

DOES *BUCKHANNON* APPLY? AN ANALYSIS OF JUDICIAL APPLICATION AND EXTENSION OF THE SUPREME COURT DECISION EIGHTEEN MONTHS AFTER AND BEYOND

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* J.D. expected 2003, University of Oregon College of Law. The author would like to especially acknowledge the support and guidance of Professor Patrick McGinley, Professor of Law, University of West Virginia School of Law. Professor McGinley’s instruction provided the “catalyst” for this note. I would also like to thank the entire staff of the Western Environmental Law Center, especially Marc Fink for conveying to me the potentially far-reaching implications of the *Buckhannon* opinion.

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I. INTRODUCTION

On May 29, 2001, the Supreme Court of the United States issued *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*.¹ Many attorneys, especially those representing the public interest, had been nervously awaiting the results. In what will probably become known as the most significant attorney’s fees decision of the generation, the Supreme Court overturned virtually every federal jurisdiction regarding the legality of awarding attorney’s fees to a “prevailing party” under the “catalyst theory.” However, the Court went further, strongly hinting toward the possible invalidation of the rule, previously approved in every jurisdiction, that a plaintiff can “prevail” and collect attorney’s fees by obtaining a favorable *settlement*. As a result of *Buckhannon*’s potentially far-reaching implications, nearly every public interest attorney must now consider the question: “Does *Buckhannon* apply to my case?”

In light of *Buckhannon*, many new legal issues have arisen. What categories of successful plaintiffs now qualify for fees under fee-shifting statutes? Can a successful party of a private settlement still qualify as a “prevailing party”? Is *Buckhannon*’s rule limited to the

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

two “prevailing party” fee-shifting provisions specifically at issue, or does it extend to fee-shifting statutes that use modifying terms such as “substantially prevailing party?” If the latter, which statutes with provisions employing similar “prevailing party” language will be affected? This note attempts to fill *Buckhannon’s* photo album with snapshots of its first eighteen months of life and beyond, covering all of its trials and tribulations through late November 2002.

Section II briefly describes the facts of the case and provides an analysis of the Supreme Court’s decision. Section III divides the post-*Buckhannon* issues into two categories. First, it generally discusses the applicability of the decision to other fee-shifting provisions in statutes such as the Equal Access to Justice Act (EAJA), the Individuals with Disabilities Act (IDEA), the Freedom of Information Act (FOIA), the Endangered Species Act (ESA), the Clean Air Act (CAA), and the Clean Water Act (CWA) with particular attention paid to the different fee-shifting language each employs. Second, it analyzes lower court decisions with respect to the particular level of success a litigant must achieve before an award may be given.

II. *BUCKHANNON*: FACTS AND DECISION

A. *The “American Rule”*

Every discussion of attorney’s fees must begin with a brief discussion of the 1975 Supreme Court ruling in *Alesky Pipeline Co.*² There, the Supreme Court strictly adhered to the “American Rule” stating that “the *prevailing* litigant is ordinarily not entitled to collect a reasonable attorney’s fee from the loser.”³ As indicated, there are several exceptions to this rule. The most significant exception occurs when Congress authorizes the courts to award attorney’s fees to a prevailing litigant.⁴ Thus, there is a general practice of not awarding fees to a prevailing party absent explicit statutory authority.⁵ This note will focus on the authorizing language found in federal statutes that utilize this exception.⁶

2. *Alyeska Pipeline Co. v. Wilderness Soc’y*, 421 U.S. 240 (1975).

3. *Id.* at 247.

4. *Id.*

5. *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994).

6. In addition to this exception, there are three other judicially recognized exceptions to the American Rule. First, a court can enforce its own orders by assessing attorney’s fees for the

B. *The Facts*

The Buckhannon Board and Care Home (BBCH) provided residents with comfortable living conditions without the institutional aura of a nursing home. Among its residents was 102-year-old Dorothy Pierce.⁷ Four years after Pierce moved into BBCH, West Virginia's Office of Health Facility Licensure and Certification ordered BBCH to evacuate the premise within thirty days for failing to meet the state's self-preservation rules.⁸ These rules required all residents of assisted living homes to have the ability, without assistance, to evacuate the premises in the event of imminent danger such as fire.⁹ At the time of the order, BBCH had three residents, including Ms. Pierce, who were not capable of self-preservation under the statute.¹⁰ Pierce's son-in-law, speaking for Ms. Pierce, stated that it "would be traumatic for her to be forced to move."¹¹

Pierce and BBCH filed suit in the Fourth Circuit against the State of West Virginia and other defendants challenging the self-preservation rules as inconsistent with the Federal Fair Housing Amendments Act of 1988¹² (FFHA) and the Americans with Disabilities Act of 1990¹³ (ADA).¹⁴ At the time, many other states had implemented the more flexible fire safety standards adopted by the National Fire Protection Association (NFPA).¹⁵ After Plaintiffs filed suit, the state of West Virginia reviewed these more flexible

willful violation of a court order. *Alyeska*, 421 U.S. at 258. Second, courts are empowered to award fees against a losing party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Id.* at 258-59. Finally, a court's equitable powers allow it to award fees in commercial litigation to plaintiffs who recovered a common fund for themselves and others through securities or antitrust litigation. *Id.* at 257.

7. Brief for Appellant at 3, *Buckhannon Bd. & Care Home, Inc., v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2001) (No. 99-1848). Pierce continued to live at BBCH until she died at age 105. *Id.*

8. *Id.* at 2.

9. W. VA. CODE §§ 16-5C-2(f), 16-5H-2(f) (1997) (as amended at 16-5H-2(j) (1998)).

10. Appellant's Brief at 3, *Buckhannon Bd. & Care Home, Inc.*, (No. 99-1848).

11. *Id.*

12. See 42 U.S.C. § 3613(c)(2) (1995) stating: "In a civil action. . .the court, in its discretion, may allow the *prevailing party*, other than the United States, a reasonable attorney's fee and costs."

13. See 42 U.S.C. § 12205 (1995), stating: "In any action or administrative proceeding pursuant to this Act, the court or agency, in its discretion, may allow the *prevailing party*, other than the United States, a reasonable attorney's fee, including litigation expenses. . . ."

14. Appellant's Brief at 3, *Buckhannon Bd. & Care Home, Inc.*, (No. 99-1848).

15. *Id.* at 4-5 (explaining that this flexible approach allowed for three tiers of evacuation capability: prompt, slow, and impractical).

standards and ultimately adopted them, repealing its self-preservation statutes.¹⁶ Defendants accordingly changed their legal stance and successfully petitioned to render the case moot. Plaintiffs then moved for an award of attorney's fees arguing that their lawsuit served as the catalyst that sparked the adoption of the amended laws and led to the ultimate relief they sought and received.¹⁷ Plaintiff's theory of obtaining such a fee award, known as the "catalyst theory," had been adopted as a valid means of obtaining attorney's fees by every federal jurisdiction except Plaintiff's—the Fourth Circuit.¹⁸ It was therefore unsurprising that, in an unpublished opinion, Plaintiffs were denied attorney's fees at the appellate level.¹⁹ Seeking to overturn this rebel Circuit's precedent, Plaintiffs sought and received a grant of certiorari from the Supreme Court on September 26, 2000.²⁰

C. *The Decision*

In a 5-4 decision written by Chief Justice Rehnquist, Ms. Pierce's estate was denied attorney's fees. Under the ADA and the FHAA, only a "prevailing party" may be awarded attorney's fees.²¹ As mentioned earlier, the normal practice among the federal courts was to construe the term "prevailing party" broadly. The Supreme Court, however, had never visited the issue as it pertained to the "catalyst theory."²² Consulting *Black's Law Dictionary* and Supreme Court precedent, the Court held that the "catalyst theory" was not a viable method for recovery under the two statutes at issue. However, the Court went further, deeming "prevailing party" to be a "legal term of art," and indicating its intent to usurp from the list of "prevailing parties" those successful litigants who entered into private settlements—a position never before adopted in *any* federal jurisdiction.²³

16. *Id.* at 8.

17. *Id.* at 9.

18. See *S-1 and S-2 v. State Bd. of Educ. of N.C.*, 21 F.3d 49, 51 (4th Cir. 1994) (citing *Farrar v. Hobby*, 506 U.S. 103 (1992), in denying attorney's fees under the "catalyst theory," but allowing an award of fees "by virtue of having obtained an enforceable judgment, consent decree, or *settlement* giving some of the legal relief sought" (emphasis added)).

19. Appellant's Brief, at xvii, *Buckhannon Bd. & Care Home, Inc.*, (No. 99-1848).

20. *Id.*

21. Under both the ADA and the FHAA, a court, "in its discretion, may allow the prevailing party. . . a reasonable attorney's fee." See *supra*, notes 12, 13.

22. *Buckhannon*, 532 U.S. at 603 n.5.

23. Since the Fourth Circuit still regarded private settlements as a viable method to award fees under this term, see *supra* note 18, the Supreme Court's indication that private settlements

Fairly stated, the specific holding was that “the ‘catalyst theory’ is not a permissible basis for the award of attorney’s fees under the FHAA and ADA.”²⁴ However, the Court clearly intended to further limit the possible situations in which successful plaintiffs using fee-shifting statutes may seek fee awards for their success. The opinion failed to adopt a single formulation of what level of success a “prevailing party” must achieve, instead defining “prevailing party” in a number of ways:

- “A party in whose favor a judgment is rendered”²⁵
- A “successful party”²⁶
- “[O]ne who has been awarded some relief by the court”²⁷
- One who receives “judgment on the merits” of his claim²⁸
- Requiring a “court-ordered ‘change [in] the legal relationship between [the plaintiff] and the defendant’”²⁹
- Requiring a “material alteration of the legal relationship of the parties”³⁰
- Requiring a “judicially sanctioned change in the legal relationship between the parties”³¹
- One that requires an “enforceable judgment” on a case “not found to be moot”³²

With so many possible roads to follow, *Buckhannon* has left the lower courts struggling to determine where to draw the line of success warranting an award of attorney’s fees.

III. POST-*BUCKHANNON*: THE ISSUES NOW BEFORE THE COURTS

Prior to the *Buckhannon* decision, every Federal Circuit court except the Fourth and the Federal Circuit (which had not addressed the issue) had determined that the “catalyst theory” was a valid

do not contain the requisite “judicial imprimatur” attempts to extend the breadth of the term to an unprecedented level.

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

25. *Id.* at 603 (quoting BLACK’S LAW DICTIONARY 1145 (7th ed. 1999)).

26. *Id.*

27. *Id.*

28. *Id.* at 605.

29. *Id.* at 604 (quoting *Tex. State Teachers Ass’n. v. Garland Indep. School Dist.*, 489 U.S. 782, 792 (1989)).

30. *Tex. State Teachers Ass’n. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989). *See also Buckhannon*, 532 U.S. at 604.

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

32. *Id.* at 609.

method of awarding attorney's fees under fee-shifting statutes.³³ The law seemed to have been settled consistently among the circuits, with the exception of subtle differences in the tests used to determine whether plaintiff's actions acted as a "catalyst" for defendant's compliance.³⁴

Since *Buckhannon*, courts have grappled with two very broad issues. The first involves the extent to which the Court's decision reaches statutes other than the FHAA and ADA. Is the Court's decision limited to these two statutes, or does it extend to all attorney's fees statutes using "prevailing party" language? Further, does it extend to statutes using similar or more discretionary language in determining what constitutes a successful party? If a court holds that *Buckhannon* applies to the statute in question, it must then address the second issue: What procedural types of successes merit the badge of "prevailing party"? Each of these issues will be analyzed in turn.

A. *Issue I: The Extension of Buckhannon to Other Fee-Shifting Statutes*

There are currently over 150 statutes containing "fee-shifting" provisions available to litigants in the United States. The language that grants an award of attorney's fees to a successful litigant varies from statute to statute. A typical fee-shifting provision includes two elements: (1) the type of success a petitioning litigant must achieve,

33. See, e.g., *Nadeau v. Helgemoe*, 581 F.2d 275, 279-81 (1st Cir. 1978); *Gerena-Valentin v. Koch*, 739 F.2d 755, 758-59 (2d Cir. 1984); *Institutionalized Juveniles v. Sec'y of Pub. Welfare*, 758 F.2d 897, 910-917 (3d Cir. 1985); *Bonnes v. Long*, 599 F.2d 1316, 1318-1319 (4th Cir. 1979) (predating *S-1 and S-2*, 21 F.3d 49, which was the Fourth Circuit case that eventually overruled the viability of the "catalyst theory"); *Iranian Students Ass'n v. Sawyer*, 639 F.2d 1160, 1163 (5th Cir. Unit A March 1981); *Citizens Against Tax Waste v. Westerville City Sch. Dist. Bd. of Educ.*, 985 F.2d 255, 257-58 (6th Cir. 1993); *Stewart v. Hannon*, 675 F.2d 846, 851 (7th Cir. 1982); *Int'l Soc'y for Krishna Consciousness, Inc. v. Andersen*, 569 F.2d 1027, 1029 (8th Cir. 1978); *American Constitutional Party v. Munro*, 650 F.2d 184, 187-88 (9th Cir. 1981); *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1474-75 (10th Cir. 1985); *Doe v. Busbee*, 684 F.2d 1375, 1379 (11th Cir. 1982); *Grano v. Barry*, 783 F.2d 1104, 1108-1110 (D.C. Cir. 1986).

