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Department of Health and Human Resources: Good-bye to Our
"private Attorneys General"*

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Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources: Good-bye to Our “Private Attorneys General”

I. INTRODUCTION

On May 29, 2001, a United States Supreme Court decision effectively changed the law in almost every federal circuit,¹ and in doing so has undermined Congress’s purpose in enacting the fee-shifting provisions of the civil rights laws. In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*,² the Court rejected the “catalyst theory” as a permissible basis for the award of attorney’s fees.³ This was accomplished by narrowly defining the term “prevailing party” in a way that “nothing in history, precedent, or plain English warrants.”⁴

The fee-shifting provisions of the civil rights statutes generally allow “prevailing” plaintiffs to recover their attorney’s fees.⁵ Consistent

1. Until the Fourth Circuit rejected the catalyst theory in 1994, every Federal Court of Appeals (except the Federal Circuit, which had not addressed the issue) had accepted the catalyst theory in some form. *See, e.g.*, *Nadeau v. Helgemoe*, 581 F.2d 275, 279-81 (1st Cir. 1978); *Gerena-Valentin v. Koch*, 739 F.2d 755, 758-59 (2d Cir. 1984); *Institutionalized Juveniles v. Sec’y of Pub. Welfare*, 758 F.2d 897, 916-17 (3d Cir. 1985); *Bonnes v. Long*, 599 F.2d 1316, 1319 (4th Cir. 1979); *Robinson v. Kimbrough*, 652 F.2d 458, 465-66 (5th Cir. 1981); *Wooldridge v. Marlene Indus. Corp.*, 898 F.2d 1169, 1173-74 (6th Cir. 1990); *Stewart v. Hannon*, 675 F.2d 846, 851 (7th Cir. 1982); *Williams v. Miller*, 620 F.2d 199, 202 (8th Cir. 1980); *Am. Constitutional Party v. Munro*, 650 F.2d 184, 187-88 (9th Cir. 1981); *J & J Anderson, Inc. v. Erie*, 767 F.2d 1469, 1474-75 (10th Cir. 1985); *Doe v. Busbee*, 684 F.2d 1375, 1379 (11th Cir. 1982); *Grano v. Barry*, 783 F.2d 1104, 1108-10 (D.C. Cir. 1986). Although in *S-1 & S-2 By & Through P-1 & P-2 v. State Board of Education of North Carolina*, 21 F.3d 49 (4th Cir. 1994), the Court of Appeals for the Fourth Circuit rejected the catalyst theory given the United States Supreme Court’s decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), most other Courts of Appeals subsequently reaffirmed their own consistently held acceptance of the catalyst theory. *See, e.g.*, *Paris v. U.S. Dep’t of Hous. & Urban Dev.*, 988 F.2d 236, 238 (1st Cir. 1993); *Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 546-50 (3d Cir. 1994); *Payne v. Bd. of Educ.*, 88 F.3d 392, 397 (6th Cir. 1996); *Zinn by Blankenship v. Shalala*, 35 F.3d 273, 276 (7th Cir. 1994); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., No. 1*, 17 F.3d 260, 263 n.2 (8th Cir. 1994); *Kilgour v. Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *Beard v. Teska*, 31 F.3d 942, 951-52 (10th Cir. 1994); *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999).

2. 532 U.S. 598 (2001).

3. *Id.* at 610.

4. *Id.* at 623 (Ginsburg, J., dissenting).

5. For example, the Civil Rights Attorney’s Fees Act of 1976 provides that in federal civil rights actions “the court, in its discretion, may allow the prevailing party . . . a reasonable

with the legislative intent behind these fee-shifting provisions, until 1994 all of the Federal Courts of Appeals (except the Federal Circuit, which had not addressed the issue) had defined the term prevailing party to include the catalyst theory.⁶ Under the catalyst theory, a plaintiff is considered a prevailing party if he obtained the relief sought, even if there had been no judgment or trial on the merits. Generally, the plaintiff also had to show a factual causal connection between the lawsuit and the favorable result.⁷ The specific requirements to obtain recovery under the catalyst theory were never fixed, rather the circuits took different approaches and continuously evolved various tests.⁸ Applying these varying tests, circuit courts have allowed plaintiffs to recover attorney's fees as prevailing parties when success was gained through a variety of circumstances, including formal consent judgments, informal out-of-court settlements, defendants' remedial action correcting the challenged policies or practices, and legislative or other third-party action that favorably moots the lawsuit.⁹

This Casenote discusses the catalyst theory's continued existence

attorney's fee as part of the costs." Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641 (1976) (codified as amended at 42 U.S.C. § 1988 (1994 & Supp. V 1999)). Although Congress gave "discretion" to the courts, Congress intended that a party seeking to enforce the rights in these statutes, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." S. REP. NO. 94-1011, at 4 (1976) (quoting *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968)). Thus, the Fees Act effectively allows prevailing plaintiffs to almost always recover their fees whereas prevailing defendants can recover fees only in exceptional circumstances. See Joel H. Trotter, *The Catalyst Theory of Civil Rights Fee Shifting after Farrar v. Hobby*, 80 VA. L. REV. 1429, 1433 (1994).

6. See *supra* note 1.

7. Martin Patrick Averill, Note, "*Specters*" and "*Litigious Fog*"?: *The Fourth Circuit Abandons Catalyst Theory in S-1 & S-2 By and Through P-1 & P-2 v. State Board of Education of North Carolina*, 73 N.C. L. REV. 2245, 2256 (1995).

