The Losing Argument Continues for Prevailing without Winning: A Critical Summary of the Impact of *Buckhanon* on the Catalyst Theory

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THE LOSING ARGUMENT CONTINUES FOR PREVAILING WITHOUT WINNING:
A CRITICAL SUMMARY OF THE IMPACT OF BUCKHANNON ON THE CATALYST THEORY

INTRODUCTION

Winning isn’t everything – it’s the only thing. To the victor go the spoils. The scoreboard has the final word. The clichés are as true in the courtroom as they are on the field: litigation is often a winner-take-all enterprise. But who is the victor when the game stops short of victory? In sports, after a delay, cancellation, or tie, each team leaves the field unaffected, and the crown of laurels graces no brow. In the legal world, however, proponents of the catalyst theory refuse to allow the laurels to gather dust. The catalyst theory turns the concept of winning on its head by crowning plaintiffs as “prevailing parties” without an official pronouncement to legitimize the victory.

The American Rule states that “litigants generally pay their own attorney fees win, lose, or draw, unless a statute provides otherwise.” In spite of this tradition, the catalyst theory allows a plaintiff to recover attorney fees from a defendant when the case is settled or otherwise terminated before the court makes a final judgment on the merits, even if the applicable fee-shifting statute does not specifically provide for such a recovery. The theory is centered around the notion that even if the court does not make a final ruling, if the plaintiff essentially gets what it wanted, it should be considered to have prevailed, and thus should be eligible under the applicable statute to have its fees shifted to the defendants. The key to bringing a plaintiff under the auspices of the

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1 Kerkhof v. MCI WorldCom, Inc., 204 F. Supp. 2d 74, 74-75 (D. Me. 2002); see also Hanrahan v. Hampton, 446 U.S. 754, 758 (1980) (“[T]he usual rule in this country [is] that each party is to bear the expense of his own attorney.”).

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The catalyst theory is a change in the defendant’s behavior as a result of the plaintiff’s suit that gives the plaintiff some of the relief sought in the suit. The theory is so named because the plaintiff’s suit is considered to be the “catalyst” that brought about the favorable change in the defendant’s actions.2

Until recently, the catalyst theory was alive and well across most of the federal circuits. However, in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources3 the Supreme Court rejected the catalyst theory in the context of the Americans with Disabilities Act (“ADA”)4 and the Fair Housing Administration Act (“FHAA”).5 Unfortunately, the catalyst theory has not faded quietly off into the sunset; in the short time since Buckhannon theoretically banished the theory from the legal landscape, the circuits have struggled to interpret the Supreme Court’s mandate, with some courts carving out exceptions that resurrect the theory in some interesting forms.6

Part I of this Note will summarize the state of the catalyst theory in the lower federal courts and the Supreme Court leading up to Buckhannon. Part II will examine the Buckhannon case itself, while Part III will suggest a proper interpretation of its holding: unless the relevant statutory fee-shift language explicitly provides that a mere change in a defendant’s behavior is a sufficient basis for awarding attorney fees to a plaintiff, Buckhannon’s rejection of the catalyst theory applies to all actions brought under fee-shifting statutes, regardless of whether the term “prevailing party” is used in the fee-shift provision. In order for a party to be considered “prevailing,” the court must grant sanctioned relief through a favorable final judgment on the merits of the claim or through a consent decree. Procedural or preliminary victories are insufficient to confer prevailing party status, and a “functional equivalent” of a consent decree can do so only if it contains the court’s endorsement of the terms of the settlement agreement and an explicit res-

2 The “catalyst” moniker carries with it the requirement that the defendant’s change of behavior must have been a result of the plaintiff’s suit. See Goodell v. Ralphs Grocery Co., 207 F. Supp. 2d 1124, 1128 (E.D. Cal. 2002) (holding that the catalyst theory does not apply because defendant changed its conduct before the plaintiff’s suit was brought).
6 Until recently, the Sixth Circuit was the only circuit not to have published any decisions concerning Buckhannon and the catalyst theory. However, in a recent decision, the Sixth Circuit modified its definition of “prevailing party” to include aspects of the catalyst theory. Habich v. City of Dearborn, 331 F.3d 524, 534 (6th Cir. 2003) (stating that “a party may ‘prevail’ if it ‘obtain[s] a change in the legal relationship of the parties that originated in a court order or that had at least received judicial sanction,’” quoting Chambers v. Ohio Dep’t of Human Servs., 273 F.3d 690, 691 (6th Cir. 2001)).
ervation of the court’s jurisdiction to enforce the settlement. Also included in this section will be a critical commentary on catalyst cases since *Buckhannon*. Part IV will canvas the policy arguments in favor of the suggested approach.

I. THE STATE OF CATALYST THEORY BEFORE *BUCKHANNON*

A. The Circuit Cases

In the vast majority of circuits, the catalyst theory was accepted in some form. In practice, the theory took on a variety of shapes, the parameters of which were defined largely by the way in which the court defined “prevailing party.” The definition of the term is of great significance to the operation of the catalyst theory because the broader the class of activities that allow a party to be considered “prevailing,” the easier it is for that party to have its fees shifted.

Some courts adopted a broad reading of the term, holding that a prevailing party is one whose “ends are accomplished as a result of the litigation,” allowing a party to prevail “in a practical sense” as long as it obtained “some of the benefit . . . sought” by the lawsuit. Under such a broad interpretation, a plaintiff’s relief might come in the form of a formal court order, or more informally in the shape of a private settlement or even by a mere change in a defendant’s behavior.

More exacting definitions of “prevailing party” required the identification of a clear nexus between the plaintiff’s suit and the defendant’s change in behavior; a plaintiff would be required to establish that its suit was a “substantial” or “significant” cause of the defendant’s provision of relief. Courts adopting this stricter definition scrutinized the strength of the plaintiff’s case, requiring

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7 Stanton v. S. Berkshire Reg’l Sch. Dist., 197 F.3d 574, 577 n.2 (1st Cir. 1999); Morris v. W. Palm Beach, 194 F.3d 1203, 1207 (11th Cir. 1999); Payne v. Bd. of Educ., 88 F.3d 392, 397 (6th Cir. 1996); Marbly v. Bane, 57 F.3d 224, 234 (2d Cir. 1995); Kilgour v. City of Pasedena, 53 F.3d 1007, 1010 (9th Cir. 1995); Hooper v. Demco, Inc., 37 F.3d 287, 293 (7th Cir. 1994); Zinn v. Shalala, 35 F.3d 273, 276 (7th Cir. 1994); Beard v. Teska, 31 F.3d 942, 951-52 (10th Cir. 1994); Baumgartner v. Harrisburg Hous. Auth., 21 F.3d 541, 546-50 (3d Cir. 1994); Little Rock Sch. Dist. v. Pulaski County Sch. Dist. #1, 17 F.3d 260, 263 n.2 (8th Cir. 1994); Wheeler v. Towanda Area Sch. Dist., 950 F.2d 128, 132 (3d Cir. 1991); Assoc. Builders & Contractors v. Orleans Parish Sch. Bd., 919 F.2d 374, 378 (5th Cir. 1990); Grano v. Berry, 783 F.2d 1104, 1108 (D.C. Cir. 1986); Williams v. Leatherberry, 672 F.2d 549, 551 (5th Cir. 1982); Stewart v. Hannon, 675 F.2d 846, 851 (7th Cir. 1982).

8 *Assoc. Builders & Contractors*, 919 F.2d at 378.

9 Stewart, 675 F.2d at 851.


11 *Williams*, 672 F.2d at 551.
that the defendant’s incentive to settle be based on “threat of victory,” not “by dint of nuisance and threat of expense.”  Although these courts allowed that “[v]ictory can be achieved well short of a final judgment (or its equivalent),”2 the plaintiff’s suit “must have prompted the defendant . . . to act or cease its behavior based on the strength of the case, not ‘wholly gratuitously’ in response to the plaintiff’s claims.”3 The level of strength required of the plaintiff’s case was not subject to a clear standard, but rather was required to be “colorable” and not “frivolous, unreasonable, or groundless.”4

However, approval of the catalyst theory was not universal before Buckhannon. The Federal Circuit had not yet addressed the issue, and the Fourth Circuit soundly repudiated its initial acceptance of the theory in S-1 and S-2 v. State Board of Education.5 The en banc court in that case held that the term “prevailing party” was reserved for those that have “obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought.”6 This circuit’s treatment of the theory is especially noteworthy, as it came in reaction to the Supreme Court’s decision in Farrar v. Hobby7 and this was the circuit in which Buckhannon was initially brought.