34. Compare *Stewart*, 675 F.2d at 851 (identifying a two factor test: (1) whether the litigation benefited the plaintiff and members of the class, and (2) whether the lawsuit acted as a catalyst, or was a material factor in the defendant's decision to change the disputed practices and therefore provide, in substantial part, the relief sought.), and *Southwest Ctr. for Biological Diversity v. Carroll*, 182 F. Supp. 2d 944 (9th Cir. 2001) (also identifying a two-part test: (1) whether the lawsuit was causally linked – i.e., the lawsuit was a catalytic factor – to securing the benefit obtained, and (2) the benefit obtained was required by law as opposed to a gratuitous act by the defendant), with *Grano*, 783 F.2d at 1111 (requiring "some basis in law for the benefits ultimately received by [a successful] litigant").

and (2) the level of discretion given to the court to award such fees.³⁵ For example, the Clean Water Act³⁶ states that the court may award costs of litigation:

“to any prevailing or substantially prevailing party. . .” (—type of success—)

“. . . whenever the court determines such award is appropriate.” (—level of discretion—)

These two elements operate independently of each other.³⁷ Thus the court’s analysis must first center on the petitioner’s level of success. After this issue is concluded, the court must weigh certain variables in the case to appropriately exercise its congressional grant of discretion. In many situations, the statutory authorization will emphasize (or even ignore completely) one of these two elements. This note has broken down the various fee-shifting provisions into five general categories, which are briefly outlined below.³⁸

In the first type of provision, a court is normally given broad discretion to award fees to parties achieving “prevailing party” status. Examples of statutes empowering courts with this authority include the Equal Access to Justice Act³⁹ and the two *Buckhannon* statutes: the Americans with Disabilities Act⁴⁰ and the Fair Housing Amendments Act of 1988.⁴¹

In the next three commonly utilized provisions, a party must at least “prevail.” But Congress has modified the term according to varying circumstances. In one situation, attorney’s fees are mandatory if the plaintiff “finally prevails.” Such statutes include the Commodity Exchange Act,⁴² the Magnuson-Moss Act,⁴³ the Packers and Stockyards Act,⁴⁴ and the Perishable Agricultural Commodities

35. See *Union of Needletrades, Indus. and Textile Employees, AFL-CIO, CLC v. U.S. Immigration and Naturalization Serv.*, 202 F. Supp. 2d 265 (S.D.N.Y. 2002).

36. 33 U.S.C. § 1365(d) (2001).

37. See *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371 (Fed. Cir. 2002).

38. *Id.*

39. 28 U.S.C. § 2412(d)(1)(A) (2000) (“Except as otherwise specifically provided by statute, a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action . . .”).

40. 42 U.S.C. § 12101 (2000).

41. 42 U.S.C. § 3601 (2000).

42. 7 U.S.C. § 18(d) (2000) (“If the petitioner finally prevails, he shall be allowed a reasonable attorney’s fee . . .”).

43. 15 U.S.C. § 2310(d)(2) (2000).

44. 7 U.S.C. § 210(f) (2000).

Act.⁴⁵ In many provisions, a successful party must have “substantially prevailed” in order for a court to consider an award of fees. Statutes employing this language include the Freedom of Information Act,⁴⁶ the Privacy Act,⁴⁷ and the National Historic Preservation Act.⁴⁸ The final category of statutes utilizing the root word “prevail” include the Clean Water Act⁴⁹ and the Employee Retirement Income Security Act.⁵⁰ In these statutes, “any prevailing or substantially prevailing party” is eligible for an award of attorney’s fees.

The next category seems less concerned with a litigant’s level of success, focusing instead on judicial discretion. For example, on its face, the Clean Air Act⁵¹ allows the court latitude to award fees whenever it “determines that such an award is appropriate.”⁵² But as we will see, despite statutory absence of a level-of-success provision, the Supreme Court has read a “prevailing party” requirement into this language, severely curtailing the level of judicial discretion.⁵³ This language is most commonly found in environmental statutes such as the Toxic Substances Control Act,⁵⁴ the Endangered Species Act,⁵⁵ the

45. 7 U.S.C. § 499g(b) (2000).

46. 5 U.S.C. § 552(a)(4)(E) (2000) (“The court may assess against the United States reasonable attorney’s fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.”).

47. 5 U.S.C. § 552b(i) (2000).

48. 16 U.S.C. § 470w-4 (2000) (“[I]f such person substantially prevails in such action, the court may award attorney’s fees, expert witness fees, and other costs of participating in such action, as the court deems reasonable.”).

49. 33 U.S.C. § 1365(d) (2000).

50. 29 U.S.C. § 1370(e)(1) (2000) (“In any action brought under this section, the court in its discretion may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney’s fees, to any party who prevails or substantially prevails in such action.”).

51. 42 U.S.C. § 7607(f) (2000) (“In any judicial proceeding under this section, the court may award costs of litigation. . . whenever it determines that such award is appropriate.”).

52. In some statutes, such as the Clean Water Act, a court is given such discretion only after it is determined whether or not the party “prevails” in some manner. The Clean Water Act at 33 U.S.C. § 1365(d) (2000) states that the court “may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.” Other statutes, such as the Toxic Substances Control Act and Clean Air Act, only use the discretionary “whenever appropriate” language.

53. See section III(A)(2)(e) of this note for discussion.

54. 15 U.S.C. § 2618(d) (2000). (“The decision of the court . . . may include an award of costs of suit and reasonable fees for attorneys . . . if the court determines that such an award is appropriate.”).

55. 16 U.S.C. § 1540(g)(4) (2000) (“The court . . . may award costs of litigation to any party, whenever the court determines such award is appropriate.”).

Surface Mining Control and Reclamation Act,⁵⁶ the Deep Seabed Hard Mineral Resources Act,⁵⁷ the Marine Protection, Research and Sanctuaries Act,⁵⁸ the Deepwater Port Act,⁵⁹ the Safe Drinking Water Act,⁶⁰ the Noise Control Act,⁶¹ the Energy Policy and Conservation Act,⁶² and the Outer Continental Shelf Lands Act.⁶³ For purposes of this note, this standard will be referred to as the “whenever appropriate” standard.

In a few situations, a litigant need only show that he has been “successful” in order to be eligible for attorney’s fees. Examples of statutes employing this language include the Real Estate Settlement Procedures Act,⁶⁴ the Fair Credit Reporting Act,⁶⁵ and the Right to Financial Privacy Act.⁶⁶ This category is briefly discussed in the same breath with the “whenever appropriate” language below under “non-’prevailing party’ statutes.”

Finally, in rare circumstances (and outside the scope of this note), Congress has severely restricted the court’s discretion by prescribing an award based on the degree of relief the claimant obtained in the underlying litigation. The Prison Litigation Reform Act of 1995⁶⁷ and the Clayton Act⁶⁸ employ such language.

1. The Extension of *Buckhannon* to Other “Prevailing Party” Statutes

The statutes at issue in *Buckhannon* were the Fair Housing Amendments Act of 1988 (FHAA)⁶⁹ and the Americans with

56. 30 U.S.C. § 1270(d) (1976 ed., Supp. V).

57. 30 U.S.C. § 1427(c) (1976 ed., Supp. V).

58. 33 U.S.C. § 1415(g)(4) (2000).

59. 33 U.S.C. § 1515(d) (2000).

60. 42 U.S.C. § 300j-8(d) (2000).

61. 42 U.S.C. § 4911(d) (2000).

62. 42 U.S.C. § 6305(d) (2000).

63. 43 U.S.C. § 1349(a)(5) (1976 ed., Supp. V).

64. 12 U.S.C. § 2607(d)(5) (2000). (“In any successful action to enforce the liability under this paragraph, the court may award the court costs of the action together with a reasonable attorney’s fee as determined by the court.”).

65. 15 U.S.C. §§1681n(c), 1681o(b) (2000).

66. 12 U.S.C. § 3417(a)(4) (2000) (stating the amount of the fee is proportionately related to the court ordered relief for violation).

67. 42 U.S.C. § 1997e(d)(B)(i).

68. 15 U.S.C. §15(a) (1990) (“[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”).

69. 42 U.S.C. § 3601 (1988).

Disabilities Act of 1990 (ADA).⁷⁰ Both statutes employed “prevailing party” language.⁷¹ The Supreme Court held that “the ‘catalyst theory’ is not a permissible basis for the award of attorney’s fees under the FHAA and ADA.”⁷² Thus, logically, one of the first issues to arise in the lower courts was whether *Buckhannon* applies only to the two statutes explicitly discussed or whether the Court’s reasoning extends to all statutes employing the “prevailing party” language. After a brief split among the circuits, this issue is now the only one on which a consensus has been reached, not only among the circuits, but seemingly among litigants as well.⁷³

Several years before *Buckhannon*, the Federal Circuit noted: “Indeed, the Supreme Court has recognized that the definition of ‘prevailing party’ does not differ from rule-to-rule or statute-to-statute.”⁷⁴ The *Buckhannon* Court approved this precedent, stating that in the two statutes at issue there, “Congress employed the term ‘prevailing party,’ a *legal term of art*.”⁷⁵ A “legal term of art,” is quite a significant label. According to a 1952 Supreme Court decision, “Congress borrows terms of art [which have] accumulated the legal tradition and meaning of centuries of practice.”⁷⁶ According to the Court, when Congress adopts such a term, it recognizes that the term connotes a particular meaning “to the judicial mind unless otherwise instructed.”⁷⁷ However, labeling “prevailing party” a “legal term of art” is quite a curious conclusion given that the “judicial minds” of the Supreme Court voted closely (5-4) on the issue. More notably, every circuit court to have previously addressed the issue except the Fourth Circuit held a different view than the Supreme Court’s narrow majority. Even more extraordinary is that, in branding the term with such status, the Court provided no discussion or analysis whatsoever

70. 42 U.S.C. § 12101 (1990).

71. 42 U.S.C. § 3613(c)(2) (1988); 42 U.S.C. § 12205 (1990).

72. *Buckhannon*, 532 U.S. at 610 (citations omitted).

73. See *N.Y. State Fed’n of Taxi Drivers, Inc. v. Westchester County Taxi and Limousine Comm’n*, 272 F.3d 154, 158 (2d Cir. 2001) (Both plaintiff and defendant “acknowledged that this reasoning has become the law.”).

74. *Schultz v. United States*, 918 F.2d 164, 166 n.2 (Fed. Cir. 1990) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983)).

75. 532 U.S. at 603 (emphasis added).

76. *Morissette v. United States*, 342 U.S. 246, 263 (1952) (discussing the intent requirement for theft, which was omitted from a federal statute, but the Court held that the omission did not eliminate intent as an element of the offense).

77. *Id.*

as to why Congress would have designated the term as such.⁷⁸ Instead, the Court cited *Black's Law Dictionary*, as the majority apparently believed it to contain such "legal terms of art."⁷⁹ Regardless of its rationale, the Court provided litigants with a narrow window of escape, which may prove important, especially when extending *Buckhannon* to non-"prevailing party" language: if Congress offers "explicit statutory authority" to the contrary, only then may lower courts follow Congress' alternate definition.⁸⁰

Because the Court labeled "prevailing party" as a legal term of art, analysis of whether *Buckhannon* applies to other statutes using the "prevailing party" language must be answered in the affirmative. In case there was any doubt, the Supreme Court provided additional guidance by referring to three "prevailing party" statutes not at issue, the Civil Rights Act of 1964, the Voting Rights Act Amendments of 1975, and the Civil Rights Attorney's Fees Awards Act of 1976 (§ 1988), and then stated that the Court has "interpreted these fee-shifting provisions consistently."⁸¹ As briefly indicated below, lower courts have dutifully extended *Buckhannon* to these and other "prevailing party" statutes.

a. Civil Rights Attorney's Fees Awards Act of 1976 (§ 1988)

In November 2001, the Second Circuit proclaimed, "[d]espite the fact that the holding in *Buckhannon* applied to the FHAA and ADA, it is clear that the Supreme Court intends the reasoning of the case to apply to § 1988 as well."⁸² Three months later, in applying *Buckhannon* to § 1988, the Fourth Circuit broadened its scope to

78. Justice Scalia gives a one-page rambling explanation as to why he feels "prevailing party" qualifies as a legal term of art, but he too fails to provide any citation as to why Congress recognized it as such. See *Buckhannon*, 532 U.S. at 615-16, (Scalia, J. concurring).

