The Buckhannon Stops Here: Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources Should Not Apply to the New York Equal Access to Justice Act

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COMMENT

THE BUCKHANNON STOPS HERE:
BUCKHANNON BOARD & CARE HOME, INC.
V. WEST VIRGINIA DEPARTMENT OF
HEALTH & HUMAN RESOURCES SHOULD
NOT APPLY TO THE NEW YORK EQUAL
ACCESS TO JUSTICE ACT

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INTRODUCTION

What do a 102-year-old resident of a West Virginia assisted living home and a formerly homeless New Yorker have in common? They will both go uncompensated for effecting governmental policy changes, due to the Supreme Court’s decision in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources.\(^1\) In that case, the Supreme Court rejected the “catalyst theory” of recovery of attorney’s fees, making it much more difficult for the most disadvantaged private litigants to enforce their civil rights against the government.

In 1996, the West Virginia Office of Health Facility Licensure and Certification ("OHFLAC") attempted to shut down the Buckhannon Board and Care Home ("BBCH") for failure to comply with West Virginia’s self-preservation rules, which required residents of residential board and care homes to be capable of evacuating themselves without assistance in the event of imminent danger.\(^2\) The orders would have forced BBCH to expel Dorsey Pierce, an alert 102-year-old woman who had lived at the home for four years, along with two other residents, none of whom could comply with the self-

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* J.D. Candidate 2005, Fordham University School of Law. I would like to thank Associate Dean Matthew Diller for his invaluable support and guidance throughout this process.
2. Brief for Petitioner at 2, Buckhannon (No. 99-1848). In three cease and desist orders, OHFLAC ordered BBCH to close its homes within thirty days, and banned it from accepting any new residents during the thirty day period. Id.; see also W. Va. Code §§ 16-5C-2(f), 16-5H-2(f) (1997), repealed by 2003 W. Va. Acts 113.
preservation provisions. After enduring two years of litigation that ultimately resulted in the repeal of the self-preservation laws, which plaintiffs claimed were violative of the Fair Housing Amendments Act of 1988 ("FHAA") and the Americans with Disabilities Act of 1990 ("ADA"), plaintiffs sued for attorney's fees pursuant to the "prevailing party" provisions of the FHAA and ADA, whereby "[t]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs." Plaintiffs sought fees under the "catalyst theory," which recognizes litigants as "prevailing parties" when they achieve a desired result because their lawsuit brings about a "voluntary change in the defendant's conduct." Despite acceptance of this theory of recovery by nearly every circuit to consider the issue, the Fourth Circuit had previously rejected the argument, and in this case affirmed the district court's denial of fees in an unpublished, per curiam opinion. The Supreme Court opted to follow the Fourth Circuit's minority stance, invalidating the catalyst theory, and thereby making it much more difficult for plaintiffs like Dorsey Pierce to

6. Id. §§ 12101-213.
7. Id. §§ 3613(c)(2), 12205.
9. See, e.g., Morris v. West Palm Beach, 194 F.3d 1203, 1207 (11th Cir. 1999) (concluding that the "catalyst test accords well with long-held notions of prevailing parties"); Stanton v. S. Berkshire Reg'l Sch. Dist., 197 F.3d 574, 577 (1st Cir. 1999) (recognizing the catalyst theory as a "practical test for discerning victory"); Payne v. Bd. of Educ. Cleveland City Sch., 88 F.3d 392, 397-400 (6th Cir. 1996) (applying the catalyst theory to claims for attorney's fees under the Individuals with Disabilities Education Act); Kilgour v. City of Pasadena, 53 F.3d 1007 (9th Cir. 1995) (opting not to follow explicitly the Fourth Circuit, and permitting recovery for attorney's fees based on the catalyst theory); Marley v. Bane, 57 F.3d 224, 233 (2d Cir. 1995) (recognizing that "an award of attorney's fees under section 1988 may be warranted where the litigation leads to a favorable result, even if the case does not culminate in a final judgment"); Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., #1, 17 F.3d 260, 262 (8th Cir. 1994) (holding that plaintiffs could recover attorney's fees as prevailing parties under the catalyst theory unless the lawsuit was frivolous, unreasonable, or groundless); Baumgartner v. Harrisburg Hous. Auth., 21 F.3d 541, 548 (3d Cir. 1994) (noting that "the Supreme Court has eschewed technical considerations and instead has followed what is essentially a result-oriented approach" in identifying prevailing parties); Beard v. Teska, 31 F.3d 942, 951-52 (10th Cir. 1994) (electing to follow the majority of circuits in accepting the catalyst theory, as opposed to the Fourth Circuit); Zinn v. Shalala, 35 F.3d 273, 276 (7th Cir. 1994) (reiterating that "plaintiffs who attain the relief they seek through defendants' voluntary action may qualify for fees by way of the catalyst theory"), all overruled by Buckhannon, 532 U.S. at 602.
obtain attorney's fees in spite of the socially beneficial results their litigation produces.12

Two years later, Henry Wittlinger, a formerly homeless New Yorker, felt firsthand the far-reaching reverberations of Buckhannon. Wittlinger received both federal and state public assistance at a Manhattan mail drop for the homeless until June 1995, when he moved into an apartment.13 Even after notifying the New York City Department of Social Services ("DSS") of his change of address, however, the DSS continued to send Wittlinger's notices of job availability to the homeless mail drop.14 Consequently, he did not receive the letters, failed to respond to them, and the DSS subsequently terminated his benefits.15 After two administrative hearings and two article 78 petitions,16 DSS finally restored his social security benefits, which it had mistakenly withheld as a result of an administrative error.17 Accordingly, the New York Supreme Court dismissed the second article 78 petition as moot.18 Wittlinger argued he was entitled to attorney's fees pursuant to (1) the fee-shifting provision for "prevailing parties" under the New York State Equal Access to Justice Act ("EAJA"),19 and (2) his qualification as a

14. Id.
15. Id. The Work Experience Program, through which Wittlinger received his benefits, required compliance with employment provisions. Id.
16. N.Y. C.P.L.R. 7803 (McKinney 2003). Article 78 petitions involve a review of a final determination or order of the state. Id.
17. Wittlinger, 786 N.E.2d at 1272. Wittlinger requested an administrative hearing, which prompted the State Department of Social Services to reverse the DSS's decision to discontinue Wittlinger's assistance, and reinstate his benefits on January 3, 1996. Id. Less than two months later, the DSS again sent a job availability notice to the Manhattan mail drop, and then cancelled Wittlinger's benefits when he failed to respond to it. Id. Wittlinger again requested an administrative appeal, but this time the state affirmed the termination of his benefits. Id. In September 1996, Wittlinger initiated an article 78 petition in order to reverse the decision terminating his benefits, after which the state stipulated to grant him a de novo administrative hearing, and in September 1999 the state found the DSS improperly denied him benefits. Id. Accordingly, the state ordered the DSS to pay Wittlinger benefits totaling over $15,000. Id. Nevertheless, Wittlinger did not receive any of these benefits, despite three state orders to comply with the decision. Id. In response, Wittlinger brought yet another article 78 proceeding in November 1999 to compel the DSS to comply with the September 1999 administrative determination. Id.

The DSS had sent notice of the article 78 decision to the wrong public assistance center for issuance of funds. The Amsterdam Public Assistance Center, which had been assigned Wittlinger's case, closed in 1997 and became a Division of AIDS Services Center, and the DSS sent the notice there instead of Center 13, where Wittlinger's case had been re-assigned. Id. at 1272 n.2. On December 1, 1999, DSS informed the state that Wittlinger's benefits would be available "hopefully by tomorrow." Id. at 1272. Over the next week, he received $12,712.50 of retroactive benefits, on December 31, 1999, he received $1,175, and finally on February 2, 2000, he received the remaining $1,184 of benefits. Id. at 1272-73.
19. N.Y. C.P.L.R. 8600-8605. (McKinney 2003). In relevant part, the EAJA
“prevailing party” under the catalyst theory, since his article 78 petition had caused the DSS to release his benefits.\textsuperscript{20} The New York Supreme Court denied attorney’s fees, and the Appellate Division affirmed the decision, relying on two grounds: first, that the state’s position was substantially justified, and second, that after \textit{Buckhannon}, the catalyst theory was “no longer a viable basis for an award of attorneys’ fees.”\textsuperscript{21} The Court of Appeals of New York affirmed the decision on the first ground, but declined to rely on the second.\textsuperscript{22} Ultimately, the decision prevented Wittlinger from recovering any of the attorney’s fees he had incurred over three years of litigation and three actions against the DSS to correct their administrative errors.\textsuperscript{23} Henry Wittlinger’s plight may soon become a commonplace scenario if New York courts refuse to recognize the catalyst theory’s continuing applicability to the state EAJA.

The New York legislature enacted the EAJA in response to the difficulties faced by the poor in obtaining legal counsel, which had reached “crisis proportions” and “jeopardize[d] both the welfare of poor persons and the legitimacy of the legal system itself.”\textsuperscript{24} The primary purpose of the New York EAJA is to “create a mechanism authorizing the recovery of counsel fees and other reasonable expenses” by low-income parties “in certain actions against the state of New York.”\textsuperscript{25} Similarly, the catalyst theory permitted recovery of attorney’s fees when a party achieved the aims sought in a lawsuit without formal judgment, and thus facilitated litigation by low- and moderate-income parties. Prior to \textit{Buckhannon} and \textit{Wittlinger}, this scheme provided access to the judicial process and a check on unjustified government action by “private attorneys general.”\textsuperscript{26}

The \textit{Wittlinger} Court of Appeals’ reluctance to endorse the Appellate Division’s reliance on \textit{Buckhannon} indicates that \textit{Buckhannon}’s applicability to the state EAJA is still an open question in New York. This Comment argues that although federal courts have applied \textit{Buckhannon} to the federal EAJA,\textsuperscript{27} the unique, inherent

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\textsuperscript{20} Wittlinger, 786 N.E.2d at 1273.
\textsuperscript{22} Wittlinger, 786 N.E.2d at 1274.
\textsuperscript{23} Id.
\textsuperscript{24} Letter from the New York State Bar Association (“NYSBA”), to Governor Cuomo, \textit{reprinted} in 1989 N.Y. Legis. Ann. 336 (urging Governor Mario Cuomo to approve the EAJA).
\textsuperscript{25} N.Y. C.P.L.R. 8600; see also Brief of Amicus Curiae NYSBA at 6, Wittlinger, (No. 2003-0005).
\textsuperscript{26} See infra text accompanying notes 39-42.
\textsuperscript{27} 28 U.S.C. § 2412 (2000); see Brickwood Contractors, Inc. v. United States, 288 F.3d 1371 (Fed. Cir. 2002).
safeguards built into the New York EAJA, as well as mounting public policy concerns about providing ordinary citizens a meaningful opportunity to exercise their rights, and our interest in preserving a valuable check on government behavior, counsel against applying *Buckhannon* to the state statute.