8. Trotter, *supra* note 5, at 1436. A majority of the circuit courts had adopted the test set out in *Nadeau v. Helgemoe*, 581 F.2d 275, 280-81 (1st Cir. 1978), requiring a showing that: (1) the lawsuit caused the defendant to change his conduct; and (2) that the defendant's changed conduct was required by law. Averill, *supra* note 7, at 2256. The minority position did not require a finding that the changed conduct was required by law, but rather used what is referred to as a "benchmark" test. *Id.* at 2256-57, 2257 n.76. This test required that the court focus on: (1) the benchmark condition that the fee claimant sought to change so as to gain a benefit or be relieved of a burden; (2) whether the fee claimant's efforts contributed in a significant way to the outcome realized; and (3) whether the outcome involved "an actual conferral of benefit or relief from burden when measured against the benchmark condition." See *DeMier v. Gondles*, 676 F.2d 92, 93 (4th Cir. 1982) (quoting *Bonnes v. Long*, 599 F.2d 1316, 1319 (4th Cir. 1979), *overruled by S-1 & S-2 By & Through P-1 & P-2 v. State Bd. of Educ. of N.C.*, 21 F.3d 49 (4th Cir. 1994)). Some courts took an intermediate approach, where once the plaintiff demonstrated the necessary factual causal connection between the lawsuit and the favorable result, the defendant could then avoid liability if the relief was a "wholly gratuitous response to a lawsuit that lacked colorable merit." See Trotter, *supra* note 5, at 1437; see also *Associated Builders & Contractors of La., Inc. v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 378 (5th Cir. 1990) (quoting *Hennigan v. Ouachita Parish Sch. Bd.*, 749 F.2d 1148, 1153 (5th Cir. 1985)).

9. Averill, *supra* note 7, at 2257.

throughout the Supreme Court's pre-*Buckhannon* development of the meaning of prevailing party and where the *Buckhannon* decision falls within this framework. More importantly, this Casenote examines how *Buckhannon*'s ultimate effect is to undermine the Congressional purpose behind enacting the fee-shifting provisions of the civil rights statutes.

II. THE *BUCKHANNON* DECISION

Buckhannon Board and Care Home, Inc. ("Buckhannon"), operated assisted living care homes in West Virginia.¹⁰ As a result of its failure to meet a state law "self-preservation" requirement, Buckhannon was ordered to shut down its facilities.¹¹ Buckhannon brought suit in the United States District Court for the Northern District of West Virginia seeking declaratory and injunctive relief,¹² claiming that West Virginia's self-preservation requirement violated the Fair Housing Amendments Act of 1988 (FHAA)¹³ and the Americans with Disabilities Act of 1990 (ADA).¹⁴ Then, in 1998, the West Virginia Legislature enacted two bills eliminating the self-preservation requirement, and the district court dismissed the case as moot, finding that the 1998 legislation eliminated the provisions that allegedly violated the federal statutes.¹⁵

Buckhannon then requested attorney's fees under the FHAA¹⁶ and the ADA,¹⁷ arguing that pursuant to the catalyst theory, it was the prevailing party since the lawsuit brought about a voluntary change in the defendant's conduct, with Buckhannon therefore achieving the desired result.¹⁸ Since the Court of Appeals for the Fourth Circuit had previously rejected the catalyst theory,¹⁹ the district court denied Buckhannon's motion for attorney's fees, and the court of appeals affirmed.²⁰ The United States Supreme Court granted certiorari to resolve the dis-

10. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001).

11. *Id.* State law required all residents of care homes to be capable of "self-preservation," or capable of moving themselves "from situations involving imminent danger, such as fire." *Id.*

12. Buckhannon also sought money damages in the original complaint but later relinquished this claim on January 2, 1998, when faced with the state's sovereign immunity defenses. *Id.* at 624 (Ginsburg, J., dissenting).

13. Fair Housing Amendments Act, 42 U.S.C. §§ 3601-3631 (1994 & Supp. V 1999).

14. Americans with Disabilities Act, 42 U.S.C. §§ 12,101-12,213 (1994 & Supp. V 1999).

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

16. 42 U.S.C. § 3613(c)(2) (1988) ("[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs.").

17. 42 U.S.C. § 12,205 (1990) ("[T]he court . . . , in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs.").

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

19. *See S-1 & S-2 By & Through P-1 & P-2 v. State Bd. of Educ. of N.C.*, 21 F.3d 49 (4th Cir. 1994).

20. *Buckhannon*, 532 U.S. at 602.

pute among the courts of appeals.²¹

The U.S. Supreme Court affirmed the court of appeals decision, holding that the catalyst theory is not a permissible basis for a plaintiff to be considered a prevailing party under the fee-shifting statutes.²² In determining that the catalyst theory cannot be part of the definition of prevailing party, the Court simply turned to Black's Law Dictionary, which defines "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded."²³ From this, the Court announced that the term prevailing party only includes a party that has been awarded some relief by the court, including a judgment on the merits and a court-ordered consent decree.²⁴

Though it appears that the *Buckhannon* court refused to recognize the catalyst theory under the fee-shifting provisions of all the civil rights statutes, this is a broad interpretation of the Court's "technical" holding. The *Buckhannon* majority specifically held the following: (1) "the 'catalyst theory' is not a permissible basis for the award of attorney's fees under the FHAA . . . and ADA"²⁵; and (2) the term "prevailing party" does not include a party "that has failed to secure a judgment on the merits or a court-ordered consent decree."²⁶ While these holdings appear to be quite narrow, they necessarily encompass much more.