79. *Buckhannon*, 532 U.S. at 603. As Justice Ginsburg's dissent noted, dictionaries provide guidance only on the general usage of a particular term, but are silent as to the intended meaning in a specific context. Thus, if Congress employs a term as a "legal term of art," it is to the legislative history one must turn for guidance. *Id.*, at 628 (Ginsburg, J. dissenting). As one commentator has recognized, "[i]f courts resolved controversial legal issues by the mechanical process of opening up *Black's Law Dictionary*, our nation would not need judges interpreting the law." Paolo Annino, *The Buckhannon Decision: The End of the Catalyst Theory and a Setback to Civil Rights*, 26 MENTAL & PHYSICAL DISABILITY L. REP. 11, 12 (Jan-Feb. 2002).

80. *Buckhannon*, 532 U.S. at 602. See also *Union of Needletrades, Indus. and Textile Employees, AFL-CIO, CLC v. U.S. Immigration and Naturalization Serv.*, 202 F. Supp. 2d 265, 268 (S.D.N.Y. 2002).

81. *Buckhannon*, 532 U.S. at 602-03 n.7.

82. *N.Y. State Fed'n of Taxi Drivers, Inc. v. Westchester County Taxi and Limousine Comm'n*, 272 F.3d 154, 158 (2d Cir. 2001).

include all “prevailing party” statutes, declaring that the term “prevailing party” must be “[i]nterpreted. . .consistently” – that is, without distinctions based on the particular statutory context in which it appears.”⁸³ Courts within the First,⁸⁴ Third,⁸⁵ Eighth,⁸⁶ Ninth,⁸⁷ and Tenth⁸⁸ Circuits also quickly followed the Supreme Court’s lead, extending *Buckhannon* to § 1988.

b. Individuals with Disabilities Education Act

The Second Circuit found supporting language for extending *Buckhannon* to the Individuals with Disabilities Education Act (IDEA) in Supreme Court precedent: “[T]he standards used to interpret the term “prevailing party” under any given fee-shifting statute are generally applicable in all cases in which Congress has authorized an award of fees to a ‘prevailing party.’”⁸⁹ The court rejected arguments that legislative history of the IDEA made *Buckhannon* inapplicable.

However, district courts within the Seventh Circuit Have split on the issue. Of the four IDEA cases in the Northern District of Illinois to address *Buckhannon*’s applicability to the IDEA, three have applied *Buckhannon*, while one has not.⁹⁰ In both *Brandon K. v. New Lenox School District* and *Jose Luis R. v. Joliet Township High School District*, each district court mechanically applied *Buckhannon* to the IDEA.⁹¹ In contrast, the court in *T.D. v. La Grange School*

83. *Smyth v. Rivero*, 282 F.3d 268, 274 (4th Cir. 2002) (quoting *Buckhannon*, 532 U.S. at 603 n.4).

84. *Richardson v. Miller*, 279 F.3d 1 (1st Cir. 2002).

85. *Farley v. Phila. Hous. Auth.*, 2002 U.S. Dist. LEXIS 11390 (E.D. Pa. 2002).

86. *Christina A. v. Bloomberg*, 167 F.Supp. 2d 1094, (D.S.D. 2001).

87. *Bennett v. Yoshina*, 259 F.3d 1097 (9th Cir. 2001).

88. *Effertz v. Barton Co.*, 157 F. Supp. 2d 1178 (10th Cir. 2001).

89. *J.C. v. Reg’l Sch. Dist. 10*, 278 F.3d 119, 123 (2nd Cir. 2002) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983)). The court averted *Buckhannon*’s exception by concluding that the legislative history of the IDEA did not provide “explicit statutory authority” to the contrary.

90. Compare *Brandon K. v. New Lenox Sch. Dist.*, 2001 WL 1491499 (N.D. Ill. E. Div. 2001), (*Jose Luis R. v. Joliet Township High Sch. Dist.* 204, 2001 WL 1000734 (N.D. Ill. 2002), and *Koswenda v. Flossmoor Sch. Dist.* 161, 2002 WL 31415744 (N.D. Ill 2002) (all applying *Buckhannon*) with *T.D. v. La Grange Sch. Dist.* 102, 222 F. Supp. 2d 1062 (N.D. Ill. E. Div. 2002) (analyzing the text, structure and legislative history of the statute to conclude that *Buckhannon* should be inapplicable to the IDEA).

91. *Brandon K.*, 2001 WL 1491499 (applying *Buckhannon* because the Court referred to similar fee shifting statutes including § 1988.). See also *Jose Luis R.* 2001 WL 1000734 (stating that nothing in *Buckhannon* limited the holding to the two statutes at issue).

District analyzed the text and structure of the IDEA and found that “critical distinctions” between it and the statutes directly at issue in *Buckhannon* existed. For example, the court noted that the statutory text of the IDEA, unlike the FHAA or the ADA, refers to settlement as a basis for fees.⁹² Also, the court quoted a provision allowing in some instances fees for mediation. Thus, the court hesitantly concluded: “I may be wrong. . . [but] the Court’s ruling in *Buckhannon* was not meant to extend to the IDEA.”⁹³

In an opinion issued less than three weeks later, the court in *Koswenda v. Flossmoor School District* disagreed with *T.D.*, asserting that many of the IDEA’s differences purported by *T.D.* are in fact found in the ADA.⁹⁴ Finding *T.D.* unpersuasive, the court went on to apply *Buckhannon* to the IDEA.⁹⁵

The Eighth Circuit,⁹⁶ the District of the District of Columbia⁹⁷ and the Southern District of New York⁹⁸ have all extended *Buckhannon*’s rationale to the IDEA.

c. Equal Access to Justice Act

At least one decision held, before it was reversed, that the “catalyst theory” was still an available claim under the “prevailing party” language of the Equal Access to Justice Act (EAJA),⁹⁹ despite *Buckhannon*’s indication to the contrary.¹⁰⁰ In deciding *Brickwood I*, the Court of Federal Claims did not treat the two elements of fee-shifting provisions independently;¹⁰¹ rather, it combined both elements and focused on the fact that the EAJA requires a court to “consider the *merits* of the underlying lawsuit” before giving an award to a

92. *T.D.*, 222 F. Supp. 2d at *8-9 (analyzing 20 U.S.C. § 1415(i)(3)(D) (2000)).

93. *Id.*

94. *Koswenda*, 2002 WL 31415744, at *8 (noting that both statutes involve a similar multi-tiered administrative process).

95. *Id.* at *9.

96. *John T. v. Iowa Dept. of Educ.*, 258 F.3d 860, 863-64 (8th Cir. 2001)

97. *Akinseye v. Dist. of Columbia*, 193 F. Supp. 2d 134, 136-40 (D.D.C. 2002) (following the Second Circuit’s decision absent precedent from the D.C. Circuit)

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

99. 28 U.S.C. § 2412(d)(1)(A) states: “[A] court shall award fees to a prevailing party . . . unless the court finds that the position of the United States was substantially justified.”

100. *See Brickwood Contractors, Inc. v. United States*, 49 Fed. Cl. 738 (2001) *vacated by Brickwood Contractors*, 288 F.3d 1371 (Fed. Cir. 2002).

101. *See* discussion in *Union of Needletrades, Indus. and Textile Employees, AFL-CIO, CLC v. U.S. Immigration and Naturalization Serv.*, 202 F. Supp. 2d 265 (S.D.N.Y. 2002), or refer to part I (A) above.

plaintiff by considering whether the defendant's position "was substantially justified."¹⁰² This requirement, the court argued, differed from the statutes at issue in *Buckhannon* because the court was *required* to take into consideration the merits of a defendant's position before it determined whether to award the plaintiff fees. Since the finding of judicial merit was the rationale behind *Buckhannon's* holding, the court held that the plain language of the EAJA was not hindered by the Supreme Court's ruling.¹⁰³ In addition, because the statute presumed the award after the "substantially justified" analysis ("shall award to a prevailing party" instead of the "may award" provision of the FHAA and the ADA), the court argued that the EAJA was intended by Congress to apply to different circumstances. Finally, the court analyzed legislative intent to decipher the purpose of the EAJA, finding that this intent would be best preserved if *Buckhannon* did not apply.¹⁰⁴ In other words, if the court's first two arguments failed under appellate scrutiny, the third argument tried to persuade that the EAJA fell within the "explicit statutory authority" exception of *Buckhannon*.

The *Brickwood I* decision gave hope to litigants filing for fees under "prevailing party" language who feared that *Buckhannon* would apply across the board to all "prevailing party" statutes. In the Ninth Circuit, one plaintiff tried to persuade the court that the "catalyst theory" was alive and well under the EAJA, using *Brickwood I* as the backbone of his argument.¹⁰⁵ In *Perez-Arellano* the Ninth Circuit shunned *Brickwood I's* holding, reasoning that the different textual language in the EAJA "does not address at all the definition of 'prevailing party.'"¹⁰⁶ The court did not address *Brickwood I's* "explicit" Congressional intent argument.¹⁰⁷

Courts in other circuits also disagreed with *Brickwood I*, holding that the EAJA fell within *Buckhannon's* guise. Within a year of

102. See *Brickwood Contractors*, 49 Fed. Cl. at 746.

103. *Id.* at 746-47.

104. *Id.* at 179. The court found that the goal of Congress in enacting the EAJA was to provide small businesses and individuals with access to the courts which they otherwise would not have had. Extending *Buckhannon* to the EAJA, the court argued, would compromise this goal. However, the *Brickwood I* court could not point to any "explicit" Congressional language.

105. *Perez-Arellano v. Smith*, 279 F.3d 791 (9th Cir. 2002).

106. *Id.* at 794 n.4.

107. *Id.*

Buckhannon, courts within jurisdictions of the Second,¹⁰⁸ Fifth,¹⁰⁹ and Seventh¹¹⁰ Circuits agreed with the Ninth¹¹¹ Circuit that *Buckhannon* extended to the EAJA. The Court of International Trade also followed suit.¹¹² Seven years prior to *Buckhannon*, the Sixth Circuit had already approached and answered the question, noting that Congress intended the EAJA's "prevailing party" provision to be read consistently with other fee-shifting statutes.¹¹³ The *Brickwood I* decision thus seemed an aberration, and indeed it was: Twenty-six days before *Buckhannon* celebrated its first birthday, the Federal Circuit overturned the decision.¹¹⁴ Among the reasons for its conclusion, *Brickwood II* discounted the lower court's finding that the EAJA's legislative history was explicit enough to show that Congress intended a contrary definition of "prevailing party."¹¹⁵ The extension of *Buckhannon* to all "prevailing party" statutes (absent an exception due to "explicit statutory authority") seems ostensibly complete.¹¹⁶

2. The Possible Extension of *Buckhannon* to Statutes Using the Root Word "Prevail"

Since "prevailing party" was the specific phrase deemed a "legal term of art" by the Supreme Court's decision, the next question in *Buckhannon's* wake is whether statutes that utilize other modifications of the word "prevail" should be included within the scope of the decision. Terms such as "substantially prevail" or "finally prevail" are common in fee-shifting provisions.¹¹⁷ One canon of construction instructs that statutory use of different terms evinces

108. See *Albodun v. McElroy*, 2002 U.S. Dist. LEXIS 3519 (2d Cir. 2002) (mechanically extending *Buckhannon* to EAJA in a half-page opinion).

109. See *Alcocer v. Immigration and Naturalization Serv.*, 2001 U.S. Dist. LEXIS 20543, *3 (N.D. Tex. 2001) (interpreting *Buckhannon* to "strongly insist[] a court respect ordinary language in its interpretation of the term 'prevailing party'").

110. See *Sileikis v. Perryman*, 2001 U.S. Dist. LEXIS 12737 (N.D. Ill. 2001).

111. *Id.*

112. See *Former Employees of Motorola Ceramic Products v. U.S.*, 176 F. Supp. 2d 1370 (Ct. Int'l Trade 2001).

113. *Heeren v. City of Jamestown*, 39 F.3d 628, 631 (6th Cir. 1994).

114. *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371, (Fed. Cir. 2002).

115. *Id.* at 1369-70.

116. There is even precedent for the extension of *Buckhannon* to contracts containing the term "prevailing party." *Utility Automation 2000, Inc. v. Choctawhatchee Elec. Co., Inc.*, 298 F.3d 1238, 1248 (11th Cir. 2002).

117. See *supra* notes 42-50 and accompanying text.

congressional intent to express different meanings.¹¹⁸ However, another canon states that the use of *similar* language in different statutes presumes application of the same interpretive standards.¹¹⁹ But since the Court interpreted the term “prevailing party” as a “legal term of art,” should not the first canon be the most informative? The inquiry is whether the term “prevailing party” is the exclusive carrier of the *Buckhannon* syndrome, thereby leaving congruent terms immune, or whether the term “prevail” is the operative root, providing an open wound for *Buckhannon’s* venom to infect numerous other fee-shifting statutes.