Part I discusses the evolution of the catalyst theory, including the development of fee-shifting provisions under the American rule, the federal and New York EAJAs, the development of the catalyst theory, the Fourth Circuit’s opinion that split from other circuits, and finally, the Supreme Court’s decision in *Buckhannon*. Part II explores *Buckhannon*’s impact on the federal and state EAJAs, and how courts have struggled to define what constitutes an action giving rise to attorney fee recovery. Part III argues that the proper resolution to this problem is to exempt the New York EAJA from the reach of *Buckhannon*, or, in the alternative, apply *Buckhannon* in a limited fashion by deeming private settlements sufficient to recover attorney’s fees.

I. THE EVOLUTION OF FEE-SHIFTING POLICY

A. The American Rule

Under the American rule, each party pays its own litigation costs regardless of the outcome of the case.28 Though originally intended to encourage plaintiffs to litigate without fear of fee liability to defendants, the American rule eventually became a “barrier between poorer clients and attorneys who were unwilling to accept the financial risk of a suit.”29 In response, courts fashioned fee-shifting exceptions to the American rule based on the private attorney general principle.30 Under the private attorney general principle, courts permit the prevailing party to recover attorney’s fees where the lawsuit a) vindicates the private litigant’s rights, and b) benefits


In 1975, however, the Supreme Court re-examined the origins of the American rule, in *Alyeska Pipeline Service Co. v. Wilderness Society*, and concluded that it is impermissible for courts to shift fees without congressional authority. The Court reasoned that although Congress had itself created several statutory exceptions to the American rule, and had not explicitly repealed the judicially-fashioned exceptions, this did not extend "any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." In response, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976 to "preserve the private enforcement of public policy" and secure "effective access to the judicial process" for civil rights litigants. Four years later, Congress drastically expanded the scope of fee-shifting exceptions to the American rule with the EAJA of 1980.

B. The Federal Equal Access to Justice Act

In relevant part, the federal EAJA provides:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any civil costs awarded pursuant to subsection (a) incurred by that party in any civil action . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Perhaps in reaction to the deregulation of the 1980s, the EAJA expanded fee-shifting policy in two important ways: first, the statute waived the government's general immunity from being assessed attorney's fees, where before there were only discrete exceptions; and second, it affirmatively sanctioned the award of fees to parties prevailing against the government in non-tort civil litigation and adversarial administrative adjudications.

Congress recognized that the increased bureaucracy and the "deterrent effect created by [an] inability to recover fees against the
Government" could allow the government to "coerce compliance with its position." Appreciating the expense of vindicating one's rights, especially against a formidable adversary with far greater resources such as the United States, Congress intended to "diminish the deterrent effect of seeking review of, or defending against, governmental action" by placing the federal government and civil litigants on more equal footing.

A private litigant must meet four threshold requirements before recovering fees under the federal EAJA: (1) the claimant must demonstrate that it is an eligible party; (2) the claimant must qualify as a "prevailing party"; (3) the claimant must show that the government's position is not substantially justified; and (4) there must be no special circumstances that make an award unjust. Soon after the enactment of the federal EAJA, many states adopted similar statutes, including New York.

C. The New York Equal Access to Justice Act

Enacted in 1989, the New York legislature intended the EAJA to "encourage individuals, small businesses, and not for profit corporations to challenge state action when it lacks substantial justification by allowing [individuals] to recover fees and litigation expenses." The Act was passed soon after the Marrero Committee

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42. EAJA, 96 Pub. L. No. 481, § 202(c)(1), 94 Stat. 2325 (1980). The statute was predicated on Congress's finding "that certain individuals, partnerships, corporations, labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings." See id. § 202(a).
44. As a procedural matter, the claimant must submit an application for fees within thirty days of final judgment explaining why he is a "prevailing party," setting forth the amount sought, and alleging that the position of the government was unjustified. 28 U.S.C. § 2412(d)(1)(B).
45. Id. § 2412(d)(2)(B).
46. Id. § 2412 (d)(1)(A).
47. N.Y. C.P.L.R. 8600 (McKinney 2003); Olson, supra note 40, at 554 n.36.
49. See generally The Marrero Comm. Report (1989) (on file with Hon. Victor Marrero Esq. and the Brooklyn Law School Library). Headed by Judge Sol Wachtler, the Marrero Committee conducted a three year survey of 10,482 New York attorneys, documenting changes in the volume and nature of their pro bono work. The committee's findings suggested that the recoverability of at least some attorney's fees was a major concern for most lawyers in small to midsize firms. Brief of Amicus Curiae NYSBA at 7, In re Wittlinger v. Wing, 786 N.E.2d 1270 (N.Y. 2003) (No. 2003-0005).
issued a report revealing that the problem of underrepresented low-income individuals had reached "crisis proportions." 50

New York's EAJA mirrors the intent of the federal EAJA, 51 though the state statute departs from its federal model when defining the scope of private litigants eligible for recovery of fees, and the degree of success a plaintiff must achieve to recover fees. While the central fee-shifting language is virtually identical to the federal EAJA, 52 New York's EAJA contains more restrictions on eligible parties than the federal EAJA. The New York EAJA only allows plaintiffs who have a net worth of less than $50,000 (excluding the value of their primary residence), owners of businesses with fewer than 100 employees, and not-for-profit corporations to recover attorney's fees. 53 In contrast, the federal EAJA considers any litigant whose net worth does not exceed $2,000,000, and owners of an unincorporated business, partnership, corporation or, association; a unit of local government; or an organization with a net worth less than $7,000,000 eligible to recover attorney's fees. 54 These distinctions prompted then-Governor Cuomo to approve the bill despite his rejection of previous bills with similar purposes. 55

Further, the federal and New York EAJAs define "final judgment" differently. 56 Whereas the federal EAJA defines final judgment as "a judgment that is final and not appealable and includes an order of settlement," 57 the state EAJA defines final judgment as "a judgment

51. Compare N.Y. C.P.L.R. 8600, with 28 U.S.C. § 2412(d). The New York EAJA was meant to allow recovery on terms "similar to the provisions of federal law contained in 28 U.S.C. § 2412(d) and the significant body of case law that has evolved thereunder." Id.; see also Memorandum from Governor Cuomo, reprinted in 1989 N.Y. Legis. Ann. 336 (noting that the statute was enacted to "improv[e] access to justice for individuals and businesses who may not have the resources to sustain a long legal battle against an agency that is acting without justification").
52. Like the federal version, the New York EAJA states that:
except as otherwise specifically provided by statute, a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust.
N.Y. C.P.L.R. 8601(a).
53. N.Y. C.P.L.R. 8602(d).
55. Memorandum from Governor Cuomo, reprinted in 1989 N.Y. Legis. Ann. 336. Cuomo explained that the present EAJA was different because (1) it contained appropriate restraints on the eligibility of individuals and organizations that could recover fees; (2) it would not deter "good faith agency action" thanks to the "substantially justified" prong; and (3) it contained limits on the amount of fees that could be awarded. Id.
that is final and not appealable, and settlement,"\textsuperscript{58} noticeably excluding the federal version's "order of" language.

Though the New York and federal EAJAs may differ as to some of the necessary qualifications for a litigant seeking to shift fees, both statutes permit recovery only by a "prevailing party."\textsuperscript{59} While the federal EAJA is silent on the definition of "prevailing party,"\textsuperscript{60} the New York EAJA describes a prevailing party as a "plaintiff or petitioner in the civil action against the state who prevails in whole or in substantial part where such party and the state prevail upon separate issues."\textsuperscript{61} The New York Court of Appeals refined this definition: A prevailing party is "a plaintiff who can show that it succeeded in large or substantial part by identifying the original goals of the litigation and by demonstrating the comparative substantiality of the relief actually obtained."\textsuperscript{62} The New York legislature also specifically noted that the EAJA was to be interpreted consistently with the federal EAJA and the "significant body of case law that has evolved thereunder."\textsuperscript{63} Central to this case law was a near unanimous endorsement of the catalyst theory, which courts developed as a common law means to more effectively implement the private attorneys general policy behind the EAJA.