B. The Supreme Court Cases

Until its decision in Buckhannon, the Supreme Court’s relationship with the catalyst theory was ambivalent at best. In Hanrahan v. Hampton,8 the Court reviewed the legislative history of the principal federal fee-shifting statute, the Civil Rights Attorney Fees Award Act (“CRAFAA”),9 and found that “Congress intended to permit the interim award of counsel fees only when a

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12 Marbley, 57 F.3d at 234-35.
13 Id. at 234.
14 Hooper v. Demco, Inc., 37 F.3d 287, 293 (7th Cir. 1994) (quoting In re Burlington N., Inc., 832 F.2d 422, 425 (7th Cir. 1987)).
16 S-1, 21 F.3d at 51 (citing Farrar v. Hobby, 506 U.S. 103 (1992)). It is interesting to note that under a post-Buckhannon regime, the Fourth Circuit’s “rejection” of the catalyst theory might actually allow for quite liberal fee shifting. The language in S-1 indicates that private settlements are enforceable mechanisms adequate to confer prevailing party status. If this language does reject the catalyst theory, it certainly retains a broad reading of “prevailing party”; short of a defendant’s voluntary change of behavior without any written agreement, a plaintiff would still be considered to have “prevailed” and would be eligible to have its fees shifted.
18 446 U.S. 754 (1980).
party has prevailed on the merits of at least some of his claims."

The Court also specified that such relief could be at the trial level or on appeal. However, no fees were awarded in this case because the appellate relief granted to the respondents was limited to entitlement to a new trial, which did not constitute a ruling on the merits of their claims. Although the grant of a new trial made ruling on the merits of the respondents' claims possible, the court found such a ruling not a matter "on which a party could 'prevail' for purposes of shifting his counsel fees to the opposing party."

In *Maher v. Gagne*, another action for fees brought under the CRAFAA, the Court indicated that a settlement agreement enforced through a consent decree could be the basis for an attorney fee award, even if it does not include an admission of liability by the defendant. The plaintiff in that case was awarded fees because she obtained virtually all of the relief she sought and "[t]he fact that [she] prevailed through a settlement rather than through litigation [did] not weaken her claim to fees." Later Court opinions characterized the holding in *Maher* as supporting the award of attorney fees for certain private settlements.

The Court's checkered treatment of the catalyst theory under the CRAFAA continued with *Hewitt v. Helms*. On one hand, the Court pronounced that it was "settled law" that a plaintiff could prevail without a formal favorable judgment if the lawsuit prompts the defendant's "voluntary action ... that redresses the plaintiff's grievances." Nevertheless, it held that "respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." The question of how much relief is required was expressly reserved, but

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21 *Hanrahan*, 446 U.S. at 758.
22 Id. at 757.
23 Id. at 759.
24 448 U.S. 122, 126 n.8 (1980) (noting that the consent decree specifically avoided ruling on admission of fault).
25 Id. at 129.
26 *Farrar v. Hobby*, 506 U.S. 103, 111 (1992); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). *But see Evans v. Jeff D.*, 475 U.S. 717, 720 (1986) (reading *Maher* to hold only "that fees may be assessed ... after a case has been settled by the entry of a consent decree"). When the majority in *Buckhannon* addressed this issue, it indicated that a private settlement could only confer prevailing party status when accompanied by a consent decree. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res., 532 U.S. 598, 604 n.7 ("Private settlements do not entail the judicial approval and oversight involved in consent decrees.").
28 Id. at 760-61.
29 Id. at 760.
30 Id. at 763. In his concurring opinion in *Buckhannon*, Justice Scalia posits that *Hewitt* is the source of the circuits' (mistaken) acceptance of the catalyst theory. *Buckhannon*, 532 U.S. at 621. But the dissent in *Buckhannon* cites cases predating *Hewitt* that adopt the catalyst theory from all circuits except the Federal Circuit. Id. at 626 n.4.
no fees were awarded in that case because the party seeking fees received no relief from the opposing party, only a favorable interlocutory ruling by the appellate court that his constitutional rights had been violated.\textsuperscript{31} Without a court order granting or ordering relief such as an award of damages, injunction or declaratory judgment, consent decree or settlement, the court was unwilling to confer prevailing party status.\textsuperscript{32}

The issue of what constitutes prevailing party status was addressed again by the Court in \textit{Texas State Teacher Association v. Garland Independent School District},\textsuperscript{33} which featured a three-part test to determine such status.\textsuperscript{34} The first prong required that the plaintiff obtain relief on a significant claim in the case and the second prong mandated that the relief affect a material alteration in the legal relationship between the parties. Finally, the change in the relationship could not be merely technical or \textit{de minimis}. Following this test, the court approved a fee-shift even though the plaintiffs did not prevail on the central issue in the case because they did obtain relief on some of their other claims. However, the Court remanded the determination of the exact amount of the fee award, which was to be reduced to reflect the amount spent litigating only those claims on which the plaintiffs prevailed.

The most problematic Supreme Court case addressing catalyst theory was \textit{Farrar v. Hobby}.\textsuperscript{35} Although its validity as a precedent in catalyst theory jurisprudence is undercut by the fact that the claim “involved no catalytic effect,”\textsuperscript{36} nevertheless the dicta in which the Court expressed its disapproval\textsuperscript{37} was the basis for the Fourth Circuit’s rejection of the catalyst theory.\textsuperscript{38} The Court’s discussion in \textit{Farrar} also indicated that even an award of nominal damages by a court is enough to allow a plaintiff to be deemed a “prevailing party,” but the status itself does not make the award of attorney fees appropriate in all cases, as the decisions whether to

\begin{footnotes}
\item[31] Hewitt, 482 U.S. at 760. The Court justified the distinction by explaining that “[r]edress is sought through the court, but from the defendant.” Id. at 761.
\item[32] Id. at 760. Even if the judgment ultimately results in a favorable change in behavior, the party seeking fees must personally benefit from the relief afforded by such change. See Rhodes v. Stewart, 488 U.S. 1, 4 (1988) (holding that changes in prison policy, even if caused by plaintiff’s suit, did not entitle plaintiff to a fee shift because he was released from prison long before the new policy took effect).
\item[33] 489 U.S. 782, 792 (1989).
\item[34] Id. at 792.
\item[37] Farrar, 506 U.S. at 111-13.
\item[38] S-1 & S-2 v. State Bd. of Educ., 21 F.3d 49, 51 (4th Cir. 1994).
\end{footnotes}
shift fees and in what amount are still within the judge’s discretion according to most fee-shifting statutes. In fact, in the case before it, the court found that no fee award was appropriate because the plaintiff, seeking $17 million, was awarded a nominal one dollar in damages for his civil rights claim. In light of his failure to prove actual harm, an essential element of his damages claim, the court concluded that the only appropriate fee award for such a “technical” victory would be no fee award at all. Shortly before its decision in *Buckhannon*, the Court once again expressly reserved a ruling on the validity of the catalyst theory, and observed that the question was still open.

II. *Buckhannon*: The Facts and Opinions

A. The Facts

The case giving rise to the Court’s direct consideration of the catalyst theory began in West Virginia. The plaintiff Buckhannon, an assisted living facility, had failed a state inspection by the West Virginia Office of the State Fire Marshal after it was determined that some residents of the home were incapable of “self-preservation” in the event of an emergency, as required by state law. In the face of an order to close the facility within thirty days, Buckhannon brought suit in the United States District Court for the Northern District of West Virginia on behalf of itself, its residents, and other local boarding facilities against the State of West Virginia, claiming that the state law requiring “self-preservation” violated the FHAA and the ADA. However, the plaintiff’s case was mooted in 1998 when the West Virginia legis-

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40 *Id.*
41 *Friends of the Earth*, 528 U.S. at 194.
42 State law required that all residents of homes such as Buckhannon be capable of “self-preservation,” or capable of moving themselves to avoid imminent danger. *W. Va. Code §§ 16-5H-1, 16-5H-2* (1998); *W. Va. Code St. R.* § 14.07(1) (1995) (although the West Virginia legislature repealed this entire act in 2003, this repeal has no effect on the analysis of the catalyst theory in this case).
43 This order was subsequently stayed pending resolution of the case. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health and Human Res.*, 532 U.S. 598, 601 (2001). The fact that Buckhannon was allowed to continue operation as the litigation progressed might explain the fact that its claim for monetary damages was dropped on January 2, 1998, leaving only claims for declaratory and injunctive relief. *Id.* at 601 n.1. The lack of monetary damages would later come back to haunt Buckhannon in its quest for attorney fees; if it had successfully been able to claim damages, its suit would not have been completely mooted by the change in the law, and it would have had independent grounds on which to seek a fee award. *Id.* at 608-09.
lature amended both the statute and its corresponding regulations, and the case was dismissed.

Buckhannon requested that its attorney fees be shifted to the defendant State under the fee-shifting provisions of the FHAA and the ADA. Both of these statutes provide that the court has discretion to award attorney fees to a “prevailing party.” Although it had not received a favorable ruling and thus had not “prevailed” in that sense, Buckhannon argued that its suit was the reason why the State had voluntarily changed its law, and that the change granted Buckhannon what it had been seeking in its suit. Therefore, under the catalyst theory, Buckhannon argued that it was indeed a “prevailing party” and eligible for a fee shift. The District Court, following Fourth Circuit precedent that rejected the catalyst theory, denied Buckhannon’s motion for attorney fees, and the Fourth Circuit Court of Appeals affirmed the District Court’s decision in an unpublished, per curiam opinion. The Supreme Court granted certiorari on September 26, 2000.