By the time *Buckhannon* blew out its first birthday candle, only two courts had addressed this question.¹²⁰ Both analyzed the issue in the context of the Freedom of Information Act (FOIA), and both held that *Buckhannon’s* assault on fee-shifting provisions had indeed contaminated all such “prevailing” language. Several significant arguments are emerging in the lower courts regarding *Buckhannon’s* extension to these types of statutes. Each is discussed below.

a. Footnote Four

Buckhannon’s ambiguity regarding its limitations has provided opposing sides with a great deal of room to argue either for or against its extension to statutes using the root word “prevail.” Parties wishing to extend the opinion to these statutes will take solace in *Buckhannon’s* footnote four. As mentioned, the Supreme Court recognized that congressional use of the term “prevailing party” was not unique to the statutes at issue in *Buckhannon*.¹²¹ However, after listing several examples that used the exact language at issue, the *stelliscript* set the stage for a future coup d’état by inexplicably

118. See *Legacy Emanuel Hosp. & Health Ctr. v. Shalala*, 97 F.3d 1261, 1265 (9th Cir. 1996) (“The use of different language by Congress creates a presumption that it intended the terms to have different meanings.”) (citing *Washington Hosp. Ctr. v. Bowen*, 795 F.2d 139, 146 (D.C. Cir. 1986)).

119. See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 692 (1983) (comparing the similar wording of § 304(d) and § 307(f) of the Clean Air Act and concluding that the similar language is evidence of Congressional intent to equate the two statutes).

120. *Union of Needletrades, Indus. and Textile Employees, AFL-CIO, CLC v. U.S. Immigration and Naturalization Serv.*, 202 F. Supp. 2d 265, 279-80 (S.D.N.Y. 2002); *Oil, Chem. and Atomic Workers Int’l Union, AFL-CIO v. Dep’t of Energy*, 288 F.3d 452, 456-57 (D.C. Cir. 2002).

121. *Buckhannon*, 532 U.S. at 602-03 (citing *The Civil Rights Act of 1964*, 42 U.S.C. § 2000e-5(k); *The Voting Rights Act Amendments of 1975*, 42 U.S.C. § 19731(e); *The Civil Rights Attorney’s Fees Awards Act of 1976*, 42 U.S.C. § 1988, and, generally, *Marek v. Chesny*, 473 U.S. 1, 43-51 (1985)).

including among this list the entire appendix of Justice Brennan's dissenting opinion in *Marek v. Chesney*,¹²² which cataloged over one-hundred fee-shifting statutes containing virtually every variation of fee-shifting language.¹²³ In footnote four, following the reference to this appendix, the Court stated, "[w]e have interpreted these fee-shifting provisions consistently."¹²⁴

Champions for *Buckhannon's* extension to "prevail"-rooted statutes therefore are justified in arguing that the *Marek* citation means that, regardless of terminology, *Buckhannon's* hand guides not only "prevailing party" statutes, but also every statute listed in *Marek*.¹²⁵ At issue in *Marek* was whether an award of "costs" to a litigant included "attorney's fees." In dissent, Justice Brennan divided 118 fee-shifting statutes into three broad categories. Each category described a separate relationship between "costs" and "attorney's fees" according to statutory language.¹²⁶ Thus, *Marek's* appendix actually demonstrates how fee-shifting provisions have been *inconsistently* interpreted according to differing statutory language. Later in footnote four, *Buckhannon* cites to footnote seven in *Hensley v. Eckerhart* to support the proposition that *Marek's* list has been interpreted consistently.¹²⁷ However, *Hensley's* footnote seven compares only "prevailing party" statutes and concludes by stating "[t]he standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" ¹²⁸

How then does one make sense of *Buckhannon's* inexplicable citation to *Marek's* appendix? The court in *Union of Needletrades* argued for incorporation of the appendix, stating that the Supreme Court "implicitly acknowledged that, in fact, the language of the statutes varied and that the Court nonetheless interpreted their

122. *Id.*

123. *Marek*, 473 U.S. at 44-51.

124. *Buckhannon*, 532 U.S. at 603 n.4 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 n. 7 (1983)).

125. *See* *Crabill v. Trans Union, L.L.C.*, 259 F.2d 662, 666-67 (7th Cir. 2001) (using the *Marek* citation as an indication of the Court's intent to apply *Buckhannon* to all fee-shifting provisions).

126. *Marek*, 473 U.S. at 43-51. The three categories were: (1) statutes that refer to attorney's fees "as part of the costs," (2) statutes that do not refer to attorney's fees as part of the costs, and (3) statutes that may or may not refer to attorney's fees as part of the costs.

127. *Buckhannon*, 532 U.S. at 603 n.4.

128. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

provisions ‘consistently.’”¹²⁹ But a stronger and contrasting argument can be made that the Court was simply citing to *Marek* in order to provide the reader with a list that comprehensively contained other “prevailing party” statutes. This explanation would be consistent with *Buckhannon*’s failure to specifically cite non-“prevailing party” statutes and the opinion’s approval of its extension to the CRA of 1964, the VRAA of 1975, the CRAFAA of 1976, and *Hensley*, all of which employ or discuss *only* “prevailing party” language. The *Marek* appendix is thus an isolated and inconsistent example presented in *Buckhannon* that includes both “prevailing party” and non-“prevailing party” statutes. Although Rehnquist’s inclusion of the *Marek* appendix sets the stage for the Court to expand *Buckhannon* to both “prevailing” and non-“prevailing” fee-shifting statutes alike, courts should resist using footnote four’s rationale to extend *Buckhannon* to fee-shifting provisions other than those employing “prevailing party” language, especially since other persuasive rationale exists for its extension.

b. “Prevail” as the Operative Word

A second (and perhaps more persuasive) argument for the expansion of *Buckhannon* to several “prevailing” fee-shifting statutes is that “prevailing” is the operative word “from which the term of art... derives its definition.”¹³⁰ Under this theory, the word “prevailing” is a term used to connote differing degrees of success, whether it is modified by the terms “substantial,” “finally,” or left unmodified, as long as the litigant’s success is manifested in some success on the merits.¹³¹

While *Buckhannon* does not explicitly state that it adheres to this theory, the main issue in *Buckhannon* is whether a litigant has attained a procedural achievement that meets the legal definition of “prevail.” Thus, there is some merit to the argument that the word “prevail” provides the muscle in the term “prevailing party.” The Court, in defining “prevailing party,” referenced *Black’s Law Dictionary*, which contained the exact term.¹³² However, the word “prevail,” according to *Black’s*, is substantially broader than

129. *Union of Needletrades, Indus. and Textile Employees, AFL-CIO, CLC v. U.S. Immigration and Naturalization Serv.*, 202 F. Supp. 2d 265, 274 (S.D.N.Y. 2002).

130. *Id.* at 280-81.

131. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 689-90 (1983); *see also Needletrades*, 202 F. Supp at 283.

132. *Buckhannon*, 532 U.S. at 603.

“prevailing party” and is defined as: “[t]o be or become effective”, “to obtain”, and “[t]o *succeed*.”¹³³ This definition is nearly identical to its definition in *Webster’s Dictionary*.¹³⁴ But the word prevail cannot be read to embody one connotation in one set of attorney’s fees statutes and convey its ordinary sense in another simply because Congress added a suffix to the root to make the term grammatically correct. Thus, the issue of whether the differing terms should be afforded different meanings should instead focus on the modifying language accompanying “prevailing,” such as “substantially” or “finally,” instead of focusing solely on the root word “prevail.” This note analyzes the modifier “substantially” as an example.

Because the base term “prevailing party,” modified or unmodified, is consistently found in various fee-shifting statutes, it would be trite to argue that Congress intended separate meanings for that specific term. The issue thus becomes how does the term “substantially” modify “prevailing party”? Since it is impossible to achieve greater procedural success than a judicial order on the merits, any argument that a litigant must achieve success greater than “prevailing party” status must fail. Rather, the question is whether the term allows for a lesser degree of success for a plaintiff to qualify for an award. *Black’s Law Dictionary* fails to define “substantially prevailing party”. *Black’s*, however, does define the term “substantial” as “actually existing; real; of considerable value.”¹³⁵ No quantifiable modifiers such as “nearly” or “almost” are listed—the definition is limited to substantive success. In at least one instance, Congress has indicated that it defines “prevailing party” the same as one who has “substantially prevailed.”¹³⁶ Combined, these arguments lead to a persuasive conclusion that “prevailing” and “substantially prevailing” parties are synonymous, leaving little rationale that the term “substantially” will create a greater probability that a successful party may achieve “prevailing party” status. In fact, one court has

133. BLACK’S LAW DICTIONARY 1188 (6th ed. 1991).

134. WEBSTER’S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 1067 (3d College ed. 1991) (meaning to be “effective” or to “succeed”).

135. BLACK’S LAW DICTIONARY 1428.

136. See Internal Revenue Code, 26 I.R.C. § 7430(c)(4)(A) (2002) (stating: “In general, the term “prevailing party” means any party . . . which:

(I) has substantially prevailed with respect to the amount in controversy, or
(II) has substantially prevailed with respect to the most significant issue or set of issues presented.”)

argued that “the modifier ‘substantially’ might make it more difficult to attain such status:

To put this in concrete terms, a FOIA plaintiff may seek thousands of documents but wind up with a judgment providing only a handful of insignificant documents. One might say this plaintiff was a prevailing party, but nevertheless not say that the plaintiff substantially prevailed.¹³⁷

Thus, unless Congress explicitly states otherwise, non-quantifiable modifiers such as “substantially” should have no effect on whether a party is legally considered to be a “prevailing party.”¹³⁸ It is untenable to argue that Congress meant to attach materially different legal consequences to the term “prevail” when it attached to it such modifiers. As of late November 2002, this author was unable to find a case in which the court failed to extend *Buckhannon* to such a statute.¹³⁹

c. *Buckhannon’s* Criticisms Exist in the “Substantially Prevailing” Framework

Every one of the Court’s criticisms of the “catalyst theory” can be applied in the “substantially prevailing” context. For example, attorney’s fees could still be awarded without a successful party obtaining a “judicially sanctioned change in the legal relationship of the parties.” A court may be authorized to award fees in this context despite a plaintiff’s failure to establish that the complaint could survive a motion to dismiss when defendant abandons his claim for reasons other than legal considerations (such as lack of money or fear of public backlash).

137. *Oil, Chem. & Atomic Workers Int’l*, 288 F.3d 452, 455 (D.C. Cir 2002).

138. An example of a quantifiable modifier would be “partially.” To this author’s knowledge, no fee-shifting provision contains quantifiable modifiers. However, if Congress passed a fee-shifting provision allowing “partially prevailing” parties to recover, it is likely that dicta from *Ruckelshaus* would provide the necessary distance to prevent *Buckhannon* from applying to such language. In *Ruckelshaus*, the court noted that section 307(f) was “meant to expand the class of parties eligible for fee awards from prevailing to *partially prevailing* parties – parties achieving *some success*.” *Ruckelshaus*, 463 U.S. at 945. Thus, the Court indicated that a “partially prevailing” party would require a less stringent test than the one provided in *Buckhannon*.

139. See, for example, *Pitchford v. Oakwood Mobile Homes, Inc.*, 2002 U.S. Dist. LEXIS 13847 (W.D. Vir. 2002) (extending *Buckhannon* to the Magnuson-Moss Act’s, 15 U.S.C. § 2310(d)(2) term “finally prevails”); See also *Oil, Chem. & Atomic Workers*, 288 F.3d 452, and *Union of Needletrades, Indus. and Textile Employees, AFL-CIO, CLC v. U.S. Immigration and Naturalization Serv.*, 202 F. Supp. 2d 265, 285 (S.D.N.Y. 2002) (extending *Buckhannon* to FOIA’s “substantially prevailing” language).

Another criticism cited by the *Buckhannon* Court was the “second major litigation” lower courts had employed to determine whether plaintiff’s allegations prompted defendant’s cessation of his actions.¹⁴⁰ A decision to award fees required inquiry into defendant’s “subjective motivations” and could turn on inferences from defendant’s conduct. This issue would be prevalent in the “substantially prevailing” framework as well.

Finally, the *Buckhannon* Court cast aside concerns that mischievous defendants would be encouraged to unilaterally moot an action on the steps of the courthouse.¹⁴¹ Without statistical proof that *Buckhannon* has indeed led to such action, the Court is sure to remain steadfast in this argument when faced with “substantially prevailing” fee-shifting statutes. Thus, all of the same concerns remain in this context, and one could foresee the Court extending *Buckhannon* to “substantially prevailing party” statutes under this rationale.

d. “Explicit Statutory Authority”

Whether “explicit statutory authority” exists must be analyzed on a statute-by-statute basis. At least one court has addressed the issue as it applies to the “substantially prevailing” language in FOIA. The D.C. Circuit in *Oil, Chemical and Atomic Workers International Union* argued that FOIA’s legislative history was too inconclusive to merit a deviation from the *Buckhannon* position.¹⁴² However, in *Vermont Low Income Advocacy Council*,¹⁴³ Judge Friendly analyzed the legislative history of FOIA, noting that it was “unusually complete.”¹⁴⁴ The committee reports basically advise courts as to the discretion they should use in awarding fees once it determines whether a party has prevailed.¹⁴⁵ The D.C. Circuit was correct in concluding that the issue of whether or not a party “prevailed” was not discussed.¹⁴⁶ Therefore, at least in the context of FOIA, no

140. *Buckhannon*, 532 U.S. at 609-10.

