases that used the catalyst theory as a basis for rewarding costs. *Id.* at 611-12. He also dismissed the dissent’s use of *Baldwin v.*

‘prevailing party’ was a legal term of art and it traditionally meant “the party that wins the suit or obtains a finding (or an admission) of liability.”¹⁰⁸ He noted, “[w]ords that have acquired a specialized meaning in the legal context must be accorded their legal meaning”¹⁰⁹ and that the dissent distorted “the term ‘prevailing party’ beyond its normal meaning for policy reasons.”¹¹⁰ Concerned that the catalyst theory would reward attorney fees to the plaintiff extortionist,¹¹¹ Justice Scalia could not support it because “one does not prevail in a suit that is never determined.”¹¹²

Justice Scalia refused to bend to the dissent’s insistence that the catalyst theory had been accepted by a majority of the federal circuits, because he recognized that the Supreme Court’s opinions had contradicted unanimous decisions by the federal circuits in the past.¹¹³ He reasoned that the precedent supported by the dissent was nothing more than decisions based on the Supreme Court’s own misleading dicta from the earlier *Hewitt*¹¹⁴ and *Farrar*¹¹⁵ decisions.¹¹⁶

Chesapeake & Potomac Tel. Co., 144 A. 703 (1929), because an equity court could award costs as the equities demanded and that the other cases the dissent cited all resulted in the awarding of fees after a judicial finding, or its equivalent, based on the merits of the plaintiff’s case. *Id.* at 612-13.

108. *Buckhannon*, 532 U.S. at 615 (Scalia, J., concurring) (recognizing that there are other meanings of the word “prevailing” in other contexts but that when the word is used in a legal context, it is a term of art).

109. *Id.* at 616 (Scalia, J., concurring) (arguing that if Congress borrowed a word from the legal tradition, the word continued to hold the ideas that had attached to the word).

110. *Id.* at 616 (Scalia, J., concurring). Justice Scalia argued, “departure from normal usage . . . cannot be justified on the ground that it establishes a regime of logical even handedness.” *Id.* at 620. “One does not prevail in a suit that is never determined.” *Id.* He contended that to stretch the holding in *Maher* to a suit where no judicial action had been taken was extending “prevailing party” past its normal meaning. *Id.* at 618.

111. *Buckhannon*, 532 U.S. at 618 (Scalia, J., concurring).

It could be argued, perhaps, that insofar as abstract justice is concerned, there is little to choose between the dissent’s outcome and the Court’s: If the former sometimes rewards the plaintiff with a phony claim (there is no way of knowing), the latter sometimes denies fees to the plaintiff with a solid case whose adversary slinks away on the eve of judgment. But it seems to me the evil of the former far outweighs the evil of the latter. There is all the difference in the world between a rule that denies the extraordinary boon of attorney’s fees to some plaintiffs who are no less “deserving” of them than others who receive them, and a rule that causes the law to be the very instrument of wrong— exacting the payment of attorney’s fees to the extortionist.

Id.

112. *Buckhannon*, 532 U.S. at 620 (advocating that there must be a cutoff for the entitlement of fees and that the cutoff should be the failure to obtain a judgment in time).

113. *Id.* at 621 (citing *McNally v. United States*, 483 U.S. 350 (1987), as an example where the Court decision contradicted every court that had considered the question).

114. 482 U.S. 755, 760-61 (1987).

It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the

3. Dissenting Opinion

The dissenting opinion, written by Justice Ginsburg and joined by Justices Stevens, Souter, and Breyer, focused its argument in three ways: precedent, plain English, and tradition.¹¹⁷ First, it expressed disapproval of the Court's requirement that a document be filed in court, and reasoned that the Court's decision upset the long-standing circuit precedent of the application of the catalyst theory to federal fee-shifting statutes.¹¹⁸ Courts of appeals found it clear that a party prevailed for fee-shifting purposes when "its ends are accomplished as a result of the litigation."¹¹⁹ They noted, with the exception of the Fourth Circuit, none of the nine other courts of appeals that had addressed the catalyst issue had changed their interpretation of 'prevail' following the Supreme Court's decision in *Farrar*.¹²⁰ The catalyst rule, therefore, deserved respect from the Supreme Court.¹²¹

defendant that affords the plaintiff all or some of the relief he sought through a judgment—*e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

Id. See also *supra* note 49 and accompanying text for further discussion of *Hewitt*.

115. 506 U.S. 103, 111 (1992).

"[T]o be considered a prevailing party within the meaning of § 1988," we held, "the plaintiff must be able to point to a resolution of the dispute, which changes the legal relationship between itself and the defendant." We reemphasized that the "[t]ouchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties."

Id. The case also contained further dicta on which the Court of Appeals for the Fourth Circuit relied to strike down the catalyst theory: A person may not be a prevailing party plaintiff under 42 U.S.C. § 1988 except by virtue of having obtained an enforceable judgment, consent decree, or a settlement giving some of the legal relief sought in a § 1988 action. S-1 & S-2 by & through P-1 & P-2 v. State Bd. of Educ., 21 F.3d 49 (4th Cir. 1994) (per curiam) (citing *Farrar v. Hobby*, 506 U.S. 103 (1992)). This exact language was not contained in *Farrar*, see *supra* notes 58 and 66.

116. *Id.* at 621-22 (noting that "[i]nforming the Courts of Appeals that our ill-considered dicta have misled them displays, it seems to me not 'disrespect,' but a most becoming (and well-deserved) humility.>").

117. *Id.* at 622-44 (Ginsburg, J., dissenting).

118. *Id.* at 622-28 (Ginsburg, J., dissenting). "The decision allows 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." *Id.* at 622. The dissent pointed to the numerous circuit courts that held the catalyst theory as a viable theory before and after the decision by the Court of Appeals for the Fourth Circuit in *S-1 & S-2. Buckhannon*, 532 U.S. at 625-628 (Ginsburg, J., dissenting).

119. *Id.* at 626 (Ginsburg, J., dissenting) (citing *Associated Builders & Contractors of La. v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 378 (5th Cir. 1990)).

120. *Buckhannon*, 532 U.S. at 625-27 (Ginsburg, J., dissenting) (noting that *Farrar* involved no catalytic effect and any language that the Fourth Circuit relied on was merely dicta).

121. *Buckhannon*, 532 U.S. at 628 (Ginsburg, J., dissenting). See *supra* note 10 for the

The dissent believed that the meaning of ‘prevailing party’ adopted by the majority was too constrictive.¹²² They urged that the use of Black’s Law Dictionary was not definitive and that terms of art were to be determined contextually as well.¹²³ Under the FHAA and ADA, they argued that Congress did not add “court ordered relief” to the standard for awarding fees, and by negative implication, did not foreclose the use of the catalyst theory.¹²⁴

They countered the concurring opinion’s argument of a lack of precedent by recognizing that several high state courts had regarded plaintiffs as prevailing when the defendant’s voluntary conduct mooted the suit but provided the plaintiffs with the relief they sought in their lawsuit.¹²⁵ The dissenting opinion focused on the result of the lawsuit, which achieved the relief that Petitioners sought.¹²⁶ The dissent urged that the proper construction of the modern civil rights fee-shifting statutes used words intended to hold their ordinary meanings.¹²⁷

The dissenting Justices advocated that the catalyst rule was adopted to “promote the vigorous enforcement” of the civil rights laws, but the Court’s holding cuts against this ideal because it denies access to the court for those “less well-heeled.”¹²⁸ Congress enacted the Civil Rights

elements of the catalyst theory as set forth by the dissent.

122. *Buckhannon*, 532 U.S. at 623 (Ginsburg, J., dissenting). The dissent argued that the fee-shifting statutes do not have language that tightly bound fees to judgments as to exclude the application of the catalyst theory. *Id.* at 629. They analogized that there had been multiple instances where a defendant’s voluntary conduct, mooted the suit, provided relief that the plaintiffs sought and that similar federal practices had been observed in cases governed by the Federal Rule of Civil Procedure 54(d), the default rule allowing costs to the prevailing party unless the court otherwise directed. *Id.* at 631-33; 10 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2667 (2d ed. 1983) (stating that “[a]s provided in Rule 54(d), costs shall be awarded to the prevailing party unless the court otherwise directs.”).

123. *Buckhannon*, 532 U.S. at 628 (Ginsburg, J., dissenting) (arguing that “[o]ne can entirely agree with Black’s Law Dictionary that a party ‘in whose favor a judgment is rendered’ prevails, and at the same time resist, as most Courts of Appeals have, any implication that only such a party may prevail.”).

124. *Buckhannon*, 532 U.S. at 629-30 (Ginsburg, J., dissenting).

125. *Buckhannon*, 532 U.S. at 629-30 (Ginsburg, J., dissenting) (arguing that the concurrence unconvincingly tries to distinguish these cases).

126. *Id.* at 625 (Ginsburg, J., dissenting). “In sum, plaintiffs were denied fees not because they failed to achieve the relief they sought.” *Id.* “On the contrary, they gained the very change they sought through their lawsuit when West Virginia repealed the self-preservation rule that would have stopped *Buckhannon* from caring for people like *Dorsey Pierce*.” *Id.*

127. *Buckhannon*, 532 U.S. at 633-34 (Ginsburg, J., dissenting) (taking the position that a lawsuit’s ultimate purpose is to achieve actual relief from an opponent and that a judicial decree is not the only way to prevail). The dissent cited several examples of the common meanings for prevail. *Id.*

128. *Id.* at 623, 640 (Ginsburg, J., dissenting). “Concomitantly, the Court’s constricted definition of ‘prevailing parties’ and consequent rejection of the ‘catalyst theory’ impede access to

Attorney's Fees Act of 1976 in response to the Court's holding in *Alyeska Pipeline Serv. Co.*¹²⁹ It did so to "ensure that nonaffluent plaintiffs would have effective access to the Nation's courts to enforce civil rights laws."¹³⁰

The dissent addressed the majority's policy arguments as unimpressive and argued that a defendant who knew that noncompliance would be expensive might be encouraged to conform his conduct to the legal requirements.¹³¹ The dissent also dismissed the concurrence's opinion that saw the catalyst theory as encouraging the extortionist, because they felt Congress assigned to the courts the ability to recognize extortionists and, therefore, to exercise discretion in awarding attorney fees.¹³²

Finally, the dissent endorsed the adoption of the three-part catalyst theory test to determine the awarding of attorney fees, which was approved by the federal circuits.¹³³ The majority opinion countered this argument by arguing that requests for attorney fees should not result in second litigations, and such a test was clearly not "readily administrable."¹³⁴

IV. ANALYSIS

The *Buckhannon* decision added a roadblock for plaintiffs who attempt to bring lawsuits under fee-shifting statutes.¹³⁵ This note

court for the less well-heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general." *Buckhannon*, 532 U.S. at 622-23 (Ginsburg, J., dissenting).