B. The Majority Opinion

The majority in Buckhannon found no ambiguity in the meaning of the term “prevailing party,” turning to Black’s Law Dictionary to define such a party as one “in whose favor a judgment is rendered, regardless of the amount of damages awarded <in certain cases, the court will award attorney’s fees to the prevailing party>. -- Also termed successful party.” From this language, the court emphasized that prevailing party status centers on some type of court-awarded relief.

In deciding the issue, the majority admitted that the Court’s prior decisions contained language that could justify both acceptance and rejection of the catalyst theory, but explained that, as it had never had specific occasion to interpret the term “prevailing party” in light of the catalyst theory, it was not bound by any of

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47 At this point, the Buckhannon litigation had entered the discovery phase. Buckhannon, 532 U.S. at 601.
52 Buckhannon, 532 U.S. at 603 (quoting BLACK’S LAW DICTIONARY 1145 (7th ed. 1999)).
53 Id.
this conflicting language. To decide whether the term allowed for an award of attorney fees in catalyst situations, the court turned to the legislative history of the CRAFAA, finding no clear Congressional intent to shift fees in catalyst situations that would justify overturning the American Rule. Applying this interpretation to the facts before it, the court found that no shifting of attorney fees would be appropriate under the similar provisions in the ADA and the FHAA. The upsetting of circuit jurisprudence was justified on the grounds that the lower court decisions had been partially based on confusing and contradictory Supreme Court dicta and that the Buckhannon decision simply set the issue straight. Justice Scalia joined the majority and also authored a separate concurring opinion to rebut the arguments of the dissent in more detail.

It is also important to note that the rationale of Buckhannon, and indeed most catalyst cases, does not apply to the situation in which the plaintiff is seeking only court costs and not attorney fees. The majority in Buckhannon expressly differentiates between costs and attorney fees: costs are awardable at a court’s discretion and according to local rules. No judicial relief is needed to justify an award of costs.

C. The Dissenting Opinion

The four-justice minority found the definition of “prevailing party” a bit more elusive. In fact, the clearer definition to the four dissenting justices was one that incorporated the catalyst theory. In contrast to the majority’s formulation of the definition which stressed its status as a legal term of art, the minority instead turned to Webster’s Dictionary for a more “everyday” definition of “prevailing party” that would allow “a favorable alteration of actual circumstances” without a “formal declaration” to confer status. This definition would center on the reality of the plaintiff gaining “the practical relief sought in her complaint.” To bolster its

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54 Id.
55 Id. at 607.
56 Id. at 605 (stating that the legitimacy of the catalyst theory was “squarely presented” and thus required reconciliation).
57 Id. at 610.
59 Buckhannon, 532 U.S. at 628-29 (Ginsburg, J., dissenting) (noting that a court need not refer to Black’s Law Dictionary to find “preclusive” definitions of ambiguous statutory terms).
60 Id. at 633 (Ginsburg, J., dissenting).
61 Id.
characterization of the term as one with a broad functional meaning, the
dissent relied and built upon, *inter alia*, the definition used in the Seventh Circuit case *Stewart v. Hannon*, in which the proper inquiry was whether a plaintiff was redressed-in-fact by the defendant's change in conduct. The dissent also approved of the Court's own historical statement that prevailing can occur in the "true and proper sense" if not formally.

In support of this broader definition, the dissent also pointed out that catalyst plaintiffs are considered prevailing for tax purposes, and that Federal Rule of Civil Procedure 54(d) provides for the default award of costs to the prevailing party, apparently rejecting the majority's distinction between costs and attorney's fees. Moreover, the dissent argued, catalyst theory is not inconsistent with a stricter definition such as the majority's that centers around the alteration of the legal relationship of the parties, because the legal relationship between parties does change when a defendant ceases the behavior to which the plaintiff objects and the suit is accordingly dismissed. Most importantly to the dissent, a more expansive, practical definition of "prevailing party" is more consistent with the goal of fee-shifting mechanisms: "to promote the vigorous enforcement of civil rights."

### III. Proper Interpretation of *Buckhannon*’s Holding

**A. To What Statutes Does Buckhannon Apply?**

A proper interpretation of *Buckhannon* does not limit its application to the statutes involved in that case or even to only those fee-shifting provisions that use the term "prevailing party." The rationale of the majority opinion relies on broad underlying policy that applies stably across all fee-shifting statutes.

1. *Is the Ruling Limited to the Statutes Involved in Buckhannon?*

In framing the issue at the beginning of its opinion, the majority pointed out that "numerous" federal statutes allow for fee-shifting and that it had granted certiorari "[t]o resolve the disagreement amongst the Courts of Appeals" regarding catalyst the-

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62 675 F.2d 846, 851 (7th Cir. 1982).
63 Id. at 851 (focusing on whether the defendant’s change “provide[s], in substantial part, the relief sought”).
65 *Buckhannon*, 532 U.S. at 631-32 9 (Ginsburg, J., dissenting).
66 Id. at 642 (Ginsburg, J., dissenting).
67 Id. at 640 (Ginsburg, J., dissenting) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978)).
In the discussion of prior circuit cases, the Court noted that those cases that adopted the catalyst theory arose under a variety of statutes, not just the ADA and the FHAA involved in Buckhannon. The reference to these cases implies that the Court meant to adopt a general rule rejecting the theory under all fee-shifting mechanisms. More explicitly, the majority opinion actually listed other federal statutes involving fee-shifting provisions and explained that it is the Court's preference to "interpret these fee-shifting provisions consistently." Even Buckhannon's dissenter implicitly recognized that the decision was not limited to the statutes involved in that case when it cited the legislative history of the CRAFAA (which was not involved in Buckhannon) to support its broad interpretation of the term "prevailing party," and explicitly when it observed the consistent treatment that such statutes have received when interpreted by the Court.

Aside from the language of the opinion itself, the fact that the term "prevailing party" is a legal term of art is instructive. The purpose of adopting terms of art is to express the same concept consistently in numerous statutes. This purpose is reflected in the established judicial practice of presuming that when Congress uses a legal term of art, it intends for the term to take on its established legal meaning. It is generally accepted, even in courts that are neutral or friendly to the catalyst concept, that Buckhannon's interpretation of "prevailing party" applies consistently to various statutes using the term.
Nevertheless, a string of post-Buckhannon cases have attempted to exempt the Individuals with Disabilities Education Act ("IDEA") from Buckhannon's reach, even though that statute uses the "prevailing party" term in its fee-shifting provision. The differentiation is asserted to be based on the policies underlying the statute. The argument goes that parents challenging a school system's alleged violation of their child's rights have a particular need for legal representation to help them navigate the IDEA's detailed procedures. Statutory language granting parents the "right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities" is purported to demonstrate congressional intent to fulfill this special need for counsel. This line of reasoning concludes that because of the prohibitive cost of counsel, denying these parents the possibility of having their attorney fees paid for in the event of settlement would "place parents in the conflicted position of choosing between legal representation and their child's interests in expeditious settlement."

First of all, it is a non sequitur to say that the statutory language cited by these courts as evidence of Congress' purpose to "assist parents in obtaining legal representation" even implicates the issue of fee shifting. It may be permissible to interpret these words as allowing parents the right to involve attorneys and experts in the IDEA process, but it is quite a leap from the plain language of the statute to infer an additional right to have that counsel paid for by the opposing party in the event of settlement. More importantly, even if Congress intended such a purpose, it could not be interpreted from the legal term of art it chose to use in the section that does directly address fee shifting. Although it is an estab-
lished canon to interpret statutory language according to the underlying purposes of the statute, a variable interpretation does not apply to standardized legal terms of art such as "prevailing party." If Congress wanted the IDEA to execute a policy by operating in a way that is not contemplated by the customary interpretation of "prevailing party," it presumably would not have deliberately used the term of art in the statute, but instead would have chosen another word that would better effectuate that policy.

2. *Is the Ruling Limited to Statutes that use the Term “Prevailing Party”?*

*Buckhannon*’s rationale encompasses more than mere statutory interpretation, and is not confined to statutes that use the "prevailing party" term. As one court put it, "the broader import of [the Buckhannon] ruling is not limited to the term ‘prevailing party.’" Indeed, it is difficult to imagine a fee-shifting mechanism that does not rely in some measure on the notion that the party to whom fees are to be shifted must be the prevailing party. As noted and supported above, fee-shifting statutes are to be interpreted consistently due to the common purpose underlying them. The prevailing party concept is so integral to the idea of fee shifting that it is the post-*Buckhannon* practice of several circuits to read the "prevailing party" term into fee-shifting statutes that do not explicitly use it. The policy and purpose of fee shifting apply regardless of the specific wording of statutes. To limit application of *Buckhannon*’s rejection of the catalyst theory based merely on the absence of the "prevailing party" term contorts the meaning and frustrates the intent of fee-shifting mechanisms in general.

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80 Id. (noting that individual provisions must be read in the context of the entire statute to effect the statute’s underlying purpose).

81 See Union of Needletrades, Indus. & Textile Employees v. United States INS, 202 F. Supp. 2d 265, 271 (S.D.N.Y. 2002) (holding that every choice of words in a statute is purposeful). Indeed, this argument underscores that interpreting fee-shifting mechanisms consistently is not, as the *Buckhannon* dissent claims, hostile to the purpose of encouraging civil rights cases to be brought. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Heath and Human Res.*, 532 U.S. 598, 640 (2001). On the contrary, it merely incorporates the default assumption of the American Rule into statutory interpretation: If the statute does not clearly indicate that the plaintiff might prevail by means other than those commonly associated with the term, it is assumed that fee shifting is inappropriate in such a case. As with all default rules, if this is not the desired result, Congress can draft the statute accordingly.