\section*{D. Prevailing Parties}

Both the federal and New York EAJAs award fees to a "prevailing party;" a term that has been the subject of much litigation.\textsuperscript{64} The

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\item \textsuperscript{58} N.Y. C.P.L.R. 8602(c).
\item \textsuperscript{59} 28 U.S.C. § 2412(d)(1)(A); N.Y. C.P.L.R. 8601(a).
\item \textsuperscript{60} The federal EAJA does not provide an explicit definition of "prevailing party," and instead refers to existing case law under the Civil Rights Attorney's Fees Awards Act for determinations of whether a party qualifies as "prevailing" under the Equal Access to Justice Act." See Grand Boulevard Improvement Ass'n v. City of Chicago, 553 F. Supp. 1154, 1166-67 (D. Ill. 1982).
\item \textsuperscript{61} N.Y. C.P.L.R. 8602(f).
\item \textsuperscript{63} N.Y. C.P.L.R. 8600.
\item \textsuperscript{64} Much of the controversy over the term "prevailing party" has arisen in the context of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2000). According to the legislative history of § 1988, a prevailing party need not obtain a favorable "final judgment following a full trial on the merits." H.R. Rep. No. 94-1558, at 7 (1976). The Senate Report to § 1988 confirmed this, stating that, "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. No. 94-1011, at 5 (1976), reprinted in 1976 U.S.C.C.A.N. 5912. Despite this seemingly plain language, courts have struggled with defining "prevailing party." In \textit{Hanrahan v. Hampton}, the Supreme Court limited the application of the rule, granting relief without a final judgment, permitting it only where a party has "established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal." 446 U.S. 754, 757 (1980) (per curiam). In \textit{Hensley v. Eckerhart}, the Supreme Court defined "prevailing party" under § 1988 as a party that ""succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."" 461 U.S. 424, 433 (1983) (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir.)
central inquiry revolves around what degree of success or relief a party must obtain before a court may deem it "prevailing."

1. Development of the Catalyst Theory

First articulated by the Eighth Circuit in *Parham v. Southwestern Bell Telephone Co.*, the catalyst theory posits that courts may consider a litigant a "prevailing party" if he or she has received some of the relief sought by the lawsuit, regardless of whether there has been a judicially-sanctioned resolution. Under the catalyst theory, courts may deem attorney's fees justified when the plaintiff's suit acts as a catalyst in prompting the defendant to take action to meet the plaintiff's claim, even in the absence of judicial mandate. Courts developed various standards for identifying a "prevailing party," but the three-part test outlined in Justice Ginsburg's *Buckhannon* dissent is representative. Justice Ginsburg would have required that a plaintiff demonstrate (1) receipt of some benefit sought in the lawsuit; (2) that the suit stated a claim that was not frivolous, unreasonable, or groundless; and (3) that the suit constituted the substantial cause or catalyst of defendant's acts that provided relief.

Twelve other circuits adopted the catalyst doctrine, and the Supreme Court has generally recognized wide latitude in defining "prevailing party." Over the last twenty years, the Supreme Court has held that a party obtaining a consent decree or favorable settlement qualifies as a "prevailing party," a plaintiff who wins a

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1978), overruled by Richardson v. Miller, 279 F.3d 1, 4-5 (1st Cir. 2002)); cf. Dawson v. Pastrick, 600 F.2d 70, 78 (7th Cir. 1979); Nadeau, 581 F.2d at 279-81. The *Hensley* Court made *Hanrahan*'s standards for prevailing parties "applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" *Hensley*, 461 U.S. at 433 n.7.

65. 433 F.2d 421, 429-30 (8th Cir. 1970).

66. Id. The *Parham* court concluded that "[a]lthough we find no injunction warranted here, we believe Parham's lawsuit acted as a catalyst which prompted the appellee to take action .... In this sense, Parham performed a valuable public service in bringing this action .... [and] Parham is entitled to reasonable attorney's fees ...."

67. Nadeau, 581 F.2d at 278-79 (noting that the "legislative history strongly suggests that a plaintiff who is partially successful in achieving the relief sought may still receive an award," and ultimately concluding that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit").

68. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 627-28 (2001) (Ginsburg, J., dissenting); accord Nadeau, 581 F.2d at 281 (requiring that a plaintiff's claim (1) cause the defendant to change a position; and (2) that the claim be legally colorable).


71. Id. at 372-73.

judgment on at least some of the merits is a "prevailing party," as long as he can demonstrate "the settling of some dispute which affects the behavior of the defendant towards the plaintiff," declaratory judgments constitute relief when they affect the defendant's behavior toward the plaintiff; a party need not prevail on a central issue in the litigation to be a prevailing party where plaintiff can "point to a resolution of the dispute which changes the legal relationship between itself and the defendant," and plaintiffs who win even nominal damages are prevailing parties. As of 1989, the year the New York EAJA was enacted, the Supreme Court held that the "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute."

The Supreme Court's 1992 decision in *Farrar v. Hobby,* however, threw doubt on this relatively coherent approach to identifying "prevailing parties." While *Farrar* explicitly recognized the line of

with Connecticut's Aid to Families with Dependent Children did not disqualify her from seeking attorney's fees under § 1988).

73. Hewitt v. Helms, 482 U.S. 755, 761 (1987). The Court recognized that when a lawsuit "produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment... the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor," but ultimately denied attorney's fees to the claimant, who had litigated to judgment and lost on all claims against the Pennsylvania State Correctional Institute. *Id.* at 760-61, 763.

74. Rhodes v. Stewart, 488 U.S. 1, 2 (1988) (per curiam) (holding that private litigants are not entitled to attorney's fees "unless the requesting party prevails," and concluding that because one of the claimants had died, and the other had been released from custody, they did not receive the benefit of the defendants' changed behavior, and therefore were not "prevailing parties").

75. Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792 (1989). The Court rejected the district court's insistence that a party must prevail on a central issue before being entitled to collect attorney's fees, and instead re-affirmed the *Hensley* standard—in which plaintiff need only succeed on any significant issue in litigation. *Id.* Ultimately, the Court found that plaintiffs' vindication of their First Amendment rights qualified them as prevailing, even though this was only a partial victory. *Id.*

76. Farrar v. Hobby, 506 U.S. 103, 111 (1992) (holding that prevailing parties must obtain at least some relief on the merits of their claims and an enforceable judgment against the defendant, or a consent decree, or settlement).

77. *Garland,* 489 U.S. at 792-93.

78. 506 U.S. 103 (1992). Plaintiff sued defendants for monetary and injunctive relief pursuant to 42 U.S.C. §§ 1983, 1985 (2000), alleging deprivation of liberty and property without due process by means of conspiracy and malicious prosecution aimed at closing plaintiff's school. *Id.* at 106. The district court found that even though all defendants except Hobby had conspired against plaintiff, and Hobby had deprived plaintiff of his civil rights, neither of these grounds constituted the proximate cause of plaintiff's injuries. *Id.* A divided Fifth Circuit reversed the subsequent fee award against one of the defendants, finding that the insignificant nominal award was a "technical victory," and a meaningless change in his legal relationship with Hobby. *Estate of Farrar v. Cain,* 941 F.2d 1311, 1315 (5th Cir. 1991). The Supreme Court found the Fifth Circuit erred in holding that technical victories, like nominal damages, did not qualify a plaintiff as a prevailing party. *Farrar,* 506 U.S. at 115-16.
Supreme Court cases that tacitly endorsed the catalyst theory, and its main holding merely confirmed that while “the ‘technical’ nature of a nominal damages award or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under § 1988.” The opinion also contained language that would come to be widely disputed. In dicta, the *Farrar* Court stated that “[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant.” This ruling effectively shifted the focus in a “prevailing party” inquiry from the defendant’s behavior toward a litigant, to their legal relationship. This language would lead the Fourth Circuit to challenge the validity of the catalyst theory, even though *Farrar* did not employ it.

2. The Split

The Fourth Circuit departed from the majority of circuits’ approval of the catalyst theory in a divided en banc decision delivered on rehearing in *S-1 & S-2 By & Through P-1 & P-2 v. State Board of Education of North Carolina.* The majority of the court held that in the wake of *Farrar,* “[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 in a § 1983 action.” Even though “most courts of appeals held that [the *Farrar*] dicta provided merely an inexhaustive list of possible prevailing party postures and continued to interpret the definition of prevailing party to include the catalyst

80. *Id.* at 114.
81. *Id.* at 113.
84. 21 F.3d 49 (4th Cir. 1994) (per curiam). Parents of handicapped children enrolled in Asheboro, North Carolina schools filed a 42 U.S.C. § 1983 claim against the city and state board of education, alleging that the policy on reimbursing tuition violated the Education of the Handicapped Act (“EHA”), 20 U.S.C. § 1400 (2000). *S1 & S2*, 21 F.3d at 50. After the court granted plaintiffs' motion for summary judgment, the defendants appealed. While the appeal was pending, the plaintiffs settled with some of the defendants. *Id.* The court dismissed all claims as moot. *Id.* at 50-51. The district court and court of appeals awarded attorney's fees to the plaintiffs because the state had changed its tuition reimbursement policy under the threat of losing its federal funding from the United States Department of Education. *Id.* at 51. On rehearing en banc, however, the Fourth Circuit Court of Appeals panel reversed, declaring the catalyst theory invalid. *Id.*
85. *Id.* at 51.
theory," the Fourth Circuit chose to invalidate the catalyst theory, holding that "[t]he fact that a lawsuit may operate as a catalyst for post-litigation changes in a defendant's conduct cannot suffice to establish plaintiff as a prevailing party. 'Catalyst theory,' allowing that result, is no longer available for that purpose." But even after the Fourth Circuit's rejection of the catalyst theory, nine other circuits continued to recognize it. Nevertheless, seven years later, the Supreme Court chose to follow the Fourth Circuit's splintering precedent.

E. Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources

1. Factual and Procedural History

Plaintiffs Buckhannon Board & Care Home ("BBCH"), Dorsey Pierce (a BBCH resident), the Residential Board and Care Association, and other similarly situated homes sought attorney's fees after their suit against the West Virginia Department of Health and Human Resources prompted the repeal of self-preservation laws allegedly violative of the FHAA and the ADA. Pursuant to the fee-shifting provisions of the FHAA and ADA, plaintiffs claimed to be "prevailing parties" under the catalyst theory, but the district court denied their request for attorney's fees. Although most other courts of appeals recognized the catalyst theory, the Fourth Circuit did not, and affirmed the denial of attorney's fees. The Supreme Court granted certiorari to resolve the split among circuits over the validity of the catalyst theory as applied to the FHAA and the ADA.