First, although the Court's precise holding rejects the catalyst theory only as it applies to the FHAA and ADA, the Court has always interpreted the language of the various civil rights statutes' fee-shifting provisions consistently.²⁷ Therefore, even though the *Buckhannon*

21. *Id.*

22. *Id.* at 610. *Buckhannon* is a five-to-four decision with Chief Justice Rehnquist writing the majority opinion. Justice Scalia wrote a concurring opinion for the purpose of responding to the dissent, in which Justice Thomas joined. Finally, Justice Ginsburg wrote a dissenting opinion and was joined by Justice Stevens, Justice Souter, and Justice Breyer.

23. *Id.* at 603 (citation omitted).

24. *Id.* at 603-04.

25. *Id.* at 610.

26. *Id.* at 600.

27. *Id.* at 603 n.4; *see also, e.g.,* *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371, 1377-80 (Fed. Cir. 2002) (finding that the *Buckhannon* court intended its holding to apply beyond the FHAA and ADA to the other fee-shifting statutes, including the statute at issue in the case, the Equal Access to Justice Act (EAJA)); *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Dep't of Energy*, 288 F.3d 452, 454-56 (D.C. Cir. 2002) (finding that the *Buckhannon* court's definition of "prevailing party" governs even the "substantially prevailed" language of the Freedom of Information Act); *Perez-Arellano v. Smith*, 279 F.3d 791, 793-94 (9th Cir. 2002) (applying *Buckhannon* to EAJA); *J.C. v. Reg'l Sch. Dist. 10, Bd. of Educ.*, 278 F.3d 119, 123-24 (2d Cir. 2002) (applying *Buckhannon* ruling to the Individuals with Disabilities Education Act); *Chambers v. Ohio Dep't of Human Servs.*, 273 F.3d 690, 693 n.1 (6th Cir. 2001) (applying *Buckhannon* ruling to claims under 42 U.S.C. § 1983); *Bennet v. Yoshina*, 259 F.3d 1097, 1100 (9th Cir. 2001) ("There can be no doubt that the Court's analysis in *Buckhannon* applies to statutes other than the two at issue in that case."); *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 666-67 (7th Cir. 2001) (finding that the *Buckhannon* court's definition of "prevailing party" governs even

Court only defined the term prevailing party under the FHAA and ADA, this definition extends to all the similar fee-shifting provisions of the various civil rights statutes. Second, in the beginning of the opinion the Court lists only two instances where a plaintiff may be considered a prevailing party: an enforceable judgment on the merits, or a settlement agreement enforced through a court-ordered consent decree.²⁸ Yet this narrow language must be examined alongside the Court's analysis throughout the opinion. In analyzing the term "prevailing party," the *Buckhannon* majority was primarily concerned with the necessary "change in the legal relationship" between the parties, stating that "our prior precedents . . . counsel against holding that the term 'prevailing party' authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties."²⁹ Consistent with this concern, the Court reasoned that a plaintiff can be considered a prevailing party as a result of a consent decree, but not as a result of a private settlement.³⁰ In contrast to a private settlement, a consent decree, though it does not necessarily involve an admission of liability, involves a "court-ordered change" in the legal relationship of the parties.³¹ From this analysis, it seems that other "court-ordered changes" in the parties' legal relationship would also satisfy *Buckhannon*, including all court-approved settlements, even if not a consent decree.³² Thus, although the

the "successful party" language of the Fair Credit Reporting Act). *But see, e.g.*, *Ctr. for Biological Diversity v. Norton*, 262 F.3d 1077, 1080 n.2 (10th Cir. 2001) (finding that since the *Buckhannon* court specifically interpreted the term "prevailing party," its rejection of the catalyst theory did not apply to the Endangered Species Act, which provides that a court may award attorney's fees "whenever . . . appropriate").

28. *See Buckhannon*, 532 U.S. at 600.

29. *Id.* at 604-05.

30. *Id.* at 604 n.7; *see also, e.g.*, *N.Y. State Fed'n of Taxi Drivers, Inc. v. Westchester County Taxi & Limousine Comm'n*, 272 F.3d 154, 158-59 (2d Cir. 2001) (finding that a private settlement did not make plaintiff a prevailing party under the *Buckhannon* decision). *But see, e.g.*, *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134 (9th Cir. 2002) (finding that because the private settlement afforded plaintiff a legally enforceable instrument as well as gave the district court jurisdiction over the issue of attorney's fees, plaintiff was the "prevailing party"); *Johnson v. District of Columbia*, 190 F. Supp. 2d 34, 44 (D.D.C. 2002) (finding that the *Buckhannon* court did not resolve whether a plaintiff who enters into a private settlement agreement could be considered a prevailing party).

31. *Buckhannon*, 532 U.S. at 604.

32. *See, e.g.*, *Utility Automation 2000, Inc. v. Choctawatchee Elec. Coop., Inc.*, 298 F.3d 1238, 1248 (11th Cir. 2002) (holding that plaintiff, by obtaining a Rule 68 Offer of Judgment, can properly be considered a prevailing party under the *Buckhannon* criteria because the Offer of Judgment represents a "judicially sanctioned change in the relationship between the parties"); *Am. Disability Ass'n v. Chmielarz*, 289 F.3d 1315, 1319-21 (11th Cir. 2002) (finding that the court's approval of the parties' settlement along with its retention of jurisdiction was the functional equivalent of a consent decree and therefore met the *Buckhannon* criteria); *Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002) ("We doubt . . . *Buckhannon* was intended to be interpreted so restrictively as to require that the words 'consent decree' be used explicitly. Where a settlement agreement is embodied in a court order such that the obligation to comply with its

Court's holding may at first glance appear to be narrow, its necessary affect is broader in application.

