

2019

Prevailing Parties in Mediation

Caleb Gerbitz

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Gerbitz, Caleb (2019) "Prevailing Parties in Mediation," *Mitchell Hamline Law Review*: Vol. 45 : Iss. 2 , Article 8.

Available at: <https://open.mitchellhamline.edu/mhlr/vol45/iss2/8>

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PREVAILING PARTIES IN MEDIATION

Caleb Gerbitz[†]

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I. INTRODUCTION

The term “prevailing party” first appeared in a federal statute in the Bankruptcy Act of 1867, which provided that “[t]he party prevailing in the suit shall be entitled to costs against the adverse party.”¹ Since then, it has become commonplace in fee-shifting provisions of statutes and contracts alike. In an adversarial process, such as litigation or arbitration, application of the term is simple: the party to which the court makes an award is the prevailing party and is entitled to attorney’s fees.

Application of the term is not so straightforward, however, when a lawsuit is resolved via the non-adversarial process of mediation. A mediated settlement often is the product of compromise in which neither side admits liability, but both sides are urged by a neutral to make concessions to resolve the dispute. The result, while avoiding further litigation, does not produce a clear “winner” or “loser” as does a court order.

Courts have generally employed one of three approaches in deciding whether a party prevailed: (1) the “no prevailing parties in mediation” approach, (2) the *Buckhannon* test, and (3) the catalyst theory. Of the three approaches, the *Buckhannon* test is by far the most common; however, few courts or scholars have paused to consider whether its application, rather than one of the other two approaches, is most appropriate in the context of mediation. The objective of this note is to survey how courts have applied the three tests in mediation and evaluate the effectiveness of each approach in the narrow context of mediation.

Two aspects of prevailing party status in mediation fall outside the scope of this note. First, courts often award mediation expenses to the party that prevails in a trial following an unsuccessful mediation.² Second,

1. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 611 (2001).

2. See SARAH R. COLE ET AL., 1 *MEDIATION: LAW, POLICY AND PRACTICE* § 9:19 (2018–19 ed.) (noting costs associated with mediation, including attorney’s fees, as an issue that is litigated in the context of mediation).

after attorney's fees are awarded to a party that prevailed, parties frequently litigate whether the fees awarded are reasonable.³ Neither of these topics are discussed in this note.⁴

Rather, this note focuses on why and how prevailing party status is awarded following a mediated resolution of a case. Part II discusses why prevailing party status matters in mediation, focusing on increased use of both fee-shifting provisions and mediation. Part III explores in depth the three most common approaches to deciding when a party prevailed in mediation. Finally, this note will conclude by considering the merits of these approaches in the narrow context of mediation.

II. WHY PREVAILING PARTY STATUS MATTERS IN MEDIATION

Prevailing party status matters when a party moves for an award of attorney's fees pursuant to a statute or a contract provision providing that a prevailing party shall be awarded attorney's fees. While this determination is straightforward following a judgment on the merits, parties that successfully defend or prosecute an action by reaching a favorable settlement also may seek fees under the provision. Whether such a party succeeds in obtaining attorney's fees turns on the determination that it was the prevailing party.

A. *Attorney's Fees Mechanics*

Two general approaches exist regarding payment of attorney's fees. Under the English Rule, or "loser pays" rule, attorney's fees are awarded to the successful litigant.⁵ In contrast, the American Rule provides that parties must bear their own costs in litigation regardless of which party wins.⁶ Although the American Rule is not always used in the United

3. *Id.* (explaining that parties often litigate whether the fees sought by the prevailing party are reasonable).

4. This note also does not explore the process by which attorney's fees are requested under Federal Rule of Civil Procedure 54(d)(2) nor does it explore in detail statutory and contractual provisions which make participation in mediation a condition precedent to awards of attorney's fees. *See id.* at § 6:4.

5. *See* Peter Karsten & Oliver Bateman, *Detecting Good Public Policy Rationales for the American Rule: A Response to the Ill-Conceived Calls for "Loser Pays" Rules*, 66 DUKE L.J. 729, 736 (2016) (discussing the origins of the English Rule under the Parliamentary Statute of Gloucester in 1278).

6. *See* David A. Root, Note, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule"*, 15 IND. INT'L & COMP. L. REV. 583, 585 (2005).

States,⁷ and the United States stands alone among industrialized countries in applying it;⁸ the American Rule has governed attorney's fees in the United States for more than two hundred years.⁹

Intellectuals pitting the American Rule against the English Rule have created a "virtual cottage industry."¹⁰ Empirically-minded proponents of each point to their favored rule's ability to increase settlement rates and decrease litigation rates.¹¹ Theoretically-minded scholars vigorously dispute the effect each rule has on low-income litigants' access to the courts.¹² Fortunately, a comprehensive comparison of the English Rule and the American Rule falls outside the scope of this note,¹³ but it is enough to recognize that the American Rule is generally the default rule in American jurisdictions.¹⁴

Predictably, many exceptions complicate the application of the American Rule. These exceptions can be grouped into six general

7. Compare *id.* at 584–85 (identifying *Arcambel v. Wiseman*, 3 U.S. 306 (1796), as the first articulation of the American Rule), with Karsten & Bateman, *supra* note 5, at 737 (pointing to *Potts v. Inlay*, 4 N.J.L. 330, 335–39 (1816), as the "first relevant case in which one can discern hints of the American Rule").

8. See Jami Rhoades Antonisse, Comment, *Attorney Fees: Attorney Fees, Prevailing Parties, and Judicial Discretion in Oklahoma Practice: How It Is, How It Should Be*, 57 OKLA. L. REV. 947, 949 (2004) ("Indeed, the American Rule is so named because the United States is unique among industrialized countries in its approach to attorney fee awards.").

9. Root, *supra* note 6, at 585.

10. Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 334 (2013).

11. *Id.* at 336–37 (noting that the effect of the English and American rules on settlement rates and litigation rates is ambiguous).

12. Proponents and detractors of the American Rule point to its effect on lower-income litigants. On one hand, plaintiffs do not risk paying the opposing party's fees if they lose, so they are more likely to bring their claims. On the other hand, plaintiffs, knowing attorney's fees will be deducted from their eventual award, may be dissuaded from bringing a lawsuit in the first place. See Antonisse, *supra* note 8, at 950 (discussing the use of statutory fee-shifting provisions to incentivize attorneys to "bring suit on behalf of litigants who would otherwise be unable to pay, or whose suits involve injunctive relief or nominal damages only").

13. For a comprehensive comparison of the English and American Rules, see Karsten & Bateman, *supra* note 5; Eisenberg & Miller, *supra* note 10; Antonisse, *supra* note 8.

14. Eisenberg & Miller, *supra* note 10, at 328–29 (noting that the American rule is generally accepted in American jurisdictions, other than Alaska, but recognizing that most other Western legal systems employ the English Rule).

categories:¹⁵ (1) fee-shifting imposed by contract, (2) fees awarded against parties who litigate in bad faith,¹⁶ (3) the Common Fund doctrine,¹⁷ (4) the Substantial Benefit rule,¹⁸ (5) fees incurred to enforce a contempt order,¹⁹ and (6) fee-shifting statutes. The first and last categories of exceptions are the concern of this note: fee-shifting provisions in statutes and contracts.

B. Prevailing Party Status in the Context of the ADR Movement

An often overlooked aspect of prevailing party provisions in both contracts and statutes is that relatively few claims brought under either are resolved by trial on the merits.²⁰ Rather, parties often settle their claims using alternative dispute resolution, including mediation, leaving application of the fee-shifting provision uncertain.²¹ This section explores the parallel upward trends in the use of fee-shifting provisions and the use of mediation to resolve litigated disputes.

1. The Increase in Fee-Shifting Provisions in Statutes and Contracts

The contemporary wave of fee-shifting statutes in the United States began during President Johnson's Great Society legislative initiative and

15. Root, *supra* note 6, at 585 (discussing exceptions to the American Rule in six general categories).

16. *Id.* at 586 ("Awarding attorneys fees for bad faith can derive from actions occurring in the filing of the lawsuit, and for conduct by parties, or their counsel, before or after the course of the proceeding.").

17. *Id.* ("The Common Fund doctrine . . . dispers[es] the litigation costs over the range of beneficiaries not involved in the litigation, but who benefit from the fund being drawn from through court order.").

18. The Substantial Benefit rule is similar to the Common Fund doctrine but it "applies to non-pecuniary benefits as well as pecuniary benefits." *Id.* at 687.

19. The Supreme Court has "held that a party can collect attorneys fees for the enforcement of a contempt order when seeking to enforce a judgment through contempt proceedings." *Id.* at 587 (citing *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 427-28 (1923)).

20. See Tracey Kyckelhahn & Thomas H. Cohen, *Civil Rights Complaints in U.S. District Courts, 1990-2006*, BUREAU OF JUST. STATS. (Aug. 2008), <https://www.bjs.gov/content/pub/pdf/crcusdc06.pdf> [<https://perma.cc/WP5A-2DYU>] (finding civil rights claims resolved by trial declined from 8% in 1990 to 3% in 2006). Civil rights claims are among those most subject to fee-shifting statutes. See Karsten & Bateman, *supra* note 5, at 749.

21. James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 117 (2006) ("Fee-shifting statutes refer to an award of attorneys' fees for 'prevailing parties.' Consequently, courts have been forced to decide, with conflicting results, whether there are 'prevailing parties' in cases resolved through mediation.").

continued in the decade following.²² The Civil Rights Attorney's Fees Awards Act of 1976²³ and the Equal Access to Justice Act,²⁴ later known as "private attorney general" statutes,²⁵ instituted fee-shifting schemes for Great Society legislation such as the Civil Rights Act of 1964,²⁶ the Voting Rights Act of 1965,²⁷ the Housing Rights Act of 1968,²⁸ and subsequent environmental legislation.²⁹ In enacting the legislation, Congress intended for the "fee-shifting provisions to encourage plaintiffs to act as private attorneys general in enforcing these statutes."³⁰

Shortly after the wave of fee-shifting statutes, in 1984, the Supreme Court identified over one hundred fifty fee-shifting statutes in the federal code.³¹ Today, there are more than two hundred equivalent federal statutes.³² State legislatures also have adopted a myriad of fee-shifting on claims ranging from child support and custody³³ to housing discrimination.³⁴ A 1984 study estimated state legislatures had adopted at least 1,974 fee-shifting statutes nationwide.³⁵ While the American Rule remains the general rule, fee-shifting statutes have eroded its hold, opening the door for parties to win attorney's fees on many types of statutory

22. See Karsten & Bateman, *supra* note 5, at 749.

23. Pub. L. No. 94-559, 90 Stat. 2641 (1976) (codified as amended at 42 U.S.C. § 1988(b) (2012 & Supp. V 2017)).

24. 5 U.S.C. § 504 (2011); 28 U.S.C. § 2412 (2011).

25. Judge Jerome Frank coined the term "private Attorney General" in *New York State v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943).

26. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

27. Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (1965).

28. Housing Rights Act of 1968, Pub. L. 90-284, 82 Stat. 73 (1968).

29. Karsten & Bateman, *supra* note 5, at 749.

30. Stefan R. Hanson, *Buckhannon, Special Education Disputes, and Attorneys' Fees: Time for a Congressional Response Again*, 2003 BYU EDUC. & L.J. 519, 519 (2003).

31. See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983) ("[V]irtually every one of the more than 150 existing federal fee-shifting provisions predicates fee awards on *some* success by the claimant.").

32. See Root, *supra* note 6, at 588 (noting "there are more than 200 federal and close to 2,000 state statutes allowing the shifting of fees").

33. See, e.g., TENN. CODE ANN. § 36-5-103(c) (West, Westlaw through 2018 Second Reg. Sess. of the 110th Tennessee General Assembly).