83 See supra note 70 and accompanying text.


85 See *Aboidun v. McElroy*, 2002 U.S. Dist. LEXIS 3519, at *2 (S.D.N.Y. Mar. 4, 2002) (holding that *Buckhannon* "leaves no doubt at all that it governs the interpretation" of a large
Most courts have applied *Buckhannon* wherever fee shifting was at issue in the case with little regard for use of the “prevailing party” term.\(^6\) However, a recent string of cases in the Ninth, Tenth, and Eleventh Circuits have refused to apply *Buckhannon* to actions for attorney fees arising under the Endangered Species Act (“ESA”)\(^7\) because the statute does not use the term “prevailing party” in its fee-shifting provision.\(^8\) These courts find the ESA’s allowance of a fee shift “whenever appropriate” is “distinguishable on its face” from the “prevailing party” language used in most other fee-shifting mechanisms.\(^9\)

Although the language of the ESA might differ slightly from more conventional fee-shifting language, the concept and purpose underlying the statute is still the same. The idea that it would ever be “appropriate” to award attorney fees to a party that had not prevailed is inconsistent with the very concept of fee shifting. Fortunately, the differentiation of the ESA from *Buckhannon* appears to be limited to a few courts,\(^9\) although the differentiation recently was approved at the appellate level in the Tenth and Eleventh Circuit Courts of Appeals, and the issue is currently under review by the Ninth Circuit Court of Appeals.

**B. What Does a Plaintiff Have to Do in Order to Prevail?**

*Buckhannon*’s death blow to the catalyst theory, though applicable to all fee-shifting mechanisms, does not end the inquiry into whether a defendant will be liable for a plaintiff’s attorney fees when the litigation stops short of final judgment. Consistent with its earlier decisions,\(^9\) the *Buckhannon* majority acknowledged that based on the legislative history of the seminal fee-shifting statute CRAFAA, a party could prevail short of a final judgment on the number of similarly worded federal fee-shifting statutes).\(^9\)

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\(^8\) Id. § 1540(g)(4). For a case from each circuit differentiating the ESA, see *Loggerhead Turtle v. County Council*, 307 F.3d 1318 (11th Cir. 2002); *Ctr. for Biological Diversity v. Norton*, 262 F.3d 1077 (10th Cir. 2001); *S.W. Ctr. for Biological Diversity v. Carroll*, 182 F. Supp. 2d 944 (C.D. Cal. 2001) (from the district level of the Ninth Circuit).

merits of the case. Just how short of that final judgment the plaintiff’s level of relief can fall continues to be a major point of contention in the circuits after Buckhannon. The plaintiff need not obtain all of the relief sought in the suit in order to be considered to have prevailed. Buckhannon specifically provides that a favorable judgment on the merits of the plaintiff’s claim or a consent decree that will enforce the terms of the settlement are sufficient to allow for a plaintiff to be considered prevailing. As a more general guiding principle, Buckhannon held that what makes the relief capable of conferring prevailing party status is the stamp of the court’s “imprimatur.” The court must be involved in granting relief in the case before it, or else it lacks sufficient power to anoint either party as prevailing.

I. What Type of Ruling is a Ruling on the Merits?

If a court ruling is to confer prevailing party status, the ruling cannot be procedural, but rather must squarely address the merits of the plaintiff’s case. For example, the Buckhannon majority explicitly stated that an interlocutory ruling that reverses a Federal Rule of Civil Procedure 12(b)(6) motion or a directed verdict are insufficient to render a plaintiff a prevailing party. Subsequent cases in lower courts have held that the fact that a plaintiff’s sur-

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93 *Id.* at 604 (citing Farrar v. Hobby, 506 U.S. 103 (1992)) (holding that even an award of nominal damages might suffice); see also Nat’l Coalition for Students with Disabilities v. Bush, 173 F. Supp. 2d 1272, 1280 (N.D. Fla. 2001) (holding that plaintiffs need only gain a small amount of the total relief sought). However, the plaintiff must make some change in the status quo in order to be considered to have gained relief. Walker v. United States HUD, 2001 U.S. Dist. LEXIS 17542 (N.D. Tex. Aug. 27, 2001). If the plaintiff does obtain less than all of the relief it sought in the suit, the court may shift less than all of the plaintiff’s attorney fees, in proportion to the plaintiff’s success. Muehe v. Sports Depot, 2002 U.S. Dist. LEXIS 7382 (D. Mass. Feb. 20, 2002) (awarding plaintiff fees only as to one claim because that claim was the only one on which it received judgment).
94 Buckhannon, 532 U.S. at 604.
95 *Id.* at 605.
96 Allowing a plaintiff to be considered to “prevail” when the court has awarded no relief exudes the same kind of judicial activism and disregard for faithful statutory interpretation that led the court in Bandera v. City of Quincy, 2002 U.S. Dist. LEXIS 16685 (D. Mass. Aug. 29, 2002), to proclaim that once the “prevailing party” threshold is crossed, fee awards “are virtually obligatory,” even though the statute at issue in that case, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (2000), uses permissive language in allowing that the judge “may” award fees. *Contra* Bublitz v. E.I. Dupont De Nemours & Co., 224 F. Supp. 2d 1234, 1245 n.5 (S.D. Iowa 2002) (holding that there is “no longer even a presumption” that fee awards should be granted under the permissive language of ERISA).
97 Buckhannon, 532 U.S. at 605; see also Pitchford v. Oakwood Mobile Homes, Inc., 212 F. Supp. 2d 613 (W.D. Va. 2002) (finding that the order adjudicating an arbitration term that does not address the merits of plaintiff’s case is procedural, while the ruling that confers status must be substantive).
98 Buckhannon, 532 U.S. at 605 (citing Hewitt v. Helms, 482 U.S. 755, 760 (1987)).
99 *Id.* (citing Hannah v. Hampton, 446 U.S. 754, 754 (1980)).

vival of a motion to dismiss or success with a preliminary injunction will not justify a fee shift. There is some confusion as to whether a temporary restraining order ("TRO") is a sufficiently final ruling to confer prevailing party status, but at least one court has found TROs to be inadequate. Most, but not all, courts have recognized the procedural/substantive distinction and allowed for fee shifts only after a substantive ruling on the merits. Likewise, a successful motion that is later overturned cannot provide the basis for prevailing party status.

The Buckhannon dissent would relax the merit requirement and allow for fee shifts in cases where the plaintiff's claim is found to be merely "colorable" and not "groundless." This approach essentially abandons the merit requirement entirely by allowing plaintiffs with non-meritorious claims that fall short of total absurdity to be considered "prevailing." Such an arrange-

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100 Pitchford, 212 F. Supp. 2d at 618 (holding that surviving a motion to dismiss is not a final ruling on which prevailing party status can be based).
101 Smyth v. Rivero, 282 F.3d 268 (4th Cir. 2002) (holding that preliminary injunction is not enough to confer status when it is not incorporated into an order of dismissal and no jurisdiction is retained); John T. v. Del. County Intermediate Unit, 2001 U.S. Dist. LEXIS 18254, at *16-*17 (E.D. Pa. Nov. 7, 2001) (holding that a preliminary injunction cannot confer status when the plaintiff voluntarily dismisses). But see Envtl. Prot. Info. Ctr. v. Pac. Lumber Co., 2002 U.S. Dist. LEXIS 17909 (N.D. Cal. Sept. 19, 2002) (holding that a preliminary injunction can confer status under statutes like the ESA and the Clean Water Act that have more permissive fee-shifting language than statutes using the "prevailing party" term); Watson v. County of Riverside, 300 F.3d 1092, 1096 (9th Cir. 2002) (providing Buckhannon's requirement of judicial imprimatur is satisfied by a preliminary injunction).

102 The main controversy seems centered in the Seventh Circuit around Johnny's Ice House, Inc. v. Amateur Hockey Ass'n, 2001 U.S. Dist. LEXIS 11671 (N.D. Ill. Aug. 2, 2001), in which the court held that a TRO and defendant's voluntary dismissal alone are not enough to confer prevailing party status. Nevertheless, such status was conferred under the facts of that case because the court order "formaliz[ed] and memorializ[ed] [defendant's] commitment" to alter its behavior, thereby subjecting it to "judicial oversight and enforcement," essentially resulting in the functional equivalent of a consent decree. Id. at *10. This case has been erroneously relied upon for the proposition that a temporary restraining order alone is enough to confer status. See Sileikis v. Perryman, 2001 U.S. Dist. LEXIS 12737, at *8 (N.D. Ill. Aug. 20, 2001) (relying on Johnny's in equating a TRO to a "finding of fact by the court indicating wrongdoing" that can form the basis for prevailing party status upon defendant's voluntary dismissal).