The *Buckhannon* decision is incredible because it goes against the thrust of the Court's previous decisions regarding the definition of prevailing party. The *Buckhannon* Court claimed that its narrow definition of the term prevailing party is supported by its prior cases, stressing that it never before allowed the award of attorney's fees under the catalyst theory.³³ The Court focused on its precise holdings regarding the specific facts of each case, emphasizing that it has only awarded attorney's fees where the plaintiff has received a judgment on the merits or a court-ordered consent decree.³⁴ This emphasis, however, was beside the point. The reality is that the Court had never allowed the award of attorney's fees under the catalyst theory because it had never before been confronted with a factual situation involving a catalytic effect.³⁵

Aside from emphasizing its prior holdings, the Supreme Court also cited dicta from some prior cases supporting the rejection of the catalyst theory.³⁶ Not surprisingly, the Court ignored dicta in its prior cases that supported acceptance of the catalyst theory.³⁷ Although the dissenting opinion even concedes that there is language in the Court's prior cases that support both the rejection and the acceptance of the catalyst theory, historically, when the Court has determined whether fee-shifting is appropriate, it has placed great weight on the practical impact of the lawsuit rather than on any "judicial *imprimatur*."³⁸ For example, the dissent notes the Court's language in *Hewitt v. Helms*, where the

terms is court-ordered, the court's approval . . . may be equally apparent.); *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134-35 n.5 (9th Cir. 2002) ("While dictum in *Buckhannon* suggests that a plaintiff "prevails" only when he or she receives a favorable judgment on the merits or enters into a court-supervised consent decree, . . . we are not bound by that dictum . . ."). *But see, e.g., Dep't of Energy*, 288 F.3d at 457-58 (finding that the court's "Stipulation and Order," which approved the parties' terms of dismissal, did not meaningfully alter the legal relationship of the parties under *Buckhannon*).

33. *See Buckhannon*, 532 U.S. at 604-06.

34. *Id.*

35. *Id.* at 603 n.5.

36. *Id.* at 603-04. For example, the Court quotes dicta from *Hewitt v. Helms*, 482 U.S. 755, 760 (1987), stating that "[r]espect 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." *Id.* at 603. The Court also quotes dicta from *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980), stating that "[i]t seems clearly to have been the intent of Congress to permit . . . an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal." *Id.* at 604.

37. *See, e.g., Hewitt*, 482 U.S. at 760 (recognizing that relief does not need to be "judicially decreed in order to justify a fee award under § 1988"); *Maher v. Gagne*, 448 U.S. 122, 129 (1980) (finding that the language of the fee-shifting provisions does not condition the 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).

38. *See Buckhannon*, 532 U.S. at 641 (Ginsburg, J., dissenting).

Supreme Court emphasized that "the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant"³⁹ The *Hewitt* Court recognized that when a lawsuit produces voluntary action by the defendant that affords the plaintiff all or some of the relief sought, the plaintiff has "prevailed" despite the absence of a formal judgment in his favor.⁴⁰

Moreover, the *Buckhannon* Court quickly disregarded any merit in the various policy arguments raised by *Buckhannon*, stating that "[g]iven the *clear meaning* of 'prevailing party' in the fee-shifting statutes, we need not determine which way these various policy arguments cut."⁴¹ Given that the Court has been grappling with the meaning of prevailing party for some time,⁴² it seems odd that it has never before found this "clear meaning" of prevailing party in the statutes. Rather, as seen in the cases discussed below, the Supreme Court has struggled with the meaning of prevailing party, continuously molding various tests.

III. "PREVAILING PARTY" BEFORE *BUCKHANNON*

Though the lower federal courts had been working with the meaning of "prevailing party" and developing the "catalyst theory" since 1976,⁴³ the United States Supreme Court took its time addressing the issue. Although the Court touched on the meaning of the term prevailing party in earlier cases,⁴⁴ it was not until 1987 that it began to provide a true framework.⁴⁵

39. *Id.* at 634 (Ginsburg, J., dissenting) (quoting *Hewitt*, 482 U.S. at 761).

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

41. *Buckhannon*, 532 U.S. at 610 (emphasis added).

42. *See generally infra* notes 43-66 and accompanying text.

43. *See, e.g., Doe v. Busbee*, 684 F.2d 1375, 1380 (11th Cir. 1982); *Stewart v. Hannon*, 675 F.2d 846, 851 (7th Cir. 1982); *Robinson v. Kimbrough*, 652 F.2d 458, 465-66 (5th Cir. 1981); *Am. Constitutional Party v. Munro*, 650 F.2d 184, 187-88 (9th Cir. 1981); *Morrison v. Ayoob*, 627 F.2d 669, 671 (3d Cir. 1980); *Williams v. Miller*, 620 F.2d 199, 202 (8th Cir. 1980); *Bonnes v. Long*, 599 F.2d 1316, 1319 (4th Cir. 1979); *Nadeau v. Helgemoe*, 581 F.2d 275, 279-81 (1st Cir. 1978).

44. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (stating that a plaintiff may be considered a "prevailing party" if the plaintiff succeeds on "any significant issue in litigation which achieves some of the benefit" sought) (quoting *Nadeau*, 581 F.2d at 278-79); *Maher v. Gagne*, 448 U.S. 122, 129-30 (1980) (finding that a plaintiff may be a "prevailing party" when plaintiff prevails through a consent decree or settlement rather than through litigation); *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980) (finding that to be a "prevailing party" the plaintiff must establish his "entitlement to some relief on the merits of his claims").

45. Daniel L. Lowery, Note, "Prevailing Party" Status for Civil Rights Plaintiffs: Fee-Shifting's Shifting Threshold, 61 U. CIN. L. REV. 1441, 1448 (1993). *See Hewitt v. Helms*, 482 U.S. 755 (1987).

A. *Pre-Buckhannon Case Law*

I. *HEWITT V. HELMS*

In *Hewitt v. Helms*, the court of appeals found that Helms's misconduct conviction, arising out of a prison riot, violated his constitutional rights; however, he ultimately lost in the district court on remand due to a sovereign immunity defense.⁴⁶ Helms then argued that when the court of appeals found his misconduct conviction unconstitutional it was a "vindication of rights," thus making him a "prevailing party."⁴⁷ The United States Supreme Court rejected this argument, stating that a favorable judicial statement of law was not enough to provide Helms with judicial relief.⁴⁸

Although the Court found that Helms had not obtained any relief, it did acknowledge that "[i]t is settled law . . . that relief need not be judicially decreed in order to justify a fee award under § 1988."⁴⁹ The Court went on to discuss its "equivalency doctrine," declaring that a judicial decree is merely a means to an end, the end being the defendant's changed conduct.⁵⁰ Thus, if the "end" sought by the plaintiff is gained through a "means" other than a judicial decree, the plaintiff may then be considered a prevailing party.⁵¹ For instance, a plaintiff is considered to have prevailed when the lawsuit produces voluntary action by the defendant that provides the plaintiff all or some of the relief sought.⁵² The Court emphasized that the real question is whether the lawsuit had somehow affected the defendant's behavior toward the plaintiff.⁵³ Helms, however, did not pass this "behavioral test," as the favorable judicial statement made by the court of appeals did not cause him to obtain anything from the defendants.⁵⁴

II. *RHODES V. STEWART*

One year later, in *Rhodes v. Stewart*, the United States Supreme Court simply restated its holding in *Hewitt*.⁵⁵ Two Ohio inmates filed a complaint alleging that prison officials violated their First and Fourteenth Amendment rights when they refused to allow the prisoners to

46. *Hewitt*, 482 U.S. at 758.

47. *Id.* at 761.

48. *Id.* at 760-61.

49. *Id.* at 760.

50. *Id.* at 761-62.

51. *Id.*

52. *Id.* at 760-61.

53. *Id.* at 761. *Hewitt* is sometimes said to have adopted a so-called "behavioral test." See Lowery, *supra* note 45, at 1447-51; Averill, *supra* note 7, at 2262.

54. *Hewitt*, 482 U.S. at 761-62.

55. *Rhodes v. Stewart*, 488 U.S. 1, 3-4 (1988).

subscribe to a magazine.⁵⁶ Although the prisoners were successful on the merits of their claim, neither plaintiff was in state custody at the time the judgment was rendered.⁵⁷ The Court emphasized the "behavioral test" of *Hewitt*, stating that a declaratory judgment, like any other judgment, constitutes relief under section 1988 only if it affects the behavior of the defendant toward the plaintiff.⁵⁸ Thus, because neither plaintiff was in state custody when the judgment was issued, they obtained no relief from the judgment.⁵⁹ In the absence of relief, the plaintiffs could not be said to have "prevailed."⁶⁰

III. TEXAS STATE TEACHERS ASSOCIATION V. GARLAND INDEPENDENT SCHOOL DISTRICT

In *Texas State Teachers Association v. Garland Independent School District*, the United States Supreme Court seemed to retreat from the "behavioral test" of *Hewitt* and *Rhodes*. The Court stated that in order to determine whether the plaintiff has achieved success on a significant issue, thereby receiving prevailing party status, "the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant."⁶¹ Thus with the *Garland* decision, it seemed as if the Court had laid out a new test for determining whether a plaintiff may be considered a prevailing party: the "legal relationship test."⁶²

IV. FARRAR V. HOBBY

In *Farrar v. Hobby*, the United States Supreme Court attempted to clarify the tests of *Hewitt*, *Rhodes*, and *Garland*. The Court seems to have combined the language of the "behavioral test" and the "legal relationship test" into one new test, stating that "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."⁶³ The Court then further emphasized

56. *Id.* at 2.

57. *Id.* at 3.

58. *Id.* at 4.

59. *Id.*

60. *Id.*

61. *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (emphasis added) (citing *Rhodes*, 488 U.S. at 3-4; *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987)). Though the Court cites both *Hewitt* and *Rhodes* for this proposition, neither of those cases use the words "legal relationship"; rather, the cases refer only to the "behavior of the defendant towards the plaintiff." See *Hewitt*, 482 U.S. at 761; *Rhodes*, 488 U.S. at 4.

62. *Garland* is sometimes said to have adopted a so-called "legal relationship test." See Lowery, *supra* note 45, at 1452-53; Averill, *supra* note 7, at 2265.