34. See, e.g., OHIO REV. CODE ANN. § 4112.051, subd. (D) (West, Westlaw through File 107 of the 132nd General Assembly).

35. Charles W. Wolfram, Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 L. & CONTEMP. PROBS. 321, 323 (1984).

claims.³⁶ Most often, these statutes award attorney's fees to a "prevailing party."³⁷

Similarly, fee-shifting provisions are commonplace in commercial contracts. Although historical data regarding the inclusion of fee-shifting provisions in contracts containing dispute resolution provisions is not readily available, Professors Theodore Eisenberg and Geoffrey P. Miller recently conducted empirical research demonstrating the extensive use of fee-shifting provisions in contracts involving public companies.³⁸ They discovered that contracting parties overwhelmingly opt out of the American Rule, retaining it in only 37.1 percent of contracts.³⁹ Instead, parties include fee-shifting provisions that either mirror the English rule, or a slight variation on it, in 40.7 percent of contracts.⁴⁰ Often, these fee-shifting contract provisions permit awards of attorney's fees to prevailing parties.⁴¹

2. *The Increase in Mediated Settlements*

Meanwhile, parties increasingly rely on mediation to settle disputes prior to trial.⁴² The phenomenon of the "vanishing trial"⁴³ in favor of

36. See Root, *supra* note 6, at 588 (categorizing fee-shifting statutes in four categories: (1) civil rights suits, (2) consumer protection suits, (3) employment suits, and (4) environmental protection suits).

37. See, e.g., *Buckhannon*, 532 U.S. at 611 (Scalia, J., concurring) ("A computer search shows that the term 'prevailing party' appears at least 70 times in the current United States Code; it is no stranger to the law."). *But see id.* at 614 (Scalia, J., concurring) (citing Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(d)(1)(B)(i) (1994) (permitting awards of attorney's fees only when they are "proportionately related to the *court ordered relief* for the violation") (emphasis added) ("[T]he phrase 'prevailing party' is not the *only* way to impose a requirement of court-ordered relief.")).

38. See Eisenberg & Miller, *supra* note 10.

39. *Id.* at 367. The remarkably low acceptance of the American Rule in contracts is especially noteworthy when compared to parties' willingness to accept default rules on access to court (accepted in 89.4 % of contracts) and access to jury trial (accepted in 80.1 % of contracts).

40. *Id.* at 352, Table 2. The remaining 22.2 % of contracts either specify that one company will always pay attorney's fees or employ another method. *Id.*

41. See *id.* at 377 n.207.

42. See Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 6 (2014) ("Mediation appears to be even more widely used than in 1997 and is today virtually ubiquitous among major companies.").

43. "The vanishing trial" was the title of a report, compiled by Professor Marc Galanter on behalf of the American Bar Association's Litigation Section, which noted the dramatic decline in trials between 1962 and 2002. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J.

alternative dispute resolution is well-documented.⁴⁴ Mediation especially has gained popularity both because courts have embraced it as a docket-clearing mechanism and because parties have embraced it for its unique advantages including privacy, informality, flexibility, and control.⁴⁵

In 2014, Professors Thomas J. Stipanowich and J. Ryan Lamare compiled the results of a 2011 survey of Fortune 1000 companies that revealed the extent to which corporate parties have embraced mediation as an alternative to litigation.⁴⁶ It showed that eighty percent or more of surveyed corporate counsel “viewed future mediation use by their company as ‘likely’ or ‘very likely’ for all categories of disputes.”⁴⁷ Meanwhile, only half of corporate counsel said their company was “likely” or “very likely” to use arbitration, indicating the increased use of mediation has also contributed to a drop-off in arbitration use.⁴⁸

The explosion in mediation as an alternative to the adversarial processes “is a natural response to the cost, length, and perceived risks and loss of control associated with litigation.”⁴⁹ Settlements reached via mediation differ from litigated resolutions in that they lack the determination that one party “won,” a fundamental feature of the adversarial processes it is replacing.⁵⁰

EMPIRICAL LEGAL STUD. 459 (2004). His report noted that while the number of civil actions increased five-fold and the number of Article III Judges had doubled, the number of civil trials fell from almost 6,000 in 1962 to just over 4,000 in 2002. *Id.* While 11.5% of federal civil cases went to trial in 1962, only 1.8% went to trial in 2002. *Id.*

44. See Stipanowich & Lamare, *supra* note 42, at 19 (“By the late 1990s, provisions for mediation were being integrated in commercial contract dispute resolution clauses as a preliminary step or precondition for arbitration or litigation. . . . In the ensuing years, meanwhile, the use of mediation to resolve disputes was cited as an important factor in the dramatic drop-off in the incidence of court trial.”).

45. Stipanowich & Lamare, *supra* note 42, at 51.

46. *Id.*

47. *Id.*

48. *Id.* at 51–52 (noting that in the 1990s “mediation provisions began popping up in commercial contracts, often as a step prior to binding arbitration” and contemplating that “[t]his phenomenon alone may account for the observed drop-off in the use of arbitration”).

49. *Id.* at 51.

50. See COLE ET AL., *supra* note 2, at § 9:19 (explaining that mediated settlements typically involve compromises); see also Michael Diamond, ‘Energized’ Negotiations: Mediating Disputes over the Siting of Interstate Electric Transmission Lines, 26 OHIO ST. J. ON DISP. RESOL. 217, 257 (2011) (discussing how mediating parties should not view “the conflict as a battle to be won,” but an opportunity to solve a problem).

3. “Prevailing Party” Status Lies at the Crux of These Trends

The parallel expansion of fee-shifting provisions and mediated settlements pull litigants in opposite directions. Fee-shifting statutes encourage plaintiffs to file claims while represented by counsel on contingency fees but limit the incentive to mediate and settle because doing so could preclude awards of attorney’s fees.⁵¹ Similarly, fee-shifting provisions in contracts encourage plaintiffs to sue a breaching party, but reaching a mediated resolution to the dispute complicates the non-breaching party’s ability to recover attorney’s fees.

In her recent note, Alexandra Genoa argued fee-shifting statutes “can be an impediment to a successful mediation settlement.”⁵² She noted that an attorney representing a client in a civil rights dispute will include attorney’s fees as part of the damages when attempting to settle “creating a greater divide between the amount requested and the number offered.”⁵³ She argued that particularly in later-stage mediations, attorney’s fees will often exceed compensatory damages, all but eliminating the incentive for plaintiff to settle in mediation.⁵⁴ Instead, plaintiffs will proceed to court in hope of prevailing and recovering both compensatory damages and attorney’s fees.⁵⁵ The risk, Genoa notes, is that “if the plaintiff subsequently loses in court, both attorney and client will be left without any award and face costs that could have been covered with a basic settlement amount.”⁵⁶

Theoretically, at least, Genoa’s concern can be resolved by a determination that one party prevailed in the broad context of their lawsuit and in awarding attorney’s fees to that party. In practice, however, courts have struggled whether and how to make that determination. The Supreme Court identified that federal fee-shifting statutes “contain varying standards as to the precise degree of success necessary for an award of fees—such as whether the fee claimant was the ‘prevailing party’, the ‘substantially prevailing’ party, or ‘successful.’”⁵⁷ Fee-shifting provisions in

51. See *Mason v. City of Hoboken*, 951 A.2d 1017, 1031 (N.J. 2008) (acknowledging that “the rationale underlying various fee-shifting statutes” is “to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to ‘even the fight’ when citizens challenge a public entity”). But see Alexandra Genoa, *How Statutory Attorney’s Fees Can Prevent Successful Outcomes in Mediations*, 30 GEO. J. LEGAL ETHICS 767, 774–75 (2017).

52. *Id.* at 774.

53. *Id.*

54. *Id.* at 775.

55. *Id.*

56. *Id.*

57. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983). Attorney’s fees may be awarded to the prevailing party in either the initial or in subsequent proceedings to resolve

contracts contain similar language.⁵⁸ When determining whether to award attorney's fees following a mediated settlement, the deciding court most often will award fees if it finds that party was the "prevailing party." However, because mediated settlements involve compromises, courts have struggled with deciding whether a party has truly "prevailed" in mediation.⁵⁹

III. APPROACHES TO DECIDING WHEN A PARTY IS A PREVAILING PARTY

Three primary approaches are used to determine when a party has prevailed as to the outcome of a mediated settlement: (1) the "no prevailing parties in mediation" approach, (2) the *Buckhannon* test, and (3) the catalyst theory. These approaches are listed in order of their permissiveness to awards of attorney's fees. The least permissive "no prevailing parties in mediation" approach views prevailing party status as incompatible with mediation.⁶⁰ The somewhat more permissive *Buckhannon* test permits finding a party prevailed provided the court approved of the settlement in some way.⁶¹ The most permissive approach, the catalyst theory, permits finding a party prevailed whenever a lawsuit accomplishes its purpose.⁶²

The three approaches discussed here are not exclusive in deciding whether to award attorney's fees following a mediated settlement.⁶³ Other approaches include explicitly defining "prevailing party" under a statute or a contract,⁶⁴ permitting judicial discretion to award attorney's fees where appropriate,⁶⁵ requiring that the attorney's fee arrangement be included in

settlement enforcement disputes; *see also* *Pottinger v. City of Miami*, 805 F.3d 1293, 1299 (11th Cir. 2015) ("[C]ircuits have therefore held that under § 1988 attorneys' fees can be awarded for defending, enforcing, opposing the modification of, or monitoring compliance with an existing consent decree.").

58. *See* Eisenberg & Miller, *supra* note 10, at 377 n.207 ("Loser-pays clauses are found in widely available model contracts.").

59. *See, e.g.*, COLE ET AL., *supra* note 2, at § 9:19 (noting the difficulty in deciding if there is a prevailing party to a compromise).

60. *Infra* § III (A).

61. *Infra* § III (B).

62. *Infra* § III (C).

63. *See, e.g.*, COLE ET AL., *supra* note 2, at § 9:19.

64. *Id.* ("The specific language in the applicable statute might be the key to resolving this issue.").

65. *Id.* (citing Endangered Species Act, 16 U.S.C. § 1540(g)(4) (2002); Clean Air Act, 42 U.S.C. § 7604(d) (1990); Safe Drinking Water Act 42 U.S.C. § 300j-8(d) (1996)).

the settlement agreement,⁶⁶ and directing the trial court to retain jurisdiction of action to rule on attorney's fees.⁶⁷

Nevertheless, the three approaches discussed in this note are applicable to most claims for attorney's fees following mediated settlements. The "no prevailing parties in mediation" approach is employed by a smattering of fee-shifting statutes and by Indiana courts.⁶⁸ The *Buckhannon* test is utilized by federal courts and several states.⁶⁹ The catalyst theory was retained by several states after the federal adoption of the *Buckhannon* test, but only California and New Jersey have applied it to mediation.⁷⁰ The following sections discuss how each of these approaches operate to determine whether a party prevailed in a mediated outcome.

A. *The "No Prevailing Parties in Mediation" Approach*

The first approach in deciding whether a successful party in mediation should be given "prevailing party" status is to exclude the possibility altogether. Although the "no prevailing party in mediation" approach is less common than the *Buckhannon* test and the catalyst theory, its use in a few jurisdictions and bright-line nature warrant discussion.

1. *Statutory Approach*

As a preliminary matter, legislatures may decide via statute to preclude awards of attorney's fees to prevailing parties in mediation altogether, thereby preventing the question of which party prevailed from ever reaching the courts. No statute broadly precludes such a finding for all claims, but legislatures have constructed statutes that either explicitly or implicitly prohibit awards of attorney's fees following a settlement. For example, California permits prevailing parties in contract actions to recover attorney's fees,⁷¹ but explicitly qualifies that "[w]here an action has been voluntarily dismissed or dismissed pursuant to settlement of the case, there shall be no prevailing party for purposes of this section."⁷²

66. *Id.*

67. *Id.*

68. *Infra* § III (A).

69. *Infra* § III (B).

70. *Infra* § III (C).

71. *See* CAL. CIV. CODE § 1717, subd. (a) (West, Westlaw through Ch. 1016 of 2018 Reg. Sess.).