141. *Id.* at 608.

142. *Oil, Chem. & Atomic Workers*, 288 F.3d at 456-57.

143. *Vt. Low Income Advocacy Council v. Usery*, 546 F.2d 509, 512-13 (2d Cir. 1976).

144. *Id.* at 512.

145. *Id.* at 512-13. See also H.R. REP. No. 93-876 (1974), reprinted in Legislative History of the Freedom of Information Act, 1974 Amendments 126-27 & n.10 (1975); S. REP. No. 93-854 (1974), reprinted in Legislative History, *supra*, at 170.

146. *Oil, Chem. & Atomic Workers*, 288 F.3d, at 456-57.

“explicit statutory authority” has been found that would dispute *Buckhannon’s* applicability.

e. Applicability of *Ruckelshaus*

Another clue to deciphering whether the Supreme Court will extend *Buckhannon* to the “substantially prevailing” framework is the Court’s possible adherence to the belief that, unless explicitly stated otherwise, Congress intends *all* fee-shifting language to award only “prevailing parties.” In a 1983 opinion also written by Chief Justice Rehnquist, the Court read a “prevailing party” requirement into the fee-shifting provision of the Clean Air Act, a provision containing no reference either to “prevailing party” language or any other level-of-success requirement.¹⁴⁷ Instead, the statute contained only the discretionary “whenever [the court] determines that such an award is appropriate” standard. Thus, one could expect an argument based on *Ruckelshaus* to go something like this: If “prevailing party” status is required to receive fees in non-“prevailing party” statutes, then certainly it will extend to “substantially prevailing” statutes. An in-depth analysis of this case, *Ruckelshaus, Administrator, Environmental Protection Agency v. Sierra Club* is provided in the next section, arguing that *Ruckelshaus* should in no way be used to extend *Buckhannon* to any fee-shifting statute.

f. Conclusion: Whether *Buckhannon* Extends to Fee-Shifting Statutes Employing the Root Word “Prevail”

The Court may have a justifiable basis to expand *Buckhannon* to other fee-shifting provisions that use the root word “prevail.” The rationale should be limited to the observation that “prevail” is the operative word, or that the same policy reasons that existed in *Buckhannon* are present in the case being considered. Using *Buckhannon’s* ambiguous reference to the *Marek* appendix in footnote four, or the Court’s opinion in *Ruckelshaus* to extend *Buckhannon* to statutes using the root “prevail,” simply goes too far. And, as always, legislative history should be analyzed to determine whether alternate “explicit” intent exists.

3. Does *Buckhannon* Have a Limit? The Possible Extension to Non-“Prevailing Party” Statutes

There is concern among many public interest plaintiffs that

147. *Ruckelshaus*, 463 U.S. 680.

several precedential Supreme Court opinions will be used as a link to extend *Buckhannon* to every fee-shifting statute, regardless of Congress's conscious attempt to omit or relax a level-of-success requirement. Two cases justify reason for concern. However, as opinions regarding non-"prevailing party" provisions begin to trickle in, courts generally appear reluctant to extend *Buckhannon* based on these two opinions.

The first case of analysis, *Ruckelshaus*, has the distinction of being one of the most relevant cases to determining the breadth of *Buckhannon's* application while preceding the *Buckhannon* decision. Its interpretation in relation to *Buckhannon* is paramount to environmental litigants and their attorneys since the majority of environmental fee-shifting statutes contain non-"prevailing party" language.¹⁴⁸ Thus, this note finds it necessary to examine this important case in order to illuminate why *Buckhannon's* holding should *not* be extended to non-"prevailing party" language.

Those in favor of *Buckhannon's* extension will covet the second case of analysis, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, for Justice White's strong dicta. There the court seemed to indicate that fee provisions in environmental statutes should be interpreted the same as civil rights statutes, such as § 1988. But much of the language of this case seems to contradict the holding of *Ruckelshaus*, and considering it was written only three years after *Ruckelshaus* with the unanimous support of the Court, a distinction must exist. This case will be discussed in depth after *Ruckelshaus*.

a. *Ruckelshaus*

Ruckelshaus was decided in 1983, eighteen years before *Buckhannon*, and was also written by Justice Rehnquist. In *Ruckelshaus*, the Environmental Defense Fund (EDF) and the Sierra Club each brought suit against the Environmental Protection Agency (EPA) under the Clean Air Act. The EDF alleged that emission standards promulgated by EPA had been tainted by inappropriate agency *ex parte* contacts with private industry. Alternatively, the Sierra Club argued that EPA did not have the authority to issue such standards. The D.C. Circuit rejected all claims alleged by both parties.¹⁴⁹ However, in two subsequent opinions, the court

148. See *supra* notes 54-62.

149. *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

unanimously decided that it was “appropriate” to award attorney’s fees to each plaintiff under § 307(f) of the Clean Air Act.¹⁵⁰

Section § 307(f) states: “In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) *whenever it determines that such an award is appropriate.*”¹⁵¹ Thus, of the two elements described as characteristic of fee-shifting provisions in section I(A) above, only the second (judicial discretion) is present in this provision. The level of success requirement is noticeably absent. The First Circuit had previously determined that such language suggested great judicial latitude in awarding fees, stating:

“The purpose of an award of costs and fees . . . is to allocate the costs and litigation equitably, *to encourage the achievement of statutory goals.* When the government is attempting to carry out a program of such vast and uncharted dimensions, there are roles for both the official agency and a private watchdog.”¹⁵²

In awarding fees to the Sierra Club and EDF, the D.C. Court of Appeals reasoned that both parties, as watchdogs, had indeed encouraged the achievement of such statutory goals, and thus qualified for fees.¹⁵³ However, the court noted that “occasions upon which non-prevailing parties will meet such criteria [will be] exceptional.”¹⁵⁴

When the issue reached the Supreme Court, the question was whether Congress, in adopting such statutory language, intended courts to have discretion to award attorney’s fees to a party who achieved *no* success on the merits after a full trial. Read in light of *Buckhannon*, the Court’s decision is somewhat confusing and contradictory.

As will be discussed in section III(B) of this note, there are four basic levels of plaintiff success as it relates to an award of attorney’s fees. Depending on statutory language, plaintiffs have historically been awarded a fee entitlement for the following procedural victories: (1) a favorable judicial order on the merits, (2) the procuring of a

150. *Sierra Club v. Gorsuch*, 672 F.2d 33, 34 (D.C. Cir. 1982); *Sierra Club v. Gorsuch*, 684 F.2d 972, 973 (D.C. Cir. 1982). The Sierra Club was awarded \$44,715, plus \$644.60 in expenses; the EDF was awarded \$45,874.10.

151. 42 U.S.C. § 7607 (1976).

152. *Natural Res. Def. Council, Inc. v. EPA*, 484 F.2d 1331, 1338 (1st Cir. 1973) (emphasis added).

153. *Sierra Club*, 672 F.2d. at 34.

154. *Id.* at 39.

consent decree,¹⁵⁵ (3) contracting a private settlement, and (4) defendant's voluntary cessation of an action without legal obligation to do so ("catalyst theory"). The *Buckhannon* Court interrupted this precedential practice, drawing the line for a fee entitlement somewhere between a consent decree (number 2 above) and a private settlement (number 3 above). The issue in *Ruckelshaus* did not concern any of these categories; instead the Court had to decide whether *no* level of success might qualify, an issue never considered in *Buckhannon*. However, seemingly in line with *Buckhannon*, the *Ruckelshaus* Court concluded that "some success on the merits [must] be obtained before a party becomes eligible for a fee award."¹⁵⁶ Remaining consistent, the *Ruckelshaus* Court also stated, "a fee claimant must 'prevail' before it may recover attorney's fees."¹⁵⁷

However, a closer look at *Ruckelshaus* reveals a deviation from *Buckhannon's* definition of the term "prevail." The *Ruckelshaus* Court noted legislative history of § 307(f) providing judges discretion to award attorney's fees for plaintiffs using the "catalyst theory," a level of success *not* on the merits. In its discussion of the legislative history of § 307(f), the Court pointed out that the 1970 Senate Report contained the following explanation of how the "whenever appropriate" standard extends to the "catalyst theory," giving new meaning to the traditional "prevailing party" language:

"The Courts should recognize that in bringing legitimate actions under [Section 307(f)] citizens would be performing a public service and in such instances the courts should award costs of litigation to such party. *This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions.*"¹⁵⁸

Later in its opinion, the Court noted the discrepancies among the lower courts in defining the term "prevailing party":

"Some courts — although, to be sure, *a minority* — denied fees to plaintiffs who lacked a formal court order granting relief, while others required showings not just of some success, but 'substantial' success. Indeed, even today, courts require that, to be a 'prevailing party' one must succeed on the 'central issue.'"¹⁵⁹

155. See note 168 (defining consent decree and explaining its use).

156. *Ruckelshaus*, 463 U.S. at 682. See also *id.* at 694.

157. *Id.* at 686.

158. *Id.* at 686 n.8 (quoting S. Rep. No. 91-1196, at 38 (1970))(emphasis added).

159. *Id.* at 688 (quoting *Coen v. Harrison County Sch. Bd.*, 638 F.2d 24, 26 (5th Cir. 1981)).

The Supreme Court determined that the legislative history of § 307(f)¹⁶⁰ was “intended to eliminate [courts’] restrictive readings of ‘prevailing party,’ thereby expanding it to incorporate the “catalyst theory.”¹⁶¹ In other words, according to *Ruckelshaus*, Congress explicitly intended, and the Supreme Court approved, the use of the catalyst theory as a viable method for obtaining fees under the “whenever appropriate” standard.¹⁶² In doing so, the Court failed to foresee the confusion it would create with its impending *Buckhannon* decision. *Ruckelshaus* simply included the “catalyst theory” under Congress’s definition of a “prevailing party” (at least in this situation), as was consistent with the majority view at the time.

Modern courts looking to *Ruckelshaus* as a guide to see whether *Buckhannon* should be extended must take more than a cursory glance. By reading a “prevailing party” requirement into the “whenever appropriate” standard,¹⁶³ *Ruckelshaus* tempts modern courts to extend *Buckhannon* to similarly worded statutes.¹⁶⁴ But couple this aspect of *Ruckelshaus* with the Court’s understanding that Congress intended inclusion of the “catalyst theory” in the “whenever appropriate” standard, and *Ruckelshaus* contradicts *Buckhannon*’s holding that the “catalyst theory” does not qualify as a “prevailing party.” Thus, courts today analyzing *Ruckelshaus*’ requirement that a “prevailing party” must be read into a fee-shifting statute, regardless of an omission of any level-of-success requirement, must realize that *Ruckelshaus* and *Buckhannon* differed in their understanding of what types of successes were considered to achieve “prevailing party” status. It follows that *Buckhannon*’s rationale is not controlling in non-“prevailing party” statutory situations.

If today’s courts find the above analysis of *Ruckelshaus* to be unpersuasive in distinguishing *Buckhannon*’s rationale, perhaps a better interpretation of *Ruckelshaus* is found in the Court’s

160. *Id.* at 686 n.8, (quoting S. Rep. No. 91-1196, at 38 (1970)).

161. *Id.* at 688.

162. *Id.* at 686-87 n.8 (“Congress found it necessary to explicitly state that the term appropriate ‘extended’ to suits that forced defendants to abandon illegal conduct, although without a formal court order; this was no doubt viewed as a somewhat expansive innovation, since under then-controlling law, . . . some courts awarded fees only to parties formally prevailing in court.”).

163. *See also* *Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1095 (5th Cir. 1999) (noting that the Supreme Court has read a prevailing party requirement into the Endangered Species Act).

164. *See* *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 666-67 (7th Cir. 2001) (noting that the Court in *Buckhannon* emphasized the similarity of most federal fee-shifting statutes).

recognition that Congress explicitly intended the “whenever appropriate” standard to qualify as an exception to *Buckhannon’s* stated general rule. Certainly *Ruckelshaus* determined that § 307(f) met *Buckhannon’s* requirement for “explicit statutory authority” for allowing recovery under the “catalyst theory.”