63. *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992).

its focus on the “legal relationship” between the parties with the controversial language that eventually led the Fourth Circuit to repudiate the catalyst theory.⁶⁴ “No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant.”⁶⁵

B. *Where Was the “Catalyst Theory” Before Buckhannon?*

None of the cases discussed above involved any catalytic effect, and so, before *Buckhannon*, the United States Supreme Court had never directly examined the soundness of the catalyst theory.⁶⁶ The catalyst theory, however, fit nicely beside the Supreme Court’s behavioral test. The underlying rationale of the behavioral test overlapped with the rationale behind the catalyst theory—a plaintiff could prevail without a formal judgment if the lawsuit had caused the defendant’s behavior toward the plaintiff to change. This overlap, however, seemed to disappear with the Court’s move away from the behavioral test in *Garland* and *Farrar*. It is difficult to reconcile the catalyst theory with the Supreme Court’s shift toward more of a legal relationship test. A plaintiff could receive attorney’s fees under the catalyst theory through a change in policy or a private settlement, and though these do affect the defendant’s “behavior” towards the plaintiff, they do not seem to alter the “legal relationship” of the parties. Thus, though neither *Garland* nor *Farrar* did away with the catalyst theory,⁶⁷ one could sense its downfall was near.

IV. *BUCKHANNON UNDERMINES THE ORIGINS AND PURPOSE OF THE CIVIL RIGHTS FEE-SHIFTING STATUTES*

To understand how the Court’s move from the “behavioral test,” to the “legal relationship test,” to ultimately the rejection of the “catalyst theory” slowly undermined Congress’s purpose in enacting the civil rights fee-shifting statutes, it is important to first examine the origins of these statutes. The civil rights fee-shifting statutes were created as exceptions to the ordinary “American rule,” requiring all parties to pay their own attorney’s fees in a lawsuit regardless of the outcome.⁶⁸ The

64. See *S-1 & S-2 By & Through P-1 & P-2 v. State Bd. of Educ. of N.C.*, 21 F.3d 49, 51 (4th Cir. 1994).

65. *Farrar*, 506 U.S. at 113. This language, however, is merely dicta, for it did not constitute the Supreme Court’s rejection of the “catalyst theory.” See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 603 n.5 (2001).

66. See *Buckhannon*, 532 U.S. at 603 n.5.

67. *Id.*

68. Lowery, *supra* note 45, at 1442. The United States Supreme Court has offered the following three justifications for the American Rule: (1) a litigant should not be punished for prosecuting or defending an action in good faith; (2) a poor person may be discouraged from bringing a valid lawsuit by the prospect of having to pay for the opposing party’s legal fees; and

American rule had created problems in the civil rights area since these suits commonly involve lower-income plaintiffs seeking only injunctive relief; consequently, no monetary damage award existed to help pay plaintiffs' legal fees.⁶⁹ As early as 1870 Congress began to enact fee-shifting statutes that enabled prevailing plaintiffs to recover attorney's fees from defendants, and by 1975 more than fifty of these statutes were in effect.⁷⁰

While some of the civil rights statutes contained specific provisions for fee-shifting, others did not. When there was no federal fee-shifting statute, the lower federal courts would fill in the gaps, allowing fees to be shifted through the judicial "private attorney general" doctrine.⁷¹ This approach was premised on the belief that when a plaintiff obtains an injunction, "he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority."⁷² This "private attorney general" doctrine was widely used among the lower federal courts⁷³ until the United States Supreme Court did away with the common law rule in *Aleyska Pipeline Service Co. v. Wilderness Society*.⁷⁴

In *Aleyska*, the United States Supreme Court recognized this private attorney general theory utilized by Congress in its fee-shifting statutes, but explained that this does not give the judiciary the right to create its own private attorney general rule.⁷⁵ Rather, the Court found that Congress has reserved for itself the authority to carve out specific exceptions to the American rule.⁷⁶ Thus, the Court rejected the judicially created private attorney general doctrine, but it did invite Congress to expand its fee-shifting provisions as it felt appropriate.⁷⁷

Congress immediately accepted this invitation to statutorily fill the

(3) the judicial system would be unreasonably burdened because of the time and expense of making fee determinations. See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

69. Averill, *supra* note 7, at 2252.

70. *Id.* For a list of these statutes, see SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 94th CONG., 2d SESS., CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (Pub. L. No. 94-559, S. 2278) SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 220-21 (App. A) (Comm. Print 1976).

71. Averill, *supra* note 7, at 2252-53.

72. *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968). Although the *Newman* court recognized this "private attorney general" rationale, it did not accept its use without explicit authorization from Congress.

73. Averill, *supra* note 7, at 2253-54.

74. 421 U.S. 240 (1975).

75. *Id.* at 263.

76. *Id.* at 269.

77. See David Shub, *Private Attorneys General, Prevailing Parties, and Public Benefit: Attorney's Fees Awards for Civil Rights Plaintiffs*, 42 DUKE L.J. 706, 710 (1992).

gaps of the fee-shifting statutes by passing the Civil Rights Attorney's Fees Act of 1976 (the "Fees Act").⁷⁸ The purpose of the Fees Act was to enable the courts to provide reasonable attorney's fees to prevailing plaintiffs in suits enforcing the civil rights laws.⁷⁹ Congress recognized, as did the common law "private attorney general" doctrine, that these civil rights laws depend heavily on private enforcement.⁸⁰ Fee awards are essential to providing private citizens a meaningful opportunity to vindicate the important Congressional policies these laws contain, for "without [the award of] counsel fees the grant of Federal Jurisdiction is but an empty gesture."⁸¹ Nonetheless, the *Buckhannon* Court's rejection of the catalyst theory will result in denying plaintiffs attorney's fees in a large number of cases, as the decision has created additional methods for defendants to avoid paying attorney's fees under the civil rights fee-shifting statutes.