72. *Id.* at subd. (b)(2).

In *Berry v. Berry*,⁷³ the California Court of Appeals applied this statute to deny attorney's fees to defendants who opposed the plaintiff's petition to confirm a mediated settlement agreement of a probate matter.⁷⁴ After the plaintiff petitioned to confirm the settlement agreement, the defendants moved to dismiss with prejudice.⁷⁵ However, the day before the plaintiff's opposition to the motion was due, he filed a request to dismiss the petition with prejudice.⁷⁶ Defendants then sought attorney's fees pursuant to the mediated agreement⁷⁷ arguing they were the prevailing parties.⁷⁸ Although the California statute precludes finding a prevailing party after a voluntary dismissal,⁷⁹ the defendants argued dismissal was not truly voluntary because the plaintiff "had knowledge of the court's indication of the legal merits and procedural inaccuracies of his petition" when he filed his motion to dismiss.⁸⁰ The court of appeals rejected this argument, however, because at least one issue in the lawsuit was entirely unresolved when the plaintiff moved to dismiss.⁸¹

The court also found persuasive that the plaintiff dismissed with prejudice, indicating "[h]is intent was to end the litigation concerning the settlement, not to manipulate the judicial process to avoid its inevitable end."⁸² If the dismissal transpired without prejudice, the court may have found that judgment on the merits against the plaintiff was "inevitable," entitling defendants to prevailing party status.⁸³ Here, however, because

73. No. D062914, 2014 WL 1028887 (Cal. Ct. App. Mar. 18, 2014).

74. *Id.* at *1.

75. *Id.* at *2.

76. *Id.*

77. The mediated settlement's attorney's fee clause provided, "In the event legal proceedings are instituted to enforce any term and provision of this Agreement, the prevailing parties shall be entitled to recover his or her reasonable attorney's fees and costs incurred therein." *Id.* at *1 n.2.

78. *Id.* at *3.

79. CAL. CIVIL CODE § 1717, subd. (b)(2).

80. *Berry*, 2014 WL 1028887, at *3.

81. *Id.* at *4 (noting that "the settlement agreement contains a severability clause," and "the parties [also] dispute whether the unenforceable provision voiding the codicil may be severed from the other provisions").

82. *Id.* at *5 (citing *Marina Glencoe L.P. v. Neue Sentimental Film AG*, 168 Cal. App. 4th 874, 878 (2008)). There is a line of cases in California "prohibiting a plaintiff from voluntarily dismissing an action *without prejudice* when the case has advanced to the point that a judgment adverse to the plaintiff is inevitable." *Id.* (citing *Groth Bros. Oldsmobile, Inc. v. Gallagher*, 97 Cal. App. 4th 60, 73 (2002)); *Cravens v. State Bd. of Equalization*, 52 Cal. App. 4th 253, 257 (1997); *Mary Morgan, Inc. v. Melzark*, 49 Cal. App. 4th 765, 767 (1996)).

83. *Berry*, 2014 WL 1028887, at *5 (citing *Bank of America, N.A. v. Mitchell*, 204 Cal. App. 4th 1199, 1212-13 (2012) (holding that when judgment against a party has

“final disposition of the entirety of the petition against [the plaintiff] was not inevitable,” the plaintiff was permitted to voluntarily dismiss the action, precluding defendants from being prevailing parties.⁸⁴

Alternatively, legislatures may implicitly preclude awards of attorney’s fees to successful parties at mediation. In *Ohio Civil Rights Commission v. Lyons*,⁸⁵ the court narrowly interpreted Ohio’s statute⁸⁶ providing awards of attorney’s fees to victims of housing discrimination.⁸⁷ In *Lyons*, a prospective tenant intervened in an action brought under Ohio’s housing discrimination statute.⁸⁸ At court-ordered mediation, the parties reached a settlement on every issue except whether the prospective tenant would be awarded attorney’s fees.⁸⁹ Importantly, the mediated settlement provided that there would be “[n]o admission and no finding of liability/guilt.”⁹⁰ The trial court then denied the prospective tenant’s application for attorney’s fees, finding that the language of the statute did not contemplate awards of attorney’s fees as a consequence of mediation.⁹¹ Specifically, because the Ohio statute required that “the court or the jury in a civil action under this section finds that a violation . . . has occurred,” the statute required resolution on the merits as a prerequisite to attorney’s fees.⁹²

The Ohio Court of Appeals affirmed, rejecting the prospective tenant’s arguments that she was a prevailing party and that the statute should be interpreted broadly.⁹³ First, although the tenant arguably could be characterized as having succeeded, that was insufficient. Unlike the federal Fair Housing Act,⁹⁴ which permits a court to “allow the prevailing

“already ripened to the point of inevitability,” defendant “no longer [has] the right to voluntarily dismiss its action”). The court distinguished *Mitchell*, noting that here “the probate court made no dispositive ruling on the entirety of Richard’s petition before he requested dismissal. . . . [F]inal disposition of the entirety of the petition against Richard was not inevitable.” *Id.*

84. *Id.*

85. No. 8-16-05, 2016 WL 5873896 (Ohio Ct. App. Oct. 3, 2016).

86. See OHIO REV. CODE ANN. § 4112.051, subd. (D) (West, Westlaw through File 107 of the 132d Gen. Assembly).

87. *Lyons*, 2016 WL 5873896, at *4-6.

88. *Id.* at *2.

89. *Id.*

90. *Id.*

91. *Id.* at *3.

92. *Id.* (citing OHIO REV. CODE ANN. § 4112.051, subd. (D)).

93. *Id.* at *5-6.

94. See 42 U.S.C. § 3612, subd. (p) (“In any administrative proceeding brought under this section, or any court proceeding arising therefrom, or any civil action under this section, the administrative law judge or the court, as the case may be, in its discretion, may

party, other than the United States, a reasonable attorney's fee and costs," the Ohio statute does not depend on a prevailing party finding but requires a court or jury find there was a violation.⁹⁵ Second, the court noted that a broad interpretation would discourage settlement since it "would force clients to proceed to trial purely to get an award for attorney's fees."⁹⁶ Indeed, the court pointed out, a narrow interpretation "arguably *encourages* settlement because defendants would be aware that if they lost at trial they would be mandated to pay the opposing attorney's fees, incentivizing them to settle at an earlier stage."⁹⁷

2. *Indiana's Common Law Approach*

Even where statutes do not preclude awards of attorney's fees as an outcome of mediation, courts may decide via common law that such awards will not be granted. To date, the only state to adopt this common law approach is Indiana. In reaching this conclusion, its courts rely on the belief that the concept of prevailing at mediation is inconsistent with the collaborative environment of mediation.

In *Reuille v. E.E. Brandenberger Construction, Inc.*, the Indiana Supreme Court adopted, at least as a presumption in contract law, a "no prevailing parties in mediation" approach. In this construction case, the court considered whether to award costs and attorney's fees to the plaintiff who, following a mediated settlement, "received all of the relief he demanded in his complaint and was able to completely repair his home from the proceeds."⁹⁸ The question turned on the interpretation of a contract provision providing that the prevailing party in any legal dispute

allow the prevailing party, other than the United States, a reasonable attorney's fee and costs.").

95. *Lyons*, 2016 WL 5873896, at *5 (citing OHIO REV. CODE ANN. § 4112.051, subd. (D) ("If the court or the jury in a civil action under this section finds that a violation of division (H) of section 4112.02 of the Revised Code has occurred, the court shall award to the plaintiff or to the complainant or aggrieved person on whose behalf the office of the attorney general commenced or maintained the civil action, whichever is applicable, actual damages, reasonable attorney's fees, court costs incurred in the prosecution of the action, expert witness fees, and other litigation expenses.")).

96. *Id.*

97. *Id.* at *6. *But see* Eisenberg & Miller, *supra* note 10, at 336-37 (noting that the effect of fee-shifting provisions on settlement rates and litigation rates is ambiguous).

98. 888 N.E.2d 770, 771 (Ind. 2008). Five years after the parties entered into an agreement for a home construction, the buyer sued the contractor alleging breach of contract, breach of warranty, and negligence. *Id.* The parties reached a mediated settlement on every issue except fees, which they reserved for judicial resolution. *Id.*

would be entitled to costs and attorney's fees.⁹⁹ The contract left "prevailing party" undefined.¹⁰⁰

The court turned to Black's Law Dictionary to define "prevailing party":

The party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered.¹⁰¹

The court reasoned, "This definition appears to contemplate a trial on the merits and entry of a favorable judgment in order to obtain prevailing party status."¹⁰² Furthermore, looking to the intent of the parties, the court concluded the parties would not have contemplated that a party could achieve prevailing party status at mediation:

[I]t seems unlikely that parties entering into a contract would intend for a settlement reached during mediation to result in either party obtaining prevailing party status. One of the purposes of mediation is to provide an atmosphere in which neither party feels that he or she has "lost" or "won" a case. Mediation is meant to remove some of the contentiousness of formal litigation in order to facilitate the negotiation process.¹⁰³

Although it noted that "contracting parties can readily agree to fee-shifting arrangements that are more prescriptive,"¹⁰⁴ the agreement in *Reuille* was a "straightforward and unadorned version" under which it should not be presumed parties intended a successful outcome in mediation to justify an award of attorney's fees.¹⁰⁵

In its concluding thought, the court floated a policy argument in support of its "no prevailing parties in mediation" approach:

99. *Id.* ("In any action at law or in equity, including enforcement of an award from Dispute Resolution, or in any Dispute Resolution involving a claim of \$5,000 or more, the prevailing party shall be entitled to reasonable costs and expenses, including attorney fees.").

100. *Id.*

101. *Id.* (quoting BLACK'S LAW DICTIONARY 1188 (6th ed. 1990)). Black's Law Dictionary has subsequently updated its definition of "prevailing party" to "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded." BLACK'S LAW DICTIONARY 1188 (10th ed. 2014) (citing *Buckhannon*, 532 U.S. at 603 (noting that *Buckhannon* relied on the seventh edition of Black's Law Dictionary)).

102. *Reuille*, 888 N.E.2d at 771-72.

103. *Id.* at 772.

104. *Id.*

105. *Id.*

[I]t seems apparent that the bright line approach . . . is the best for most litigants. The worst approach would be one in which “prevailing party” is treated with ambiguity or discretion, provoking litigation about who won the litigation, in addition to litigation over the appropriate amount of fees.¹⁰⁶

Since *Reuille*, Indiana courts have consistently declined to award prevailing party status based on a party’s favorable mediated settlement.¹⁰⁷ In at least one instance, the Indiana Court of Appeals even extended the *Reuille* approach to arbitration.¹⁰⁸ Other state courts, however, have not followed—or even considered to any notable extent—Indiana’s “no prevailing parties in mediation” approach.¹⁰⁹

B. The Buckhannon Test: Was There a “Judicially Sanctioned Change in the Parties’ Legal Relationship”?

The next approach considered, the *Buckhannon* test, represents a middle-ground approach. While it is more permissive of finding a party prevailed than the “no prevailing parties in mediation” approach, it is not as permissive as the catalyst theory. The *Buckhannon* test permits awards of attorney’s fees based on a determination that a party prevailed in mediation, but it requires something more—specifically, some type of

106. *Id.* As this note is replete with instances in which parties have litigated whether a party prevailed at mediation, the court’s concern appears to be well-placed. The court also rejected the argument that Indiana ever followed the catalyst theory. *Id.* (citing *Heritage House of Salem, Inc. v. Bailey*, 652 N.E.2d 69, 79–80 (Ind. Ct. App. 1995); *State Wide Aluminum, Inc. v. Postle Distribs., Inc.*, 626 N.E.2d 511, 516–17 (Ind. Ct. App. 1993); *State ex rel. Prosser v. Ind. Waste Sys., Inc.*, 603 N.E.2d 181, 189 (Ind. Ct. App. 1992)); *Id.* at 772 n.2 (“The opinions referenced . . . suggest that Indiana has not adopted the catalyst theory in 1997.”).