129. *Id.* at 635 (Ginsburg, J., dissenting); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 262 (1977) (holding that the "circumstances under which attorney's fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine"). See *supra* notes 40-42 and accompanying text for further discussion of this case.

130. *Buckhannon*, 532 U.S. at 636 (Ginsburg, J., dissenting) (citing H.R.Rep. No. 94-1558, at 1 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5910). See *infra* notes 155-60 and accompanying text for further discussion of Congressional intent.

131. *Buckhannon*, 532 U.S. at 638-39 (Ginsburg, J., dissenting) (alleging that the majority did not look beneath the surface of their policy arguments and instead focused on the meaning of prevailing).

132. *Buckhannon*, 532 U.S. at 640-41 (Ginsburg, J., dissenting) (arguing that it was normal for the judges in the cases to resolve fee disputes and determine at their discretion whether an award was in order and the amount that was due).

133. *Id.* at 627-28. See *supra* note 10 (outlining the catalyst theory).

134. *Buckhannon*, 532 U.S. at 610; Trotter, *supra* note 61, at 1440 (stating that the catalyst theory likely "generates more superfluous litigation than it avoids, considering the vast amounts of secondary litigation that have resulted from the inherently vague standards" used for recovering attorney fees).

135. *Buckhannon*, 532 U.S. at 600-04 (holding a judgment on the merits or a consent decree "create[s] the material alteration of the legal relationship of the parties necessary to permit an award

considers the impact of the bright-line rule for determining ‘prevailing party’ status on the parties in fee-shifting litigation¹³⁶ and the Court’s holding, which contradicts the intent of Congress.¹³⁷ It examines how the courts are facing the challenges related to ‘prevailing party’ status and the effects on litigants in different types of fee-shifting statutes. This note further considers the possible continued viability of the catalyst theory under certain circumstances¹³⁸ and recommends that Congress respond to the *Buckhannon* decision.¹³⁹

A. Determining the Clear Meaning of Prevailing Party

The Supreme Court decided that the definition of ‘prevailing party’ was clear.¹⁴⁰ Both the majority and the concurring opinions endorsed the use of *Black’s Law Dictionary* in defining ‘prevailing party.’¹⁴¹ Justice Scalia, in the concurrence, advocated the use of *Black’s Law Dictionary* for terms that were “tailored to judicial settings” including ‘prevailing party.’¹⁴² This approach to the interpretation of legal terms

of attorney’s fees” (citations omitted)); *Id.* at 623 (Ginsburg, J., dissenting) (arguing that a person with limited resources could count on a judge to award them attorney fees when fees were warranted and still accept relief offered voluntarily by the defendant).

In fact, because of the litigation, the plaintiffs’ lawyers would not collect \$200,000 that was owed from the plaintiffs for legal services rendered. Marcia Coyle, *Fee Change is a Sea-change But Some Seek Way to Skirt Justices’ Limit on Catalyst Theory Fees*, NAT’L L.J., June 11, 2001, at A1, available at WESTLAW, 6/11/01 NLJ A1, (Col. 5). Plaintiffs’ counsel fully expected to win on the merits of the case so attorney fees were not seen as a compelling issue. *Id.* The state acknowledged that it would never settle the case, and unfortunately for the plaintiffs, six weeks later, the legislators repealed the law instead. *Id.*

136. See *infra* notes 140-53 and accompanying text.

137. See *infra* notes 154-79 and accompanying text.

138. See *infra* notes 180-227 and accompanying text.

139. See *infra* notes 228-30 and accompanying text.

140. *Buckhannon*, 532 U.S. at 610 (noting “[g]iv[en] the clear meaning of ‘prevailing party’”). *Contra Buckhannon*, 532 U.S. at 628 (Ginsburg, J., dissenting) (stating “[t]he Court today detects a ‘clear meaning’ of the term prevailing party . . . that has heretofore eluded the large majority of the courts construing those words.”); Martin A. Schwartz, *Attorney’s Fees Recovery Restricted in Civil Rights Cases*, N.Y.L.J., Aug. 21, 2001, at 3, available at WESTLAW, 8/21/2001 NYLJ 3, (col. 1) (arguing that the meaning cannot be clear when four Supreme Court Justices and eleven circuit courts reached the opposite result).

141. *Buckhannon*, 532 U.S. at 603 (citing *Black’s Law Dictionary* to define legal terms of art such as prevailing party); *Id.* at 615-16 (Scalia, J., concurring) (recognizing prevailing party as a term of art and *Black’s Law Dictionary* was a part of the body of learning that accorded the term its legal meaning).

142. *Buckhannon*, 532 U.S. at 615-16 (Scalia, J., concurring) (holding that words that have acquired legal meaning should be defined based on the “body of learning” from which the term was borrowed and the term continued to hold the cluster of ideas that had attached to it over the centuries of practice); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Remains A Fortress: An Update*, 5 GREEN BAG 2d 51, 55 (2001) (arguing “Given *Buckhannon* . . . *Black’s Law*

was consistent with the Court's current trend of relying on legal dictionaries to define legal terms.¹⁴³ When arguing before the Court about the definition of a term, a lawyer would be well advised to cite a dictionary as an authority for the definition of that term, because the Court has relied on a dictionary in nearly half of all the opinions in the Supreme Court's two-centuries of existence.¹⁴⁴

In deciding the bright-line merit rule,¹⁴⁵ the Supreme Court drew a distinction "between judicial relief and any other type of relief."¹⁴⁶ The focus in awarding attorney fees has shifted from the relief sought by the

Dictionary may be the presumptive dictionary used by Justices Scalia and Thomas, at least for words and phrases 'tailored to judicial settings.'). See *supra* note 2 for the definition of 'prevailing party' found in *Black's Law Dictionary*.

143. Thumma & Kirchmeier, *supra* note 142, at 51-52 (declaring that since the 1997-1998 Term, the Court used dictionaries to define 28 words in 23 opinions and from 1990 through the 1997-1998 Term the Court relied on dictionaries in almost 180 opinions to define more than 220 terms).

144. *Id.* at 52 (providing a summary of the number of times the Supreme Court and each individual Justice have relied on a dictionary and which dictionaries each of the current Justices prefer). For instance, Justice Scalia cited a dictionary on average in 4.17 opinions per year to define 5.42 terms while Justice Thomas cited a dictionary in 3.57 opinions per year to define 4.14 terms from 1990 to 1998. *Id.* at 52. Their use of dictionaries increased in 1998-2001 to 4.0 opinions for 4.33 terms and 3.66 opinions for 4.0 terms, respectively. *Id.* For an extensive survey of the use of dictionaries in Supreme Court opinions and court opinions generally, see Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227 (1999).

145. Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1991). She defines as:

Rules. – A legal directive is "rule"-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited facts, leaving irreducibly arbitrary and subjective value choices to be worked out somewhere else. A rule captures the background principle or policy in a form that from then on operates independently. A rule necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness. But the rule's force as a rule is that decisionmakers follow it, even when direct application of the background principle or policy to the facts would produce a different result.

Id. at 58. See generally *Bennett v. Yoshina*, 259 F.3d 1097, 1101 (9th Cir. 2001) (holding that the Supreme Court made a bright line rule that a plaintiff would not qualify as a prevailing party for instances where a political branch in the state was motivated to enact legislation solely due to the suit, because it lacked the "necessary judicial imprimatur") (quoting *Buckhannon*, 532 U.S. at 605, 121 S. Ct. 1840). *Contra Trotter*, *supra* note 61, at 1439 (arguing that "Deciding the merits seems superfluous once a defendant effectively concedes that its conduct was illegal by voluntarily changing its behavior.").

146. Adam Babich, *Fee Shifting After Buckhannon*, 32 ENVTL. L. REP. 10137, Jan., 2002, available at Westlaw, 32 Env'tl. L. Rep. 10137 (noting that after the *Buckhannon* decision, attorney fees are precluded when there is "nonjudicial alteration of actual circumstances"); 4 RONALD D. ROTUNDA & JOHN E. NOVAK, TREATISE ON CONSTITUTIONAL LAW-SUBSTANCE & PROCEDURE § 19.36 (3d ed Supp. 2002) available at WESTLAW, CONLAW S 19.36 (stating that now the "general rule is that there must be a judicially-sanctioned change in the legal relationship of the parties in order for a court to approve an award of attorney's fees").

plaintiff to the court's role in the securing the relief.¹⁴⁷ By transforming the case-by-case determinations into a set of rigid formalities, the district court judges lost their use of discretion in awarding fees to prevailing parties.¹⁴⁸ Rules like this cast doubt on the district court's fact-finding abilities because they leave little room for discretion.¹⁴⁹

Even though the majority endorsed the term 'prevailing party' as having a clear meaning, the extent of judicial involvement necessary to prevail remains cloudy.¹⁵⁰ A court-approved settlement is now enough to prevail even though such a settlement may have no admission of liability.¹⁵¹ Further, it places the trigger of the fee awarding rule in the hands of the parties, primarily the defendants, whose aims are "contrary to the interests of those Congress sought to protect."¹⁵² This is troubling because the defendant can now deprive the plaintiff of attorney fees through their voluntary cessation of an illegal act before enough judicial

147. *Buckhannon*, 532 U.S. at 621 (Ginsburg, J., dissenting) (classifying such event as "a court entry memorializing her victory").

148. *The Supreme Court, 2001 Term—Leading Cases*, 115 HARV. L. REV. 457, 464 (2001) [Leading Cases] (arguing that the fee-shifting scheme should be fact-intensive and standard-based to evaluate the plaintiff's possible success and protect the plaintiff from manipulation by the defendant). By substituting a formalistic rule instead of equitable discretion, the decision threatens to weaken civil rights enforcement because judges can no longer use discretion in what fee awards would be fair. *Id.* at 463-64. "Not only can a careful judicial eye squelch defendant gaming, but with the particulars of cases at their disposal, district court judges are simply better equipped to advance congressional goals when determining whether a party has prevailed" *Id.* at 466. A bright line rule will continue to lead to arbitrary results. *Id.* at 464. *See also*, Sullivan, *supra* note 145, at 62 (acknowledging that the argument that rules are fairer is based in the requirement that judges must act consistently therefore reducing the danger of arbitrariness or bias while the counterargument is that rules cause decisions to be arbitrary because judges are forced to treat cases that are substantively alike differently in view of underlying principles).

149. Sullivan, *supra* note 145, at 64 (noting that "Rules embody a distrust for the decisionmaker they seek to constrain.").