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86. Loring, supra note 29, at 984.
87. S-1 & S-2, 21 F.3d. at 51.
88. See Stanley, supra note 70, at 378-79 n.70.
90. Id. at 600-01.
93. Id. §§ 12101-12213.
94. Id. § 3613(c)(2) (providing in relevant part that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs").
95. Id. § 12205 (providing in relevant part that "the court . . . in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs").
98. The Court noted that it had never directly addressed the issue before, although (1) "[d]ictum in Hewitt v. Helms, 482 U.S. 755, 760 (1987), alluded to the possibility of attorney's fees where 'voluntary action by the defendant . . . affords the plaintiff all or some of the relief . . . sought,'" and (2) the Fourth Circuit relied on
2. The Majority Opinion

In a five-four decision delivered by Justice Rehnquist and joined by Justices O'Connor, Scalia, Kennedy, and Thomas, the Supreme Court affirmed the Fourth Circuit's decision.99 Relying on Black's Law Dictionary, which defines "prevailing party" as a "party in whose favor a judgment is rendered, regardless of the amount of damages awarded,"100 and after reviewing its prior treatment of "prevailing party," the Court concluded that as a prerequisite to recovery of fees, a plaintiff must demonstrate a "material alteration of the legal relationship of the parties."101 According to the Court, the catalyst theory did not satisfy this requirement because it permitted recovery "where there is no judicially sanctioned change in the legal relationship of the parties."102 Moreover, the Court found that "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change."103

Petitioners argued that the legislative history of the Civil Rights Attorney's Fees Awards Act104 sustained a broad reading of "prevailing party" that accommodated the catalyst theory.105 The Court, however, dismissed this legislative history as "at best ambiguous."106

The Court viewed skeptically petitioners' public policy argument, that without the catalyst theory defendants could unilaterally moot an action before judgment to avoid paying attorney's fees, and therefore "deter plaintiffs with meritorious but expensive cases from bringing suit,"107 noting that such a scenario "only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for

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99. Id. at 610.
102. Id. at 605.
103. Id.
104. S. Rep. No. 94-1011, at 5 (1978), *reprinted in* 1976 U.S.C.C.A.N. 5908. Petitioners argued that "the phrase 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits," and that "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." *Buckhannon*, 532 U.S. at 607 (quoting H.R. Rep. No. 94-1558, at 7 (1976); S. Rep. No. 94-1011, at 5).
105. *Buckhannon*, 532 U.S. at 607.
106. Id. at 608.
107. Id.
damages, a defendant’s change in conduct will not moot the case."\textsuperscript{108} The Court then invalidated the catalyst theory.\textsuperscript{109}

3. Justice Scalia’s Concurrence

In his concurrence, Justice Scalia argued that preservation of the catalyst theory would result in the very same public policy inequities the dissent and petitioners claimed it would prevent.\textsuperscript{110} Acknowledging that both the dissent and majority’s positions will from time to time result in unfairness because the “former sometimes rewards the plaintiff with a phony claim . . . [and] the latter sometimes denies fees to the plaintiff with a solid case whose adversary slinks away on the eve of judgment,”\textsuperscript{111} Scalia nevertheless opted for the latter scenario, noting that “the evil of the former far outweighs the evil of the latter.”\textsuperscript{112} He was principally concerned with the low threshold of merit plaintiffs need to establish before becoming entitled to recover attorney’s fees under the FHAA and ADA: Justice Scalia feared that “the wannabe-but-never-was plaintiff could recover fees.”\textsuperscript{113}

Scalia also pointed out that the public policy concerns raised by the dissent actually cut both ways; the dissent’s fear that the majority’s decision will “impede access to court for the less well-heeled,” did not take into account that “the catalyst theory also harms the ‘less well-heeled,’ putting pressure on them to avoid the risk of massive fees by abandoning a solidly defensible case early in litigation.”\textsuperscript{114} Scalia concluded that where the catalyst theory might coerce either party to settle prematurely, the majority correctly eliminated it with respect to the FHAA and ADA.

4. The Dissent

Justice Ginsburg’s dissent, joined by Justices Stevens, Souter, and Breyer offered a vastly different interpretation of “prevailing party,” one that relies more on contextual considerations\textsuperscript{115} such as circuit

\textsuperscript{108} Id. at 608-09. The Court also briefly noted some countervailing policy considerations—namely that defendants would be disincentivized from voluntarily changing possibly legal behavior because their “potential liability for fees in this kind of litigation can be as significant as, and sometimes even more significant than, their potential liability on the merits,” but refused to base its rejection of the catalyst theory on public policy. Id. at 608 (quoting Evans v. Jeff D., 475 U.S. 717, 734 (1986)).

\textsuperscript{109} Id. at 610.

\textsuperscript{110} See id. at 610-22 (Scalia, J., concurring).

\textsuperscript{111} Id. at 618.

\textsuperscript{112} Id.

\textsuperscript{113} Id. at 619.

\textsuperscript{114} Id. at 620.

\textsuperscript{115} The dissent underscored that “[i]n prior cases, we have not treated Black’s Law Dictionary as preclusively definitive; instead, we have accorded statutory terms,
precedent, legislative intent, statutory comparisons, and plain English.\textsuperscript{116}

The dissent first criticized the majority’s departure from the well-established circuit precedent of applying the catalyst theory to federal fee-shifting statutes, and its decision to follow the Fourth Circuit’s rejection of the catalyst theory.\textsuperscript{117} The dissent reasoned that the majority’s approach would “allow[] a defendant to escape a statutory obligation to pay a plaintiff’s counsel fees, even though the suit’s merit led the defendant to abandon the fray, to switch rather than fight on, to accord plaintiff sooner rather than later the principal redress sought in the complaint.”\textsuperscript{118} According to the dissent, the effects of such an interpretation of “prevailing party” were clearly contrary to the legislative intent behind fee-shifting statutes.\textsuperscript{119}

Citing the House and Senate reports for the Civil Rights Attorney’s Fee Awards Act of 1976,\textsuperscript{120} the dissent highlighted the motivating force behind the statute: “to ensure that nonaffluent plaintiffs would have `effective access' to the Nation’s courts to enforce civil rights laws.”\textsuperscript{121} More importantly, as the dissent underscored, the legislative history provides that “[f]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.”\textsuperscript{122}

In support of awarding fees without an enforceable judgment, the dissent contrasted the “prevailing party” language with other statutes that address fee-shifting.\textsuperscript{123} For example, the dissent pointed to the Prison Litigation Reform Act of 1995 (“PLRA”), which provides that fee awards for prisoners must be “proportionately related to the court

\textsuperscript{116} See id. at 622-44.
\textsuperscript{117} See id. at 625-27 (criticizing the majority’s reliance on Farrar when “the issue [of catalyst theory] ‘was not presented for this Court’s decision in Farrar”’ (citation omitted)).
\textsuperscript{118} Id. at 622.
\textsuperscript{119} In response to the majority’s contention that the legislative history was “at best ambiguous,” id. at 607-08, the dissent averred that the majority’s “constricted definition of ‘prevailing party,’ and consequent rejection of the ‘catalyst theory,’ impede[d] access to court for the less well-heeled, and shr[u]nk the incentive Congress created for the enforcement of federal law by private attorneys general,” id. at 622-23.
\textsuperscript{121} Buckhannon, 532 U.S. at 636 (quoting H.R. Rep. No. 94-1558, at 1 (1976)).
\textsuperscript{122} Id. at 637 (quoting S. Rep. No. 94-1011, at 5 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5912)). The dissent also observed that the House report specifically supports awarding fees for informal relief: “After a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed.” Id. at 638 (quoting H.R. Rep. No. 94-1558, at 7).
\textsuperscript{123} Id. at 629-30.
ordered relief for the violation.”

The dissent argued that if Congress had intended to require a court judgment before plaintiffs could collect fees under the FHAA and the ADA, then it would have foreclosed recovery without judgment, as it did in the PLRA.125

In keeping with this reasoning, the dissent offered its own plain meaning of “prevailing party,” arguing that a “lawsuit’s ultimate purpose is to achieve actual relief from an opponent.... [I]f a party reaches the ‘sought-after destination,’ then the party ‘prevails’ regardless of the ‘route taken.’”126 The dissent also underscored the Supreme Court’s tendency to place “greatest weight not on any ‘judicial imprimatur,’ but on the practical impact of the lawsuit,”127 a tendency the dissent believed was clearly at odds with the majority’s stance.

II. UNCERTAINTY AND INCONSISTENCY IN DEFINING “PREVAILING PARTIES” POST-BUCKHANNON

Part II outlines the basic debate over the merits of the Buckhannon decision, and focuses on the case’s impact on civil rights litigation in federal and New York courts. Specifically, this part examines the New York courts’ inconsistent treatment of “prevailing parties” in the wake of the Buckhannon decision.