107. *See, e.g., Delgado v. Boyles*, 922 N.E.2d 1267, 1272 (Ind. Ct. App. 2010) (“[I]n the absence of a contractual definition of prevailing or successful party and a trial on the merits, as in *Reuille*, we conclude that litigation which is resolved by mediation or private settlement cannot result in a winner or loser.”).

108. *See Jessup v. Chi. Franchise Sys., Inc.*, No. 29A02–1302–PL–160, 2013 WL 6198243, at *5 (Ind. Ct. App. Nov. 26, 2013) (declining to name one party the prevailing party in arbitration when the other side “won on some issues and were ultimately awarded a greater amount on their claim”).

109. However, the Tennessee Court of Appeals appears to favor the approach, stating in dicta, “We also observe that this is a case where one is hard-pressed to identify a ‘prevailing’ party. The dispute ended in a mediated agreement.” *See In re Nathaniel C.T.*, 447 S.W.3d 244, 247 (Tenn. Ct. App. 2014) (denying award of attorney’s fee in a termination of parental rights case because statute awarding fees extended only to custody cases).

judicial ratification of the mediation's outcome.¹¹⁰ The *Buckhannon* test is applied to all federal statutes that award attorney's fees to prevailing parties.¹¹¹ In addition, several states have adopted the *Buckhannon* test to apply to fee-shifting provisions governed under state law, including Hawaii,¹¹² New Mexico,¹¹³ Ohio,¹¹⁴ Oklahoma,¹¹⁵ Rhode Island,¹¹⁶ and Texas.¹¹⁷

The *Buckhannon* test was the product of a sharply contested five-four Supreme Court decision in *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*.¹¹⁸ In that case, the plaintiffs, who operated care homes and provided assisted living, challenged a state statute¹¹⁹ under the Fair Housing Amendments Act of 1988 ("FHAA")¹²⁰ and the American with Disabilities Act ("ADA").¹²¹ After failing an inspection because the state fire marshal found that some

110. *Infra* § III(B)(1).

111. *See* CRST Van Expedited, Inc. v. EEOC, 136 S.Ct. 1642, 1646 (2016) (citing *Buckhannon*, 532 U.S. at 602-03 ("Congress has included the term 'prevailing party' in various fee-shifting statutes, and it has been the Court's approach to interpret the term in a consistent manner.")).

112. *See* Oahu Publ'ns, Inc. v. Abercrombie, 332 P.3d 159, 169 (Haw. 2014).

113. New Mexico has applied the test articulated in *Buckhannon* since at least 1993. In *Dunleavy v. Miller*, the New Mexico Supreme Court held that "the prevailing party is the party who wins the lawsuit—that is, a plaintiff who recovers a judgment or a defendant who avoids an adverse judgment." 862 P.2d 1212, 1219 (N.M. 1993).

114. *See* GMS Mgmt. Co. v. Ohio Civil Rights Comm'n, 64 N.E.3d 1025, 1033-34 (Ohio Ct. App. 2016) (applying *Buckhannon* to deny attorney's fees under fee-shifting provision of Ohio's housing discrimination statute).

115. *See* Tibbetts v. Sight 'n Sound Appliance Ctrs. Inc., 77 P.3d 1042 (Okla. 2003).

116. *See* Direct Action for Rights & Equal. v. Gannon, 819 A.2d 651, 659 (R.I. 2003) (applying *Buckhannon* to interpret state Access to Public Records Act fee-shifting provision).

117. *See* Intercont'l Grp. P'ship v. KB Home Lone Star L.P., 295 S.W.3d 650, 656 n.27 (Tex. 2009) ("[A] plaintiff must receive affirmative judicial relief to be considered a prevailing party.").

118. 532 U.S. 598 (2001). Chief Justice Rehnquist delivered the opinion of the Court in which Justices O'Connor, Scalia, Kennedy, and Thomas joined. *Id.* Justice Scalia also wrote a concurring opinion with which Justice Thomas joined. *Id.* at 610 (Scalia, J., concurring). Justices Ginsburg, Stevens, Souter, and Breyer dissented in an opinion written by Justice Ginsburg. *Id.* at 622 (Ginsburg, J., dissenting). Although *Buckhannon* was not a case dealing with mediation, its broad applicability covers prevailing party determinations in the context of mediation.

119. W. VA. CODE §§ 16-5H-1, 16-5H-2 (1998) (requiring, prior to 1998 amendments, that residents of residential board and care homes be capable of "self-preservation").

120. *Buckhannon*, 532 U.S. at 598; *see* 42 U.S.C. § 3601 *et seq.* (1998).

121. *Buckhannon*, 532 U.S. at 598; *see* 42 U.S.C. § 12101 *et seq.* (1998).

residents were not capable of “self-preservation” as required by state law, the *Buckhannon* plaintiffs sued for declaratory and injunctive relief challenging the “self-preservation” requirement.¹²² Before a judgment on the merits was issued, the West Virginia Legislature eliminated the “self-preservation requirement.”¹²³ Upon the defendant’s motion, the district court dismissed the case as moot and the plaintiffs “requested attorney’s fees as the ‘prevailing party’ under the FHAA and ADA.”¹²⁴

Prior to the Court’s ruling, the *Buckhannon* plaintiffs would have been awarded attorney’s fees under the catalyst theory by every circuit court other than Fourth Circuit, the circuit from which the *Buckhannon* appeal was brought.¹²⁵ The Supreme Court, however, rejected the catalyst theory, adopting instead what this note refers to as the *Buckhannon* test.¹²⁶ The Court held “prevailing party” was a “legal term of art” which contemplated awards of attorney’s fees only when a party “has been awarded some relief by the court.”¹²⁷

Under the Supreme Court’s rule, the *Buckhannon* plaintiffs could not be prevailing parties because, while their lawsuit achieved its desired result when the state legislature eliminated the “self-preservation” requirement, there was no “court-ordered change in the legal relationship between the plaintiff and the defendant.”¹²⁸ Although *Buckhannon* dealt specifically with the fee-shifting provisions of the FHAA and ADA, the Court indicated its holding applies broadly to all federal fee-shifting

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

123. *Id.* at 601.

124. *Id.* (citing 42 U.S.C. § 3613(c)(2) (“The court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee and costs.”)); *see also* 42 U.S.C. § 12206 (“The court . . . in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee, including litigation expenses, and costs.”).

125. *Id.* at 602 (citing *S-1 & S-2 v. State Bd. of Educ. of N.C.*, 21 F.3d 49, 51 (1994) (en banc)) (“Although most Courts of Appeals recognize the ‘catalyst theory,’ the Court of Appeals for the Fourth Circuit rejected it . . .”).

126. *Id.* at 605 (“A defendant’s voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents thus counsel against holding that the term ‘prevailing party’ authorizes an award of attorney’s fees *without* a corresponding alteration in the legal relationship of the parties.”); *see id.* at 610 (“[W]e hold that the ‘catalyst theory’ is not a permissible basis for the award of attorney’s fees under the FHAA and ADA.”).

127. *Id.* at 603 (quoting BLACK’S LAW DICTIONARY 1145 (7th ed. 1999)) (stating that Black’s Law Dictionary “defines ‘prevailing party’ as ‘a party 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*.”).

128. *See id.* at 604 (internal quotation marks omitted).

statutes awarding attorney's fees to the prevailing party.¹²⁹ In the context of mediation, therefore, the *Buckhannon* test applies whenever attorney's fees are sought under a federal fee-shifting statute after an agreement is reached in mediation.

1. *Elements of Buckhannon Test*

The *Buckhannon* test consists of two parts to determine whether there is a prevailing party despite no final judgment on the merits.¹³⁰ The first part requires there be a "material alteration of the legal relationship of the parties."¹³¹ The second part requires the relief be "judicially sanctioned."¹³² Each part of the test must be satisfied to deem a party the prevailing party.¹³³

a. *"Material Alteration of the Legal Relationship of the Parties"*

The first part of the *Buckhannon* test considers whether a party was successful enough to be properly characterized as having prevailed, by considering whether settlement agreement resulted in a "material alteration of the legal relationship of the parties."¹³⁴ Whether the alteration between the parties was substantial enough to be "material" was not altered by *Buckhannon*; prior Supreme Court rulings articulate the standard.¹³⁵

A party prevails if it is successful on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."¹³⁶ Factors the court must consider include "whether the plaintiff (1) obtained relief on a significant claim in litigation, (2) that effected a material

129. The Court noted its holding's broad applicability recognized, "Congress . . . has authorized the award of attorney's fees to the 'prevailing party' in numerous statutes in addition to those at issue here." *Id.* 602-03 (citing Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k); Voting Rights Act Amendments of 1975, 42 U.S.C. § 1973(e); Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988).

130. *Id.*

131. *Id.*

132. *Id.*

133. See *Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 589 F.3d 1027, 1030 (9th Cir. 2009) ("The material alteration and the judicial sanction are two separate requirements.").

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

135. See *Baer v. Klagholz*, 786 A.2d 907, 910 (N.J. Super. Ct. App. Div. 2001) (citing *John T. ex re/Robert T. v. Iowa Dep't of Educ.*, 258 F.3d 860, 864-67 (8th Cir. 2001)).

136. *Henley v. Eckerhart*, 461 U.S. 424, 434 (1983).

alteration in the parties' legal relationship and (3) that is not merely technical or *de minimus* in nature."¹³⁷

Satisfaction of this element can depend on whether *res judicata* would bar a future claim. In *Hometown Services, Inc. v. Equitylock Solutions, Inc.*, the plaintiff sued on a contract without first submitting the dispute to mediation as required by the contract.¹³⁸ The contract also provided that the "prevailing party" would be entitled to recover reasonable attorney's fees and other costs in the event of a legal action.¹³⁹ The federal court, applying North Carolina law,¹⁴⁰ dismissed the action without prejudice because plaintiff failed to "submit the dispute to mediation before commencing suit."¹⁴¹ After the defendant sought attorney's fees under the contract provision and two North Carolina statutes,¹⁴² the court denied the motion.¹⁴³ "The Fourth Circuit makes a distinction between a dismissal with prejudice and a dismissal without prejudice for the purposes of awarding costs and attorney's fees."¹⁴⁴ Since the dismissal was without prejudice, the defendant was not a prevailing party, so it was not entitled to attorney's fees.¹⁴⁵

Courts also have found that even when *res judicata* would bar bringing the settled claim in the future, the party's success in mediation

137. *Y.O. ex re/M. v. New Britain Bd. of Educ.*, 1 F. Supp. 2d 133, 138 (D. Conn. 1998) (citing *Tex. Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-93 (1989)).

138. Civ. No. 1:13-cv-00304-MR-DLH, 2014 WL 5335928, at *1 (W.D.N.C. Oct. 20, 2014).

139. *Id.* at *2. The contract provision stated, "Should either of us institute legal action arising out of or relating to this Agreement, the prevailing party will be entitled, in addition to such other relief as may be granted, to recover reasonable attorney's fees and all other related court costs from the other party." *Id.*

140. *Id.* at *1 ("In the Fourth Circuit, state substantive law is applied to determine the award of attorneys' fees pursuant to a contractual or statutory provision.").

141. *Id.* at *1.

142. N.C. Gen. Stat. § 6-21.6 (2015) (West, Westlaw through S.L. 2018-145 of the 2018 Reg. and Extra Sess., including through 2019-4, of the Gen. Assembly); N.C. Gen. Stat. § 6-21.5 (2006) (West, Westlaw through S.L. 2018-145 of the 2018 Reg. and Extra Sess., including through 2019-4, of the Gen. Assembly).

143. *Hometown Services*, 2014 WL 5335928, at *4.