150. Babich, *supra* note 146 (analyzing that a consent decree may be enough to prevail as should a voluntary remand, while an out-of-court settlement would probably not be enough to prevail). "In sum, whenever a Court issues an order that affords significant relief to a plaintiff, the plaintiff is a 'prevailing party' regardless of whether the opposing party resists, defaults, settles, or unilaterally surrenders." *Id.* *See infra* notes 160-227 and accompanying text for further discussion of the courts' responses to the *Buckhannon* ruling.

151. *Buckhannon*, 532 U.S. at 622 (Ginsburg, J., dissenting) (arguing that the court's decision really has no merit requirement, as a court-approved settlement is enough to receive fees although it may lack an admission of liability). *Contra Buckhannon*, 532 U.S. at 604 (holding "settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees" because it is a court-ordered "chang[e] [in] the legal relationship between [the plaintiff] and the defendant" even if it does not "include an admission of liability" (citations omitted)).

152. *Leading Cases*, *supra* note 148, at 465 (arguing that the stronger the plaintiff's case becomes, the more the defendant can benefit by avoiding a judgment, consent decree or a court-approved settlement).

involvement occurs and therefore, the initial illegal action will go unchecked by the judicial system.¹⁵³

B. Contrary to Legislative Intent

Due to the five-to-four decision,¹⁵⁴ the argument that the Court's decision was contrary to Congress's intent remains alive.¹⁵⁵ In the Senate Report No. 94-1101, Congress expressly declared that the purpose of the Civil Rights Attorney's Fees Awards Act of 1976 was to "give[] the federal courts discretion to award attorneys' fees to prevailing parties in suits brought to enforce the civil rights acts which Congress ha[d] passed since 1866."¹⁵⁶ They premised fee-shifting statutes on the appreciation that a plaintiff brings an action not for himself alone but also as a 'private attorney general' in vindicating a policy that Congress considered of the highest priority, and that has left much of the policing powers to private individuals.¹⁵⁷ Under the civil

153. Barton Aronson, *How a Recent Supreme Court Attorneys' Fees Decision Will Dramatically Change the Enforcement of Civil Rights and Other Laws*, FindLaws Legal Commentaries, at <http://writ.news.findlaw.com/aronson/20010629.html> (Jun. 29, 2001) (discussing that "the ability of the defendant to deprive a plaintiff of a hard-earned fee is now beyond the reach of the courts" because the defendant can voluntarily moot the lawsuit, and without a judgment or a settlement and get away without paying the plaintiff's attorney fees).

154. *Buckhannon*, 532 U.S. 598.

155. *Id.* at 636 (Ginsburg, J., dissenting) (declaring that "Congress enacted § 1988 to ensure that nonaffluent plaintiffs would have 'effective access' to the Nation's courts to enforce civil rights laws" (citations omitted)). The Senate Report on the 1976 Civil Rights Attorney's Fees Awards Act states: "[F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. No. 94-1011, at 5 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5912, cited in *Buckhannon*, 532 U.S. at 637 (Ginsburg, J., dissenting).

156. S. Rep. No. 94-1011, at 5 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5908-09 (declaring that the law was meant to remedy gaps in the civil rights laws created by the Supreme Court's decision in *Alyeska*, 421 U.S. 240 (1975)).

157. Samuel R. Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281, 306 (1977) (discussing that Congress made fee-shifting statutes "premised upon the proposition that private enforcement is essential to the effectuation of the substantive statutory scheme and that the award of attorney's fees is essential to effective private enforcement"); Daniel L. Lowery, "Prevailing Party" Status for Civil Rights Plaintiffs: Fee-shifting's Shifting Threshold, 61 U. CIN. L. REV. 1441, 1446 (1993) (stating that the main goal of the Fees Act was to enable citizens to bring civil rights claims and encourage attorneys to accept civil rights cases); Sisk, *supra* note 10, at 279 (noting that "[a] primary purpose of the Equal Access to Justice Act is to encourage private parties to initiate litigation to challenge unreasonable government rules and policies and, thereby, to directly influence the policy deliberations of administrative agencies."); Sternlight, *supra* note 38, at 577 (asserting that "[r]egardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards."); Bob Van Voris, *South Florida's ADA Industry Lawyer, Partners File 740 Suits on Behalf of Disabled*, NAT'L L.J., July 16, 2001, at A1 (recognizing the

rights laws, Congress recognized that attorney fees are available for judgments short of determinations on the merits because many plaintiffs have little or no money to hire a lawyer to defend their rights and could not bring their claims otherwise.¹⁵⁸ The Court's interpretation of 'prevailing party' does not follow Congress' intent when it now requires a consent decree or a judgment on the merits.¹⁵⁹

C. Impact on Civil Rights Litigation

1. Immediate Results and Predicted Changes in Strategies

Immediately following the *Buckhannon* ruling, some plaintiffs' lawyers offered to settle their cases at a discount.¹⁶⁰ Defendants ordered to pay attorney's fees under the catalyst theory appealed if they could,

need for the private litigant to enforce the ADA and noting that the policing of small businesses was left to the private individual).

158. S. Rep. No. 94-1011, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910 (noting "[i]f private citizens are able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court"). "Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief (citing *Kopet v. Esquire Realty Co.*, 523 F.2d 1005 (2d Cir. 1975)." S. Rep. No. 94-1011, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912. See Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 165 (2002) (arguing that a "a fee award is appropriate if the citizen plaintiff has materially advanced the goals of the statute, even without a favorable judgment").

159. S. Rep. No. 94-1011, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913. The Senate Report on the Civil Rights Attorney's Fees Awards Act of 1976 states:

This bill . . . provides the fee awards which are necessary if citizens are able to effectively secure compliance with these existing statutes. There are very few provisions in our Federal laws which are self-executing. Enforcement of the laws depends on governmental action and . . . on private actions through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

Id.; Shub, *supra* note 6, at 706 (hypothesizing that "Joe cannot afford to pay for legal services; yet an attorney is willing to take Joe's case because of the award of attorney's fees he knows will be forthcoming if Joe's suit is successful"). By denying fees to Joe's lawyer, "[a]ttorneys w[ill] become increasingly hesitant to take on clients like Joe." *Id.* at 725. "Despite these clients' legitimate claims of having suffered violations of their civil rights, the likelihood that either the client would not be able to pay or that the court would not award attorney's fees would result in these clients' inability to obtain legal representation in these important cases." *Id.*

160. Van Voris, *supra* note 157 (noting that *Buckhannon* had this effect on public litigation claims).

and plaintiffs found their fee awards reversed.¹⁶¹ Requests by plaintiffs for attorney fees based on the catalyst theory were vacated or denied.¹⁶²

The ruling was a big win for businesses and the government because they no longer had to be concerned with as many plaintiffs bringing civil rights lawsuits and the ruling also limited their liability as to plaintiff attorney fees.¹⁶³ Further, the ruling may also reduce the

161. *E.g.*, *Chambers v. Ohio Dep't of Human Servs.*, 273 F.3d 690, 693 (6th Cir. 2001) (reversing the district court's award of attorney fees based on the catalyst theory, because after *Buckhannon*, the catalyst theory was no longer viable in determining a prevailing party); *New York State Fed'n of Taxi Drivers, Inc. v. Westchester County Taxi & Limousine Comm'n*, 272 F.3d 154 (2d Cir. 2001) (holding that the catalyst theory was no longer a permissible basis for awarding attorney fees under § 1988 and because the lawsuit did not result in a judicially sanctioned change in the legal relationships, the award of attorney fees was reversed); *Johnson v. Rodriguez*, 260 F.3d 493 (5th Cir. 2001) (reversing the award of attorney fees based only on the catalyst theory because of the rejection of the catalyst theory in *Buckhannon*); *Sacco v. Dep't of Justice*, No. DC-0752-99-0219-A-1, 90 M.S.P.R. 37, 41-42 (M.S.P.B. Sept. 4, 2001) (holding the catalyst theory was not a permissible basis for the award of attorney fees by the Board); *Auguste v. Hammons*, 727 N.Y.S. 2d 880 (N.Y. App. Div. 1 Dept. July 26, 2001) (holding the catalyst theory of recovery as being rejected by the Supreme Court in *Buckhannon* and reversing the award of attorney fees).

162. *E.g.*, *Ken-N.K., Inc. v. Vernon Twp.*, No. 98-1871, 2001 WL 1006265, at **8 (6th Cir. Aug. 23, 2001) (holding that because the plaintiffs did not obtain a judgment on the merits or a consent decree and the catalyst theory was no longer allowed, they were not prevailing parties and accordingly, attorney fees were denied); *Reimer v. Champion Healthcare Corp.*, 258 F.3d 720 (8th Cir. 2001) (vacating attorney fees awarded under the catalyst theory); *J.S. v. Rampo Central Sch. Dist.*, 165 F. Supp. 2d 570 at 570, 574-75 (S.D.N.Y. 2001) (holding that *Buckhannon* should be applied retroactively because the Court did not overrule clear past precedent nor did it establish a new principle of law and therefore attorney fees based on the catalyst theory are denied); *Sileikis v. Perryman*, No. 01 C 944, 2001 WL 965503, at *3 (N.D.Ill. Aug. 21, 2001) (holding that the plaintiff can no longer rely on the catalyst theory to receive an award of attorney fees and that the plaintiff's request for attorney's fees under the catalyst theory is denied); *Sumner v. Principi*, 1st Vet. App. 256 at 256 at *1 (Vet. App. Nov. 6, 2001) (holding that the catalyst theory was no longer viable, and because the remand did not recognize an administrative error, the appellant was not a prevailing party); *Vaughn v. Principi*, 15 Vet. App. 277 at 278 at *2 (Vet. App. Nov. 9, 2001) (holding the catalyst theory was no longer available to achieve prevailing party status and as such the plaintiff cannot recover fees); *Thayer v. Principi*, 15 Vet. App. 204 (Vet. App. Sept. 4, 2001) (holding that the catalyst theory is no longer available to achieve prevailing party status under the EAJA).