A. General Ramifications of Buckhannon on Civil Rights Litigation

Directly following Buckhannon, defendants who had been ordered to pay attorney’s fees under the catalyst theory appealed where possible, and some plaintiffs suffered a reversal of their fee awards.128 Elsewhere, plaintiffs’ lawyers offered to settle their cases at a discount.129 On one hand, the decision came as a relief to businesses and government, who could now look forward to not only fewer plaintiffs bringing civil rights lawsuits, but also reduced fee liability when they do face suit.130 On the other hand, the Buckhannon decision has made it much more difficult for individuals to bring civil rights litigation by enabling defendants to engage in strategic

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126. Id. at 634 (quoting Hennigan v. Ouachita Parish Sch. Bd., 749 F.2d 1148, 1153 (5th Cir. 1985)).
130. Id. at 394-95.
behavior, and deterring civil rights lawyers from accepting potential plaintiffs' cases.\textsuperscript{131}

Supporters of the decision argue that it will reduce litigation in a number of ways. In the first place, \textit{Buckhannon} will decrease the number of frivolous suits filed by civil rights litigants who bring illegitimate claims in the hopes of pressuring defendants to capitulate in order to avoid paying attorney's fees and other litigation costs.\textsuperscript{132} Second, the bright line rule set forth by the \textit{Buckhannon} decision will either reduce or at least expedite fees-based litigation.\textsuperscript{133} Third, some "praise \textit{Buckhannon} for encouraging settlements and fostering predictability."\textsuperscript{134} These advocates of the decision explain that pre-\textit{Buckhannon}, a defendant might have been liable for fees even after settlement, so "it might have felt the odds were better if it pushed forward and vigorously defended the suit."\textsuperscript{135}

Critics of \textit{Buckhannon}, however, argue that defendants now have the ability to string out litigation in an effort to force the plaintiff to drop the case due to prohibitive costs.\textsuperscript{136} Alternatively, defendants may voluntarily change their contested policies when the plaintiff seems on the verge of winning, thereby mooting the case, and preventing the plaintiff from collecting attorney's fees or an injunction.\textsuperscript{137} \textit{Buckhannon} opponents insist that the decision could actually increase litigation because plaintiffs will insist on obtaining consent decrees accompanying settlements, litigate to try to stop courts from finding a case moot, and bring more actions for damages.\textsuperscript{138} Furthermore, detractors highlight the conflict of interests civil rights plaintiffs' attorneys will face: they will be torn between advising against settlement (and thereby risking payment), and truly acting in their client's best interests.\textsuperscript{139}

\textsuperscript{131} Id. at 395-97.
\textsuperscript{132} Id. at 395 n.164 (citing Matthew D. Slater, Comment, \textit{Civil Rights Attorney's Fee Awards in Moot Cases}, 49 U. Chi. L. Rev. 819, 823 (1982)).
\textsuperscript{133} See Margaret Graham Tebo, \textit{Fee-Shifting Fallout: In the Two Years Since the Supreme Court Limited Catalyst Theory, Civil Rights Lawyers Find Themselves Torn Between Losing Fees and Settling for Their Clients}, 89 A.B.A. J. 54, 57 (2003). An employment defense lawyer observed that pre-\textit{Buckhannon}, "[a] lot of the time, you see cases where the merits are resolved and the only remaining issue is the amount of attorneys fees—and sometimes that battle rages on long after the rest of the case is finished." \textit{Id.} at 58.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} See Stanley, \textit{supra} note 70, at 395.
\textsuperscript{137} Id. Defense attorneys maintain that this is an unlikely scenario because few defendants would spend the money or time to drop a case just before trial simply to avoid paying the plaintiff's attorney's fees. \textit{Id.} (citing Marcia Coyle, \textit{Fee Change Is a Sea-Change But Some Seek Way to Skirt Justices' Limit on Catalyst Theory Fees}, Nat'l L.J., June 11, 2001, at A1).
\textsuperscript{138} Id. at 396.
\textsuperscript{139} Tebo, \textit{supra} note 133, at 57.

Though Buckhannon only addressed specifically the FHAA and ADA, its reach has been felt far beyond these statutes. The Buckhannon Court affirmed that it interprets fee-shifting statutes uniformly,\(^{140}\) which has led many other courts to apply the Buckhannon definition of “prevailing party” to fee-shifting statutes other than the ADA and FHAA. However, while federal courts were quick to extend Buckhannon to the Attorney’s Fees Awards Act,\(^{141}\) there was some uncertainty in extending it to the federal EAJA.

By and large, most federal courts extended Buckhannon to the EAJA,\(^{142}\) but the Court of Federal Claims was a notable outpost of resistance for a time. In Brickwood Contractors, Inc. v. United States ("Brickwood II"),\(^{143}\) the Court of Federal Claims denied the government’s appeal from a judgment awarding attorney’s fees to a plaintiff who had been deemed a “prevailing party” under the catalyst theory,\(^{144}\) refusing to apply Buckhannon to the EAJA\(^{145}\) “on three

\(^{140}\) Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res., 532 U.S. 598, 603 n.4 (2001) (noting that “[w]e have interpreted these fee-shifting provisions consistently”); see also Schultz v. United States, 918 F.2d 164, 166 n.2 (Fed. Cir. 1990) (stating “the Supreme Court has recognized that the definition of ‘prevailing party’ does not differ from rule-to-rule or statute-to-statute”).


\(^{142}\) Thayer v. Principi, 46 Fed. Appx. 623 (Fed. Cir. 2002) (denying attorney’s fees after applying Buckhannon to the EAJA in Veterans Court); Perez-Arellano v. Smith, 279 F.3d 791 (9th Cir. 2002) (denying attorney’s fees to a plaintiff who had challenged an action by the Immigration and Naturalization Service and ultimately secured naturalization, but failed to obtain an enforceable judgment or settlement decree); Abiodun v. McElroy, No. 01-CV-0439, 2002 WL 3199342, at *1 (S.D.N.Y. Mar. 6, 2002) (denying attorney’s fees under the EAJA where plaintiffs’ claim was dismissed as moot, although they ultimately received the relief sought, based on Buckhannon); Miller v. Apfel, No. Civ.A. 300CV0107M, 2001 WL 1142763, at *2 (N.D. Tex. Sept. 26, 2001) (applying the Buckhannon standard to a Social Security plaintiff seeking attorney’s fees under the EAJA); J.S. & M.S. v. Ramapo Cent. Sch. Dist., 165 F. Supp. 2d 570 (S.D.N.Y. 2001) (concluding that private settlement does not create a “prevailing party” for the purposes of the Individuals with Disabilities Education Act after Buckhannon).

\(^{143}\) Brickwood Contractors, Inc. v. United States, 49 Fed. Cl. 738 (Fed. Cl. 2001) [hereinafter Brickwood II].

\(^{144}\) See Brickwood Contractors, Inc. v. United States, 49 Fed. Cl. 148, 165 (Fed.
alternative grounds:"  (1) Buckhannon did not extend to the EAJA; (2) even if it did, the Buckhannon holding was fact-specific, and its facts were distinguishable from Brickwood's; and (3) in the event that Buckhannon's holding and facts do apply to Brickwood, a Temporary Restraining Order ("TRO") hearing constituted the necessary judicial imprimatur.146

The Brickwood II court contrasted the text of the EAJA with that of the FHAA and ADA, and observed two important distinctions: (1) the FHAA and ADA contained permissive fee-shifting language,147 whereas the EAJA had mandatory fee-shifting language,148 which created a "presumption" of entitlement to fees for prevailing parties absent from the other statutes;149 and (2) neither the FHAA nor the ADA contained "substantially justified" language, as the EAJA did.150

Addressing the Buckhannon Court's concerns that the catalyst theory would reward plaintiffs for "simply filing a nonfrivolous but nonetheless potentially meritless lawsuit,"151 the Brickwood II court argued that "[t]he 'substantially justified' requirement of [the] EAJA provides a safeguard to ensure that a plaintiff's victory had the necessary legal merit to support an award of attorney's fees."152 In the alternative, the Brickwood II court adopted a more relaxed standard for satisfying Buckhannon's standards, and argued that even if the

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146. Id. at 749.
147. The FHAA provides: "In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs." 42 U.S.C. § 3613(c)(2) (2000) (emphasis added). Likewise, the ADA provides "In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee." Id. § 12205 (emphasis added).
148. The EAJA provides: "Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses ... unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A) (2000) (emphasis added).
149. Brickwood II, 49 Fed. Cl. at 746.
150. Id.
152. Id. at 747. The Brickwood II court further elaborated on the "substantially justified" requirement, noting that it "directs the court to consider the merits of the case underlying the EAJA application," and therefore, "takes pressure off the 'prevailing party' requirement." Id.
new “prevailing party” definition applied to the EAJA, the court’s earlier examination of the merits during the TRO hearing “represent[ed] the necessary ‘judicial imprimatur’ that caused the change in the legal relationship of the parties.”

Less than a year later, however, the Court of Appeals for the Federal Circuit reversed Brickwood II, holding that the phrase “prevailing party” should be interpreted in the same way under the EAJA as under other fee-shifting statutes. The Brickwood III court held that the Buckhannon standard for “prevailing party” extends to fee-shifting statutes other than the ADA and FHAA despite differing statutory language, and that the lower court’s comments during the TRO hearing neither established the necessary judicial imprimatur, nor constituted “a court-ordered change in the legal relationship of the parties,” as required by Buckhannon. According to the Brickwood III court, although Buckhannon dealt specifically with the FHAA and the ADA, it “also expressly cited to the Appendix to Justice Brennan’s dissenting opinion in Marek v. Chesny, which lists over 100 federal fee-shifting statutes,” including the Equal Access to Justice Act. Furthermore, the Brickwood III court echoed Buckhannon’s reference to the Supreme Court’s practice of interpreting fee-shifting statutes consistently. Since the resolution of the Brickwood II split, some commentators perceive a consensus “reached, not only among the circuits, but seemingly among litigants as well,” that Buckhannon’s “prevailing party” requirements apply to the EAJA.