144. *Id.* at *2 (citing *Best Indus., Inc. v. CIS BIO Intern.*, 1998 WL 39383, at *1 (4th Cir. 1998) (holding there was no prevailing party when the court granted voluntary dismissal without prejudice)); *Kollsman v. Cohen*, 996 F.2d 702 (4th Cir. 1993) (holding a party was a prevailing party when dismissal was with prejudice). Notably, the cases cited by the district court predate *Buckhannon*. Because the Fourth Circuit was the only circuit that did not employ the catalyst theory prior to *Buckhannon*, it is uncertain whether this prejudice-based prevailing party distinction would apply under the catalyst theory.

145. *Id.* at *3.

may not be significant enough to be material. The federal court for the District of New Mexico, in *In re Hunt*, applied the same reasoning as *Buckhannon* to deny an award of attorney's fees to a debtor who had incurred fees while attempting to enforce a mediated agreement.¹⁴⁶ The mediated agreement included the following fee-shifting provision: "The parties agree that this Agreement is enforceable in Court and the non-prevailing party is responsible for costs and attorney fees if any action is filed to enforce this Agreement."¹⁴⁷ In the subsequent lawsuit to enforce the agreement, however, the court held that "[s]ince both parties were ordered to perform, the Court will not award attorney fees."¹⁴⁸

Similarly, winning on several issues but losing on one important issue may prevent a finding that a party's success was sufficiently material. The federal court for the Eastern District of Virginia, in *In re Gordon Properties, LLC*, refused to find Gordon Properties was a prevailing party and entitled to fees associated with either of two mediations.¹⁴⁹ There, after mediation in district court failed, mediation in bankruptcy court was successful in reaching a settlement.¹⁵⁰ After Gordon Properties sought attorney's fees for both mediations, the court denied the motion, reasoning that even if the judicial approval element were satisfied, there was no basis to find that Gordon Properties prevailed.¹⁵¹ This was especially true because, as part of the mediated settlement, Gordon Properties agreed to dismiss a related state court claim which "was a very important issue to Gordon Properties."¹⁵²

The court's holding in *Gordon Properties* underlines a primary obstacle parties face when attempting to recover attorney's fees following a mediated settlement. Oftentimes, mediated settlements are satisfactory to all parties and may not justify a finding that one party prevailed, even if there was a judicially sanctioned change in the parties' legal relationship.¹⁵³ In those circumstances, the "alteration of the legal relationship of the

146. No. 14-13109 tfl3, 2016 WL 8115493, at *7 (Bankr. D.N.M. Dec. 23, 2016) (rejecting all twelve theories raised by debtor and denying his motion to recover attorney's fees).

147. *Id.* at *5.

148. *Id.*

149. No. 09-18086-RGM, 2013 WL 5379828, at *3-4 (Bankr. E.D. Va. Sept. 26, 2013).

150. *Id.* at *3.

151. *Id.*

152. *Id.* at *4.

153. *See id.* at *3 n.3 ("This case presents several interesting questions. One is whether either party to the settlement agreement was the 'prevailing party.' A settlement by its very nature means that the parties reached a satisfactory resolution.").

parties” will not be sufficiently material to satisfy the first element of the *Buckhannon* test.

b. “Judicial Imprimatur on the Change”

The second part of the *Buckhannon* test is most distinguishable from the other two tests discussed in this note. Rather than requiring a judgment on the merits as the “no prevailing parties in mediation” approach requires¹⁵⁴ or forgoing the requirement of court action at all as the catalyst theory holds,¹⁵⁵ the *Buckhannon* test requires there be a “judicial *imprimatur*” on the mediated settlement.¹⁵⁶ The Supreme Court in *Buckhannon* elaborated that under the “judicial *imprimatur*”¹⁵⁷ requirement, “[a] defendant’s voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change.”¹⁵⁸

Private settlements, including mediated settlements, are insufficient standing alone to establish judicial *imprimatur*, unless incorporated into a court action.¹⁵⁹ Generally, where there is no judgment on the merits, a court-ordered consent decree is necessary to establish the judicial *imprimatur*.¹⁶⁰ A consent decree is “[a] court decree that all parties agree to.”¹⁶¹ As one court noted, a consent decree is “merely the court’s recordation of the private agreement of the parties.”¹⁶²

154. See *supra* Part III (A).

155. See *infra* Part III (C).

156. *Buckhannon*, 532 U.S. at 605.

157. See *Imprimatur*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A general grant of approval; commendatory license or sanction, esp. by an important person.”).

158. *Buckhannon*, 532 U.S. at 605; see also *Christina A. v. Jennifer A. v. Bloomberg*, 315 F.3d 990, 992 (8th Cir. 2003) (recognizing that prevailing party status requires “legal change, rather than a voluntary change, in the relationship of the parties . . .”).

159. See *Buckhannon*, 532 U.S. at 604 n.7 (“Private settlements do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal.”); *id.* at 606 (“Never have we awarded attorney’s fees for a nonjudicial ‘alteration of actual circumstances.’”).

160. See *Sonii v. General Electric*, No. 95-c-5370, 2003 WL 21541039, at *5 (N.D. Ill. June 11, 2003) (“[I]n most of the post-*Buckhannon* cases in which courts have found settling plaintiffs to be prevailing parties in the absence of a consent decree, the district courts had given ‘judicial sanction’ in some capacity, most commonly by the incorporation of the parties’ agreement into a court order and/or the retention of jurisdiction to enforce its terms.”).

161. See *Decree*, BLACK’S LAW DICTIONARY (10th ed. 2014).

162. See *Ad-Ex, Inc. v. City of Chicago*, 565 N.E.2d 669, 678 (Ill. App. Ct. 1990).

Buckhannon clearly “establish[ed] that enforceable judgments on the merits and court-ordered consent decrees create the ‘material alteration of the legal relationship of the parties’ necessary to permit an award of attorney’s fees.”¹⁶³ It did not, however, explicitly hold that those were the only methods by which a judicial *imprimatur* could be established.¹⁶⁴ Although courts most often decide cases under *Buckhannon* by noting whether a consent decree was entered, courts have split in deciding whether settlements that do not become consent decrees are sufficient to establish a judicial *imprimatur*. In the context of voluntary mediation to resolve a pending lawsuit, this determination can be critical.

In *Melton v. Frigidaire*, the Illinois Court of Appeals concluded that a settlement agreement, which was “made part of the record through an attachment to plaintiff’s petition for attorney fees and costs,”¹⁶⁵ combined with the trial court’s retention of jurisdiction to enforce the settlement established a sufficient judicial *imprimatur*.¹⁶⁶ The case applied *Buckhannon* to the fee-shifting provision of the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act (“Magnuson-Moss”).¹⁶⁷ That consumer-protection statute¹⁶⁸ permits consumers who “finally prevail in any action brought” under the Act to recover reasonable attorney’s fees.¹⁶⁹ In *Melton*, a consumer sought attorney’s fees after the

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

164. *See id.*

165. 805 N.E.2d 322, 323 (Ill. App. Ct. 2004). Although the settlement in *Melton* was not the product of mediation, its analysis is nonetheless instructive in the context of a mediated settlement.

166. *See id.* at 328 (“If the trial court’s actions are limited to dismissing the lawsuit, it has not played a role in the settlement. Its role is passive, at best. But if the trial court reserves jurisdiction to enforce the settlement that has been presented to it, as this trial court did, it has used its judicial power to ensure the terms of the settlement will be carried out. That gives the trial court an active role in the settlement. It is a ‘judicial *imprimatur*.’”). *But see* Baer v. Klagholz, 786 A.2d 907, 910 (N.J. Super. Ct. App. Div. 2001) (interpreting *Buckhannon* to hold that “judgments on the merits and settlement agreements enforced through consent decrees” are the exclusive remedies of sufficient judicial *imprimatur* to justify an award of attorney’s fees).

167. 15 U.S.C. § 2301 *et seq.* (1994).

168. The purpose of the Act is to “improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products” 15 U.S.C. § 2302, subd. (a) (2000).

169. 15 U.S.C. § 2310, subd. (d)(2) (1994) (“If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys’ fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and

parties settled a lawsuit over a malfunctioning refrigerator, but reserved for the trial court the determination regarding fees.¹⁷⁰ The terms of the settlement were written in a letter which entered the court record as an attachment to the petition for attorney's fees.¹⁷¹ The appellate court, noting that the trial court was aware of the settlement and retained jurisdiction to enforce it, held that the consumer was a prevailing party under *Buckhannon*.¹⁷²

The court, in awarding fees, found persuasive the policy behind Magnuson-Moss's fee-shifting provision stating, "Limiting attorney fees and costs to cases where a plaintiff has secured a judgment on the merits or a consent decree would discourage attorneys from bringing actions under Magnuson-Moss. It would virtually eliminate the disposition of cases through settlement, a disservice to the efficient administration of justice."¹⁷³ Accordingly, a settlement agreement plus sustained judicial jurisdiction to enforce the agreement was enough to find the consumer prevailed in its settled Magnuson-Moss claim.¹⁷⁴

However, *Melton's* reasoning is relatively uncommon. Courts have hesitated to find there is a sufficient judicial *imprimatur* on the outcome of a mediation unless the court adopts the settlement agreement in a consent decree.¹⁷⁵ This is true even when a mediated agreement expressly provides that attorney's fees are to be determined by the court. In *United States ex rel. Hydrograss Technologies, Inc. v. Lodge Construction, Inc.*, the parties reached a mediated settlement regarding damages and left the value of attorney's fees to the court.¹⁷⁶ Nevertheless, the court denied the plaintiff's

prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.").

170. *Melton v. Frigidaire*, 805 N.E.2d 322, 323 (Ill. App. Ct. 2004).

171. *Id.*

172. *Id.* at 328 ("The court not only was aware of the terms of the settlement agreement, but expressly retained jurisdiction to enforce those terms. There was a judicially sanctioned change in the relationship of the parties."). It was important to the court that the settlement agreement be presented to court. *Id.* at 325-26 (citing *Bruemmer v. Compaq Computer Corp.*, 768 N.E.2d 276, 288 (Ill. App. Ct. 2002) (refusing to find *Buckhannon* test satisfied in a Magnuson-Moss claim differing notably only in that the settlement was not presented to the trial court)).

173. *Id.* at 328.

174. *Id.*

175. *See, e.g., T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 476 (7th Cir. 2003); *Doe v. Bos. Pub. Sch.*, 358 F.3d 20, 25 (1st Cir. 2004); *John T. ex rel. Paul T. v. Delaware Cty. Intermediate Unit*, 318 F.3d 545, 560 (3d Cir. 2003); *see generally Aronov v. Napolitano*, 562 F.3d 84 (1st Cir. 2009) (holding that a suit did not constitute a consent decree under the Equal Access to Justice Act).

176. No. 2:13-cv-26-Ptm-29CM, 2014 WL 5529288, at *1 (M.D. Fl. Oct. 31, 2014).

motion for fees, and, on reconsideration, affirmed its denial of fees under *Buckhannon*.¹⁷⁷ Reserving the value of attorney's fees was not a "judicially sanctioned change in the legal relationship," so "the Court had no basis to award fees and costs."¹⁷⁸ The parties could not create the judicial sanction of the change in their legal relationship.¹⁷⁹

2. *Examples of Buckhannon's Application to Mediation*

While *Buckhannon* itself did not deal with a mediated settlement, its rule has been applied to mediation in a range of circumstances. The following are especially noteworthy examples of *Buckhannon's* application in the context of the Individuals with Disabilities in Education Act ("IDEA") and the Voting Rights Act.

a. *Application to Individuals with Disabilities in Education Act*

Perhaps no other fee-shifting statute has generated as much difficulty following mediated settlements as the IDEA.¹⁸⁰ The IDEA provides a means for parents and guardians to enforce their disabled child's right to a "free and appropriate public education" through a variety of means.¹⁸¹ The IDEA also incentivizes parents and guardians to pursue these rights by promising attorney's fees should they succeed in enforcing their child's rights.¹⁸²

Two issues complicate application of the IDEA's fee-shifting provision, however. First, the IDEA has statutorily prescribed extensive use of ADR, especially mediation, to resolve complaints without protracted legal dispute.¹⁸³ The IDEA has been successful in this regard as most IDEA claims are resolved without extensive litigation.¹⁸⁴

177. *Id.*

178. *Id.* at *2.