163. Jack Hayes, *U.S. Supreme Court Denies ADA Legal Fees*, NATION'S RESTAURANT NEWS, June 25, 2001, at 1 (declaring the ruling offered encouragement to restaurant owners who had been plagued by an epidemic of ADA lawsuits). The restaurant owners hoped that *Buckhannon* would stop the tide of opportunistic lawyers who on a contingent fee basis brought suits for minor violations and tried to speed up compliance through the threat of large attorney fee bills. *Id.* See Tony Mauro, *Relief Must Be Awarded by Court, Not Volunteered by Defendants*, N.Y.L.J., May 30, 2001, at 1, available at Westlaw, 5/30/2001 N.Y.L.J. 1, (col. 3) (noting that it was a win for the business community from General Motors to the Girl Scouts). "The extortion by plaintiffs' attorneys who seek fees without winning the very case they started is over," said Charles Newman of the St. Louis office of Bryan Cave, who wrote a brief for the Alliance of Automobile Manufacturers arguing that the catalyst theory had enabled plaintiffs' lawyers to link fee requests to actions by car companies such as voluntary recalls." *Id.* See also, Barbara K. Bucholtz, *Gestalt Flips by an Acrobatic Supreme Court and the Business-related cases on its 2000-2001 Docket*, 37

number of frivolous claims brought by civil rights plaintiffs.¹⁶⁴ Less restrictive ways are available to address that problem because defendants could easily respond with a Rule 11 motion for sanctions¹⁶⁵ or request their own attorney fees under the bad faith doctrine.¹⁶⁶

On the other hand, defendants who are violating a civil rights law have an incentive to string out the litigation, and when a plaintiff appears likely to prevail just before trial, the defendant can unilaterally change their policies and moot the lawsuit to avoid the fee award.¹⁶⁷ Defense attorneys contend that is an unrealistic result because no defendant would want to expend the money or time to drop the case just before trial in order to be relieved of the possible obligation to pay the plaintiff's attorney fees.¹⁶⁸

TULSA L. REV. 305, 326 (noting the decision could be considered a win for the business community); Zinn, *supra* note 158, at 132 (opining that "the citizen suit is a blunt instrument [and] [u]nfettered citizen enforcement would not create an optimal mix of cooperative and adversarial enforcement because citizen plaintiffs will not always distinguish between productive and excessive cooperation."); Juan Otero, *Supreme Court Ruling Limits Cost Shifting Attorneys' Fees for Plaintiff*, NATION'S CITIES WEEKLY, June 4, 2001, at WESTLAW (recognizing that this result was a victory for cities and towns because the catalyst theory opened up the municipalities for extortionate strike suits to obtain attorney fees without regard to the "existence or non-existence of litigation on the issue in question").

164. Matthew D. Slater, Comment, *Civil Rights Attorney's Fees Awards in Moot Cases*, 49 U. CHI. L. REV. 819, 823 (1982). The problem arises that a potential plaintiff could bring an illegitimate civil rights claim hoping that the defendant will decide to appease the plaintiff and pay the attorney fees instead of undertaking extended litigation and still having to pay his own lawyer. *Id.* at 824.

165. FED. R. CIV. P. 11. Rule 11 authorizes that:

By presenting to the court . . . an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, -

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument. . . .

Id. The court may also authorize sanctions against the lawyers, law firms or parties for violations of Rule 11. *Id.*; Klausner, *supra* note 22, at 301 (arguing that such a ruling requires attorney to "refrain from litigating for improper purposes, to exhibit candor toward the court, and to perform a reasonable investigation of the law and facts with respect to all papers submitted to the court").

166. See *supra* note 25 for further discussion of the bad faith doctrine.

167. Coyle, *supra* note 135 (predicting that defendants may act in this unilateral manner to foil plaintiffs); *The People Lose*, NEWS & OBSERVER (RALEIGH, N.C.), June 1, 2001, at A20, available at 2001 WL 3467550 (allowing defendants with weak claims to get out-of-court settlements or change their behavior right before going to trial and thus avoid the adverse judgment and the award against them for attorney fees); Mauro, *supra* note 163, at 1 (noting that "[t]his gives defendants a strong incentive to string out litigation as long as possible and then, on the eve of trial, unilaterally fix the situation and stick their tongues out at the plaintiffs.").

168. See Coyle, *supra* note 135 (arguing that manipulation by the private or government defendant is unlikely because it would result in an extreme waste of resources).

Plaintiffs that bring a claim now have several courses of action including insisting on a consent decree accompanying a settlement, litigating to try to stop the court from finding that their case is moot, and bringing actions for damages where they would have originally sought only injunctive relief.¹⁶⁹ Resources will be spent on additional hearings over settlements, consent decrees, dismissals, and other collateral issues involving attorney fees and, therefore, eliminate anything saved by the rejection of the catalyst theory and its hearings.¹⁷⁰

Potential plaintiffs are now in a position where they may decide not to bring a claim because they cannot afford it.¹⁷¹ Those particularly

169. See also, Martin A. Schwartz, *Section 1983 Constitutional Litigation*, in SECTION 1983 CONSTITUTIONAL LAW 2001, at 73 (PLI Litig. & Admin. Practice Course, Handbook Series No. H0-00D7, 2001), available at Westlaw, 667 PLI/LIT 37. He suggests that the possible strategies for a plaintiff are now:

1. inclusion of a claim for monetary relief with the prayer for injunctive relief;
2. seek relief on behalf of a class of persons pursuant to Fed.R.Civ. P. 23;
3. during settlement negotiations insist that any settlement agreement be embodied in a consent decree;
4. argue vigorously against dismissal of the action on mootness grounds; and
5. lobby Congress for legislative change to overturn *Buckhannon*.

Id. See also, Coyle, *supra* note 135 (predicting the behavior of plaintiffs as seeking damage claims in addition to injunctive relief); Leading Cases, *supra* note 148, at 465 (stating that “Fear of being denied fees will induce plaintiffs, if they choose to file at all, to expend time and resources to sidestep a finding of mootness even if the defendant voluntarily complies”); Richard A. Rothschild, *Events Leading Up to the Fee Litigation: What You Need to Think About Even If You are Not Going to Be the One to Write the Fee Motion*, in LITIGATING SECTION 1988 ATTORNEYS’ FEES 2001, at *10 (PLI Litig. & Admin. Practice Course, Handbook Series No. H0-00ER, 2001), available at Westlaw, 666 PLI/LIT 7 (arguing that plaintiffs should “[i]nsist on stipulated judgment or consent decree rather than out-of-court settlement” and “[s]ettle fees and merits together” as well as “[i]n appropriate cases call defendants’ bluff and litigate to judgment”); Candice Sang-Jasey & Linda D. Headley, *Attorneys’ Fees and Damages in Special Education Cases*, N.J. LAWYER: THE MAGAZINE, Dec. 2001, at *39, available at WESTLAW, 212-Dec N.J. Law. 38 (advising that under IDEA, parents should either secure an agreement on fees as part of a settlement, insist that settlements be placed on the record and incorporated in a decision and order at the due process level, or in an order or judgment at the appellate level). *E.g.*, *Gottfried v. Medical Planning Serv., Inc.*, 280 F.3d 684, 691 (6th Cir. 2002) (acknowledging that even though a claim for injunctive relief is moot, relief in the form of damages for a past constitutional violation is not moot).

170. Leading Cases, *supra* note 148, at 466-67 (arguing that resources will now be spent on dismissal motions instead of the catalyst theory); Coyle, *supra* note 135 (predicting its impact will depend on the extent to which defendants change their conduct); Thomas Scarlett, *Supreme Court Limits Reimbursement of Attorney Fees under Federal Statutes*, TRIAL, Aug. 2001, at *17, available at Westlaw, 37-AUG Trial 16 (recognizing that the decision will keep people with valid claims from going to court and may force some claims through longer litigation rather than allowing for informal settlement).

171. The People Lose, *supra* note 167 (arguing that the people most hurt by the *Buckhannon* decision are the “people of modest means”) See Sternlight, *supra* note 38, at 582 (noting the Supreme Court’s decisions have practically guaranteed that a civil rights plaintiff’s attorney will end up “in the red.”). “[P]laintiffs’ attorneys are . . . economically forced to abandon civil rights

harmed are plaintiffs enforcing several environmental fee-shifting statutes¹⁷² where damages are not recoverable and only injunctive relief is available.¹⁷³ While public interest groups acknowledge that attorney fees are helpful, they have other sources of income.¹⁷⁴ Nonetheless, the average citizen will be discouraged from filing a lawsuit and will likely have difficulty finding a lawyer,¹⁷⁵ because there will be a decrease in the amount of litigation that public interest attorneys will be able to undertake and still remain solvent.¹⁷⁶

litigation, leaving plaintiffs with no adequate representation.” *Id.*

172. Russell & Gregory, *supra* note 39, at 308 (suggesting that Congress “empowered private citizens to institute suits to enforce environmental regulations and compel regulatory agencies to enforce such regulations”). See Coyle, *supra* note 135 (noting that the Clean Water Act, the Comprehensive Environmental Response, Compensation and Liability Act and the Resource Conservation and Recovery Act are affected by the *Buckhannon* ruling); Babich, *supra* note 146 (noting several fee-shifting environmental statutes that used the term prevailing party in their text as RCRA § 7002(e), Emergency Planning and Community Right-To-Know Act § 326(f), Comprehensive Environmental Response, Compensation and Liability Act § 310(f), CWA §§ 505(d) and 505(b)(3), Oil Pollution Act § 1006(g), Hazardous Liquid Pipeline Safety Act § 215 and Equal Access to Justice Act).

173. Mauro, *supra* note 163 (recognizing that the ruling in *Buckhannon* will be devastating to environmental cases where the only relief is injunctive); Aronson, *supra* note 153 (noting that most of the statutes involve only injunctive relief and compensatory damages may be unavailable under most environmental laws).

174. Aronson, *supra* note 153 (predicting that it is a “blow to national civil rights organizations” but that there are still other sources of income for them unlike the “other people out there”). See Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 237 (1984) (discussing that public interest litigants are funded through a variety of sources and attorney fees are only a modest source of funding for those public interest organizations).

175. Percival & Miller, *supra* note 174, at 237-38 (arguing that the prospective benefit to an individual public interest litigant will generally not be sufficient to make it worthwhile to bring a civil rights claim); The People Lose, *supra* note 167 (arguing *Buckhannon* will likely result in fewer attorneys being willing to gamble their time and money on public interest litigation); Mauro, *supra* note 163 (acknowledging that “there will be a strong disincentive for lawyers to take on cases for people who can’t afford to pay”); Aronson, *supra* note 153 (noting that attorneys were reporting less activity on cases for federal remedial statutes).

176. Coyle, *supra* note 135 (arguing that the *Buckhannon* decision will reduce the amount of lawsuits that public interest lawyers will be able to undertake); Sternlight, *supra* note 38, at 577, 598 (discussing that the Supreme Court’s rulings have caused civil rights attorneys to have to structure their practices in such a manner as to keep themselves from meeting financial disaster which makes it more difficult for a plaintiff to secure representation). The Supreme Court’s rulings have made it very difficult for attorneys to specialize in “plaintiffs’-side civil rights law.” *Id.* at 599.

See Berger, *supra* note 157, at 311. Though some courts have said “[a] member of the legal profession has the obligation to represent clients who are unable to pay for counsel and also bring suits in the public interest. While embarking upon their duties, they should not be motivated by a desire for profit but by public spirit and sense of duty.” *Id.* Public interest lawyers are still few and far between. *Id.* at 313.