By late November 2002, only a handful of courts had expressed an opinion on the issue of *Buckhannon’s* extension to non-“prevailing party” provisions.¹⁶⁵ In the “whenever appropriate” context, the Eleventh Circuit has thus far provided the most comprehensive analysis in *Loggerhead Turtle v. County Council of Volusia County*.¹⁶⁶ There, a lawsuit under the Endangered Species Act (ESA)¹⁶⁷ was filed against a Florida county alleging that its lack of measures to protect endangered sea turtles was resulting in unauthorized takings.¹⁶⁸ After four years of litigation, the county adopted more stringent beachfront lighting regulations, resolving the problem, mooted plaintiffs’ claim.¹⁶⁹ Based on the “catalyst theory,” the district court held that plaintiffs were entitled to an award of fees, finding that the lawsuit was the primary impetus for the adoption of the regulations.¹⁷⁰ Arguing that *Buckhannon* invalidated the catalyst theory under the ESA, the county appealed.¹⁷¹

On appeal, the Eleventh Circuit held *Buckhannon* inapplicable to the ESA for three reasons. First, the court found “clear evidence that Congress intended that a plaintiff whose suit furthers the goals of a “whenever. . . appropriate” statute be entitled to recover attorney’s fees.”¹⁷² Because legislative history of the ESA provided little guidance on the matter, the court turned to *Ruckelshaus*, noting that the Supreme Court had already analyzed the legislative history of the “whenever appropriate” standard in the context of the Clean Air Act.¹⁷³ After reviewing the legislative material summarized in

165. See Jim Hecker, “Catalyst Theory” for Fee Awards in Environmental Suits Survives ‘*Buckhannon*,’ 32 ENV’T REP. (BNA) 1797 (2001) (considering *Buckhannon* issues in the context of environmental statutes containing non-“prevailing party” provisions).

166. *Loggerhead Turtle v. The County Council of Volusia County, Florida*, 307 F.3d 1318 (11th Cir. 2002).

167. 16 U.S.C. 1531

168. *Loggerhead Turtle*, 307 F.3d at *1-2.

169. *Id.* at *1-6.

170. *Id.* at *7-8.

171. *Id.* at *9.

172. *Id.* at 18.

173. *Id.*

Ruckelshaus, the court found “unambiguous evidence that Congress intended the ‘whenever . . . appropriate’ fee provisions of the Clean Air Act and Clean Water Act to allow fee awards to plaintiffs who do not obtain court ordered relief but whose suit has a positive catalytic effect.”¹⁷⁴ Since both statutes only briefly preceded the ESA and were drafted with exactly the same language, the court found it likely that Congress intended the ESA provision to have the same effect.¹⁷⁵

Second, the court reasoned that because *Buckhannon* “makes no reference whatsoever” to the “whenever appropriate” standard, *Buckhannon* likely does not apply outside the “prevailing party” context.¹⁷⁶ Finally, in “prevailing party” scenarios, the *Buckhannon* court was not persuaded by the argument that the catalyst theory is necessary to prevent “mischievous defendants” from avoiding liability for fees by voluntarily changing their conduct.¹⁷⁷ Such a fear, the Court argued may only materialize “in claims for equitable relief.”¹⁷⁸ Thus, the *Loggerhead Turtle* court argued that because suits under the ESA may only seek equitable relief, this policy argument does not exist in the “whenever appropriate” context.¹⁷⁹

Several district courts within the Ninth Circuit have also addressed *Buckhannon*’s potential extension to the ESA. The court in *Southwest Center*, holding that *Buckhannon* did not apply to the Endangered Species Act (ESA), was most persuaded by the fact that “the ‘whenever . . . appropriate’ language of the ESA is distinguishable on its face from the ‘prevailing party’ language of the civil rights statutes.”¹⁸⁰ The court also acknowledged the *Ruckelshaus* Court’s “implicit[] recogni[tion] [of] Congressional intent to adopt the

174. *Id.* at 21-22.

175. *Id.*

176. *Id.* at 22. The court’s statement that “*Buckhannon* makes no reference whatsoever” to the “whenever appropriate” standard is not entirely correct. As mentioned earlier, *Buckhannon* cited to the entire appendix of Justice Brennan’s dissent in *Marek v. Chesney*. Among the statutes Brennan listed were the CWA, the CAA, and the ESA. Thus, albeit indirectly, *Buckhannon* did reference the “whenever appropriate” standard. See subparagraph III(A)(2)(a) above.

177. *Buckhannon*, 532 U.S. at 608-09.

178. *Id.* at 608.

179. *Loggerhead Turtle*, 307 F.3d at *23. (“[T]he very policy consideration underlying the *Buckhannon* opinion actually cuts the other way in the contest of “whenever . . . appropriate” statutes.”)

180. *Southwest*, 182 F. Supp. 2d at 947. *See also id.* at 948 (“Given the Court’s increased reliance on the plain meaning of the specific language used by Congress in its statutes . . . we are disinclined to extend the Court’s interpretation to language that is dissimilar on its face.”). At the time of publication, *Southwest Center* is being appealed.

‘catalyst theory’ of attorney’s fee awards in statutes, such as the CAA, that contain the ‘whenever . . . appropriate’ standard.”¹⁸¹ Similarly, in *EPIC v. Pacific Lumber Company*, the court interpreted *Ruckelshaus* as an indication that the “whenever appropriate” standard creates a “less-demanding standard than that of the civil rights statutes.”¹⁸² The court went on to hold *Buckhannon* inapplicable to the ESA.

The fourth and final case discussing this issue as it applies to the ESA reached the same conclusion. In *Center for Biological Diversity v. Norton*, the Tenth Circuit likewise noted the differing language between the “prevailing party” and “whenever appropriate” statutes, concluding that “*Buckhannon* is not applicable [to the ESA].”¹⁸³ However, since neither party in that case raised the issue, the court declined to authoritatively decide it.¹⁸⁴

Outside of the “whenever appropriate” standard, at least one court has reached a contrasting result regarding *Buckhannon*’s applicability to non-“prevailing party” provisions. In *Crabill v. Trans Union, L.L.C.*,¹⁸⁵ Judge Posner indicated that *Buckhannon* extended to all fee-shifting statutes. The relevant statute was the Fair Credit Reporting Act (FCRA), which allows recovery of attorney’s fees “in the case of any *successful* action . . .” Seemingly, the court accepted *Buckhannon*’s (following referral to *Black’s Law Dictionary*) indication that “prevailing party” means “successful.”¹⁸⁶ The court then applied this meaning to the FCRA’s language. But Posner also cited to *Buckhannon*’s footnote four and Scalia’s concurring theory that “a litigant ‘who left the court emptyhanded gets no fees.’”¹⁸⁷ This interpretation is likely to be used later by the Seventh Circuit - and possibly others - to conclude that *Buckhannon* applies to *all* fee-shifting provisions. Adhering to the Seventh Circuit’s rationale¹⁸⁸ that “success” and “prevailing” are synonymous, the Eleventh Circuit has stated that it agrees with Posner’s conclusion with regard to the Fair

181. *Id.* at 947.

182. *Environmental Protection Information Center v. Pacific Lumber Company*, 2002 U.S. Dist. LEXIS 17909, *12 (N.D. Cal. 2002).

183. *Ctr. for Biological Diversity v. Norton*, 262 F.3d 1077, 1080 n. 2 (10th Cir. 2001).

184. *Id.*

185. *Crabill*, 259 F.3d at 666-67.

186. *Buckhannon*, 532 U.S. at 603. *See also supra* text accompanying note 26.

187. *Crabill*, 259 F.3d at 666.

188. *Crabill*, 259 F.3d at 666-67. *See also supra* text accompanying note 26.

Credit Reporting Act, a similarly worded statute.¹⁸⁹ However, Posner's dictum in this opinion contains almost no analysis¹⁹⁰ or research and could be easily sidestepped in other jurisdictions.¹⁹¹

To conclude, there are several reasons why *Ruckelshaus*' indication that a "prevailing party" must be read into all fee-shifting statutes (regardless of a statutory omission of any level of success requirement) should not be used to extend *Buckhannon* to "whenever appropriate" statutes. First, in contrast to *Buckhannon*, the *Ruckelshaus* Court's interpretation of the definition of "prevailing party" includes success via the "catalyst theory." Second, *Ruckelshaus* contemplates the issue of awarding fees where there had been *no* success at all and any application to other scenarios of a plaintiff's success is merely dicta. Third, the Court recognizes "explicit statutory authority" in the legislative history by expanding the scope of a judicial award to plaintiffs invoking the "catalyst theory." Fourth, several courts have indicated that the difference between the "prevailing party" and "whenever appropriate" provisions are clearly distinguishable on their face.¹⁹² Fifth, policy reasons stated in *Buckhannon* do not apply in the "whenever appropriate" context. Finally, it must be mentioned that, for the same reasons given above (see section II (A)(2)(a)), *Buckhannon*'s footnote four is ambiguous and one cannot conclude its extension applies to this issue as well.

b. *Pennsylvania*

In the other relevant Supreme Court decision, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, the pertinent issue was whether the Clean Air Act authorized fees for time spent by counsel in regulatory proceedings.¹⁹³ In other words, the crux of the issue in *Pennsylvania* was what type of attorney "action" warranted

189. *Nagle v. Experian Info. Solutions, Inc.*, 297 F.3d 1305, 1307 (11th Cir. 2002)(holding that the primary difference between the FCRA and the FDCPA's attorney's fees provisions is that the FDCPA allows for both statutory and actual damages, while the FCRA only allows actual damages).

190. *See*, for example, section III(A)(2)(a) of this note above for an analysis of *Buckhannon*'s footnote four.

191. The *Nagle* opinion of the Eleventh Circuit, merely agreed with *Crabill*'s "*result*" as it applied to FCRA, without proclaiming adherence to its rationale. While this seems to provide a little wiggle room for other statutes, it certainly appears that the Eleventh Circuit has already decided the issue with respect to the FCRA.

192. E.g. *see* fn. 162-165 and accompanying analysis.

193. *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 548 (1986).

recovery of fees. In answering this question, the Court analyzed circuit court precedent in the context of the Civil Rights Attorney's Fees Awards Act of 1976 (§ 1988) and determined that post-judgment monitoring of consent decrees was compensable.¹⁹⁴ Analogizing civil rights statutes with environmental statutes, the Court suggested that the purposes of each was sufficiently similar "to interpret both provisions governing attorney's fees in the same manner."¹⁹⁵ Leaving the door cracked, the Court stated that analysis of the respective legislative histories "lends credence" to such an interpretation.¹⁹⁶ However, unlike *Ruckelshaus, Pennsylvania* had nothing to do with "prevailing parties." The plaintiff had already prevailed; the issue centered on the amount. Thus, *Pennsylvania's* holding, in light of *Ruckelshaus'* approval of the "catalyst theory" in the "whenever appropriate" standard, should be limited to the issue of what type of *actions* attorneys may recover fees for providing. *Pennsylvania* and its dicta have been distinguished by at least one circuit court on similar grounds.¹⁹⁷ Also of note in *Pennsylvania* is the fact that two of the Justices, dissenting as to a non-relevant portion of the opinion, warned that the Court "rush[ed] to judgment" and the Court's haste would only "confuse the federal courts."¹⁹⁸

B. Issue II: Judicial Recognition of a Plaintiff's Level of Success

Once it is determined that *Buckhannon* extends to the particular statute at issue, the plaintiff faces another hurdle. To increase the chance of a fee award, the plaintiff must characterize his success in such a way as to receive judicial sanctioning. But, in many situations, *Buckhannon* offered only vague guidance as to how this may be accomplished.

194. *Id.* at 559.

195. *Id.* at 560.

196. *Id.* at 559 (explaining that the purposes behind both legislative histories are nearly identical, which provides support for the idea that they should be interpreted similarly).

197. See *Southwest Ctr. for Biological Diversity v. Carroll*, 182 F. Supp. 2d 944, 948 (9th Cir. 2001) (distinguishing *Pennsylvania* for two reasons: (1) the court was analyzing the same word, ("action") contained in both statutes and not prevailing parties, and (2) the current court's "increased reliance on the plain meaning of the specific language used by Congress in its statutes.").

198. *Pennsylvania*, 478 U.S. at 569 (Blackmun, J. dissenting).

1. A Brief Introduction to *Buckhannon's* Levels of Success

Subjectively, plaintiffs may deem any number of procedural or substantive victories as successes. For example, surviving a motion for a directed verdict or receipt of a temporary restraining order constitute procedural successes. *Buckhannon*, however, was concerned only with substantive successes. In other words, the Court was concerned only with whether a plaintiff achieved at least some of the *relief sought* in the complaint. As can be inferred from *Buckhannon*, there are four broad categories of successful plaintiff outcomes.¹⁹⁹ In order of the strength of the plaintiff's legal victory, they are as follows:

- (1) A favorable judicial order on the merits
- (2) The procuring of a consent decree²⁰⁰
- (3) Contracting for a private settlement
- (4) A defendant's voluntary cessation of the offensive action without a legal obligation to do so (otherwise known as the "catalyst theory")

The *Buckhannon* decision clearly settled any confusion as to whether categories (1) and (4) qualified as "prevailing parties." However, appellate courts are puzzled as to the specific type of judicial recognition *Buckhannon* requires before an award may be granted to a successful plaintiff under categories (2) or (3). Inconsistent appellate decisions have resulted from this uncertainty.