However, the controversy is not limited to the Seventh Circuit; at least one other court has held that a TRO is sufficient to confer status. See Envtl. Prot. Info. Ctr. v. Pac. Lumber Co., 2002 U.S. Dist. LEXIS 17909 (N.D. Cal. Sept. 19, 2002) (finding that a TRO can confer status when the "prevailing party" term is used in the statute).

103 See, e.g., Sileikis, 2001 U.S. Dist. LEXIS 12737 (holding that filing a complaint and scheduling of a hearing do not sufficiently involve the court to justify conferring status). But see Lynom v. Widnall, 222 F. Supp. 2d 1 (D.D.C. 2002) (ruling that having the court remand the case for board reconsideration is enough of a ruling on the merits to change the legal relationship of the parties).
106 Id. at 620 n.4 (Scalia, J., concurring) ("[T]he catalyst theory's purported 'merit test' . . . is scant protection for the innocent.").
ment leaves the defendant in the doubly unjust position of liability for the plaintiff's attorney fees and for those it incurred itself while defending the meritless claim. It also allows courts to sidestep Buckhannon, as it is the same standard followed by pre-Buckhannon courts in administering the catalyst theory. Aside from being too permissive, the "groundless" standard is too undefined and inefficient to administer in a meaningful way, especially if the plaintiff's claim has already been mooted.

2. If the Court Makes no Formal Ruling, what Other Forms of Relief Sufficiently Involve the Court so as to Allow for Fee Shifting?

The most striking effect of Buckhannon's abandonment of the catalyst theory is that a defendant's voluntary change in behavior is no longer enough to confer prevailing party status, even if the change in behavior is what the plaintiff was seeking in the lawsuit; there must be a corresponding "judicially sanctioned change in the legal relationship of the parties." If a defendant merely changes its behavior voluntarily, until a consent decree is entered, the behavior remains just that — voluntary. The "favorable alteration of actual circumstances," as advocated by the dissent, is not a legally binding act capable of altering either party's legal status because the defendant is in no way bound to continue providing the plaintiff with relief. Although voluntary changes of behavior no longer confer prevailing party status, post-Buckhannon lower courts have embraced the idea that "prevailing" can occur short of a formal ruling on the merits when the court issues a formal consent decree, in which it adopts the terms of the parties' agreement and retains jurisdiction to enforce it.

Some courts, especially the District of Columbia and Ninth Circuits, have seized upon the "alteration in the legal relationship" language in the majority opinion to allow for fee shifting when the

107 See, e.g., Grano v. Barry, 783 F.2d 1104, 1110 (D.C. Cir. 1986) (formulating a similar standard).
108 Buckhannon, 532 U.S. at 620 (Scalia, J., concurring).
109 Id. at 605; see also Effertz v. Barton County, 157 F. Supp. 2d 1178, 1184 (D. Kan. 2001) ("[T]he definition of 'prevailing party' does not include a party who achieves a desired result through defendant's voluntary change.").
110 Buckhannon, 532 U.S. at 633.
relief to the plaintiff comes in the form of a private settlement with the defendant. The settlement, usually a contract between the plaintiff and the defendant, is the source of the alteration in the legal relationship because it binds both parties with legal rights and responsibilities, which allows for prevailing party status to be conferred upon the plaintiff.

Relying solely on a private settlement to confer prevailing party status is problematic because the relief and the corresponding change in the legal relationship are not court-ordered. This approach ignores the Buckhannon majority’s requirement of judicial imprimatur and closely resembles the catalyst theory in practice.

Nevertheless, the cases from the Ninth Circuit have found settlements of claims brought under other statutes to be a sufficient change in the legal relationship to confer prevailing party status. One such opinion classified Buckhannon’s rejection of the argument that private settlements can confer prevailing party status as dicta, and chose rather to follow Circuit precedent to allow for a fee shift. The Supreme Court recently denied certiorari when this decision was appealed. Barrios v. Cal. Interscholastic Fed’n, 277 F.3d 1128, 1134 (9th Cir. 2002) (holding that legally enforceable settlement of an ADA claim can make plaintiff a prevailing party because it forces the defendant to do something he would not otherwise be required to do), cert. denied, 537 U.S. 820 (2002); see also Richard S. v. Dep’t of Developmental Servs., 2003 U.S. App. LEXIS 1396, at *1-*2 (9th Cir. Jan. 29, 2003) (holding an ADA settlement to be proper basis for fee shift); Carson v. Billings Police Dep’t, 2002 U.S. App. LEXIS 11720, at *5-*6 (9th Cir. June 12, 2002) (finding settlement capable of conferring prevailing party status under CRAFAA); Ostby v. Oxnard Union High, 209 F. Supp. 2d 1035 (C.D. Cal. 2002) (concluding that IDEA plaintiff was prevailing party because its settlement was legally enforceable in court).

The inefficacy of the settlement as a means for conferring the court’s stamp on the alteration of the relationship between the parties is demonstrated by the manner in which the rights conferred by a settlement differ from those resulting from a court-ordered judgment or decree. In an effort to exercise the rights afforded it under a private contractual settlement, a plaintiff would have to bring a private claim for breach of contract in an appropriate court, most likely not even the one in which its original claim was filed. In contrast, enforcement of a judgment or decree would not entail any of the interpretation necessary in the contract case because the relevant document would be a product of the court. If the defendant were in violation of a court order or judgment, enforcement of the order (which derives its legitimacy from the governmentsponsored court) would be more a matter of public concern to be handled by the state, rather than a private contractual dispute. See Pitchford v. Oakwood Mobile Homes, Inc., 212 F. Supp. 2d 613 (W.D. Va. 2002) (holding that private settlement cannot confer status); Roberson v. Giuliani, 2002 U.S. Dist. LEXIS 2750, at *5-*7 (S.D.N.Y. Feb. 21, 2002) (requiring court involvement in relief in order to activate fee shift), vacated, 346 F.3d 75 (2d Cir. 2003).
with the only difference being that the change in the defendant’s behavior must be commemorated in a document. Relief that comes in the form of a contractual settlement derives its validity from the parties to the case, not the court. As the relief becomes more informal, the parties take control of the terms and implementation of the relief, and the court is not involved in evaluation or enforcement based on the merits of the case.\footnote{114}

To illustrate, the court’s involvement in awarding relief to a plaintiff in the context of a private settlement is limited to hearing a case \textit{after} the plaintiff files a separate and subsequent claim for the defendant’s breach of the contractual settlement.\footnote{115} There are a few problems with basing an award of attorney fees on this level of court involvement. First, the possibility of a future lawsuit is too tenuous a hook upon which to hang prevailing party status. Any court involvement at all in the relief is contingent on the defendant breaching the terms of the settlement—a situation that very well might never arise. Such prospective involvement in possible future scenarios is an inadequate basis for the award of fees in the separate original case presently before the court.

Moreover, the timing of the court’s involvement is also inconsistent with any power it might have to shift fees because the court would lack the power to enforce the settlement on its own initiative through its contempt power.\footnote{116} It must wait for a private action to be brought by the plaintiff (which will probably be done in another court) before any enforcement bearing the stamp of judicial \textit{imprimatur} can be affected. Until a court is called upon to enforce the contract, any “relief” that the plaintiff enjoys is a result of its own bargaining with the defendant, not the court’s involve-

\footnote{114}{Indeed, the level of necessary judicial involvement in a private settlement is reflected in the fact that the parties had the same power to enter into the agreement before the case was brought before the court.}\footnote{115}{The action would probably need to be pursued in another court entirely; if the terms of the private settlement are not incorporated into a consent decree (or possibly an order of dismissal in some places), the subsequent settlement enforcement is a contract action that will have to be filed in state rather than federal court. \textit{Roberson}, 2002 U.S. Dist. LEXIS 2750, at *12-*13.}\footnote{116}{See \textit{id.} at *15-*16 (discussing lack of authority to find contempt after dismissal). The process of enforcing a consent decree is quite different than that of a private settlement. To enforce a consent decree, the plaintiff need only petition the court from which the order derived to issue an order to the defendant “to show cause why [it] should not be adjudged in civil contempt and sanctioned.” \textit{Reynolds v. Roberts}, 207 F.3d 1288, 1298 (11th Cir. 2000). The burden is thus on the defendant to prove it is not in breach. In contrast, a private contract action must be brought by the plaintiff in state court (unless independent grounds for federal jurisdiction exist). In this unrelated proceeding, the burden of interpreting the settlement and providing evidence of breach will be on the plaintiff.}
ment in the shaping and enforcement of its terms.\textsuperscript{117} As the district court in \textit{Roberson v. Guiliani} put it:

> Although it may be minimal, there is a level of judicial scrutiny of the terms of a consent decree that is entirely absent when a lawsuit is dismissed based on the parties' agreement to settle it. When a district court is asked to approve a consent decree, it must make at least a "minimal determination of whether the agreement is appropriate to be accorded the status of a judicially enforceable decree."\textsuperscript{118}

The importance of judicial involvement in the award of relief is further demonstrated by the Supreme Court's statement that a declaration that a defendant has violated the Constitution unaccompanied by "judicial relief" is not enough to confer prevailing party status on a plaintiff.\textsuperscript{119} Unless \textit{Buckhannon} overturned this statement, of which the opinion gives no indication,\textsuperscript{120} it would appear that a change in the legal relationship alone, without any specific court-ordered relief, is an insufficient basis for fee shifting.\textsuperscript{121}

Allowing a plaintiff to be considered to have prevailed after it has settled is also troubling from a larger theoretical perspective.