Many cases could be handled through pro bono representation, but Rule 6.1 of The Model Rules of Professional Conduct states only that “[a] lawyer should aspire to render at least (50) hours

2. Conflicts of Interest and Ethical Concerns

Attorneys in civil rights actions have considerable concern over their ability to receive payment for their legal services.¹⁷⁷ Cases under fee-shifting statutes could lead to conflicts of interest between the client and the lawyer on what is in the best interest of the client, particularly in regard to availability of fees.¹⁷⁸ An attorney will have to be creative in the settlement negotiations to zealously represent the client, and at the same time, protect herself.¹⁷⁹ Plaintiffs will likely refuse to agree to settlements that do not result in the judicial imprimatur or the needed

of pro bono publico legal services per year.” MODEL RULES OF PROFESSIONAL CONDUCT R. 6.1 (1983). There is an overwhelming need for this representation, but many lawyers do not do pro bono work on a monthly basis. Timothy Day, *Opening Doors to Justice: Unfinished Business*, WYO. LAW., Dec. 2001, at *4, available at Westlaw, 24-DEC Wyo. Law. 4. Tennessee lawyers cited several excuses for not taking pro bono work including they were too busy, they were financially constrained, and they were too inexperienced in poverty law areas. Susan C. Robertson & Elizabeth W. Sims, *Tennessee Lawyers, Who Are You?*, TENN. BAR JOURNAL, Feb. 2002, at *27, available at WESTLAW, 38-FEB Tenn. B.J. 22.

177. Sternlight, *supra* note 38, at 592.

Generally, the biggest concerns of these attorneys are the following: (1) they may be forced into settlement which requires them to forego their entire fee; (2) they may be awarded fees, in a settlement or court award, which do not reflect their hourly rate; (3) they may be awarded fees, in a settlement or court award, which do not reflect all of the hours expended on the litigation; (4) they may be denied adequate compensation for the delay in payment or risk of non-payment they have endured; and (5) they may be forced to absorb the cost of expert witnesses.

Id.

178. Charles W. Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline*, 47 LAW & CONTEMP. PROBS. 293, 309-10 (1984) (noting that in fee-shifting statutes, the lawyer’s conduct in representation of a client may be influenced by impermissible conflicts of interest that led the lawyer to take steps other than in the best interest of the client); The Model Rules of Professional Conduct state: “[a] lawyer shall not represent a client if the representation of that client may be materially limited by . . . the lawyer’s own interests.” MODEL RULES OF PROFESSIONAL CONDUCT R. 1.7 (b) (1983). The Model Code of Professional Responsibility states: “[a] lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101 (1981).

179. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981) (declaring that “A Lawyer Should Represent a Client Zealously Within the Bounds of the Law”); Mauro, *supra* note 163 (mentioning that an attorney should work for a settlement for the client and then worry about the attorney fees, but if the settlement is insufficient to show that the plaintiff prevailed, attorneys will be forced to negotiate for the attorney fees at the same time as the settlement, which could give rise to a conflict); Sternlight, *supra* note 38, at 592. In order to protect herself, the attorney should use a fee agreement. *Id.* Attorneys could limit their practice to clients who can afford to pay full hourly rates on a regular billing basis. *Id.* at 593. A partially contingent fee agreement could be used. *Id.* at 594. An attorney needs to keep ‘complete and detailed records’ of the work performed on the case. *Id.* at 595.

attorney fees.¹⁸⁰ The main impact will be to develop complex settlement agreements and to impose extra litigation fees that do not benefit either the plaintiff or the defendant.¹⁸¹

D. Sufficiency of Settlement and Other Judicial Proceedings

Most courts now face the challenge of determining whether the settlement agreement is more like a consent decree or a private settlement and whether the agreement had enough judicial involvement.¹⁸² Several courts have determined that without a court order, the settlement agreement is merely a private settlement,¹⁸³ but generally, when some type of court order is present, the plaintiff prevails.¹⁸⁴ Furthermore, a partial consent decree was sufficient to prevail,¹⁸⁵ but a partial settlement was not.¹⁸⁶ The District Court for the

180. Babich, *supra* note 146 (discussing ways that the plaintiff can respond to the *Buckhannon* ruling); Aronson, *supra* note 153 (arguing that a plaintiff must continue to fight on in order to secure attorney's fees which is counterproductive).

181. Babich, *supra* note 146 (arguing that by complicating settlements, it will increase the litigation costs to both parties).

182. *Buckhannon*, 532 U.S. at 604, n.7 (stating that “[p]rivate settlements do not entail the judicial approval and oversight involved in consent decrees”). Compare *Luis R. v. Joliet Township High Sch. Dist.*, No. 01 C 4798, 2002 WL 54544, at *2-*3 (N.D. Ill. Jan. 15, 2002) (holding the mediation agreement between the parties was nothing more than a private settlement and that private settlement agreements do not confer prevailing party status) with *Christina A. v. Bloomberg*, No. CIV. 00-4036, 2001 WL 1168165, at *4 (D.S.D. Sept. 28, 2001) (arguing that “[t]he Settlement Agreement in this case is not a formal consent decree. But to read *Buckhannon* to require one particular form for resolving a dispute in order to become a prevailing party is to read the opinion too narrowly”). “As the Supreme Court noted, a consent decree often does not include an admission of liability, but it is a court-ordered change in the relationship between the parties.” *Id.* The court held that the settlement agreement in this case did the same thing. *Id.*

183. *E.g.*, *J.C. v. Reg. Sch. Dist. 10*, 278 F.3d 119 (2d Cir. 2002) (denying as valid the plaintiffs’ argument that the IEP determination was more like a judicial consent decree than like a private settlement); *Luis R. v. Joliet Township High Sch. Dist.*, No. 01 C 4798, 2002 WL 54544, at *2-*3 (N.D. Ill. Jan. 15, 2002) (holding the mediation agreement between the parties was nothing more than a private settlement and that private settlement agreements do not confer prevailing party status); *Toms v. Taft*, No. C2-00-190, 2001 WL 1681120, at *3 (S.D. Ohio Sept. 7, 2001) (holding the agreement was purely private and the court did not rule or give an order on the merits).

184. *E.g.*, *Barrios v. Cal. Interscholastic Fed’n*, No. 00-56479, 2002 WL 54635, at *4 (9th Cir. Jan. 16, 2002) (holding the plaintiff prevailed when he entered into a legally enforceable settlement agreement against the defendant which eventually stipulated to a dismissal with prejudice); *Christina A. v. Bloomberg*, No. CIV. 00-4036, 2001 WL 1168165, at *4 (D.S.D. Sept. 28, 2001) (holding that the court expressly retained jurisdiction over the matter and had “the necessary judicial imprimatur”); *Johnny’s Icehouse, Inc. v. Amateur Hockey Ass’n of Ill.*, No. 00 C 7363, 2001 WL 893840, at *1, *3 (N.D. Ill. Aug. 7, 2001) (holding the court’s order that memorialized the AHAI’s agreement to dismiss two pending actions was enough to legally alter the relationship between the parties).

185. *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, No. CIV.A. MGJ95309, at *3 (D.Md.

Northern District of Florida argued that the denial of fees for a private settlement was merely dicta in *Buckhannon*, and it may still be possible to recover attorney fees under the catalyst theory when dealing with settlements.¹⁸⁷

Other steps in the judicial process have come under scrutiny as to when judicial involvement was sufficient to award attorney fees.¹⁸⁸ Following *Buckhannon*, a mooted claim does not give rise to ‘prevailing party’ status.¹⁸⁹ Courts in various jurisdictions have held that *Buckhannon* could not be extended to award fees for a voluntary dismissal with prejudice,¹⁹⁰ a remand,¹⁹¹ a preliminary injunction,¹⁹² a preservation of the status quo,¹⁹³ a unilateral status determination

Dec. 12, 2001) (holding a partial consent decree is enough for the plaintiff to prevail).

186. *Smyth v. Rivero*, No. 00-2453, 2002 WL 245978, at *1, *7, *13 (4th Cir. Feb. 21, 2002) (holding that a partial settlement was not enough to give the plaintiffs prevailing party status because it was incomplete as to the merits of the case and because it did not explicitly incorporate the terms of the district court’s order).

187. *National Coalition for Students with Disabilities v. Bush*, 173 F. Supp. 2d 1272 (arguing that “any suggestion that fees may not be recovered for a mere private settlement was dictum” and that the Court did not explicitly state that fees may not be recovered merely because of merely a private settlement); *Sang-Jasey & Headley*, *supra* note 169, at *39 (arguing that *Buckhannon* leaves the “door open for using the catalyst theory where the settlement is adopted by a court”).

188. *See infra* notes 189-205 and accompanying text.

189. *Cycholl v. Principi*, No. 00-2454, 2001 WL 1642027, at *4 (Vet. App. Dec. 19, 2001) (holding that prevailing party cannot be “based on obtaining a remand” even though the change in the law through the enactment of VCAA left the suit moot); *Wittlinger v. Wing*, 2001 WL 1658106 (N.Y. App. Div. 1 Dept. Dec. 27, 2001) (holding under 42 U.S.C. § 1988 the denial of attorney fees was proper because the plaintiff’s suit was dismissed as moot).

190. *Richardson v. Miller*, 279 F.3d 1, 2 (1st Cir. 2002) (holding that under the Attorney’s Fee Awards Act of 1976, the plaintiff is not a prevailing party based on a voluntary dismissal with prejudice).

191. *E.g.*, *Former Employees of Motorola Ceramic Prods. v. United States*, No. 99-07-00393, 2001 WL 1505087, at *3 (Ct. Int’l Trade Nov. 28, 2001) (holding “this Court’s remand order did not constitute a judicially sanctioned change in the parties’ legal relationship”); *Cycholl v. Principi*, No. 00-2454, 2001 WL 1642027, at *4 (Vet. App. Dec. 19, 2001) (holding that prevailing party cannot be “based on obtaining a remand” because of a change in the law by the enactment of VCAA). *But cf.* *Babich*, *supra* note 146 (arguing that a remand is a court order that is entered in the plaintiff’s case and it changes the rights between the plaintiff and the defendant).

192. *John T. v. Delaware County Intermediate Unit*, No. CIV.A. 98-5781, 2001 WL 1391500, at *6 (E.D. Pa. Nov. 7, 2001) (holding a preliminary injunction was not enough to sustain an award of attorney fees for the prevailing party).