153. Cf. id. at 749. “[T]he court’s remarks at the TRO hearing amounted to a finding that the Navy had acted unlawfully, and the defendant’s change in conduct was a product of judicial action in the lawsuit.” Id.
155. Id. at 1377-78.
156. Id. at 1380.
158. Brickwood III, 288 F.3d at 1377 (citation omitted). According to the Brickwood III court, the EAJA’s legislative history “intended, overall, that the meaning and interpretation of ‘prevailing party’... match and be consistent with its construction and interpretation in other federal fee-shifting statutes.” Id. at 1379. Moreover, the court reasoned that the “substantially justified” prong indicates that the bar for recovering attorney’s fees was meant to be higher than other fee-shifting statutes, but “application of the ‘catalyst theory’... would have the opposite result.” Id. at 1378.
159. Id. at 1377; see also Marek, 473 U.S. at 49.
160. Brickwood III, 288 F.3d at 1377.
161. Klein, supra note 141, at 109 (citing N.Y. State Fed’n of Taxi Drivers, Inc. v. Westchester County Taxi & Limousine Comm’n, 272 F.3d 154, 158 (2d Cir. 2001) (noting that both plaintiff and defendant “acknowledged that this reasoning has become the law”).
162. Id.
C. The Judicial Imprimatur

Circuits are still split, however, on the question of what sort of relief represents the necessary judicial *imprimatur* required by *Buckhannon* to create a "prevailing party." In *Buckhannon*, the Court declared that an operative judicial determination must include a "material alteration of the legal relationship of the parties,"163 and offered as examples enforceable judgments on the merits and court-ordered consent decrees,164 reasoning that "[a]lthough a consent decree does not always include an admission of liability by the defendant, it nonetheless is a court-ordered 'chang[e] [in] the legal relationship between [the plaintiff] and the defendant.'"165 The Court also announced that private settlements did not embody the necessary judicial *imprimatur* to establish a "prevailing party" because they did not "entail the judicial approval and oversight involved in consent decrees"166 (although it admitted previous recognition of private settlements as grounds for awarding attorney's fees),167 in most cases, federal courts lack jurisdiction to enforce private contractual settlements "unless the terms of the agreement are incorporated into the order of dismissal."168 The lower federal courts have been left to determine "where on this continuum a successful plaintiff will cease to legally prevail."169

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."170 *Smyth v. Rivero*,171 a Fourth Circuit case, is

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164. *Id.* Some commentators distinguish four broad categories of successful plaintiff outcomes:

(1) [a] favorable judicial order on the merits[]; (2) [p]rocuring a consent decree[]; (3) [c]ontracting for a private settlement[]; and (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.

Klein, *supra* note 141, at 131 (citations omitted).

165. *Buckhannon*, 532 U.S. at 604 (quoting *Garland*, 489 U.S. at 792 (alterations in original)).

166. *Id.* at 604 n.7.

167. *Id.* at 604.

168. *Id.* at 604 n.7 (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994)).


170. *Id.* at 134 (citation omitted).

171. 282 F.3d 268 (4th Cir. 2002). In *Smyth*, plaintiffs brought a § 1983 action against the Virginia Department of Social Services, arguing that the agency's
representative of the majority of circuits' relatively narrow view of consent decrees. There, the court held that merely obtaining a preliminary injunction does not qualify a party as "prevailing," and set forth a strict standard for distinguishing between private settlements and consent decrees. A court must explicitly retain jurisdiction and oversight over an agreement for an enforceable settlement, i.e., a cognizable consent decree, to exist. Based on this reasoning, the court denied plaintiffs' request for attorney's fees, finding that neither the preliminary injunction nor the agreement wherein the defendant would forgo repayment of certain benefits constituted the necessary judicial imprimatur for recovery of fees.

The Ninth and D.C. Circuits, along with the Northern District of Florida, on the other hand, "have openly defied Buckhannon's expansion of its 'catalyst theory' analysis into the realm of settlement agreements." In Johnson v. District of Columbia, the D.C. Circuit

requirement that recipients identify the fathers of their children before receiving benefits violated the Social Security Act, 42 U.S.C. §§ 601-603 (2000). Smyth, 282 F.3d at 271. The district court entered a preliminary injunction prohibiting the agency from denying benefits to the plaintiffs. Id. at 272. The agency subsequently agreed to not seek repayment of benefits paid to the plaintiffs prior to the filing of the lawsuit. Id. at 273. The case was ultimately dismissed after the agency modified its policy so that children born after 1996 need not identify their fathers, and the agency restored the plaintiffs' benefits. Id.

The Smyth court found that the "preliminary, [and] incomplete nature of the merits examination and the inter-play between the 'likely harms' and 'likelihood of success' factors in the preliminary injunction inquiry" did not satisfy the prevailing party requirement of § 1988. Smyth, 282 F.3d at 277.

172. The Smyth court observed that "[a] consent decree, because it is entered as an order of the court, receives court approval and is subject to the oversight attendant to the court's authority to enforce its orders, characteristics not typical of settlement agreements." Id. The court recognized, however, that "an order containing an agreement reached by the parties may be functionally a consent decree for purposes of the inquiry to which Buckhannon directs us, even if not entitled as such." Id.

173. Id. at 281. Distinguishing consent decrees from settlements, the Smyth court concluded that, "[a] court's responsibility to ensure that its orders are fair and lawful stamps an agreement that is made part of an order with judicial imprimatur, and the continuing jurisdiction involved in the court's inherent power to protect and effectuate its decrees entails judicial oversight of the agreement." Smyth, 282 F.3d at 282 (emphasis added).

174. Smyth, 282 F.3d at 284. The agreement was not deemed part of the court's order because the trial court neither retained jurisdiction nor compelled compliance with the agreement. Id.

175. Klein, supra note 141, at 135; see Barrios v. Cal. Interscholastic Fed'n, 277 F.3d 1128 (9th Cir. 2002) (permitting recovery of attorney's fees based on an enforceable settlement); Nat'l Coalition for Students with Disabilities v. Bush, 173 F. Supp. 2d 1272, 1279-80 (N.D. Fla. 2001) (holding that because plaintiff's private settlement was enforceable and the court compelled compliance with it, plaintiff was a "prevailing party").

declined to apply *Buckhannon* to private settlements, explaining "that private settlements do constitute a material alteration in the legal relationship between two parties sufficient to confer prevailing party status," since a court with jurisdiction over an agreement can enforce its terms. 178  Contrary to *Smyth, Johnson* maintained that a court's oversight and approval of a settlement are "immaterial to whether that settlement agreement is legally enforceable." 179  Thus, the question of whether private settlements bear the necessary judicial *imprimatur* for recovering attorney's fees remains unsettled. 180

The *Buckhannon* Court's concern over federal courts' jurisdiction to enforce private settlements, however, seems inappropriate with respect to state courts. In *Kokkonen v. Guardian Life Insurance Co. of America*, 181 the Court held that while federal courts do not automatically retain jurisdiction to enforce private settlements unless the parties explicitly stipulate for it or there is some independent basis for federal jurisdiction, "enforcement of the settlement agreement is for state courts." 182  Thus, it would seem that state courts do not face the same jurisdictional problems that federal courts do in the enforcement of private settlements.

D. Buckhannon's Impact on State Fee-Shifting Statutes

Several states have adopted the *Buckhannon* standard when interpreting "prevailing party" language in their own statutes. 183  For

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178. *Id.* at 45.
179. *Id.* at 45 n.3.
182. *Id.* at 381-82.
example, the Supreme Court of Connecticut applied *Buckhannon's* standard for identifying a "prevailing party" pursuant to Connecticut General Statute section 52-240(a), which provides attorney's fees in product liability actions. That court found that settlements for which the court would enter judgment against the defendant for the settlement amount "as upon default," created prevailing parties. In *Taylor v. City of Lenoir*, the North Carolina Court of Appeals denied plaintiffs attorney's fees based on *Buckhannon*. The *Taylor* court concluded that although plaintiffs' suit may have contributed to the city's voluntary change in conduct, the change "was not a legally enforceable action required by judgment, or an order or a court approved settlement of the trial court[, and therefore] . . . plaintiffs do not qualify as prevailing parties for purposes of awarding attorney's fees." In New York, however, courts have applied *Buckhannon* uncertainly and inconsistently.


Prior to *Buckhannon*, New York courts recognized the catalyst theory, and applied it to both federal and state fee-shifting statutes. For example, in *Diaz v. Franco*, the New York Appellate Division, First Department, unanimously found that the plaintiff's action was

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states that "[e]xcept as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees." *Id.* at 529 n.17 (quoting Alaska R. Civ. P. 82(a); see also Graham v. Daimler-Chrysler Corp., No. B152928, 2002 Cal. App. Unpub. LEXIS 11318, at *16 (Ct. App. Dec. 6, 2002) (deeming the catalyst theory a legitimate basis for recovering attorney's fees under California's attorney's fee-shifting statute, Cal. Civ. Proc. 1021.5, in spite of *Buckhannon*).

184. *Wallerstein*, 780 A.2d at 917. According to the statute, "[i]f the court determines that the claim or defense is frivolous, the court may award reasonable attorney's fees to the prevailing party in a products liability action." *Id.* at n.3 (discussing Conn. Gen. Stat. § 52-240(a) (2003)).


187. 558 S.E.2d at 242.

188. *Id.* at 249. Plaintiffs attempted to recover attorney's fees based on North Carolina's common fund doctrine, which provides that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Id.* at 248 (quoting Bailey v. North Carolina, 500 S.E.2d 54, 56 (N.C. 1998)). After *Buckhannon*, the *Taylor* court held that "in order for the common fund doctrine to apply, the party seeking an award of attorney's fees must be the prevailing party, and must show that he has maintained a successful lawsuit." *Id.*

189. *Id.* at 249 (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001)).

190. *See*, e.g., *Dicent v. Wing*, 724 N.Y.S.2d 595, 596 (App. Div. 2001) (deeming plaintiff a prevailing party where "petitioner obtained substantial relief and succeeded in her goal when the City provided the accounting in its response to the petition," just weeks before the *Buckhannon* decision).

likely the catalyst behind the defendant's delayed review of plaintiff's housing application, and accordingly awarded attorney's fees pursuant to § 1988. The Appellate Division also applied the catalyst theory to the New York EAJA, as demonstrated in Shvartszayd v. Dowling, where the First Department also unanimously awarded attorney's fees to a plaintiff who had been wrongfully denied Social Security benefits, finding that the Department of Social Services' failure to comply with a reinstatement of benefits order was not substantially justified. In Centennial Restorations Co. v. Abrams, the Appellate Division, Third Department, deemed the petitioner a prevailing party under the New York EAJA, where the plaintiff had only achieved partial relief because the city's action "furthered petitioner's interest and conferred an actual benefit upon it."