First, as the *Buckhannon* Court discussed, the rejection of the catalyst theory will probably encourage defendants to voluntarily change their conduct to satisfy plaintiffs before trial.⁸² Yet, when these defendants end the litigation by changing their conduct, they are also avoiding the attorney's fees that would have been awarded had the plaintiff "prevailed" at trial. Nevertheless, the *Buckhannon* Court claimed that a defendant could not necessarily avoid attorney's fees by altering his conduct, for "so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case."⁸³ This disregards the fact that an action for damages in civil rights cases is unlikely because sovereign immunity will prevent most claims for damages.⁸⁴ Despite this barrier to damages claims, the Court maintained that a federal court will not dismiss a case as moot unless it is absolutely clear that the defendant's prior conduct is not reasonably expected to recur.⁸⁵

78. Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641 (1976) (codified as amended at 42 U.S.C. §1988 (1994 & Supp. V 1999)). In addition to the Fees Act, Congress has authorized the award of attorney's fees to the "prevailing party" in many other statutes, including the ADA and FHAA, both at issue in *Buckhannon*. See generally *Marek v. Chesny*, 473 U.S. 1, 43-51 (1985) (Appendix to opinion of Brennan, J., dissenting). Courts have interpreted all these fee-shifting provisions consistently. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 n.4 (2001).

79. S. REP. NO. 94-1011, at 2 (1976).

80. *Id.*

81. *Id.* at 3-4.

82. See *Buckhannon*, 532 U.S. at 608.

83. *Id.* at 608-09.

84. In the *Buckhannon* case itself, the plaintiffs dropped their damages claims when faced with the defendants' sovereign immunity pleas. See *id.* at 624 (Ginsburg, J., dissenting). Moreover, even if damages are not prohibited by sovereign immunity, most civil rights plaintiffs only seek injunctive relief. See *Evans v. Jeff D.*, 475 U.S. 717, 757 n.10 (1986) (Brennan, J., dissenting).

85. See *Buckhannon*, 532 U.S. at 609.

Nonetheless, a plaintiff who obtains the relief sought will probably not want to continue the long process of litigation if the only remaining purpose is to obtain attorney's fees.⁸⁶

Just as the Court's rejection of the catalyst theory will result in defendants voluntarily changing their conduct in order to avoid paying attorney's fees, defendants will also be more encouraged to settle before trial to escape these fees. This incentive to settle already existed under the catalyst theory, for defendants would settle to negotiate attorney's fees rather than having a court impose attorney's fees after a lengthy trial.⁸⁷ Without the catalyst theory, though defendants' incentives to settle remain, the incentive to negotiate attorney's fees has disappeared. So long as parties enter into private settlements, not requiring approval by the courts, if the settlements have no provision for granting attorney's fees to the plaintiffs, the courts cannot thereafter award counsel fees.⁸⁸ One might think that this will simply result in plaintiffs not agreeing to settle without attorney's fees provisions in the settlement agreements. Yet the plaintiffs' only goal in these lawsuits is to obtain the relief to which they believe they are entitled; it is the lawyers' goal to also receive attorney's fees. If defendants agree to settle, giving full relief to plaintiffs, plaintiffs will usually want to accept the settlement despite the lack of attorney's fees. Since the plaintiffs' lawyers are required to evaluate settlement offers on the basis of their clients' interests, without considering their own interests in receiving a fee,⁸⁹ the lawyers should advise their clients to accept these settlements, even though it may result in them not getting their fees.

One might first think that there is no great harm in lawyers not getting their fees, especially when plaintiffs receive the relief they deserve. Plaintiffs, however, will not receive relief for long; lawyers will not represent these plaintiffs if they cannot receive their fees. Plaintiffs cannot pay these legal fees on their own. Even Congress has recognized that in the majority of civil rights cases, "the citizen who must sue to enforce the law has little or no money with which to hire a lawyer."⁹⁰ Moreover, a contingency fee arrangement or retainer is not possible for many lawyers because statute, court rule, or the Internal Revenue Service prohibit legal aid societies from entering into fee agreements with their clients.⁹¹ Even if lawyers could enter into such agreements, a con-

86. *Id.* at 639 (Ginsburg, J., dissenting).

87. *Id.* at 609.

88. *Id.* at 604 n.7.

89. *See Evans*, 475 U.S. at 728 n.14; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.2(a), 1.7(b), 2.1 (1999); MODEL CODE OF PROF'L RESPONSIBILITY EC 5-1, 5-2, 7-7 to 7-9 (1999).

90. S. REP. NO. 94-1011, at 2 (1976).

91. *See Evans v. Jeff D.*, 475 U.S. 756-57 n.10 (1986).

tingency fee arrangement would be useless because in a majority of cases the plaintiff can obtain only injunctive relief and cannot receive damages because of sovereign immunity.⁹² Finally, even when damages are claimed, many civil rights actions involve amounts that are too small to provide real compensation through a contingency fee arrangement.⁹³ These hurdles force plaintiffs' lawyers in civil rights cases to rely on the fee-shifting statutes to receive their fees. Consequently, when defendants are able to avoid paying attorney's fees under the statutes by voluntarily changing their conduct or negotiating a settlement, plaintiffs' lawyers do not get paid. Eventually, lawyers will no longer be financially able to represent plaintiffs in these civil rights actions.