179. *Id.* at *1 (quoting *Am. Disability Ass'n, Inc. v. Chmielarz*, 289 F.3d 1315, 1320 (11th Cir. 2002) ("[I]f the district court either incorporates the terms of a settlement into its final order of dismissal *or* expressly retains jurisdiction to enforce a settlement, it may thereafter enforce the terms of the parties' agreement.")).

180. The Individuals with Disabilities Education Act of 1997, Pub. L. No. 105-17 (1997), 111 Stat. 37 (codified at 20 U.S.C. 1400 et seq. (2002)).

181. *See, e.g.*, Hanson, *supra* note 30, at 520.

182. *See* 20 U.S.C. § 141.5(i)(3)(B); *see also* Hanson, *supra* note 30, at 521 ("Congress intended that the fee-shifting provisions of the IDEA would promote its enforcement.").

183. *See, e.g.*, Hanson, *supra* note 30, at 520 (noting that enforcement tools include "state-level administrative mechanisms of compliance complaints, mediation, due process hearings, and lawsuits in federal courts").

184. *See* U.S. General Accounting Office, Rep. No. GAO-03-897, *Special Education: Numbers of Formal Disputes are Generally Low and States are Using Mediation and*

Consequently, the volume of mediated settlements of IDEA claims is high.¹⁸⁵ Second, settlements reached in an IDEA mediation are typically outside the court's reach, preventing the establishment of a judicial *imprimatur*.¹⁸⁶

The IDEA provides, "In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs . . . to a prevailing party who is the parent of a child with a disability."¹⁸⁷ Although mediation is an enumerated proceeding under section 1415,¹⁸⁸ an mediated agreement with nothing more is insufficient to award attorney's fees to a party under that section.¹⁸⁹ Rather, under *Buckhannon*, a plaintiff who brings a claim under the IDEA and agrees to dismiss the proceeding based on a mediated resolution of the claim is not a prevailing party under the statute.¹⁹⁰ Examples of courts refusing to find a prevailing party following a mediated resolution of an IDEA claim are plentiful and consistently deny awards of attorney's fees unless both elements of the *Buckhannon* test are satisfied.¹⁹¹

Other Strategies to Resolve Conflicts 2, 13 (2003) (reporting the number of increasing IDEA claims resolved through mediation). *But see* Christopher P. Borreca & David B. Hodgins, *Education of Public School Students with Disabilities*, Hous. Law., Mar.-Apr. 1997, at 12 ("Ironically, the IDEA itself has actually promulgated extensive litigation since its inception as its language is clarified in the courts and the rights of children with disabilities evolve over time.").

185. *See, e.g.*, Hanson, *supra* note 30, at 531 (quoting 143 Cong. Rec. S4354-02 (1997) (statement of Sen. Gorton) ("It is the committee's strong preference that mediation become the norm for resolving disputes under IDEA.")).

186. *See id.* at 545 ("Under *Buckhannon*, if the plaintiff's attorneys' fees are not made part of the formal mediation agreement, it is unlikely that the plaintiff would obtain them under the fee-shifting provisions of the IDEA as now interpreted.").

187. *See* 20 U.S.C. § 1415(i)(3)(B) (2005).

188. *Id.*; Hanson, *supra* note 30, at 530 ("In the 1997 reauthorization of the IDEA, Congress introduced mediation into the specific procedural remedies offered under the Act. The provisions for mediation required that 1) the mediation be voluntary, 2) the mediation not be used to delay the parent's right to a due process hearing, 3) the mediation be conducted by a qualified, impartial, and trained mediator, 4) any agreement reached in mediation be in writing, 5) no content of mediation discussions be used in any subsequent due process hearing, and 6) the state bear the cost of the mediation.").

189. *See, e.g.*, Hanson, *supra* note 30, at 546.

190. *A.R. ex rel. R.V. v. N.Y. City Dep't of Educ.*, 407 F.3d 65, 77 (2d Cir. 2005) ("[U]nder *Buckhannon*, a settlement of an IDEA administrative proceeding between the parties, followed by a dismissal of the proceedings-without more-does not render the plaintiff a 'prevailing party' for statutory fee-shifting purposes no matter how favorable the settlement is to the plaintiff's interests.").

191. *See* COLE ET AL., *supra* note 2, § 9:19 n.19 (listing numerous examples of decisions denying fees under the IDEA).

In one typical example, a plaintiff who agreed to dismiss an IDEA claim as part of a mediated resolution of the claim was not a prevailing party. In *RB III ex rel. Batten v. Orange East Supervisory Union*, plaintiff sought attorney's fees following a mediated resolution of the plaintiff's due process complaint regarding his Individualized Education Plan ("IEP").¹⁹² However, because the due process proceeding was dismissed upon request, there was no relief awarded by the court, as required by *Buckhannon*.¹⁹³ More precisely,

[T]he Hearing Officer's dismissal order lack[ed] the necessary "administrative *inprimatur*" to give the plaintiff prevailing party status. As the parties did not participate in a hearing before the Hearing Officer, there is no judgment on the merits. There was also never a court-ordered consent decree, or a "court-ordered *change* in the legal relationship between the parties."¹⁹⁴

In short, settlement via mediation and dismissal of an IDEA claim, does permit finding a party prevailed and is entitled to attorney's fees under the IDEA.¹⁹⁵

A stay-put order obtained prior to a settlement of an IDEA claim also is insufficient to establish either element of the *Buckhannon* test. In *Tina M. v. St. Tammany Parish School Board*, plaintiffs obtained a stay-put order which allowed their child to attend classes while a due process hearing to review a change in the child's educational plan was pending.¹⁹⁶ After the IDEA claim settled via mediation, plaintiffs sought attorney's fees under IDEA's fee-shifting provision, arguing they were the prevailing parties in the prior administrative proceeding.¹⁹⁷ The Fifth Circuit rejected their argument because the stay-put order was neither a "judicially sanctioned relief" nor a "material alteration of the legal relationship of the parties."¹⁹⁸

Although the stay-put order provided relief to the plaintiffs, it was not judicially sanctioned since it was automatic under the IDEA.¹⁹⁹ Granting

192. No. 5:15-cv-196, 2015 WL 9582145, at *1 (D. Vt. Dec. 30, 2015).

193. *Id.* at *2 ("The Court ultimately concluded that it is not enough that a party achieved some sought-after benefit, but rather a prevailing party 'is one who has been awarded some relief *by the court*.'") (emphasis in original) (quoting *Buckhannon*, 532 U.S. at 603).

194. *Id.* (quoting *J.S. v. Ramapo Cent. Sch. Dist.*, 165 F. Supp. 2d 570, 576 (S.D.N.Y. 2001)).

195. *Id.*

196. 816 F.3d 57, 59 (5th Cir. 2016).

197. *Id.*

198. *Id.* at 60.

199. *Id.*

the order was “not a determination on the merits of the case.”²⁰⁰ Furthermore, the stay-put order did not amount to a “material alteration of the legal relationship of the parties” because it did not “permanently alter the legal relationship of the parties.”²⁰¹ Unlike a preliminary injunction, which requires a finding that the party was likely to succeed on the merits, “the IDEA’s stay-put provision is an ‘automatic’ ‘procedural safeguard.’”²⁰² Because neither element of the *Buckhannon* test was satisfied by a stay-put order under the IDEA, the plaintiffs’ stay-put order, with nothing more,²⁰³ did not entitle them to prevailing party status.²⁰⁴

While certainly the exception, one case did find the judicial *imprimatur* element satisfied by treating a mediated IDEA settlement read into the record as a consent decree. In *Jose Luis R. v. Joliet Township High School District 204*, the Illinois federal district court awarded prevailing party status in an IDEA case following a mediated settlement because “the legal relationship between plaintiffs and Joliet Township changed when the agreement was read into the record.”²⁰⁵

The challenge posed by *Buckhannon* upon the IDEA has endured since *Buckhannon* was decided. Several scholars have commentated on the challenge,²⁰⁶ and courts have at times only reluctantly adhered to *Buckhannon* in the context of the IDEA.²⁰⁷ Nevertheless, neither Congress nor the courts have acted to more readily permit parents and guardians to recover attorney’s fees under the IDEA following a mediated settlement.

200. *Id.*

201. *Id.*

202. *Id.* at 60.

203. The court in *Tina M.* identified cases from other circuits in which a stay-put order plus something more may be sufficient to establish prevailing party status. *Id.* at 61 (citing *Termine ex rel. Termine v. William S. Hart Union High Sch. Dist.*, 288 F. App’x. 360, 362 (9th Cir. 2008) (awarding prevailing party status when stay-put order was accompanied by two other rulings which were on the merits)); *Douglas v. D.C.*, 67 F. Supp. 3d 36, 38–41 (D.C. Cir. 2014) (awarding prevailing party status when district court granted both a stay-put order and a preliminary injunction); *Dep’t of Educ. Haw. v. C.B. ex rel. Donna B.*, No. Civ. 11-00576, 2013 WL 704934, at *4–5 (D. Haw. Feb. 26, 2013) (awarding prevailing party status when plaintiffs received stay-put order and a ruling that the student was “denied . . . a free and appreciate education”).

204. *Id.* at 60.

205. No. 01-C-4798, 2001 WL 1000734, at *2 (N.D. Ill. Aug. 29, 2001).

206. See, e.g., Hanson, *supra* note 30; Martin A. Kotler, *Distrust and Disclosure in Special Education Law*, 119 PENN ST. L. REV. 485, 525–26 (2014).

207. See, e.g., *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 475 (7th Cir. 2003).

b. Voting Rights Act: Bear v. County of Jackson

In *Bear v. County of Jackson*, the Western District of South Dakota applied the *Buckhannon* test to deny attorney’s fees to members of the Oglala Sioux tribe following their mediated settlement of a Voting Rights Act claim. The plaintiffs sued to “establish a satellite office for voter registration and in-person absentee voting in the town of Wanblee on the Pine Ridge Indian Reservation.”²⁰⁸ Following a settlement conference before a magistrate judge, the county funded a satellite office for the upcoming election and reached an agreement with the South Dakota Secretary of State to fund the satellite office until 2023.²⁰⁹ After the claim was dismissed on ripeness grounds, plaintiffs moved for attorney’s fees and costs under section 14(e) of the Voting Rights Act.²¹⁰

The court denied the motion, systematically applying the *Buckhannon* test. First, the plaintiffs failed to show there was a “material alteration of the legal relationship” because dismissing the lawsuit as moot did not alter the legal relationship of the parties.²¹¹ Plaintiffs also argued, without citing authority and without success, that because the agreement provided that the Secretary of State enforce the agreement to operate the satellite office, its enforcement “by the executive branch rather than the judiciary makes its agreement no less public than a consent decree.”²¹²

The court also rejected two arguments that the relief was judicially sanctioned. First, cancellation of a preliminary injunction hearing following the settlement conference with a magistrate judge was an insufficient judicial *imprimatur* of change.²¹³ An agreement reached via mediation with a judge “is not the same as a judgment on the merits, a consent decree, or a preliminary injunction—all of which involve a measure of court action

208. 5:14-CV-05059-KES, 2017 WL 52575, at *1 (W.D.S.D. Jan. 4, 2017).

209. *Id.*

210. *Id.*; 52 U.S.C. § 20510(c) (“In a civil action under this section, the court may allow the prevailing party (other than the United States) reasonable attorney fees, including litigation expenses, and costs.”). Application of this fee-shifting provision is identical to other “private attorneys general” statutes. *See Pottinger v. City of Miami*, 805 F.3d 1293, 1298–99 (11th Cir. 2015) (identifying that 42 U.S.C. § 1988 governs awards of attorney’s fees under civil rights statutes but refusing to find a prevailing party because plaintiff class had agreed via mediated settlement to limit awards of attorney’s fees).