Post-Buckhannon, New York courts have applied the new "prevailing party" standard reluctantly and inconsistently. On the one hand, in Auguste v. Hammons, the New York Appellate Division reversed a 1999 award for attorney's fees, specifically relying on Buckhannon. Shortly after the plaintiff, Henroit Auguste, commenced an article 78 proceeding to protest the New York City Department of Social Services' ("DSS") termination of his Medicaid benefits, DSS restored them, and the New York Supreme Court dismissed the proceeding as moot. The trial court considered Auguste a "prevailing party" and awarded him attorney's fees. The Appellate Division reversed, refusing to recognize Auguste as a prevailing party under the catalyst theory; the court concluded that "[s]ince [the New York] Supreme Court did not issue an enforceable judgment on the merits of petitioner's constitutional claims, there was

192. Id. at 267; see also Thomasel v. Perales, 578 N.Y.S.2d 110 (App. Div. 1991) (awarding attorney's fees pursuant to § 1988 to plaintiffs who had entered into a private settlement).
194. Id. at 631-32.
196. Id. at 560. Ultimately, however, the court denied plaintiff attorney's fees because it found the government's position "substantially justified." Id. at 560-61.
198. 727 N.Y.S.2d at 880.
199. Id.
200. Id.
201. Id.
202. Id. The court noted that "[w]hile petitioner asserts that attorney's fees were authorized because the filing of the petition was the 'catalyst' for the remedial action taken by DSS, namely a restoration of his benefits, this theory of recovery has recently been rejected by the United States Supreme Court [in Buckhannon]." Id.
no material alteration in the legal relationship of the parties sufficient to support an award of attorney's fees." 203

On the other hand, in a factually similar situation, in Wittlinger v. Wing, the New York Court of Appeals specifically declined to rely on Buckhannon. 204 Although the Court of Appeals upheld the Appellate Division’s denial of attorney’s fees, instead of doing so on the basis of Buckhannon, as the Appellate Division had, the court grounded its denial of fees on a finding that the government’s position was “substantially justified.” 205 Thus, it remains unclear whether the catalyst theory permits recovery of fees under the New York EAJA. 206

Most recently, in Wright v. New York State Office of Children & Family Services, 207 the New York Supreme Court for Erie County again skirted the issue of the catalyst theory’s remaining viability, although it explicitly refused to follow Buckhannon’s rejection of private settlements as enforceable judgments. 208 In that case, the plaintiff initiated an article 78 proceeding against the New York State Office of Children and Family Services, Erie County Department of Social Services, and New York State Central Register of Child Abuse and Maltreatment, seeking an annulment of a maltreatment report and an amendment of the report to reflect that the report was unfounded. 209 After the plaintiff submitted her brief, counsel for the State Office and State Register informed the appellate division that they would administratively annul the maltreatment determination, and subsequently submitted letters to the plaintiff advising her that the administrative “hearing was cancelled and the determination complained of would be expunged from the record.” 210 When the plaintiff requested attorney’s fees, the defendants argued that in the absence of any settlement, the plaintiff was left only with the now-defunct catalyst theory. 211 Without commenting on the applicability of the catalyst theory, the court found that “[t]he signed writings by Respondents’ counsel in the two letters agreeing to Petitioner

203. Id.
204. In In re Wittlinger v. Wing, 786 N.E.2d 1270 (N.Y. 2003), the plaintiff also sought attorney’s fees based on DSS’s restoration of public assistance benefits after he had commenced an article 78 petition.
205. Id. at 1273-74 (concluding that based on its finding that the government’s position was substantially justified, it “need not reach the ‘catalyst’ issue and Buckhannon’s impact on the interpretation of the New York Equal Access to Justice Act”).
206. “The [Wittlinger] Court’s ruling was a disappointment to advocates hoping for a definitive answer.... The unanswered question is whether a complainant is entitled to counsel fees if his legal action or threat of litigation is the catalyst for the result he sought.” Major Decisions from New York’s High Court, N.Y. L. J., July 30, 2003, at A1.
208. Id. at *3.
209. Id. at *1.
210. Id.
211. Id. at *2-*3.
Wright’s terms bind those Respondents pursuant to ordinary contract law and CPLR Rule § 2104. The court went on to conclude that the writings “manifest[ed] all of the necessary formalities for an enforceable settlement agreement in New York. Hence, the State Respondents’ reliance on the federal case law addressing legal catalyst theory is misplaced.

The state defendants next argued that the plaintiff had not obtained sufficient relief to be considered a prevailing party, relying on Buckhannon’s disapproval of private settlements as grounds for recovery of fees. The Wright court dodged this point, stating that Buckhannon’s language concerning legal enforceability “only provides guidance to the Court, and is itself dicta. Buckhannon . . . did not involve a settlement of any sort.” Based on the court’s previous conclusion that the defendant’s correspondence was legally enforceable, the court held that the plaintiff’s settlement did not implicate the catalyst theory, and did render her a prevailing party.

The Wright court further justified its departure from Buckhannon by highlighting differing language in the federal and state EAJAs. While the federal EAJA defines “final judgment” as “a judgment that is final and not appealable and includes an order of settlement,” the state EAJA defines final judgment as “a judgment that is final and not appealable, and settlement.” The Wright court concluded that the New York legislature intended to “include those who prevailed through settlement” as eligible applicants under the EAJA, arguing that “[b]y creating a more generous standard for applicants than the federal statute, the state statute is not controlled by the recent developments in the federal common law cutting away

212. Id. at *2. In relevant part, N.Y. C.P.L.R. 2104 (McKinney 2003) provides: An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered.

214. Id.
215. Id. at *3.
216. Id. The Wright court explained that:
   Given the Court’s conclusion that Petitioner Wright obtained a signed, written acceptance of her terms by the State Respondents, which the Court finds legally bound them pursuant to CPLR 2104, the Court must also conclude that this case falls on the other side of the line from the legal catalyst cases, including Buckhannon, and Wittlinger v. Wing, precisely because the agreement is legally enforceable.

218. Id. (emphasis added).
220. Id. at 8602(c) (emphasis added).
at the field of federal applicants." Thus, New York courts have treated Buckhannon's applicability to the New York EAJA in a contradictory manner, and have, in some cases, openly defied its dicta. This presents a crucial issue wherein the civil rights of our most disadvantaged citizens hang in the balance.

III. STOPPING BUCKHANNON IN ITS TRACKS: BUCKHANNON DOES NOT APPLY TO THE NEW YORK EAJA

New York courts have a critical opportunity to ensure meaningful access to justice for the state's most vulnerable citizens. New York would check unjustified governmental action by continuing to recognize the catalyst theory, or in the alternative, at least recognizing private settlements as bearing the judicial *imprimatur* necessary to recover attorney's fees.

Part III of this Comment argues that Buckhannon ought not apply to the New York EAJA, based on that case's limited holding, the legislative intent of both the federal and state EAJAs, the textual differences between the EAJAs and the FHAA and ADA, the textual differences between the federal and New York EAJAs, and several policy concerns.

**A. The Limited Nature of the Buckhannon Holding**

Given its limited holding, Buckhannon should not apply to the federal or state EAJAs. The Buckhannon Court restricted its holding to the FHAA and the ADA, and while it mentioned other fee-shifting statutes throughout its opinion, these comments were clearly dicta. Nowhere in the opinion did the Court specifically reference the federal EAJA, or any state versions. In short, Buckhannon does not necessarily mandate the application of its holding to the EAJAs.

222. Id.

223. Miller, supra note 30, at 1363; see also Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 602-03 n.4; Brickwood II, 49 Fed. Cl. 738, 744 (Fed. Cl. 2001) (characterizing the Buckhannon Court's mention of other fee-shifting statutes as dicta).

224. Miller, supra note 30, at 1363; see also Brickwood II, 49 Fed. Cl. at 745 (noting that "[t]he Buckhannon court also specifically listed three other statutes which have been consistently interpreted with the two statutes at issue in Buckhannon, but the EAJA statute was not mentioned in this list"); but see Buckhannon, 532 U.S. at 603 (referencing the appendix to Justice Brennan's dissent in Marek v. Chesny, 473 U.S. 1 app. at 49 (1985) (Brennan., J., dissenting), which lists over 100 fee-shifting statutes, including the EAJA, at number twenty-eight).

Several courts, however, have declined to apply Buckhannon to other statutes listed in Brennan's appendix. For example, the Tenth and Eleventh Circuits, as well as the Central District of California, have all refused to apply Buckhannon to the Endangered Species Act, 16 U.S.C § 1540(g)(4) (2000), which appears as number twenty-two in Brennan's appendix. See Marek, 473 U.S. at app. 46 (Brennan, J., dissenting); Loggerhead Turtle v. County Council of Volusia County, Fla., 307 F.3d 1318, 1319, 1326-27 (11th Cir. 2002); Ctr. for Biological Diversity v. Norton, 262 F.3d
B. Legislative Intent

Furthermore, applying Buckhannon to the EAJAs would thwart the basic legislative intent behind the acts. Congress intended that the interpretation of "prevailing party" be "consistent with the law that has developed under existing statutes." At the time the federal EAJA was enacted, the catalyst theory was a well-recognized part of the relevant case law. Hence, the congressional intent to incorporate the catalyst theory into the statute is a reasonable inference, especially in light of Congress's explicit pronouncement that "prevailing party should not be limited to a victor only after entry of a final judgment following a full trial on the merits." Indeed, Congress stated that "[a] party may be deemed prevailing if he obtains a favorable settlement of his case," and cited Foster v. Boorstin, wherein the Court of Appeals for the District of Columbia observed:

Surely the effectiveness of this incentive for persons of limited means would be greatly diminished if the complainant were forced to bear the expense of his attorneys' fees whenever the Government chose to award the requested relief after a court action had been filed but prior to a judgment or a court order.

Such explicit endorsements of informal resolutions as sufficient for recovering attorney's fees belie the Buckhannon Court's characterization of the legislative history as "ambiguous."

Likewise, the New York Legislature intended the state EAJA to improve "access to justice for individuals and businesses who may not have the resources to sustain a long legal battle against an agency that is acting without justification," and specifically stipulated that the statute be interpreted according to the case law developed under the federal EAJA.