193. *Walker v. U.S. Dep’t of Hous. & Urban Dev.*, No. 3-85-CV-1210-R, at *2 (N.D. Tex. Sept. 18, 2001) (holding that although plaintiffs had achieved the “preservation of the status quo ante,” it did not constitute a judgment in their favor, a necessary prerequisite to establishing a party’s entitlement to fee-shifting as a prevailing party). *Compare* *Cole v. Dep’t of Justice*, No. AT-0752-00-0495-A-1, 90 M.S.P.R. 627 (M.S.P.B. Dec. 20, 2001) (holding that a rescission of an action by an agency, which returned the appellant to the status quo ante, did not make the plaintiff a prevailing party because it lacked the necessary judicial imprimatur); *Sacco v. Dep’t of Justice*, No. DC-0752-00-0136-A-1, 2001 WL 1347228 (M.S.P.B. Oct. 18, 2001) (holding that the agency’s unilateral rescission of a suspension of the appellant did not make the appellant a prevailing party);

proceeding,¹⁹⁴ an offer of judgment under Rule 68,¹⁹⁵ or a stipulation granting accommodations.¹⁹⁶ The courts held that the plaintiffs prevailed by attaining a default judgment or a settlement order issued by a hearing officer.¹⁹⁷ A judicial pronouncement where the defendant had violated the Constitution and judicial relief was ordered proved enough to prevail in the District Court for the Northern District of Texas.¹⁹⁸ So far, the two courts that addressed the retention of jurisdiction over a settlement split as to whether the plaintiff was prevailing.¹⁹⁹ Two other courts differed on fees for monitoring a consent decree.²⁰⁰ A court has yet to revisit whether a plaintiff prevails through arbitration and would then be entitled to attorney's fees.²⁰¹

Nichols v. Dep't of Veteran Affairs, No. PH-0752-99-0313-A-1, 2001 WL 1090258 (M.S.P.B. Sept. 4, 2001) (holding "the agency's voluntary change in conduct . . . although accomplishing what the appellant sought to receive by filing an appeal with the Board, lacks the necessary judicial imprimatur").

194. *Belk v. Capacchione*, 274 F.3d 814 at 814-15 (4th Cir. Dec. 14, 2001) (Wilkinson, C.J., concurring) (concurring in denial of reconsideration of attorney fees and holding fees were not awardable under a unitary status determination proceeding to prove whether the school district was in compliance with federal law).

195. *Aynes v. Space Guard Products, Inc.*, No. IP 99-1299-C-B/S, 2001 WL 826823 (S.D.Ind. June 23, 2001) (holding that under Rule 68, offers of judgment are neither a judgment on the merits nor a court-ordered consent decree and therefore, *Buckhannon* is not dispositive in determining whether or not the plaintiff is a prevailing party).

196. *Dorfsman v. Law Sch. Admission Council, Inc.*, No. Civ.A. 00-0306, 2001 WL 1754726, at *5 (E.D. Pa. Nov. 28, 2001) (holding that although the parties entered into the stipulation, the plaintiff voluntarily settled her claim against the defendants and therefore did not have the judicially sanctioned change in the parties' legal relationship).

197. *Edwards-DiPasquale v. Wilfran Agricultural Indus., Inc.*, No. Civ. A. 00-3818, 2001 WL 1632122 (E.D. Pa. Dec. 17, 2001) (holding that obtaining a default judgment is enough to award attorney fees to the plaintiff as the prevailing party); *Brandon K v. New Lenox Sch. Dist.*, No. 01 C 4625, 2001 WL 1491499, at *2 (N.D. Ill. Nov. 23, 2001) (holding that the legal relationship between the parties changed when the settlement terms by an agreed order were issued by the impartial hearing officer and therefore the plaintiff can prevail).

198. *Dews v. The Town of Sunnyvale*, No. 3:88-CV-1604-R, 2001 WL 1032194, at *2 (N.D. Tex. Aug. 24, 2001) (deciding that the plaintiff was a prevailing party because the court had issued a judicial pronouncement that had explicit findings of liability against the defendant even though the relief had not yet been determined).

199. *Compare Roberson v. Giuliani*, No. 99 CIV 10900 DLC, 2002 WL 253950, (S.D.N.Y. Feb. 21, 2002), at *1 (holding that the plaintiffs were not prevailing parties when the court agreed to retain jurisdiction over the settlement agreement because the agreement was not a judicial sanctioning of the alteration of the legal relationship between the parties) *with Christina A. v. Bloomberg*, 167 F. Supp. 2d 1094 at 1098 (D.S.D. 2001) (holding that the court expressly retained jurisdiction over the matter and had "the necessary judicial *imprimatur*").

200. *Compare Burt v. Contra Costa*, No. C-73-0906, 2001 WL 1135433, at *9 n.11 (N.D. Cal. Aug. 20, 2001) (holding that it would be inconsistent to extend *Buckhannon* to the monitoring and enforcing of a consent decree without some sort of judicial intervention) *with Hispanics United of DuPage County v. Village of Addison*, 157 F. Supp. 2d 962 (N.D. Ill. 2001) (allowing plaintiff attorney fees for monitoring and enforcing a consent decree).

201. MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 21.4 (3)

The Third Circuit was extremely sympathetic to the appellant in a partially moot civil rights action.²⁰² The court concluded that the appellant could still receive attorney fees because portions of the appellees' policies were unconstitutional based on a declaratory judgment initiated by the appellees.²⁰³ They interpreted *Buckhannon* as allowing attorney fees to a prevailing party who "is one who has been awarded some relief by the court" and concluded that the appellant's had met the test.²⁰⁴ The District Court for the District of Massachusetts held a plaintiff that still had an action for damages could receive attorney fees even though the defendant's voluntary actions mooted the rest of the plaintiff's claims.²⁰⁵

E. Effect on Other Fee-shifting Statutes

1. Statutes with Wording Similar to the ADA & the FHAA

The Supreme Court acknowledged that they have interpreted fee-

(Nov. 2001) available at WESTLAW, EMPL S 21.4 (citing *Sullivan v. Pennsylvania Dep't of Labor*, 663 F.2d 443 (3d Cir. 1981) (allowing a plaintiff to prevail based on an arbitration agreement)).

202. *County of Morris v. Nationalist Movement*, 273 F.3d 527, 529 (3d Cir. 2001) (holding "that events which occurred subsequent to the contested orders render this appeal moot as to the question of attorney's fees"). The County of Morris brought a declaratory judgment in state court to determine the constitutionality of its policies regarding the private use of county facilities in the face of threatened litigation by the Nationalist Movement who wanted to hold a parade and rally in Morristown on July 4, 2000. *Id.* The Nationalist Movement then removed the case to the district court and filed a counterclaim alleging violations of its First Amendment rights as well as an application for permanent and preliminary injunctions, compensatory and punitive damages, attorney's fees, and declaratory relief. *Id.* at *2. On July 4, 2000, the Nationalist Movement held its parade and rally but it did not enter onto the county facilities. *Id.* at *3. The district court denied the Nationalist Movement's application for attorney fees for its role as a defendant in the declaratory judgment. *Id.* at *4.

203. *Id.* at 536 (holding that the Nationalist Movement "indisputably prevailed on significant issues in the present action to the extent that portions of policy 4:1.01 were held unconstitutional" therefore the Nationalist Movement was a prevailing party and should be awarded attorney fees because of the declaratory judgment). The Third Circuit dismissed as moot the National Movement's counterclaim pertaining to the county facilities. *Id.* at *5. The court felt that National Movement's counterclaim was identical to the declaratory judgment and the Nationalist Movement was nominally the defendant rather than the plaintiff and, therefore, was entitled to prevail under § 1988. *Id.*

204. *Morris*, 273 F.3d 527, 529 (citing *Buckhannon*, 532 U.S.C. 598, 603 (2001)).

205. *Homier Distributing Co., Inc. v. City of New Bedford*, 188 F. Supp. 2d 33, *2 (D. Mass. 2002) (holding the defendant's ordinance was in violation of the Commerce Clause, therefore the plaintiff was a prevailing party based on the damages claim even though part of the case was mooted due to the rescinding of the law).

shifting statutes consistently and this has had a direct effect on many of the fee-shifting statutes containing the term ‘prevailing party.’²⁰⁶ While *Buckhannon* only addressed the ADA and the FHAA,²⁰⁷ courts have used the *Buckhannon* decision to support the denial of fees under fee-shifting statutes of similar language.²⁰⁸ Courts have also addressed the prevailing party status in the National Voter Registration Act,²⁰⁹ the Individuals with Disabilities Education Act,²¹⁰ the Fair Credit Reporting Act,²¹¹ Title VII of the Civil Rights Act of 1964,²¹² and the Civil Right’s

206. *Buckhannon*, 532 U.S. at 602 n.4; Bucholtz, *supra* note 163, at 326 (noting that the ruling’s ramifications implicate all federal statutes with fee-shifting provisions); Sisk, *supra* note 10, at 262 (acknowledging “[t]he meaning of ‘prevailing party’ under the EAJA is the same as under other fee-shifting statutes”); Perry A. Zirkel, Commentary, *Special Education Law Update VII*, 160 WEST’S EDUC. L. REP. 1 (2002) (deciding that rejection of the catalyst theory under the ADA extended to other federal statutes that authorize attorney’s fees to prevailing parties in the absence of clear contrary Congressional intent).

207. *Buckhannon*, 532 U.S. at 601 (recognizing plaintiffs requested attorney’s fees under the Americans With Disabilities Act and the Fair Housing Amendment Act). *E.g.*, *Richardson v. Miller*, 279 F.3d 1, 6 (1st Cir. 2002) (holding “we are constrained to follow the Court’s broad directive and join several of our sister circuits in concluding that the catalyst theory may no longer be used to award attorney’s fees under the Fees Act”); *Bennett v. Yoshina*, 259 F.3d 1097, 1100-01 (9th Cir. 2001) (stating that “[t]here can be no doubt that the Court’s analysis in *Buckhannon* applies to statutes other than the two at issue in that case. Specifically, the provision at issue in this case, the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988, was cited by the Court as a ‘nearly identical’ to the two at issue in *Buckhannon*.”).

208. See *supra* notes 29 & 33 and *infra* notes 209-14 for examples of fee-shifting statutes.

209. 42 U.S.C.A. § 1973gg-9 (West, WESTLAW through P.L. 107-89, approved Dec. 18, 2001) (stating that “In a civil action . . . the court may allow the prevailing party reasonable attorney fees”); *National Coalition for Students with Disabilities v. Bush*, 173 F. Supp. 2d 1272, 1279 (N.D. Fla. 2001) (holding the plaintiffs are prevailing because the settlement agreement and the resulting order were a material alteration in the legal relationships).