211. *Bear*, 2017 WL 52575, at *2 (citing *N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006) (“[I]t would be ironic, to say the least, if the Tribes were awarded attorneys’ fees against the defendant whose voluntary action triggered this result.”)).

212. *Id.*

213. *Id.* at *4.

and potential continued court oversight.²¹⁴ Second, the timing of the defendants' agreement to open the satellite office was "irrelevant in deciding whether there [was] a judicially sanctioned approval of a material alteration of the legal relationship of the parties."²¹⁵

In the next section, this note will consider the alternative to *Buckhannon's* focus on judicially sanctioned change. The catalyst theory has no such requirement.

C. *The Catalyst Theory: Did Lawsuit Achieve the Desired Result?*

The catalyst theory "posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct."²¹⁶ The approach is more permissive than both the "no prevailing parties in mediation" approach²¹⁷ and the *Buckhannon* test²¹⁸ because it permits a court to award attorney's fees based on a mediated outcome regardless of whether there was a judicial sanction on the outcome.

Prior to *Buckhannon*, the catalyst theory was the most frequently exercised approach to awarding attorney's fees following a settlement.²¹⁹ It was enacted by every federal circuit court of appeal besides the Fourth Circuit and enjoyed similar support in state courts.²²⁰ However, claims for attorney's fees following mediation were uncommon pre-*Buckhannon* since mediation had not yet gained mainstream acceptance.²²¹ Post-*Buckhannon*, the catalyst theory has disappeared entirely from federal practice and lost much of its support in state courts.²²² Today, jurisdictions which explicitly retain the catalyst theory include California,²²³ Massachusetts,²²⁴ New Jersey,²²⁵ the District of Columbia,²²⁶ Illinois,²²⁷ and

214. *Id.* (citing *N. Cheyenne Tribe*, 433 F.3d at 1085–86).

215. *Id.* (citing *Coates v. Powell*, 639 F.3d 471, 475 (8th Cir. 2011)).

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

217. *See supra* Part III(A).

218. *See supra* Part III(B).

219. *See* Lucia A. Silecchia, *The Catalyst Calamity: Post-Buckhannon Fee-Shifting in Environmental Litigation and a Proposal for Congressional Action*, 29 COLUM. J. ENVTL. L. 1, 2 (2004).

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

221. *See supra* Part III(C)(1).

222. *See* Silecchia, *supra* note 219, at 2 ("[I]n 2001, the 'catalyst theory' was dealt a fatal - or nearly fatal - blow in [*Buckhannon*].").

223. *See* *Graham v. DaimlerChrysler Corp.*, 101 P.3d 140, 156 (Cal. 2004).

224. *See* *Brown v. F.L. Roberts & Co.*, 896 N.E.2d 1279, 1291 (Mass. 2008) ("[W]e rejected the application of [*Buckhannon*] and its progeny to fee requests under Massachusetts fee-shifting statutes or other Massachusetts authority.").

Vermont.²²⁸ Only two of these jurisdictions—California and New Jersey—have applied the catalyst theory in the context of mediation.²²⁹

Circuit courts applying the catalyst theory pre-*Buckhannon* generally required that three conditions be met to prevail without a final judgment or consent decree: (1) the defendant must have given some relief sought by the plaintiff; (2) the suit must have stated at least a colorable claim; and (3) the suit must have been “a ‘substantial’ or ‘significant’ cause of defendant’s action providing relief.”²³⁰

Dillard v. City of Foley provides an example of the causal relationship analysis, central to the catalyst theory, as applied in the context of mediation.²³¹ Representatives of a class of African-Americans sued the City of Foley, Alabama, under the Voting Rights Act of 1965²³² for racially-discriminatory annexation policies.²³³ After a settlement was reached via mediation before a magistrate judge, the plaintiffs moved for attorney’s fees.²³⁴ While the city did not dispute that “plaintiffs obtained substantially all of their desired relief in the consent decree,” the parties disputed whether the lawsuit was “‘a substantial factor or a significant catalyst in motivating’ Foley to end its unconstitutional behavior.”²³⁵

The city argued this causation element of the catalyst theory was not satisfied because it had “already embarked upon the course of action [correcting the discriminatory practice], prompted not by any of the plaintiffs’ efforts, but by the Department of Justice’s prior objections to

225. See *Mason v. City of Hoboken*, 951 A.2d 1017, 1032 (N.J. 2008).

226. See *Frankel v. D.C. Office for Planning & Econ. Dev.*, 110 A.3d 553, 558 (D.C. 2015) (“[W]e hold that the catalyst theory continues to operate in D.C.”).

227. See *Uptown People’s Law Ctr. v. Dep’t of Corrs.*, 7 N.E.3d 102, 109 (Ill. App. Ct. 2014) (applying catalyst theory to the fee-shifting provision in Illinois’s Freedom of Information Act).

228. See *Bonanno v. Verizon Bus. Network Sys.*, 93 A.3d 146, 154 (Vt. 2014) (“We take this opportunity to . . . explicitly preserve the catalyst theory as a possible route to attorney’s fees . . .”).

229. See *Graham*, 101 P.3d at 156; *E.M. v. Millville Board of Education*, 849 F. Supp. 312, 313–14 (D.N.J. 1994).

230. *Buckhannon*, 532 U.S. at 627–28 (Ginsburg, J., dissenting).

231. 995 F. Supp. 1358 (M.D. Ala. 1998).

232. Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 (1994).

233. *Dillard*, 995 F. Supp. at 1361.

234. *Id.* at 1362. While not relevant to the catalyst theory analysis here, it is worth noting that the settlement was approved by the court via a consent decree. *Id.* So, although this case predated *Buckhannon*, the outcome would likely have been the same post-*Buckhannon*. Regardless, the causation analysis applied in this case is specific to the catalyst theory.

235. *Id.* at 1363.

Foley's annexation practices."²³⁶ The plaintiffs disputed the city's claim, arguing that its pre-litigation actions to correct the discriminatory practice were "tentative at best, and insincere at worst."²³⁷ Rather, plaintiffs argued, it was their lawsuit that ultimately compelled the city to change course.²³⁸ The court weighed the evidence and concluded that "the plaintiffs' efforts contributed substantially to the accomplishment of their objectives in this litigation," so they were "prevailing parties entitled to their attorneys' fees and expenses."²³⁹

In reaching its conclusion, the *Dillard* court noted that the lawsuit does not have to be the sole cause of the defendant's subsequent action, but rather it is sufficient that the plaintiff's lawsuit plays a "substantial role" in causing the remedial action.²⁴⁰ Thus, deciding the causation element of the catalyst theory "is an intensely factual, pragmatic issue," to be determined by "the chronology of events, the nature of the relief sought and obtained, and the role of the plaintiff's action in activating the change."²⁴¹ An instructive analogy employed by the court was to determine whether the plaintiff "hopp[ed] a departing locomotive" or "actually set the train on its ultimately-fruitful course at a time when it was not clear that it would ever leave the station."²⁴²

1. *The Catalyst Theory's Decline in the Context of Mediation's Rise*

The catalyst theory was abrogated by the *Buckhannon* decision in 2001.²⁴³ Meanwhile, mediation had only just begun its move into the mainstream at that time.²⁴⁴ Indeed, "[m]ediation in the 1990s was viewed as an alternative to negotiation, not to trial."²⁴⁵ To the extent the catalyst theory's rejection by the Supreme Court coincided with mediation's rise,

236. *Id.* at 1362.

237. *Id.* at 1366 (noting that a pre-litigation letter from the city's counsel to plaintiff's counsel stated he never indicated the city intended to take the corrective action).

238. *Id.*

239. *Id.* at 1366-67 ("Thus, the court concludes that the filing of the plaintiffs' motion for further relief and the plaintiffs' subsequent efforts to negotiate a settlement played the requisite substantial role in causing Foley to undertake remedial action . . . and that the plaintiffs are therefore prevailing parties . . .").

240. *Id.* at 1366.

241. *Id.* at 1365.

242. *Id.* at 1366.

243. *Buckhannon*, 532 U.S. at 698.

244. *See* COLE ET AL., *supra* note 2, at § 4:3.

245. *Id.*

there is an unfortunate shortage of caselaw employing the catalyst theory in the context of mediation.

A Westlaw search of instances in which the catalyst theory and mediation are referenced together revealed 124 cases, 106 of which were issued after *Buckhannon* was decided.²⁴⁶ Only sixteen of the cases produced by the search were decided in state court, out of *Buckhannon*'s reach. Of the sixteen cases in state courts, only four employed the catalyst theory in deciding whether a party may prevail as an outcome of mediation, three cases from California and one from New Jersey.²⁴⁷ An additional six cases in federal court analyzed the outcome of a mediation under the catalyst theory prior to *Buckhannon*.²⁴⁸ Five of those cases were claims for attorney's fees under the IDEA.²⁴⁹

For context, a Westlaw search of instances in which *Buckhannon* was cited in the context of mediation revealed 349 cases.²⁵⁰ All but sixteen of those cases were in federal court where *Buckhannon* controls, demonstrating that the caselaw surrounding the *Buckhannon* test's application to mediation is far more developed than the case law surrounding the catalyst theory's application to mediation.

2. Application of the Catalyst Theory

Although the caselaw surrounding the catalyst theory's application to mediation is limited, it is worth considering in greater depth how it was applied to the IDEA prior to *Buckhannon* and how California has applied it more recently in the context of state law.

246. The author conducted the following boolean search in Westlaw: “‘catalyst theory’ & ‘mediat!’” which returned 124 cases. The search was then refined to opinions issued after *Buckhannon* was decided on May 29, 2001, which returned 106 results.

247. *Consumer Cause, Inc. v. Mrs. Gooch's Nat. Food Mkts, Inc.*, 127 Cal. App. 4th 387 (Cal. Ct. App. 2005); *Graff v. Vallejo City Unified Sch. Dist.*, No. A108600, 2006 WL 1073010 (Cal. Ct. App. Apr. 24, 2006); *Cordan v. Kahn*, No. H029400, 2006 WL 2048290 (Cal. Ct. App. July 24, 2006); *Signature Info. Sols., LLC v. Jersey City Mun. Utils Auth.*, No. A-1503-14T2, 2016 WL 1064389 (N.J. Super. Ct. App. Div. Mar. 18, 2016). The other state cases either rejected the catalyst theory, refused to employ it because the action dealt with federal law, or were otherwise inapplicable.

248. *Holmes v. Millcreek Twp. Sch. Dist.*, 205 F.3d 583 (3d Cir. 2000); *Dillard v. City of Foley*, 995 F. Supp. 1358 (M.D. Ala. 1998); *S.D. v. Manville Bd. of Educ.*, 989 F. Supp. 649 (D.N.J. 1998); *B.K. v. Toms River Bd. of Educ.*, 998 F. Supp. 462, 474 (D.N.J. 1998); *E.M. v. Millville Bd. of Educ.*, 849 F. Supp. 312 (D.N.J. 1994); *Edie F. v. River Falls Sch. Dist.*, No. 99-C-354-C, 2000 WL 34229993 (W.D. Wis. Apr. 12, 2000).