Regarding instances of judicially approved orders, the court recognizes by order that the defendant has violated the plaintiff's legal rights. In this situation, a plaintiff may be awarded a judgment

199. While almost every case will fall under one of these four categories, a recent California district court decision held that "prevailing party" status could, in some circumstances, be awarded for a preliminary injunction. There, a preliminary injunction caused defendant to change its conduct. Thus, although summary judgment was eventually entered on behalf of defendant, "plaintiffs received relief from the Court which instituted a change in the legal relationship between the parties." *See Vanke v. Block*, No. CIV.98-4111 DDP, *4-5 (C.D. Cal. 2002).

200. *Nat'l Coalition for Students with Disabilities v. Bush*, 173 F. Supp. 2d 1272, 1278 (2001) (holding that a consent decree is "an order of the court compelling the defendant to comply with specified terms, not because the court has independently concluded that the plaintiff is entitled to that relief, but because the defendant has voluntarily agreed to those terms"). *See also Int'l Ass'n of Firefighters, AFL-CIO v. Cleveland*, 478 U.S. 501, 523 n.13 & 525 (1986) (holding that "consent decrees have become widely used as devices to facilitate settlement" due to the prospect of continued oversight and ease of enforcement by the courts; the decree must (1) "spring from and serve to resolve a dispute within the court's subject-matter jurisdiction," (2) "come within the general scope of the case made by the pleadings," and (3) "further the objectives of the law upon which the complaint was based.").

on the merits of his claim after a full trial; therefore, there is no doubt that a successful plaintiff “prevails” for purposes of attorney’s fees.²⁰¹

The *Buckhannon* Court also explicitly upheld fee awards if a plaintiff’s success fits under the broad but blurred umbrella of consent decrees. It stated that because a consent decree is a “court-ordered” change in the legal relationship of the parties, a plaintiff “prevails,” regardless of whether a defendant admits liability.²⁰²

In a settlement agreement, each party negotiates with respect to his interests, taking into consideration such factors as the probability of success if the case went to trial, or the ability to finance continued litigation. Courts view settlement agreements as analogous to contracts, and may retain jurisdiction over the enforcement of their terms. However, courts do *not* speak to the liability of either party or the merits of each side’s individual claims regarding the issue presented in the case. Therefore, *Buckhannon* indicates that traditional settlement agreements do not contain the necessary *judicial imprimatur* to warrant an award of fees.²⁰³

Lastly, a plaintiff may successfully achieve partial relief through defendant’s voluntary cessation of its offensive conduct. This theory of success is better known as the “catalyst theory.” In such situations, the court issues no orders and does not determine liability. The defendant, seeing little or no chance of success, acquiesces to plaintiff’s wishes, though sometimes only temporarily. The case may or may not be rendered moot after the defendant ceases his action. As mentioned, *Buckhannon* specifically rejected a fee award under the catalyst theory, thereby lying to rest the so-called “split” among the Circuits.²⁰⁴

The issue remaining for lower courts to decide is where on this continuum a successful plaintiff will cease to *legally* “prevail” for purposes of a fee award. May a court award attorney’s fees to successful parties in a private settlement, or must there be judicial recognition of the success? Courts have taken several approaches to finding an answer to this question. The results have created vastly different, and very intriguing results.

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

202. *Id.*

203. *Id.* at 604 n.7.

204. *Buckhannon*, 532 U.S. 598 (2001).

2. Drawing the Line

The Supreme Court fell short of holding that fees may be recovered only by way of either a consent decree or a judicial order based on the merits of the claim.²⁰⁵ The fact pattern the Court had before it disallowed the formulation of an exhaustive list of the various forms of judicial relief that a plaintiff could obtain to warrant a fee award. After consulting Supreme Court precedent, the *Buckhannon* Court concluded that the requisite judicial determination for an award of fees must include a “material alteration of the legal relationship of the parties.”²⁰⁶ Examples of such “material alteration” include “enforceable judgments on the merits and court-ordered consent decrees.”²⁰⁷

A closer look at *Buckhannon* reveals that the Court also left open the possibility that other “material alterations” exist. For example, the Court indicated that private settlements “incorporated into [an] order of dismissal,” qualify as a judicially accepted “material alteration” that warrants a fee award.²⁰⁸ Two members of the majority also noted their belief that court-approved settlements bore the necessary judicial imprimatur.²⁰⁹ Lower courts are in agreement that, despite the Court’s previous indications to the contrary,²¹⁰ *Buckhannon* implied that private settlements lacking judicial sanctioning are now precluded from an award of fees.²¹¹ In doing so, the Court tailored the requisite level of a litigant’s success more narrowly than *any* court had ever done. Even the Fourth Circuit, the lone Circuit to reject the “catalyst theory” prior to *Buckhannon*, had deemed a plaintiff of a settlement agreement to be a “prevailing party” as long as he had secured at least a “settlement giving some of

205. *Id.* at 604. See also *Nat’l Coalition for Students with Disabilities*, 173 F. Supp. 2d at 1278; *Oil, Chem. & Atomic Workers Int’l Union v. Dep’t. of Energy*, 288 F.3d at 460 (Rogers, J., dissenting.)

206. *Buckhannon*, 532 U.S. at 604 (quoting *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)).

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

208. *Buckhannon*, 532 U.S. at 604 n.7.

209. *Buckhannon*, 532 U.S. at 618 (Scalia, J., concurring, joined by Thomas, J.)

210. See *Maher v. Gagne*, 448 U.S. 122, 129 (1980) (The Court suggested here that a party may “prevail” in some scenarios by virtue of a private settlement.)

211. *Compare Barrios v. Cal. Interscholastic Fed’n*, 277 F.3d 1128 (9th Cir. 2001) (recognizing the Court’s indication, but holding that the 9th Circuit is bound by prior precedent) with all cases in note.

the legal relief sought.”²¹² But, regardless of the lower court’s universal recognition of the path the Supreme Court chose to follow, the courts have split in applying this dictum.

As discussed, courts have varied their approaches in deciphering where *Buckhannon* draws the award/no award line, and which of the many standards set forth should be applied. A majority of federal courts (within the First, Second, Third, Fourth, Seventh, Eighth and Eleventh circuits) have held that *Buckhannon* limits “prevailing parties” to parties who have received either a consent decree or final judicial order on the merits.²¹³ This interpretation requires plaintiffs to receive a “judicially sanctioned change in the legal relationship of the parties,” or some form of “judicially sanctioned relief.”²¹⁴ A district court within the Eighth Circuit used the “material alteration in the legal relationship” standard to reach the same conclusion, but, as several other courts have done, it expanded the meaning of

212. *S-1 and S-2*, 21 F.3d 49, 51 (1994) (“A person may not be a ‘prevailing party’ plaintiff under 42 U.S.C. § 1988 except by virtue of having obtained an enforceable judgment, consent decree, or *settlement* giving some of the legal relief sought. . .”).

213. *New Eng. Council of Carpenters v. Kinton*, 284 F.3d 9, 30 (1st Cir. 2002) (denying fees because the lower court failed to issue an “order compelling, or leading to [plaintiff’s sought after relief]”); *J.C. v. Reg’l Sch. Dist. 10*, 278 F.3d 119, 121 (2d Cir. 2002) (concluding that *Buckhannon* held that a prevailing party may only be applied to one who receives judicial sanctioning through a judgment on the merits or a consent decree); *Roberson v. Guilliani*, 2002 U.S. Dist. LEXIS 2750, 9 (S.D.N.Y. 2002) (Representing the proposition that even though private enforceable settlements may materially alter the legal relationship, it must be “judicially sanctioned” in order to qualify plaintiff as a “prevailing party.”); *Truesdell v. Philadelphia Hous. Auth.*, 290 F.3d 159 (3d Cir. 2002) (The court found that an Order (1) contained mandatory language, (2) is entitled “Order,” and (3) bears the signature of the District Court judge, not the parties’ counsel, and (4) gave plaintiff the right to request judicial enforcement of the settlement against defendant.); *Smyth v. Rivero*, 282 F.3d 268, 280 (4th Cir. 2002) (Explaining the difference between consent decree and private settlement because of the “Supreme Court’s determination that a line should be drawn between them.”); *Luis R. v. Joliet Township H.S. Dist. 204*, 2001 U.S. Dist. LEXIS 13951, 4 (7th Cir. 2001) (“Private settlement agreements do not confer prevailing party status”); *Christina A. v. Bloomberg*, 167 F.Supp. 2d 1094, 1098 (D.S.D. 2001) (allowing plaintiff in a private settlement to achieve “prevailing party” status because “to read *Buckhannon* to require one particular form for resolving a dispute in order to become a prevailing party is to read the opinion too narrowly.” Here, the court reasoned that because it retained jurisdiction to enforce the “Settlement Agreement,” this was enough to satisfy the “judicial imprimatur” requirement of *Buckhannon*); *Nat’l Coalition for Students with Disabilities v. Bush*, 173 F. Supp. 2d 1272 (N.D. Fla. 2001); *Am. Disability Ass’n v. Chmielarz*, 289 F.3d 1315, 1317 (11th Cir. 2002) (Court approval of the terms of a settlement agreement coupled with its explicit retention of jurisdiction are the functional equivalent of a consent decree); *Akinseye v. District of Columbia*, 193 F. Supp. 2d 134 (D.D.C. 2002).

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

“consent decree” into the dominion of a settlement agreement.²¹⁵ Steadfast in the minority, the Ninth Circuit, the D.C. District, and Northern District of Florida have openly defied *Buckhannon’s* expansion of its “catalyst theory” analysis into the realm of settlement agreements.²¹⁶ At the time of this writing, several Circuits had yet to address the issue.

a. The Majority View

An articulate and comprehensive analysis discussing *Buckhannon’s* limitation of the scope of attorney’s fees can be found in the Fourth Circuit case of *Smyth v. Rivero*.²¹⁷ There, plaintiffs sued a state agency alleging that the statutory requirement of paternity identification for welfare applicants violated the Social Security Act. After a preliminary injunction, the agency modified its policy mooted part of the claim. The two sides then settled the remaining issues, and the plaintiff moved for an award of fees. The court interpreted *Buckhannon* to explicitly reject private settlements as a basis for prevailing party status, finding that an award was allowed only if a plaintiff succeeded by means of a judicial order, a “consent decree,” or a “functional” consent decree.²¹⁸ It implied that, while in some cases a “functional” consent decree might not officially be labeled as such, both forms contain the same characteristics.

Smyth stated that a consent decree reflects “rules generally applicable to other judgments and decrees.”²¹⁹ The court favorably cited precedent, which stated that a consent decree “may be enforced by judicial sanctions, including citation for contempt if it is

215. *Christina A.*, 167 F. Supp. 2d at 1098. *See also* Luis R., et al., v. Joliet Township H.S. Dist. 204, 2001 U.S. Dist. LEXIS 13951, *2, *5 (N.D. Ill. 2001) (allowing plaintiff to recover fees when a hearing officer read the mediated settlement into the record. The court reasoned that the legal relationship between the parties changed because this reading had the “approval and sanction” of the court).

216. *Barrios v. Cal. Interscholastic Fed’n*, 277 F.3d 1128 (9th Cir. 2002) (holding that the court is bound by precedent in the Ninth Circuit allowing an award of attorney’s fees in private settlements, but is not bound by dicta from the Supreme Court); *Johnson v. District of Columbia*, 190 F. Supp. 2d 34 (D.D.C. 2002) (holding that attorney’s fee waiver in settlement did not preclude “prevailing party status”); *Nat’l Coalition for Students with Disabilities v. Bush*, 173 F. Supp. 2d 1272 (N.D. Fla. 2001) (holding that defendants settling qualified the plaintiffs as prevailing parties).

217. *Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002).

218. *Id.* at 281 n.10.