\textsuperscript{117}This argument does not address the different treatment of class action settlements, which are subject to mandatory review and approval by the court.

\textsuperscript{118}\textit{Roberson}, 2002 U.S. Dist. LEXIS 2750, at *9-*10 (quoting United States v. IBM, 163 F.3d 737, 740 (2d Cir. 1998)). The court goes on to describe the scrutiny that the court must apply to the decree: "[T]he district court must be certain that the decree 1) 'spring[s] from and serve[s] to resolve a dispute within the court's subject-matter jurisdiction,' 2) 'come[s] within the general scope of the case made by the pleadings,' and 3) 'further[s] the objectives of the law upon which the complaint was based.'" Id. at *10 (quoting Kozlowski v. Coughlin, 871 F.2d 241, 244 (2d Cir. 1989)).

Although the \textit{Roberson} decision was vacated and remanded by the Second Circuit on September 30, 2003, see \textit{Roberson} v. Giuliani, 346 F.3d 75 (2d Cir. 2003), the requirement of court oversight of the settlement terms remained intact. The Second Circuit held that the plaintiffs in that case had prevailed based on the court's retention of jurisdiction to enforce the settlement, and did not require that the terms of the settlement be explicitly enumerated in the order of dismissal. However, in so holding, the Second Circuit did not abandon the requirement that the court approve and adopt the settlement terms through its order: "[B]ecause the court has the general responsibility to ensure that its orders are fair and lawful, it retains some responsibility over the terms of the settlement agreement as the parties' obligation to comply with the agreement was made part of its order." Id. at 82. Therefore, the Second Circuit did not dispute the need for court oversight of settlement terms, but rather merely took issue with the form that the oversight should take. Whereas the district court would have required the court to enumerate the terms of the settlement in its order, the Second Circuit found that incorporation of the settlement order by reference was sufficient evidence of court oversight.

\textsuperscript{119}\textit{Hewitt} v. Helms, 482 U.S. 755, 760 (1987) (explaining the requirement of judicial relief before plaintiff can be said to prevail).

\textsuperscript{120}\textit{Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.}, 532 U.S. 598, 603-04 (2001) (referring to \textit{Hewitt}).

\textsuperscript{121}See \textit{Griffin v. Steeltek, Inc.}, 261 F.3d 1026 (10th Cir. 2001) (holding that a finding that defendant's behavior was illegal is insufficient to confer prevailing party status if the plaintiff does not receive judgment or damages due to a recognized injury).
A settlement is an agreement that is acceptable to both sides; otherwise, the parties would not enter into it. In that sense at least, each side can be said to have prevailed in that its “ends are accomplished as a result of the litigation.” In a more practical sense, such a rule would require a time-consuming and ultimately subjective inquiry into the merits of the plaintiff’s claim and why each party decided to settle. Did the settlement occur because the plaintiff’s case was likely to win at trial or because the suit would simply be too much of a nuisance to litigate? This ultimately inconclusive line of questioning into the intent of the parties is an unsound and unjust basis for shifting fees and might even violate a defendant’s right to a trial by jury, as determinations of intent are traditionally the province of the jury, and the court has sole discretion in fee-shift determinations. At the very least, a court-conducted assessment of the merits of the plaintiff’s case for a fee-shift determination is a waste of resources as it necessitates an inefficient mini-trial, or “second major litigation,” on attorney fees.

3. Will the “Functional Equivalent” of a Consent Decree Confer Prevailing Party Status?

Some courts have allowed an order of dismissal into which the terms of the parties’ private settlement are incorporated to function as a consent decree and thus confer prevailing party status. Although the Buckhannon majority opinion indicates in

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123 See Hooper v. Demco, 37 F.3d 287, 292 (7th Cir. 1994) (suggesting that the reasons parties settle may be “wholly unrelated to the substance and issues involved in the litigation,” in that “[a] suit may be groundless, and settled for its nuisance value, or settled by a party for wholly gratuitous reasons, thus not justifying an award of attorney’s fees”).

124 The concern of fee-shift determinations not being heard before a jury is probably undercut by the fact that the rights granted under the fee-shifting provision of a statute are arguably more akin to an equitable rather than a legal claim, and therefore not connected to the trial by jury guarantee. See Buckhannon, 532 U.S. at 612, 632 n.8 (discussing discretion of equity courts in awarding costs). The argument for requiring fee-shift claims to be heard before a jury would also have to overcome Supreme Court precedent distinguishing “public rights” created by statute from “private rights” arising from common law. Crowell v. Benson, 285 U.S. 22, 50-51 (1932), and its progeny suggest that only the latter are entitled to a trial by jury. Moreover, even if the statutory origin of fee-shifting claims is not dispositive, there is additional Court precedent allowing for common law claims that are ancillary to disputes within an agency’s jurisdiction to be resolved by the agency, signifying that the right to a jury trial is not absolute even as to common law claims. See Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 841 (1986) (allowing common law counterclaims to be resolved by CFTC).

dicta that the "functional equivalent" of a consent decree might confer prevailing party status, some courts have been cautious in conferring status in such cases.

The distinction between a private settlement thus incorporated and a consent decree is warranted for reasons similar to those discussed above in the context of other types of private settlements. The court is not involved in adjudication or formulation of settlement terms, whereas a consent decree's terms are judicially sanctioned because they are "so-ordered by the court." The settlement terms are a product of the parties, not the court, and thus lack the necessary judicial imprimatur. By its very definition, a consent decree is distinct from a private settlement; even if the court plays no role in the negotiation of the terms in the consent decree, in issuing the formal order that releases the case subject to the terms stated in the order, the court adopts the terms as its own and agrees to enforce them.

This mark of approval, emphasized by the court’s agreement to enforce the terms through the jurisdiction retained by the consent decree, supplies the brand of judicial imprimatur that makes fee shifting appropriate. The importance of the court’s formal expression of its approval of the terms of the settlement is reflected by the fact that some courts that do recognize functional equivalents of consent decrees do so only if the court actively incorporates the settlement terms into the order, as opposed to merely stating that the judgment was "entered in accordance with" the settlement agreement or referencing the agreement or otherwise mentioning the fact of settlement in the court record.
Secondly, although the court can independently enforce a consent decree through its contempt power, after an order of dismissal the court retains no power to enforce settlement terms contained in the order on its own initiative. Unless the court explicitly retains jurisdiction, the settlement giving rise to the order of dismissal is merely another contract to be enforced by a plaintiff's suit, subject to the same jurisdictional problems raised by other settlements. Consequently, in order for a "functional equivalent" of a consent decree to preserve the stamp of *imprimatur* required by *Buckhannon*, the court should be required to both endorse the terms of the settlement and explicitly retain jurisdiction over the case.

In addition to the various interpretations of *imprimatur*, post-*Buckhannon* courts have also grappled with interpreting what "judicial" means in the context of judicial *imprimatur*. Cases brought under certain statutes, such as the IDEA, are heard primarily in administrative forums and rarely see a courtroom. Nevertheless, parties to these hearings and the negotiations surrounding them often incur attorney fees. Some courts read the requirement of court involvement to exclude administrative hearings and require that the case be brought into the judicial forum before attorney fees can be awarded.
fees can be shifted. Yet others read the judicial component of *imprimatur* more broadly to extend to administrative officers. These courts justify this broader reading as necessary in the context of statutes that set up regulatory regimes because requiring plaintiffs to file a separate action in court to obtain a judicially enforceable settlement would be too burdensome. In fact, one court calls the prospect of obtaining access to a court “impossible” when settlement occurs at the agency level.

While requiring that a court suit be brought might be burdensome, it can hardly be classified as “impossible” in light of section 1415(i)(2)(A) of the IDEA, which provides “aggrieved” parents who are unhappy with the administrative process the right to file a civil claim in either state or federal court, regardless of the amount in controversy. The significance of this provision is two-fold: First, it demonstrates that Congress envisioned the courts as an accessible part of the IDEA scheme, and therefore access to them is not “impossible.” Second, and more specifically, it shows that Congress identified the division of the administrative and judicial forums, and therefore, it is an impermissible distortion to interpret the phrase “judicial *imprimatur*” to envision proceedings in the separate agency entity. Congress might have just as easily added, substituted, or supplemented the term “administrative” to the fee-shifting provision if it so wished, but it did not. Allowing

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138 See L.C. v. Waterbury Bd. of Educ., 2002 U.S. Dist. LEXIS 6079, at *7-*9 (D. Conn. Mar. 21, 2002) (holding that a final decision of due process hearing officer is sufficient to allow a party to prevail because the IDEA provides that attorney fees can be awarded “in any action or proceeding brought under this section” and the statutory definition of “proceeding” includes administrative hearings); Jose Luis R. v. Joliet Township High Sch. Dist. 204, 2001 U.S. Dist. LEXIS 13951, at *5 (N.D. Ill. Aug. 27, 2001) (allowing plaintiffs in an IDEA proceeding prevailing party status because parties’ agreement was read into the administrative record before a hearing officer). It should be noted that these cases involve the IDEA, a statute that uses fee-shift language that is arguably differentiable from standard statutory fee-shift language and explicitly allows that administrative costs can be included in a reasonable assessment of attorney fees. 20 U.S.C. § 1415(i)(3)(B) (2000); see also 20 U.S.C. § 1415(h)(1) (2000) (according right to counsel at hearings). It is not clear whether the argument for application of judicial *imprimatur* to administrative schemes other than the IDEA’s would find support in these precedents.