210. 20 U.S.C.A. § 1415 (i)(3)(B) (West, WESTLAW through P.L. 107-89, approved Dec. 18, 2001) (stating “the court . . . may award reasonable attorney’s fees as part of the costs to the parents of a child with a disability who is the prevailing party”). *E.g.*, *J.C. v. Reg. Sch. Dist. 10*, 278 F.3d 119 (2d Cir. 2002) (denying as valid the plaintiffs’ argument that the IEP determination was more like a judicial consent decree than like a private settlement under the IDEA); *Baer v. Klugholz*, 786 A.2d 907 (N.J. Super. Ct. App. Div. 2001) (allowing attorney fees under the Federal Individuals with Disabilities Education Act for challenging eight regulations but not for securing the amendment of 15 others); *J.S. v. Rambo Central Sch. Dist.*, No. 01 CIV 0238, 2001 WL 1180923, at *1, *4-*5 (S.D.N.Y. Sept. 21, 2001) (holding that after *Buckhannon*, the agreement entered into by the plaintiffs and defendants was merely a private settlement, and since no order was issued by the Impartial Hearing Officer, no attorney fees were awardable).

See also, *John T. v. Delaware County Intermediate Unit*, No. CIV.A. 98-5781, 2001 WL 1391500, at *6 (E.D. Pa. 2001) (noting that the plaintiff tried to argue that IDEA cases contained different incentives for settlement compared to the FHAA and the ADA in *Buckhannon*). The court held that *Buckhannon* did apply and denied the fee award. *Id.* at *8.

211. 15 U.S.C.A. § 1681 (West, WESTLAW through P.L. 107-89, approved Dec. 18, 2001). The fee-shifting section states: “On a finding by the court . . . the court shall award to the prevailing party attorney’s fees reasonable in relation to the work expended.” *Id.*; *Crabill v. Trans Union*,

Attorney's Fees Awards Act of 1976.²¹³

The Equal Access to Justice Act has been the focus of much of the latest litigation over 'prevailing party' status because the statute contained sections of dissimilar language relating to attorney fees.²¹⁴ Most courts have generally held that *Buckhannon's* prevailing party definition applies to the Equal Access to Justice Act and have followed the trend of other similarly worded fee-shifting statutes.²¹⁵ The United

L.L.C., 259 F.3d 662, 666 (7th Cir. 2001) (holding that there was nothing in the "text, structure, or legislative history . . . to suggest that its attorneys' fee provision has a different meaning from the provision at issue in *Buckhannon*").

212. 42 U.S.C.A. § 2000e-5(k) (West, WESTLAW through P.L. 107-89, approved Dec. 18, 2001) (stating "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs") (emphasis added); *Johnson v. Rodriguez*, Nos. 00-50443, 00-50570, 2001 WL 845180 (5th Cir. 2001) (reversing the award of attorney fees under Title VII based only on the catalyst theory); *Aynes v. Space Guard Products, Inc.*, No. IP 99-1299-C-B/S, 2001 WL 826823 (S.D. Ind. 2001) (holding that the plaintiff was not a prevailing party under Title VII because no material alteration of the legal relationship of the parties).

213. 42 U.S.C.A. § 1988 (West, WESTLAW through P.L. 107-89, approved Dec. 18, 2001) (declaring "the court . . . may allow the prevailing party . . . a reasonable attorney's fee"); *Bennett v. Yoshina*, 259 F.3d 1097, 1100-01 (9th Cir. 2001) (holding that the *Buckhannon* decision applied to the Civil Rights Attorney's Fees Awards Act of 1976 and that the catalyst theory was no longer allowed).

214. 28 U.S.C.A. § 2412(d)(1)(D) (West, WESTLAW through P.L. 107-89, approved Dec. 18, 2001). The statute requires fee awards to be given to "the party" to "a civil action brought by the United States" when the demand by the United States substantially exceeds the judgment obtained by the United States. Compare *Id.*, with 28 U.S.C.A. § 2412(d)(1)(A) (West, WESTLAW through P.L. 107-89, approved Dec. 18, 2001). The pertinent part reads: "Except as otherwise specifically provided by statute, a court shall award prevailing party . . . fees and other expenses . . . incurred by that party . . . unless the court finds that the circumstances make an award unjust." 28 U.S.C.A. § 2412(d)(1)(A) (West, WESTLAW through P.L. 107-89, approved Dec. 18, 2001).

215. *E.g.*, *Perez-Arellano v. Smith*, 279 F.3d 791 (9th Cir. 2002) (holding that under the EAJA, the plaintiff was not a prevailing party because neither a judgment nor a consent decree occurred and the language of the EAJA was not dissimilar to the language of the ADA or FHAA, therefore the *Buckhannon* decision precluded the use of the catalyst theory under the EAJA); *Miller v. Apfel*, No. Civ. A. 300CV0107M, 2001 WL 1142763, at *2 (N.D. Tex. Sept. 26, 2001) (holding that a party is entitled to recover attorney's fees under the EAJA if plaintiff is found to be a prevailing party under the *Buckhannon* decision).

Courts have held that prevailing party status attached to an order of dismissal but not to a stipulation of dismissal. *North Carolina Alliance for Transportation Reform, Inc. v. U.S. Dep't of Transportation*, 151 F. Supp. 2d 661 (M.D.N.C. 2001) (holding that the order of dismissal was enough to make the plaintiffs a prevailing party because it embodies a significant portion of the relief the plaintiffs sought in the action); *Former Employees of Motorola Ceramics Products v. United States*, No. 99-07-00393, 2001 WL 1505087, at *3 (Ct. Int'l Trade Nov. 28, 2001) (holding the stipulation for dismissal does not meet the prevailing party plateau for attorney fees because it did not include a judicially sanctioned change in the parties' legal relationship); *Alcocer v. Immigration and Naturalization Serv.*, No. 300CV2015-H, 2001 WL 1142807, at *3 (N.D. Tex. Sept. 21, 2001) (holding that because the court did not consider the merits of the plaintiff's claim, the INS adjustment of the claimant's status was not a judgment on the merits or a court-ordered consent decree, and in the totality of the circumstances, the claimant did not prevail). See also, *United States v. One 1997 Toyota Land Cruiser*, 248 F.3d 899 (9th Cir. 2001) (remanding to

States Court of Appeals for Veterans Claims has been the battleground for many of the issues regarding ‘prevailing party’ status under the Equal Access to Justice Act, but they too have followed the *Buckhannon* decision and the trends of the other courts.²¹⁶ The ruling in *Buckhannon* has also affected how ‘prevailing party’ is interpreted in state proceedings when the state law makes fees awardable based on ‘prevailing party’ status.²¹⁷ It has added complexity for federal courts in

determine under the EAJA the claimant’s eligibility for attorney fees under the “special circumstances that could make an award unjust” and vacating a previous award of fees as the claimant was not prevailing under the *Buckhannon* standard as to a judgment but may be prevailing as to a settlement). For the general trends in similar fee-shifting statutes, see *supra* notes 182-205 and the accompanying text.

Contra, *Brickwood Contractors, Inc. v. United States*, 49 Fed. Cl. 738, 747 (Jan. 29, 2001) (holding that the *Buckhannon* interpretation of prevailing party does not resolve the interpretation of prevailing party in the EAJA). The court found “the court shall award to a prevailing party . . . fees” in the EAJA, which is distinguishable from “the court . . . may allow the prevailing party . . . a reasonable attorney’s fee” found in both the ADA and the FHAA. *Id.* at 745-746. They also noted that the Court did not mention the EAJA and so *Buckhannon* could not be used to resolve the interpretation of prevailing party under the EAJA. *Id.* at 745. The court felt that by requiring formal written judgment as in *Buckhannon*, it would “inhibit settlements and discourage parties from taking self-corrective action. . . .” *Id.* at 749. For those reasons, it declined to bar recovery for the plaintiff of attorney fees after the *Buckhannon* decision. *Id.*

216. *Thayer v. Principi*, 15 Vet. App. 204 (Vet. App. Sept. 4, 2001) (holding that the catalyst theory is no longer available to achieve prevailing party status under the EAJA); *Belton v. Principi*, No. 98-1225, 2001 WL 1564308, (Vet. App. Nov. 13, 2001) (holding that under the EAJA the term ‘prevailing party’ cannot be distinguished from the interpretation in *Buckhannon*, therefore the plaintiff did not prevail). In this court, the burden of showing prevailing party status lies on the EAJA applicant. *Id.*

An EAJA application for attorney fees must contain (1) a showing that the applicant is a prevailing party; (2) a showing that he is a party eligible for an award because his net worth does not exceed \$2,000,000; (3) an allegation that the Secretary’s position was not substantially justified; and (4) an itemized statement of the attorney fees sought. *Times v. Principi*, No. 00-2406, 2001 WL 1751503, at *1 (Vet. App. Jan. 23, 2001) (holding the Secretary’s position was not substantially justified and the appellant was entitled to attorney fees). *See also*, *Hatzenbuhler v. Principi*, No. 00-2332, 2001 WL 1751397, at *2 (Vet. App. Jan. 23, 2001) (holding that the Secretary had not met his burden to demonstrate that his position at the administrative stage was substantially justified); *Sachs v. Principi*, 15 Vet. App. 414 (Vet. App. Feb. 6, 2002) (holding that the plaintiff was not a prevailing party under *Sumner* because the disposition of the party’s appeal did not result in a remand predicated on an administrative error); *Westre v. Principi*, No. 00-2396, 2002 WL 167991, at *1-*2 (Vet. App. Jan. 18, 2002) (holding that the remand of the appellant’s claim was predicated on an administrative error and the Secretary did not meet his burden to demonstrate that his position at the administrative stage was substantially justified, therefore qualifying the appellant qualifies as a prevailing party); *Sumner v. Principi*, 15 Vet. App. 404 (Vet. App. Jan. 22, 2002) (Kramer, J., concurring) (concurring in the denial of fees because neither a judicial imprimatur on the change nor a judicially sanctioned change in the legal relationship of the parties was present in the case); *Sumner v. Principi*, 15 Vet. App. 256 (Vet. App. Nov. 6, 2001) (holding that the remand did not make the appellant a prevailing party because the remand was not predicated upon an administrative error).