The ultimate effect of this process is to restrict plaintiffs' access to the courts, thereby undermining Congress's purpose in enacting the fee-shifting statutes by reducing enforcement of the civil rights laws. Congress enacted the fee-shifting statutes to ensure that nonaffluent plaintiffs have effective access to the courts.⁹⁴ These "private attorneys general" need competent counsel to be able to vigorously enforce civil rights laws.⁹⁵ Congress was well aware of the necessary link between fee-shifting statutes and enforcement of the civil rights laws, noting that not awarding attorney's fees "would be tantamount to repealing the [civil rights statutes] by frustrating [their] basic purpose."⁹⁶

In order to ensure that plaintiffs would continue to have access to the courts to act as "private attorneys general," Congress indicated that the catalyst theory should be included in the definition of prevailing party.⁹⁷ When enacting the Fees Act, Congress pointed out that a plaintiff does not need to obtain formal relief from the court to obtain an award of attorney's fees. As the Senate Report stated, "for purposes of the award of counsel fees, parties may be considered to have *prevailed* when they vindicate rights . . . without formally obtaining relief."⁹⁸ Similarly, the House Report explained that although a defendant might voluntarily cease the unlawful practice, a "court should still award fees

92. *Id.*

93. *Id.*

94. *Buckhannon Bd. & Care Home, Inc. v. W.Va. Dep't of Health & Human Res.*, 532 U.S. 598, 636 (2001) (Ginsburg, J., dissenting) (citing H.R. REP. NO. 94-1011, at 1).

95. *Id.* at 635-36 (Ginsburg, J., dissenting).

96. S. REP. NO. 94-1011, at 3 (1976).

97. *Buckhannon*, 532 U.S. at 637 (Ginsburg, J., dissenting) (citing S. REP. NO. 94-1011, at 5 (1976); H.R. REP. NO. 94-1558, at 7 (1976)). Both the Senate and House reports use the case of *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970), as supporting authority. See S. REP. NO. 94-1011, at 5 (1976); H.R. REP. NO. 94-1011, at 7 (1976). The *Parham* court awarded attorney's fees under a Title VII fee statute because the plaintiff's lawsuit had "acted as a catalyst" in the defendant's agreement to cease its discriminatory practices. *Parham*, 433 F.2d at 429-30.

98. S. REP. NO. 94-1011, at 5 (1976) (emphasis added).

even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed."⁹⁹ The House Report further states:

The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. It would also include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury. If the litigation terminates by consent decree, for example, it would be proper to award counsel fees. A "prevailing party" should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion.¹⁰⁰

Despite this bold legislative language, the *Buckhannon* Court refused to seriously consider this Congressional intent when forming its definition of prevailing party, claiming that the legislative history was "at best ambiguous."¹⁰¹ The lower federal courts, however, have been using the catalyst theory to define prevailing party for the past twenty-five years as a means of implementing Congress's purpose in enacting the fee-shifting statutes.¹⁰² In doing this, the lower courts have relied on this clear legislative history.¹⁰³ The *Buckhannon* Court's exclusion of the catalyst theory from the definition of prevailing party eliminates one of the primary methods used to implement the purpose of the civil rights fee-shifting statutes. With the *Buckhannon* decision effectively rejecting the catalyst theory, there is a danger of losing all potential "private attorneys general." As Congress predicted, if "successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the

99. H.R. REP. NO. 94-1558, at 7 (1976).

100. *Id.* Even though the House Report only uses the term "consent decree," this is simply one example of various types of settlements. The report is generally discussing out-of-court settlements and is not limiting its point to only consent decrees, for the report places no emphasis on "court-ordered changes in the parties' legal relationship."

101. *Buckhannon*, 532 U.S. at 607-08. This is the same legislative history that the Court used in previous cases to aid in defining the term "prevailing party." *Id.* at 607.

102. Justice Scalia, in his concurring opinion, attempted to undermine the lower federal courts' efforts by distorting the conception of the catalyst theory. Justice Scalia viewed the catalyst theory as a rule awarding attorney's fees to plaintiffs who "gain[ed] victory by virtue of strength or superiority" when the "defendant only 'abandoned the fray' because the cost of litigation—either financial or in terms of public relations—would be too great." *Id.* at 617 (Scalia, J., concurring). This description of the catalyst theory, however, is misguided, for all of the circuit courts agreed that in order for a plaintiff to be a "prevailing party" through informal success, the plaintiff must show a factual causal connection between the lawsuit and the favorable result. See *supra* note 7 and accompanying text.

103. See *Buckhannon*, 532 U.S. at 638 (Ginsburg, J., dissenting) (citing *Dunn v. Fla. Bar*, 889 F.2d 1010, 1013 (11th Cir. 1989); *Exeter-West Greenwich Reg'l Sch. Dist. v. Pontarelli*, 788 F.2d 47, 51 (1st Cir. 1986)); *Robinson v. Kimbrough*, 652 F.2d 458, 465 (5th Cir. 1981); *Am. Constitutional Party v. Munro*, 650 F.2d 184, 187 (9th Cir. 1981).

injunctive powers of the Federal Courts.”¹⁰⁴

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104. S. REP. NO. 94-1011, at 3 (1976).

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