A court that does allow for administrative officers to serve as bearers of judicial *imprimatur* must still address the issue of whether simply reading the settlement terms into the administrative record will suffice as the mark of the agency’s authority over the plaintiff’s relief, or if the administrative officer must also endorse the terms. See the discussion of this distinction in section IV(B)(3) of this Note.

139 Akinseye, 193 F. Supp. 2d at 139.


141 Indeed, it is important to note that parties who choose not to exercise their § 1415(h) right to a trial are still not without the option of bargaining for attorney fees during the settlement process, which can then be enforced in a court as any other contract.
administrative officers to be classified as judicial represents another step down the slippery slope of expanding the "prevailing party" term beyond its intended meaning. As Justice Scalia predicted in his Buckhannon concurrence, allowing pre-judgment relief\textsuperscript{142} to confer prevailing party status opens up an ever-extending number of avenues to fee shifting that have no logical stopping point; "[t]here must be a cutoff of seemingly equivalent entitlements to fees."\textsuperscript{143} Continuation down this slope would eventually result in the possibility of a fee shift any time lawyers can be involved in a hearing of any kind, be it before a court or the local school board.

Another unfortunate effect of allowing fee shifting in the context of administrative hearings might be to "legalize" proceedings that were formulated to be more informal, flexible, and accessible. Statutory schemes that feature an administrative proceeding as a precursor to legal action do so to allow the parties to focus on the situation before them and to find a cooperative solution that obviates the need for a court case. Classifying administrative proceedings as judicial hearings in which fees can be shifted simply turns these hearings into a part of the pretrial process. For example, if fees can be shifted in IDEA proceedings, parents are more likely to involve their attorneys in discussions with school officials about educational plans for their children. Those educators will respond by involving the school district's attorneys. The sum of this legal involvement will be a less productive meeting focused more on legalisms and less on informal collaborative solutions.

IV. POLICY ARGUMENTS

A broad reading of Buckhannon prevents the rejection of the catalyst theory from being a mere technicality. Accordingly, the reading proffered by this Note is also supported by several policy arguments that can be applied generally in the argument against the catalyst theory.

\textsuperscript{142} Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res., 532 U.S. 598, 619-20 (2001) (Scalia, J., concurring) (pointing out that "it would take no more twisting of language to produce prelitigation attorney's fees than to produce . . . decreeless attorney's fees").

\textsuperscript{143} Id. at 620. Indeed, this is the same problem that plagued the catalyst theory. Even the dissent's three-part test to contain and define the parameters of the theory, which is derived from a test that had been developed in the circuits before Buckhannon, is admittedly not for "ready administrability." Burlington v. Dague, 505 U.S. 557, 566 (1992).
A. Effect on Incentive to Settle

The strongest policy consideration in favor of an exacting interpretation of *Buckhannon* and a sharp rejection of the catalyst theory is the effect that any other reading would have on a defendant’s incentive to settle, a behavior that is desirable in our legal system. The possibility that a defendant might still be liable for attorney fees even when doing what the plaintiff demands acts as a disincentive to the defendant to voluntarily settle or change behavior, a result which is both unjust and inefficient. If the goal of the plaintiff’s legal action is to effect a change in behavior, the defendant should have the option to do so voluntarily without penalty. The legal system also prefers private resolution of conflicts where possible, which is frustrated by the disincentive to settle that results when the court can interfere to shift fees. The prospect of fee shifts after settlement therefore encourages prolonged litigation by punishing a defendant for stopping the lawsuit before judgment.144

In response to arguments addressing the defendant’s incentive to settle, proponents of the catalyst theory raise concerns of providing incentive to plaintiffs to bring claims.145 The argument, which is especially strong in the context of civil rights violations,146 reasons that if fees might be shifted to defendants that lose at trial or eventually comply, more meritorious suits will be filed by plaintiffs who would otherwise not have the means to do so. However, the connection between encouraging meritorious suits and shifting fees well short of a final decision on the merits has not been established empirically; as the majority in *Buckhannon* points out, there has been no evidence provided that fewer claims are brought in jurisdictions such as the Fourth Circuit that have not been recognizing catalyst theory.147 Besides, the proper interpretation of *Buckhannon* advocated by this Note is not likely to discourage worthy suits; the required ruling on the merits or consent decree is not likely to be a prohibitive hurdle for a plaintiff with a meritorious claim. Moreover, the additional possibility of a fee shift under the catalyst theory is not likely to be determinative in a decision to bring a meritorious claim; on the contrary, it is more likely to encourage plaintiffs with frivolous claims to file never-

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144 *See Buckhannon*, 532 U.S. at 608-09 (discussing a defendant’s willingness to settle when exposure to liability for attorney’s fees remains).
145 *See id.* at 635-36 (Ginsburg, J., dissenting) (explaining how, under the catalyst rule, a plaintiff could accept relief offered by a defendant and still receive attorney fees).
146 *See id.* (Ginsburg, J., dissenting) (explaining Congressional desire to provide non-affluent plaintiffs access to courts to enforce civil rights claims).
147 *Id.* at 608.
theless in the hopes of forcing the defendant to settle out of con-
venience.\textsuperscript{148}

Supporters of the catalyst theory in general, and a limited
reading of \textit{Buckhannon}'s rule specifically, also urge that a defen-
dant is not really discouraged from settling, because the allocation
of attorney fees can always be addressed in the settlement agree-
ment itself. Although this is true, awarding plaintiffs the bargain-
ing power of a threatened fee shift if the agreement does not ad-
dress the issue reduces the realistic advantage to the defendant of
entering into a futile attempt to bargain for fees. As liability for
attorney fees can be as expensive as liability for the underlying
claim,\textsuperscript{149} this power shift may well be enough to deter a defendant
from considering settlement altogether. Under a regime that al-

lows for fees to be shifted when the plaintiff’s relief comes in the
form of a private settlement, the plaintiff with a weak claim has
even less to lose. In such a case, the plaintiff knows that she need
not even bargain for a fee shift if the defendant wishes to avoid
suit, because a fee shift will probably occur anyway because of the
defendant’s decision to settle. The plaintiff’s increased bargaining
power makes the negotiation of attorney fees more difficult, which
in turn makes settlement a less attractive option for defendants
faced with the prospect of liability for fees above and beyond the
settlement.\textsuperscript{150}

\textbf{B. Inconsistency with the American Rule and Adversarial System}

A limited reading of \textit{Buckhannon} is also inconsistent with the
American Rule and the nature of America’s adversarial system.
The American Rule states that each party pays its own way in an
adversarial system.\textsuperscript{151} If a plaintiff brings suit and gets what it
wants from the suit before judgment, it does not then become the
defendant’s responsibility to pay the plaintiff for bringing a claim
against it. Indeed, the operation of the adversarial system and the
tenets of free will that underlie it dictate that the risk be borne by
the plaintiff as the initiator of the suit. Just as the plaintiff bears
the burden to prove the merits of its case, if the court does not is-

sue a final ruling on the merits of the case, the plaintiff bears the

\textsuperscript{148} See id. at 618 (Scalia, J., concurring) (expressing fear that allowing settlements to con-
fer prevailing party status might implicate the law in "exacting the payment of attorney's fees to
the extortionist").

\textsuperscript{149} Evans v. Jeff D., 475 U.S. 717, 734 (1986).

\textsuperscript{150} See Marek v. Chesny, 473 U.S. 1, 7 (1985) ("[M]any a defendant would be unwilling to
make a binding settlement offer on terms that left it exposed to liability for attorney's fees in
whatever amount the court might fix on motion of the plaintiff.").

\textsuperscript{151} Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 293 (1st Cir. 2001).
burden of convincing the court to issue a consent decree if the plaintiff wishes to be eligible for a fee shift.

The inconsistency of fee shifting short of a court judgment on the merits is also demonstrated in the lack of symmetry with respect to the treatment of plaintiffs and defendants. Although most fee shifting mechanisms use the term "prevailing party" (as opposed to "prevailing plaintiff"), both the catalyst theory and a permissive reading of Buckhannon operate only to the benefit of plaintiffs. For example, if a defendant's change in behavior moots the plaintiff's case and provides the plaintiff with some of the relief sought in the suit, the catalyst theory directs that the plaintiff has sufficiently prevailed so as to be eligible to have its fees shifted to the defendant. However, if it is the plaintiff's change in behavior that moots the suit, for example dropping the suit because of lack of likely success, the catalyst theory does not allow the defendant, who has been forced to incur fees preparing to defend a frivolous or spurious claim, to shift those fees to the plaintiff.152

A reading of Buckhannon that does not allow a private settlement to confer prevailing party status is consistent with the principle that an adversarial system vests ownership and control of the dispute in the parties, not the court.153 Without court intervention, a settlement is a regular private-party negotiation. It would not be appropriate in a regular negotiation situation for the court to interfere and award negotiation costs to one side. Likewise, unless it has been called upon to enforce the terms of a settlement or has ruled on the merits of a claim, it is inappropriate for the court to award fees when the claim is mooted by the private action of the parties.