217. *Wallerstein v. Stew Leonard’s Dairy*, 258 Conn. 299, 303 (Conn. Oct. 9, 2001) (holding based on *Buckhannon* the plaintiff was a prevailing party because a judgment had been ordered in

the interpretation of state laws concerning ‘prevailing party’ status and whether or not the catalyst theory is still viable.²¹⁸

2. Statutes with Wording Dissimilar to *Buckhannon*

Many fee-shifting statutes allow attorney fees “whenever . . . appropriate” but do not contain ‘prevailing party’ in their language.²¹⁹ Fortunately for plaintiffs, most courts have held that the wording of these statutes on their face was distinguishable from the ADA and FHAA, and, therefore, the ruling in *Buckhannon* did not apply.²²⁰

Courts held that *Buckhannon* did not apply to the Employee Retirement Income Security Act of 1974,²²¹ which allows for an award of reasonable attorney’s fee and costs of action to either party, because of dissimilar language.²²² Under the Endangered Species Act,²²³ both

his favor); *Auguste v. Hammons*, 727 N.Y.S.2d 880 (App. Div. 1 Dept. July 26, 2001) (noting the decision in *Buckhannon* added support to their standard for prevailing party that a judgment on the merits was needed and that the catalyst theory was rejected); *Taylor v. Lenoir*, No. COA99-1228-3, 2002 WL 46930, at *7 (N.C. App. Jan. 15, 2002) (holding that where a lawsuit, the merits of which have never been determined, brings about a voluntary change in a defendant’s conduct, and where that change in conduct results in financial benefits for certain plaintiff class members, the plaintiffs were not prevailing and therefore could not obtain attorney fees under the North Carolina state retirement system); *but cf.* *Desalvo v. Bryant*, No. S-9827, 2001 WL 227309 (Alaska Feb. 15, 2002) (allowing the catalyst theory to determine if a plaintiff is prevailing under a settlement agreement by settling the claim and achieving the goal of the lawsuit).

218. *Richardson*, 279 F.3d 1, 5 (1st Cir. 2002) (holding that there is not a single case where the Massachusetts courts have recognized the catalyst theory for state law claims).

219. *E.g.*, ENDANGERED SPECIES ACT, 29 U.S.C.A. § 1132(g) (West, WESTLAW through P.L. 107-89, approved Dec. 18, 2001) (declaring that “the court in its discretion may allow a reasonable attorney’s fee . . . to either party”); EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, 29 U.S.C.A. § 1132 (g) (West, WESTLAW through P.L. 107-89, approved Dec. 18, 2001) (stating that “the court in its discretion may allow a reasonable attorney’s fee . . . to either party”); *Babich*, *supra* note 146 (noting several important fee-shifting statutes that provide for fee awards when the court deems an award appropriate including CAA §§ 304(d) and 307(f); Endangered Species Act § 11(g)(4); Safe Drinking Water Act § 1449(d); Toxic Substances Control Act § 20(c)(2); Surface Mining Control and Reclamation Act § 520(d); Deepwater Ports Act § 16(d); Act to Prevent Water Pollution From Ships § 1910(d); Noise Control Act § 12(d); Marine Protection, Research, and Sanctuaries Act § 105(g)(4); and Outer Continental Shelf Lands Act § 23(a)(5)).

220. *Babich*, *supra* note 146 (noting certain provisions do not provide for awards of fees to prevailing parties).

221. 29 U.S.C.A. § 1132(g) (West, WESTLAW through P.L. 107-89, approved Dec. 18, 2001) (declaring “the court in its discretion may allow a reasonable attorney’s fee . . . to either party”).

222. *E.g.*, *Davenport v. Abrams*, No. 98 CIV. 8327 (LAK), 2001 WL 694574, at *3 (S.D.N.Y. June 19, 2001). This court recognized that the

Second Circuit ha[d] fashioned a five-factor test to determine attorney’s fees under Section 1132 (g): (1) the degree of the offending party’s culpability or bad faith, (2) the ability of the offending party to satisfy an award of attorney’s fees, (3) whether an award of fees would deter other persons from acting similarly under like circumstances, (4) the relative merits of the parties’ positions, and (5) whether the action conferred a common

the Central District Court of California²²⁴ and the Tenth Circuit Court of Appeals²²⁵ declared that the catalyst theory is still a viable option for awarding attorney fees where the statutes did not contain the ‘prevailing party’ language.²²⁶ Therefore, the catalyst theory appears to be viable for the statutes that allow fees when the court deems an award appropriate.²²⁷

benefit on a group of pension plan participants.

Id. at *3. The court decided that because the language of the statute did not include ‘prevailing party,’ *Buckhannon* did not apply. *Id.* Cf. *Hu*, *supra* note 28, at 220-21 & 229-30 (discussing the five factors, their application in ERISA cases and proposing a legal merits test).

223. 16 U.S.C.A. § 1540(g)(4) (West, WESTLAW through P.L. 107-89, approved Dec. 18, 2001) (stating “[t]he court, in issuing any final order in any suit brought [by civil litigant] may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate”).

224. *Southwest Center for Biological Diversity v. Carroll*, 182 F. Supp. 2d 944, 947 (C.D. Cal 2001) (finding the language in the Endangered Species Act distinguishable from the language of the statutes in *Buckhannon*). Additionally, the court concluded that the legislative history of the Endangered Species Act, like the Clean Air Act, demonstrated that the catalyst theory should be a permissible way to award fees. *Id.* at 947. They determined that because the Supreme Court relied on the plain meaning of prevailing party and the lack of any mention of the Endangered Species Act or other environmental statutes, the holding of *Buckhannon* should not be extended to statutes that were dissimilar on their face. *Id.* at 948. Therefore, they concluded that in the absence of the Supreme Court or Ninth Circuit overruling the catalyst theory for lawsuits under the Endangered Species Act or other environmental statutes, it was appropriate for the court to exercise its discretion and award attorney fees. *Id.* at 948.

225. *Center for Biological Diversity v. Norton*, 262 F.3d 1077, 1077 (10th Cir. 2001) (holding that the catalyst theory was still permitted under the Endangered Species Act but that the Center had failed to demonstrate that its lawsuit was a catalyst in causing the Secretary of Interior to take action). The plaintiffs brought an action of injunctive relief to force the Secretary of the Interior to list the Arkansas River shiner as an endangered species. *Id.* Similar to *Buckhannon*, the suit became moot and the plaintiffs filed for litigation costs that included attorney’s fees. *Id.* The court cited *Powder River Basin Res. Council v. Babbitt*, 54 F.3d 1477, 1486 (10th Cir. 1995) that under the CLEAN WATER ACT, 30 U.S.C. § 1270, the catalyst test that a “claimant seeking attorney fees . . . must demonstrate that it was the catalyst behind the change in the defendant’s conduct” even when “there has been no adjudication on the merits.” *Center for Biological Diversity*, 262 F.3d at 1077. Because both parties advocated the use of the catalyst theory under the Endangered Species Act, the court assumed its applicability to 16 U.S.C. § 1540(g)(4) because the wording in the Clean Water Act and the Endangered Species Act was virtually the same. *Id.* The court then determined that the Center had failed to show a causal link between the lawsuit and the action taken by the Secretary of the Interior. *Id.* at *5.

226. *Center for Biological Diversity*, 262 F.3d 1077 (holding that the Court’s conclusion in *Buckhannon* about the term prevailing party is not applicable to the case at hand under the Endangered Species Act); *Southwest Center for Biological Diversity*, 182 F. Supp. 2d at 948 (declining to extend the Supreme Court’s interpretation in *Buckhannon* to the Endangered Species Act).

227. *Babich*, *supra* note 146 (arguing that the catalyst theory is still alive in most environmental statutes). *But see*, *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983) where the Supreme Court discussed the appropriateness standard under the Clean Air Act and held that “absent some degree of success on the merits by the claimant, it is not ‘appropriate’ for a federal court to award attorney’s fees under § 307(f).” *Id.* at 694. It expanded the Clean Air Act to allow

F. A Call to Congress to Respond

The concurring opinion encouraged Congress to make clear what prevailing party really meant.²²⁸ Based on *Buckhannon*, another option for legislators is to change the language of the statutes to allow for fees ‘when appropriate’ and eliminate the ‘prevailing party’ requirement.²²⁹ Either of these approaches might allow the revival of the catalyst theory in fee-shifting statutes containing ‘prevailing party’ language. Congress responded after *Alyeska Pipeline Serv. Co.* and hopefully, they will heed this call and respond to help plaintiffs enforce their rights.²³⁰

V. CONCLUSION

The *Buckhannon* ruling will have far reaching effects on litigants as they prepare to battle over violations under fee-shifting statutes.²³¹ It has increased the threshold that a plaintiff must reach to prevail through a bright-line rule and has denied the courts much of their discretion in awarding fees.²³² The judicial system faces continued struggles in deciding when the court has been involved enough and when awards of attorney fees are appropriate.²³³ It affects both statutes of similar and dissimilar language and, thus, the catalyst theory is not dead, but it is

attorney fees to parties achieving some success, even if not major success. *Id.* at 688. Section 307(f) of the Clean Air Act, 42 U.S.C. § 7607(f), allowed an award of fees in certain proceedings “whenever [the court] determines that such an award is appropriate.” *Id.* at 681-82.

228. *Buckhannon*, 532 U.S. at 622 (Scalia, J., concurring) (stating “Congress is free . . . to revise these provisions”).

229. See Babich, *supra* note 146 (arguing that the “catalyst theory should remain viable under fee-shifting statutes that rely on the ‘whenever appropriate standard’”); Coyle, *supra* note 135 (acknowledging that public interest groups hope to still be able to use the catalyst theory under all of the federal environmental statutes but the Clean Water Act, the Comprehensive Environmental Response, Compensation and Liability Act and the Resource Conservation and Recovery Act).

230. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240 (1977); Comment, *Civil Rights Attorneys’ Fees in Cases Resolved on State Pendent and Federal Statutory Grounds*, 130 U. PA. L. REV. 488, 488-89 (1981) (stating that Supreme Court returned fee-shifting statute determinations to Congress for further guidance). The Supreme Court in *Alyeska* concluded that it was Congress’s job to decide what the circumstances should be to award attorney’s fees and the range of awards that should be given. *Id.* In response, Congress enacted the Civil Rights Attorney’s Fees Awards Act of 1976 with the prevailing party status in the statutory provisions. *Id.* at 489. Maybe Congress will respond once again. See Richard A. Posner, *Statutory Interpretation—In the Classroom and In the Courtroom*, 50 U. CHI. L. R. 800, 803 (arguing that law students should “learn about the frequency and feasibility of legislative overruling of judicial decisions that interpret statutes contrary to the purpose of the legislation as conceived by either the enacting Congress or a subsequent one.”). *Contra* Coyle, *supra* note 135 (alleging that most civil rights attorneys are not optimistic about the chance that Congress will respond and overturn the *Buckhannon* ruling).

231. See *supra* notes 160-227 and accompanying text.

232. See *supra* notes 140-53 and accompanying text.

233. See *supra* notes 182-227 and accompanying text.

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severely stifled.²³⁴ There is hope, though, that Congress may respond as it did in *Alyeska Pipeline Serv. Co.*²³⁵ and ease the expense for plaintiffs that try to vindicate their rights and the rights of the public for the public good.²³⁶

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234. *See supra* notes 206-27 and accompanying text.

235. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1977). *See supra* notes 228-30 and accompanying text.

236. *See supra* notes 154-59 and accompanying text.