219. *Id.* at 280.

violated.”²²⁰ The court noted that both actual and functional consent decrees contain the following characteristics: (1) a demonstration by the party claiming to be prevailing that “it has received some of the relief it sought in bringing the lawsuit”,²²¹ (2) careful judicial scrutiny as to the fairness and lawfulness of the decree’s terms;²²² (3) an explicitly stated *order for jurisdiction* forcing the parties’ compliance with the settlement’s terms;²²³ and (4) a court’s continuing “jurisdiction to enforce the terms of the resolution.”²²⁴ Applying this analysis to the facts of the case, the court concluded that the agreement failed to reach consent decree status because the court did not explicitly incorporate the settlement terms in the dismissal order, nor did the agreement contain a provision retaining the court’s jurisdiction.²²⁵

Several jurisdictions have followed a similar analysis to the *Smyth* line of reasoning. The Southern District of New York in *Roberson v. Guilliani*, for example, dismissed a plea for attorney’s fees where the court retained jurisdiction but “did not review the terms of the Agreement before dismissing the case.”²²⁶ The *Roberson* court indicated as well that a consent decree must be “directly enforceable through the district court’s contempt power.”²²⁷

But few jurisdictions have incorporated all of the factors used in *Smyth*, instead construing “consent decree” much more liberally. In one example, a district court within the Seventh Circuit held that simply reading the settlement agreement into the record before a hearing officer was enough.²²⁸ In another case, a court entry

220. *Id.* at 280. (quoting *United States v. Miami*, 664 F.2d 435, 439-40 (Former 5th Cir. 1981) (en banc) (Rubin, J., concurring)).

221. *Id.* at n.11.

222. *Id.* at 29-30

223. *Id.* at 36.

224. *Id.* at 29.

225. *Id.* at 42. *See also* *Kokkonen v. Guardian Life Ins. Co. Of Am.*, 511 U.S. 375 (1994) (finding no jurisdiction to enforce private settlement but noting “the situation would be quite different if the parties’ obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal—either by separate provision (such as a provision ‘retaining’ jurisdiction’ over the settlement agreement) or by incorporating the terms of the settlement agreement in the order.”)

226. *Roberson v. Guilliani*, 2002 U.S. Dist. LEXIS 2750 (S.D.N.Y. 2002).

227. *Roberson*, 2002 U.S. Dist. LEXIS 2750, at *14.

228. *Luis R. v. Joliet Township H.S. Dist. 204*, 2001 U.S. Dist. LEXIS 13951 (N.D. Ill. 2001).

memorializing the claimant's victory qualified.²²⁹ Judicial scrutiny of the agreement's fairness and enforcement of its terms were not discussed in either case. Similarly, the District of Nebraska has professed its belief that a private settlement coupled only with an explicit retention of jurisdiction to enforce the settlement qualifies as a functional equivalent of a consent decree.²³⁰

In one of the more curious cases, the Eleventh Circuit hesitantly accepted *Buckhannon's* dicta of refusing awards for plaintiffs who enter into settlement agreements as it stated that *Buckhannon* "at least suggests that it is now the law."²³¹ Plaintiffs were disabled individuals who allegedly failed to vote in the 2000 presidential election as a result of violations of the National Voter Registration Act ("NVRA"). Plaintiffs eventually filed a "Request for Court Approval of Settlement," with an attached Settlement Agreement signed by counsel for both sides.²³² Without resolving any contested issue, the court "ordered" the parties to abide by their settlement agreement without putting on record the terms to which the defendants agreed, and without ruling in plaintiff's favor.²³³ In the subsequent litigation for attorney's fees, the same judge concluded that the lack of these provisions did not affect the "order" from qualifying as a consent decree. As long as there was an order "compelling the defendant to comply with specified terms" (here, the "order" to abide by the settlement) the court concluded that plaintiff could receive fees.²³⁴ When defendants challenged that no official "order" was given by the judge, the court stated: "The appropriateness of an award of fees surely ought not turn on whether the court does or does not retype the provisions of a settlement agreement as part of an order compelling compliance."²³⁵ The court noted that one of *Buckhannon's* reasons for its disapproval of fee awards for private settlements was that federal jurisdiction to enforce

229. *Johnny's Icehouse, Inc., v. Amateur Hockey Ass'n of Ill.*, 2001 U.S. Dist. LEXIS 11671, *9 (N.D. Ill. 2001); *See also Brandon K.*, 2001 U.S. Dist. LEXIS 20006, at *8 (N.D. Ill. 2001) (using *Barron's Law Dictionary* to find the elements of a consent decree and hold that an "Agreed Order" by an impartial hearing officer applies.).

230. *Reed v. Shenandoah Memorial Hospital*, 2002 U.S. Dist LEXIS 14867, *10 (D. Neb. 2002).

231. *Nat'l Coalition for Students with Disabilities*, 173 F. Supp. 2d at 1278

232. *Id.* at 1275.

233. *Id.* at 1275-76.

234. *Id.* at 1278.

235. *Nat'l Coalition for Students with Disabilities*, 173 F. Supp. 2d at 1278-79.

private settlements is often lacking.²³⁶ However, it reconciled this concern by concluding that “in the case at bar such jurisdiction has been explicitly retained.”²³⁷

It appears as though a majority of the courts implicitly recognize that in a fees award case the first characteristic of the *Smyth* analysis is a given: Plaintiffs must receive some of the relief sought.²³⁸ The second characteristic looks to be exclusive to *Smyth* and the Fourth Circuit. The trait that appears to be at the heart of the consent decree analysis is what constitutes a judicial “order.” A major source of debate among the courts is whether the requisite *judicial* imprimatur requires the power of contempt or is simply a term that indicates some degree of judicial oversight.

b. The Minority View

Since *Buckhannon*, two courts have allowed the recovery of attorney’s fees when a party gains a measure of relief through a private settlement.²³⁹ Probably the most comprehensive analysis derives from the D.C. district court in *Johnson v. District of Columbia*.²⁴⁰

In *Johnson*, the mother of the plaintiff, a child in need of special services, requested that the District of Columbia Public Schools (DCPS) evaluate her son for special placement.²⁴¹ A year of solicitation and a lawsuit followed.²⁴² In January of 2001, four months prior to *Buckhannon*, the plaintiff entered into a settlement agreement with the DCPS.²⁴³ One of the stipulations of the settlement offer was a waiver of attorney’s fees.²⁴⁴ After agreeing to the settlement, plaintiff sued, alleging that the waiver clause violated the attorney’s fees provision of the Individuals with Disabilities

236. *Buckhannon*, 532 U.S. at 604 n.7.

237. *Nat’l Coalition for Students with Disabilities*, 173 F. Supp. 2d at 1279. See generally *Chmielarz*, 289 F.3d 1315 (reaffirming *Nat’l Coalition for Students with Disabilities*); See *Christina A.*, 167 F. Supp. 2d at 1098-99 (finding by lower court in the Eighth Circuit reaching a similar conclusion in a case on remarkably similar grounds).

238. See *Nat’l Coalition for Students with Disabilities*, 173 F. Supp. 2d at 1279 n.5 (“There is at least *some* basis for saying that the party favored by the settlement or decree prevailed *in the suit.*”) (emphasis in original).

239. *Johnson*, 190 F. Supp. 2d 34; *Barríos*, 277 F.3d 1128.

240. *Johnson*, 190 F. Supp. 2d 34.

241. *Id.* at 36-39

242. *Id.*

243. *Id.*

244. *Id.*

Education Act (IDEA), a statute that includes “prevailing party” language.²⁴⁵ Defendants argued that, regardless of whether that provision was in the settlement agreement, *Buckhannon* disallowed recovery of attorney’s fees in private settlements.²⁴⁶

The *Johnson* court acknowledged that *Buckhannon*’s pronouncement regarding the “catalyst theory” may have spilled into the private settlement arena.²⁴⁷ However, *Johnson* recognized that the issue was not directly before the Supreme Court, and thus was not conclusively resolved. *Johnson* then, for several reasons, declined to extend the holding in *Buckhannon* to private settlements.²⁴⁸

First, the *Johnson* court grasped onto the “material alteration” criterion instead of the more demanding “judicially sanctioned” standard.²⁴⁹ The court then drew an analogy between a settlement agreement and a contract, which closely resembled the analysis by the Eleventh Circuit.²⁵⁰ The court concluded that “private settlements do constitute a material alteration in the legal relationship between two parties sufficient to confer prevailing party status” because a court holding jurisdiction over a settlement agreement can enforce its terms.²⁵¹ Directly disputing the rationale in *Smyth*, *Johnson* argued that degrees of oversight and approval are “immaterial to whether that settlement agreement is legally enforceable by a court.”²⁵²

Furthermore, *Johnson* recognized that since the specific issue in *Buckhannon* was whether a defendant’s voluntary acquiescence to a plaintiff’s wishes constituted a legal claim for attorney’s fees, any language regarding private settlements was purely dicta. Agreeing with the Ninth Circuit’s reasoning in *Barrios v. California Interscholastic Federation*,²⁵³ the *Johnson* court prioritized prior circuit court precedent as taking primacy over mere dicta from a Supreme

245. *Id.*

246. *Id.*

247. *Id.* at 44-46.

248. *Id.* at 45.

249. *Id.*

250. *Id.*; See *Nat’l Coalition for Students with Disabilities*, 173 F. Supp. 2d 1272 (employing similar rationale).

251. *Id.*

252. *Id.* at 43 n.3. (discrepancy with who may initiate the enforceable agreement. In *Smyth*, for example, the court strictly adheres to *Buckhannon* in holding that only a court may initiate a legally enforceable order. In *Johnson*, the court argues that the genesis of the direction is irrelevant as to whether a court may oversee and enforce the agreement).

253. *Barrios*, 277 F.3d 1128.

Court decision.²⁵⁴ Thus, “without a holding from the Supreme Court or the D.C. Circuit to the contrary, this Court will not reject prior D.C. Circuit precedent that allows for the award of attorney’s fees to plaintiffs who enter into private settlements.”²⁵⁵

As eluded to above, the D.C. district court decision harmonized its reasoning with the Ninth Circuit’s opinion in *Barrios*. In *Barrios*, a disabled baseball coach, having been repeatedly denied access to the baseball field during games for safety reasons, sued an athletic association alleging violations of the Americans with Disabilities Act. The parties eventually reached a settlement agreement. In a footnote, the court concluded that *Buckhannon* involved a claim under the “catalyst theory,” not a settlement agreement. Echoing the rationale of *Johnson*, the court stated, “we are not bound by that dictum, particularly when it runs contrary to this court’s holding in [prior precedent], by which we are bound. Moreover, the parties, in their settlement, agreed that the district court would retain jurisdiction over the issue of attorney’s fees, thus providing sufficient judicial oversight to justify an award.”²⁵⁶

IV. CONCLUSION

The *Buckhannon* decision was a major deviation from established circuit court precedent. Justice Scalia, in concurrence, states his opinion that this long-prevailing view “ha[d] been nurtured and preserved by our own misleading dicta (to which I, unfortunately, contributed).”²⁵⁷ Regardless of what one might think of *Buckhannon*, the decision is now law. As such, legal arguments regarding *Buckhannon* should focus on its application and interpretation.²⁵⁸

Buckhannon has raised two main issues. The first issue concerns the fee-shifting language in attorney’s fees provisions other than the ones at issue in the case. The lower courts seem unified in the belief that *Buckhannon* extends to all other statutes employing “prevailing party” language. Few courts have addressed the issue in the “substantially prevailing” or “whenever appropriate” context. Because “prevail” was the operative word in the Court’s depiction of

254. *Johnson*, 190 F. Supp. 2d at 45.

255. *Id.*

256. *Barrios*, 277 F.3d 1128, at 15 n.5.

257. *Buckhannon*, 532 U.S. at 621 (Scalia, J. concurring).

258. See ANNINO, *supra* note 7 (providing a thorough examination of suggestions as to how to overcome the *Buckhannon* decision).

“prevailing party” as a “legal term of art,” it would seem logical to extend *Buckhannon* to statutes employing all forms of the root word “prevail.” However, statutes containing the “whenever appropriate” language should be considered immune to the *Buckhannon* rationale. Regardless of what the language of the fee-shifting provision directs, *Buckhannon* did provide one way out: If the “explicit statutory authority” of a particular statute indicates a deviation from the normal method of interpretation, courts must respect Congress’s alternate intention.

The second issue concerns judicial recognition of a plaintiff’s level of success. Clearly, judicial orders and consent decrees contain the necessary “judicial imprimatur” to merit an award of fees. However, *Buckhannon* indicates that there are more judicially approved scenarios that would merit such an award. This issue has caused lower courts the most difficulty. Some jurisdictions, such as the Fourth Circuit, have set the bar high, requiring careful judicial scrutiny of settlement terms and an explicitly stated order for continued jurisdiction. Others have only required the court to retain jurisdiction. The Ninth and D.C. Circuits have taken a contrasting view, holding that dicta in Supreme Court decisions does not override respective circuit court precedent.

This note has attempted to provide a “snapshot in time” of the current issues and outcomes of most of the issues and sub-issues facing the courts since *Buckhannon*. Will the Ninth and D.C. Circuits prevail in their rebellious interpretation of *Buckhannon*? Probably not in the long run, but it is difficult to say. If the circuit courts have learned anything from the *Buckhannon* opinion, it is to be cautious of imprudent reliance on Supreme Court dicta, however justifiable. It is for this precise reason that courts should not put too much stock in *Buckhannon*’s footnote four, or rely too heavily on *Pennsylvania* for the theory that “whenever appropriate” language should be interpreted in the same manner as “prevailing party” language.