Nor is the likelihood of a defendant holding out on bad faith to prolong the litigation, only to settle or change the allegedly objectionable behavior close to the date of trial, a reason to apply the

152 This result is impermissible under statutes that by their language "allow defendants as well as plaintiffs to receive a fee award." Buckhannon, 532 U.S. at 620 (Scalia, J., concurring).
153 This emphasis is not present in systems following the European model, which features an inquisitorial role for the court. See generally Geoffrey C. Hazard, Jr., The Adversary System, in Ethics in the Practice of Law 120 (1978) (contrasting the adversarial model with the inquisitorial or interrogative model used in civil law countries). In such a regime, liberal fee shifts at the discretion of the court would be more appropriate, as it is the court's responsibility to actively shape the fact-finding that leads to evaluation of the case, whereas judges in an adversarial system only have power to evaluate the information presented by the self-interested parties. The control of the parties is such a benchmark of the adversarial system that in some cases, even after the court renders judgment the parties may disregard the court's treatment of the case and renegotiate a more satisfactory arrangement. See R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960).
THE LOSING ARGUMENT

As a threshold matter, it is a defendant’s prerogative in an adversarial system to assess the likelihood of its success at trial and to decide to settle. The perceived prospect of success can change as the trial date draws nearer due to, for example, new information being uncovered. This argument also ignores the dynamics of the settlement process, which is powered partially by the increasing pressure of the impending trial. Settlement is not likely to continue to be a viable option if fees are to be shifted to defendants according to how closely the trial date looms. Moreover, this paper tiger objection to bad-faith prolonging of litigation makes little sense when examined from a tactical standpoint; as it is holding off, a defendant would be racking up its own attorney fees, negative publicity, and lost opportunity costs. As noted above, attorney’s fees can sometimes be more expensive than actual liability, making it unlikely that even the most vindictive defendant would be willing to incur such costs.

At the end of the day, there is no need for the catalyst theory in an adversarial system that affords plaintiffs a variety of options. Plaintiffs can convince the court of the need for a consent decree to enforce the defendant’s compliance. There is also the option to negotiate for fees during settlement; if it is important enough for a defendant to avoid publicity of trial and accumulation of its own attorney fees, it will negotiate fees acceptable to the plaintiff. In order to receive attorney fees and still stay within the letter of a fee-shifting statute, a plaintiff might also choose to seek damages, even if nominal. If a private settlement is effected, the plaintiff can always bring suit if the defendant breaches the settlement by resuming the allegedly offensive behavior, possibly for damages for both the initial claim’s fees and fees for the enforcement action.

154 It should also be noted that in advancing this argument, the dissent provided no proof that this is a regular practice of defendants in jurisdictions that did not adopt the catalyst theory.


156 This is only an option if the catalyst theory is not in practice. See the discussion of bargaining power in section IV(A) of this Note.

157 See Buckhannon, 532 U.S. at 604 ("We have held that even an award of nominal damages suffices under [the prevailing party] test."). But see Ciaiprazi v. County of Nassau, 195 F. Supp. 2d 398 (E.D.N.Y. 2002) (denying fees because they are rarely permitted when nominal damages are awarded). However, it should be noted that passing the prevailing party test only means that the judge can consider an appropriate fee award; in the case of nominal damages, a judge might find that although the plaintiff prevailed, the only appropriate award fees in proportion to his success is no award. See Farrar v. Hobby, 506 U.S. 103, 115-16 (1992) (awarding no attorney fees to prevailing plaintiff who received nominal damages because he could not prove actual damages).

158 A plaintiff might seek such damages for the fees incurred in bringing the original action under a quasi-contract theory. The plaintiff’s reliance on the defendant’s change in behavior prompted it to drop the initial suit, making the attorney fees incurred in filing the claim detri-
In sum, the only situation in which a plaintiff would be afforded no option to recover under a fee-shifting mechanism would be when it has not availed itself of any of the above options and it is clear to the court that either the plaintiff’s claim is meritless or that no further jurisdiction is needed to ensure that the defendant’s behavior does not recur. If a plaintiff’s efforts fail in all of these respects, to order the defendant to pay the plaintiff’s attorney fees would be patently unfair.

C. Separation of Powers and Constitutional Concerns

The doctrine of separation of powers also mandates that the catalyst theory be abandoned. Even if the goal of fee-shifting statutes is, as the dissent in Buckhannon states, “to promote the vigorous enforcement’ of . . . civil rights,” the means of achieving that goal are better fleshed out in Congress, not in the courts. Congress, with its superior fact-finding capabilities, is better able to assess the need, desirability, and parameters of the catalyst theory as a social policy. Unless Congress specifically provides in the text of a statute that the catalyst theory may be applied, the courts should not be in the business of pursuing their own policy goals.

It may even be unconstitutional for judges to award attorney’s fees under the catalyst theory in any situation, even if Congress does allow for a catalyst fee shift in the relevant statute. Article III of the Constitution grants jurisdiction over cases and controversies arising under the Constitution and laws of the United States, language which has long been relied upon to limit the function of a court to deciding the dispute before it. If the parties to a suit privately settle the case, by definition there is no longer a case or controversy, and the court’s jurisdiction is extinguished. Therefore, unless it has also ruled on the merits of the case, imposing attorney fees on an ex-party exceeds the court’s constitutional jurisdiction. The function of the court and the source of its jurisdiction is dispute resolution; a plaintiff should not be allowed to use

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159 Buckhannon, 532 U.S. at 640 (Ginsburg, J., dissenting) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978)).
160 See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665 (1994) (“As an institution, moreover, Congress is far better equipped than the judiciary to ‘amass and evaluate the vast amounts of data . . . ’”) (quoting Walters v. Nat’l Assoc. of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985)).
161 Key Tronic Corp. v. United States, 511 U.S. 809, 819 n.13 (1994) (“[T]he efficacy of an exception to the American Rule is a policy decision that must be made by Congress, not the courts.”).
162 U.S. CONST. art. III.
the court as a remuneration device without first invoking its jurisdiction on the merits of the claim.

This constitutional concern might be countered by looking at the fee-shifting statute itself as the basis for a new, separate dispute, thus providing the court with a case or controversy on which to rule. First of all, this argument is only colorable if the fee-shifting statute explicitly allows for a catalyst fee shift, which most do not. Furthermore, recent Supreme Court cases indicate that there is a limit to Congress’ power to create new causes of action, possibly calling into question the very validity of fee-shifting statutes, which attempt to enlarge the court’s jurisdiction to cover post-dispute claims. At the very least, however, the Supreme Court has recognized that an action for attorney fees relies on the underlying statutory claim for its viability: “[T]he interest in attorney’s fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.”

A logical conclusion from this relationship might be that once the claim is mooted by settlement, there is no Article III standing to support a further claim for attorney fees.

CONCLUSION

In order to give effect to the Court’s rejection of the catalyst theory, *Buckhannon* must be given a properly expansive reading. The Court’s fidelity to the plain language and intent of fee-shifting statutes as an exception to the American Rule (and not the rule itself) should be observed under all fee-shifting statutes that do not have language explicitly permitting a catalyst fee shift, regardless of whether the statutory language incorporates the “prevailing party” term. An appropriate fee shift under such statutes should be awarded only after the court grants a favorable judgment on the

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163 The Court’s scrutiny of Congressional power to create new causes of action has centered largely around the tension between the constitutional requirement of standing and citizen suit provisions in environmental statutes attempting to grant “any person” the right to sue. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (setting out three-part test for standing that must be met regardless of the ESA’s statutory language allowing “any person” to sue). Although the content of these cases and statutes differ from those concerning fee shifting and the catalyst theory in obvious ways, the underlying problem is similar. In the context of the standing cases, the Court’s objection is with the plaintiff’s reduced ability to allege some sort of injury-in-fact (usually cast as a procedural or informational harm) that would satisfy standing requirements. See *id.* at 562-67 (discussing the injury-in-fact requirement). Shifting the attorney fees of plaintiffs under the catalyst theory suffers from the same fatal flaw because such plaintiffs typically cannot prove damages, or else they would have no need to invoke the catalyst theory as the basis for the requested fee shift. See *Buckhannon*, 532 U.S. at 608-09. Thus, fee-shifting provisions, especially as utilized under the catalyst theory, essentially grant these plaintiffs “standing” to seek attorney fees where they otherwise would be ineligible to do so.

merits to the shiftee or issues a consent decree or other order incorporating the terms of the parties’ settlement and retaining jurisdiction to enforce them. Interpretations that allow a plaintiff to claim victory and entitlement to a fee shift after a defendant’s voluntary change of behavior or a private settlement allow the catalyst theory to continue in practice and render *Buckhannon* meaningless. This losing proposition surely produces no “prevailing party.”

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