249. *See id.*

250. The author used the search term “mediat!” to search opinions citing the Supreme Court's opinion in *Buckhannon*.

a. *Application to Individuals with Disabilities in Education Act (“IDEA”)*

Of the pre-*Buckhannon* cases that employed the catalyst theory to cases involving mediation, nearly all dealt with IDEA claims.²⁵¹ In *E.M. v. Millville Board of Education*,²⁵² a federal district court was called upon to decide whether the mother of an autistic student was a prevailing party after reaching a mediated settlement of her IDEA claim.²⁵³ In that case, after the school board proposed transferring the plaintiff’s daughter to another school, the mother requested mediation.²⁵⁴ At mediation, the plaintiff sought continued placement for her daughter at the same school in a second grade class and additional resources for her daughter’s learning. A mediated agreement was reached; the parties agreed the plaintiff’s daughter would continue attending the same school and would receive the additional resources, but that she would enroll in first grade.²⁵⁵ The plaintiff then requested attorney’s fees under the IDEA, and, after the defendant refused, she filed a lawsuit to recover the fees.²⁵⁶

The court employed a two-prong variation of the catalyst theory, then-employed in the Third Circuit. The test required determining: “(1) ‘whether plaintiffs achieved relief;’ and (2) ‘whether there is a causal connection between the litigation and the relief from the defendant.’”²⁵⁷ Although the defendant argued the relief obtained by the plaintiff was only *de minimis* since the daughter was not promoted to second grade, the court held the relief was sufficient to satisfy the first prong of the catalyst theory.²⁵⁸ The plaintiff “prevailed on the significant issue of the case—maintaining enrollment at Reich rather than moving to Mount Pleasant.”²⁵⁹ The second prong, the causation element, was satisfied because while the plaintiff’s requests were previously denied, her retention of counsel and pursuit of mediation “signaled her determination to exhaust all administrative and judicial avenues.”²⁶⁰ Both the causation and sufficient

251. See *supra* note 248. While *Buckhannon* was decided in 2001, the IDEA was amended to incorporate mediation in 1997, creating a short window during which federal courts were permitted to apply the catalyst theory to the IDEA.

252. 849 F. Supp. 312 (D.N.J. 1994).

253. *Id.* at 313-14.

254. *Id.*

255. *Id.* at 314.

256. *Id.*

257. *Id.* at 316 (citing *Wheeler v. Towanda Area Sch. Dist.*, 950 F.2d 128, 131 (3d Cir. 1991)).

258. *Id.* at 316-17.

259. *Id.* at 317.

260. *Id.*

relief prongs of the catalyst theory were satisfied, so the plaintiff was a prevailing party.²⁶¹

In another IDEA case analyzed under the catalyst theory, a different federal district court denied prevailing party status to parents' suing on behalf of their child. In *Edie F. v. River Falls School District*,²⁶² while a due process hearing was pending, plaintiffs and the school district held several mediations which resolved all the issues between the parties, yet the court held there was insufficient evidence to establish the parents were prevailing parties.²⁶³

The court applied a slightly different two-prong articulation of the catalyst theory. "To satisfy the catalyst test, the court must determine '(1) whether the lawsuit was "causally linked to the relief obtained"; and (2) whether the defendant acted gratuitously, that is, the lawsuit was frivolous, unreasonable, or groundless."²⁶⁴ In *Edie*, neither element was satisfied.²⁶⁵ Although chronology is a "significant clue" as to whether the lawsuit caused the relief, standing alone, it is insufficient to factually establish causation.²⁶⁶ Because the plaintiffs' on submitted chronology evidence, the court held its evidence was insufficient "to support the conclusion that their request for a due process hearing caused the relief provided for in the mediation agreement."²⁶⁷ Furthermore, the plaintiffs' failed to show that their claim had merit because no facts were introduced "comparing [the child]'s Individualized Education Program before and after mediation."²⁶⁸ Accordingly, plaintiffs were not prevailing parties because neither element of the Seventh Circuit's articulation of the catalyst theory was satisfied by the mediated agreement.²⁶⁹

These two cases demonstrate how differently courts analyzed claims for attorney's fees under the catalyst theory compared to under the *Buckhannon* test. The catalyst theory was certainly more permissive of claims for attorney's fees following an IDEA settlement, but courts nevertheless conducted rigorous factual analysis to decide whether a party prevails.

261. *Id.*

262. No. 99-C-354-C, 2000 WL 34229993 (W.D. Wis. Apr. 12, 2000).

263. *Id.* at *1-2, *5.

264. *Id.* at *4 (quoting *Fisher v. Kelly*, 105 F.3d 350, 353 (7th Cir. 1997)).

265. *Id.* at *4-5.

266. *Id.* at *4 (quoting *Morris v. City of West Palm Beach*, 194 F.3d 1203, 1209 (11th Cir. 1999)).

267. *Id.*

268. *Id.* at *5.

269. *Id.*

b. Rancho Mirage Country Club Homeowners Ass'n v. Hazelbaker

California has employed the catalyst theory to determine whether a party prevailed in mediation more than any other jurisdiction post-*Buckhannon*.²⁷⁰ In *Rancho Mirage Country Club Homeowners Ass'n v. Hazelbaker*, the California Court of Appeals was called upon to determine whether a condominium association was entitled to attorney's fees after a member couple agreed, via a mediated settlement, to modify their patio to comply with the association's covenants, conditions, and restrictions.²⁷¹ The Davis-Stirling Act,²⁷² which governs condominiums and other common interest developments in California, contains a mandatory ADR provision as prerequisite to filing an enforcement action under the Act.²⁷³ It also features a mandatory attorney's fee provision: "In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs."²⁷⁴

In California, "[t]he analysis of who is a prevailing party under the fee-shifting provisions of the Act focuses on who prevailed 'on a practical level' by achieving its main litigation objectives."²⁷⁵ While the court did not explicitly identify this as the catalyst theory, its reference to "achieving . . . main litigation objectives" is the same model the catalyst theory's "desired result" test.

In *Hazelbaker*, the court affirmed the trial court's finding that the association "prevailed on a practical level."²⁷⁶ The court explained, "[t]he

270. See *supra* Part III(C)(1). The California Supreme Court affirmed the catalyst theory generally in *Graham*, 101 P.3d at 149, and lower courts subsequently employed it in the context of mediation.

271. 2 Cal. App. 5th 252, 255 (2016).

272. Davis-Stirling Common Interest Development Act, CAL. CIVIL COD. § 4000-6150 (West, Westlaw through Ch. 1016 of 2018 Reg. Sess.).

273. CAL. CIVIL COD. § 5930, subd. (a) ("An association or a member may not file an enforcement action in the superior court unless the parties have endeavored to submit their dispute to alternative dispute resolution pursuant to this article.").

274. CAL. CIVIL COD. § 5975, subd. (c). It is worth noting that while the Act makes an award of attorney's fees to the prevailing party mandatory, California statutes preclude an award of attorney's fees in a contract action after a case is dismissed pursuant to a settlement agreement. CAL. CIVIL COD. § 1717, subd. (b)(2) ("Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section.").

275. *Hazelbaker*, 2 Cal. App. 5th at 260 (citing *Heather Farms Homeowners Ass'n v. Robinson*, 21 Cal. App. 4th 1568, 1574 (1994)). It is worth noting that this case was not decided under CAL. CIV. CODE § 1717, so that statute's provision precluding a finding of a prevailing party when a case is voluntarily dismissed or settled was not applicable. *Id.* at 260 n.6.

276. *Id.* at 261.

Association wanted defendants to make alterations to their property to bring it in compliance with the applicable CC & Rs The Association achieved that goal, with defendants completing the modifications to the patio”²⁷⁷ Although there were some differences between the modifications initially sought by the association and the actual modifications, those differences were “reasonably viewed as de minimus.”²⁷⁸ In addition, defendants could not “point to any success in any aspect of the litigation itself” to defeat the association’s practical victory.²⁷⁹ Accordingly, the association “achieved its main litigation objectives as a practical matter.”²⁸⁰

While the catalyst theory has been infrequently applied to disputes resolved by mediation, these few pre-*Buckhannon* federal cases and recent state cases reveal a fact-intensive test that studies what occurred before, during, and after a successful mediation.

IV. CONCLUSION

This note has explored why and how courts determine whether a party prevailed under a fee-shifting provision in a contract or statute. It analyzed the conflicting, parallel, upward trends of both fee-shifting provisions and the use of mediation to resolve disputes.²⁸¹ It also featured a comprehensive survey of the three most frequently used approaches to deciding whether a party prevailed in a mediation.²⁸²

Ultimately, the “no prevailing parties in mediation” approach adopted by the Supreme Court of Indiana is the approach most suited to mediation. This approach avoids additional litigation after a settlement is reached, is best suited to protect the confidentiality of mediation, and is most consistent with the objective of mediation.

Both the *Buckhannon* test and the catalyst theory permit parties to return to court to request attorney’s fees after reaching a settlement. Under *Buckhannon*, the court must first approve the agreement, then it must analyze whether a party prevailed by considering whether the approved agreement constitutes a “material alteration of the legal relationship of the parties.”²⁸³ Under the catalyst theory, the task upon the court after

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *See supra* Part II(B).

282. *See supra* Part III.

283. *See supra* Part III(B)(1).

settlement is even greater; it must make “intensely factual” determination regarding whether the lawsuit caused the subsequent settlement.²⁸⁴

Under the “no prevailing parties in mediation” approach, however, parties are empowered to reach an agreement regarding attorney’s fees while in mediation, preventing the issue from even reaching the court.²⁸⁵ Some have argued forcing parties to resolve attorney’s fees would inhibit reaching a settlement at all.²⁸⁶ In some instances that will be true; however, when faced with a decision to settle a case or continue litigation, savvy advocates will incorporate the risk of attorney’s fees into their demands and offers.

Next, the *Buckhannon* test and especially the catalyst theory present confidentiality concerns which are avoided by the “no prevailing parties in mediation” approach. Under both former approaches, a judge must essentially decide whether a party was successful enough in mediation to be a prevailing party.²⁸⁷ However, because most jurisdictions resolutely guard the confidentiality of mediation, the judge is left to decide whether a party succeeded without knowing what prompted the agreement that was reached.²⁸⁸ The “no prevailing parties in mediation” approach side-steps the issue by directing parties to agree on fees in mediation rather than asking a judge to decide whether a party prevailed with only some of the facts.

Finally, the “no prevailing parties in mediation” approach is most consistent with the objective of mediation. The approach, as evidenced by its name, is limited. Outside the context of mediation, it lacks the broad applicability of the *Buckhannon* test and the catalyst theory. However, mediation is a unique venue to resolve conflict that calls for a unique approach to deciding whether a party prevailed. Mediation calls upon

284. See *supra* Part III(C).

285. See *Reuille*, 888 N.E.2d at 772 (“[I]t seems apparent that the bright line approach . . . is the best for most litigants. The worst approach would be one in which ‘prevailing party’ is treated with ambiguity or discretion, provoking litigation about who won the litigation, in addition to litigation over the appropriate amount of fees.”).

286. See *E.M. v. Millville Bd. of Educ.*, 849 F. Supp. 312, 315 (1994) (“The very mechanism which allows parties to sit together in a less formal, non-adversarial context to resolve disputes would be jeopardized by the threat of a weighty legal fee hanging over the heads of the [parties].”).

287. See *supra* Part III(B), (C).

288. See *Cassel v. Superior Court*, 244 P.3d 1080, 1083 (Cal. 2011) (“In order to encourage the candor necessary to a successful mediation, the Legislature has broadly provided for the confidentiality of things spoken or written in connection with a mediation proceeding.”); see also Charles W. Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 LA. L. REV. 91 (1999).

parties to set aside their adversarial approach and work with a neutral third-party to seek an outcome that is, if not pareto-optimal, more optimal than litigation for both sides.²⁸⁹ This aspect distinguishes mediation from other forms of dispute resolution to which either the *Buckhannon* test or the catalyst theory may apply and warrants an approach unique to mediation to decide whether a party prevailed.

The “no prevailing parties in mediation” approach is best equipped to decide whether a party has prevailed in a mediation because it avoids protracted litigation over attorney’s fees, ensures confidentiality, and is most consistent with the objectives of mediation.

289. See COLE ET AL., *supra* note 2, at § 3:4 (noting other forms of ADR are distinct from mediation because they involve “contested hearings, which involve adversarial presentation of evidence (or summaries of evidence) and arguments, resulting in a nonbinding finding or decision”).

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