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1077, 1080 n.2 (10th Cir. 2001); S.W. Ctr. for Biological Diversity v. Carroll, 182 F. Supp. 2d 944, 947 (S.D. Cal. 2001).
225. Miller, supra note 30, at 1362.
227. Miller, supra note 30, at 1368.
229. Id.
231. Id. at 342.
C. Textual Differences Between the EAJAs and the FHAA and ADA

In addition to Buckhannon's limited holding and the directives set forth by the legislative history, significant textual differences between the EAJAs and the FHAA and ADA further counsel against extending Buckhannon. In the first place, the EAJAs only permit recovery when the government is not “substantially justified” in its position, unlike the FHAA and the ADA. The “substantially justified” prong... alleviates the concerns associated with a broad definition that allows the catalyst theory.” This provision creates a higher bar to recovery absent in the other two statutes. The EAJAs also permit a court to deny fees “when special circumstances make an award unjust,” whereas the FHAA and ADA do not. This language considerably distinguishes the EAJAs from the FHAA and the ADA, negating the necessity for applying Buckhannon. Basically, the EAJAs’ higher standard for recovery reduces the concern, expressed by the Buckhannon Court, that courts will award undeserving plaintiffs attorney’s fees.

D. Textual Differences Between the Federal and State EAJAs

Nevertheless, in the event that federal courts do continue to apply Buckhannon to the federal EAJA, New York courts need not follow suit because the New York EAJA is significantly distinguishable from its federal counterpart. Indeed, the state EAJA goes beyond the federal EAJA’s standard for recovery by defining “prevailing party” as “a plaintiff or petitioner in the civil action against the state who prevails in whole or in substantial part.” This is a significantly higher threshold requirement than the federal EAJA, which only requires a

235. 28 U.S.C. § 2412(d)(1)(A)(2000). “[A] court shall award to a prevailing party other than the United States fees and other expenses... unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.” Id.; see also N.Y. C.P.L.R. 8601(a).
236. 42 U.S.C. § 12205 (2000) (“In any action or administrative proceeding commenced pursuant to this chapter, 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, and costs...”); id. § 3613(c)(2) (“In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee and costs.”).
237. Miller, supra note 30, at 1363 (citing Brickwood Contractors, Inc. v. United States, 49 Fed. Cl. 738, 747 (Fed. Cl. 2001)).
238. Id.
239. Id. at 1363-64; see 28 U.S.C. § 2412(d)(1)(A).
240. See Miller, supra note 30, at 1363-64.
plaintiff to succeed on “any significant issue” or receive “some of the benefit” sought from the lawsuit.243

Furthermore, the New York EAJA places more restrictions on eligible parties than the federal EAJA: New York’s EAJA only allows plaintiffs “who have a net worth of less than $50,000 (excluding the value of their primary residence),” “owners of businesses with fewer than 100 employees,” and charitable “not-for-profit corporations” to recover attorney’s fees.244 In contrast, the federal EAJA defines an eligible party more expansively than the State EAJA: “(i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000.”245

These textual differences indicate that New York’s EAJA forces plaintiffs to meet a higher “prevailing” threshold, and only applies to more economically challenged litigants, as compared to the federal EAJA.

Though in New York Clinical Laboratory Ass’n, Inc. v. Kaladjian,246 the New York Court of Appeals concluded that the state “Legislature’s departure from the Federal EAJA . . . evinces an intent to impose a stricter standard for demonstrating prevailing party status under the State EAJA than under its Federal counterpart,”247 this Comment shows that these heightened restrictions actually mitigate the necessity for applying Buckhannon. According to the Buckhannon Court, one of the primary concerns associated with the catalyst theory was that “a plaintiff could recover attorney’s fees if it established that the ‘complaint had sufficient merit to withstand a motion to dismiss for lack of jurisdiction or failure to state a claim on which relief may be granted.’”248 Examining the level of success required to be a “prevailing party,” the New York Clinical Laboratory court ruled that it would only regard a plaintiff as a prevailing party if it “can show that it succeeded in large or substantial part by identifying the original goals of the litigation and by demonstrating the comparative substantiality of the relief actually obtained.”249

244. 1989 N.Y. Legis. Ann. 336; see also N.Y. Clinical Lab., 649 N.E.2d at 815.
246. Id. at 811.
247. Id. at 814.
249. N.Y. Clinical Lab., 649 N.E.2d at 815.
Under New York's EAJA, it is unlikely that an unworthy plaintiff would collect fees, because a litigant could not recover without meeting the burden of demonstrating the substantiality of the relief as compared with the goals of the litigation. Hence, New York's exacting scrutiny over the level of success plaintiffs must demonstrate before becoming entitled to attorney's fees makes it unnecessary to apply *Buckhannon*.

Furthermore, although the New York Clinical Laboratory court identified some legislative history evidencing concern over limiting the award of attorney's fees, the heightened restrictions that were enacted because of these reservations specifically accommodate the catalyst theory's broader scope of recovery. Indeed, then-Governor Cuomo and then-Attorney General Robert Abrams, both of whom had opposed bills with similar purposes in the past, acknowledged that the New York EAJA contained sufficient restraints on attorney's fees awards, and supported its passage. The New York EAJA's distinctive provisions alleviate the need to further guard against awarding fees to undeserving plaintiffs. In light of the legislative and executive pronouncements that the New York EAJA contains adequate checks on fee-shifting, it is unnecessary to apply *Buckhannon* as a further restriction on the state EAJA.

**E. Policy Reasons**

Aside from the several legal reasons cited above, significant policy concerns also caution against applying *Buckhannon* to the New York EAJA.

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250. Id.
251. Id. at 814-15. In approving the bill, the Governor stated that "a program of providing recompense for the cost of correcting official error is highly desirable as long as it is limited to helping those who need assistance, it does not deter State agencies from pursuing legitimate goals and it contains adequate restraint on the amount of fees awarded." Id. (quoting 1989 N.Y. Legis. Ann. 336) (emphasis omitted)).
253. See id. Governor Cuomo noted that "this bill . . . is different" from previous bills with similar purposes, which had been disapproved due to (1) appropriate limitations on eligibility; (2) the "substantially justified" prong, which will not deter good faith agency action; and (3) limits on when and how much attorney's fees may be awarded. Id.; see also Memorandum from Attorney General Abrams, to Governor Cuomo, reprinted in 1989 N.Y. Legis. Ann. 336. The attorney general noted that the New York EAJA "has been carefully crafted to meet many of the objections which have resulted in the disapproval of [similar] bills in previous years. . . . I have no legal objection to the bill." Letter from Attorney General Robert Abrams, reprinted in 1989 N.Y. Legis. Ann. 336.
1. The Need to Provide Access to Justice for New York’s Indigent Citizens

The problem of legal underrepresentation among New York’s most vulnerable citizens is a well-documented, but as yet unmitigated, phenomenon. In her most recent report on the state of the judiciary, Chief Judge Judith Kaye observed that “study after study has found we are meeting only a small percentage of the civil legal needs of the poor.” She stressed the importance of ensuring that underprivileged individuals’ “entitlement to equal justice is not thwarted by lack of money, and surely not by barriers erected by the courts themselves.” By refusing to apply Buckhannon to the state EAJA, New York courts can “remove one such court-imposed barrier to access to justice, and ... stem any further erosion in available legal services to this woefully underserved population.” By recognizing the catalyst theory as applied to the state EAJA, New York courts will come one step closer to legitimizing the premise that all people are equal before the law.

2. Private Attorneys General Rationale

The federal EAJA, upon which the State EAJA is modeled, specifically stressed that its role was to encourage private enforcement of public policy by compensating private attorneys general. To realize the private attorneys general rationale, Congress enacted the federal EAJA to expand governmental liability for fees. This private attorneys general rationale is absent from both the FHAA and the ADA, and it is therefore inappropriate to extend Buckhannon to the EAJA. “A broader definition of prevailing party than

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254. See Report to the Chief Judge of the Legal Services Project, Funding Legal Services for the Poor 3 (May 1998) (asserting that the “unmet need for critical legal services among poor New Yorkers has been thoroughly documented, is very great and is worsening”); Preliminary Report of Committee to Improve the Availability of Legal Services (June 30, 1989) (reporting that “there is an imbalance of crisis proportions between the ... unmet need for civil legal services among the poor ... and the legal resources now available to address it.”).


256. Id. at 6.


260. Miller, supra note 30, at 1364.

261. Id.
Buckhannon's conception is more consistent with the expansion of liability for attorney's fees that Congress sought to achieve under the EAJA.262

Moreover, it is only fair to compensate private citizens for efforts that bring about favorable changes for society as a whole.263 Indeed, Congress stated that "the expense of correcting error on the part of the Government should not rest wholly on the party whose willingness to litigate [or] adjudicate has helped to define the limits of Federal authority."264 Thus, allowing Buckhannon to reach the EAJAs would have the very effect the statute intended to prevent.

3. Government Party

Unlike the FHAA and ADA, the state and federal EAJAs only apply to suits involving the government.265 Due to the government's size, greater resources, and expertise, private plaintiffs may be daunted from initiating litigation against it.266 Because the EAJAs only apply to parties in suit against the government, and the government has superior resources, Justice Scalia's argument in Buckhannon that the catalyst theory can harm "less-well heeled" parties on either side of the litigation267 is unfounded. This is especially true under the New York EAJA, where individual plaintiffs must have a net worth of less than $50,000 to recover attorney's fees.268

Applying Buckhannon to the EAJAs would create yet another disincentive to bringing suit against the government because the "government could moot cases by voluntarily changing its behavior."269 The stronger the merits of a case, the more likely the government would change its behavior, thereby discouraging plaintiffs with the most meritorious cases, but the fewest financial resources, from bringing suit.270

Furthermore, citizen suits against the sovereign function as an

262. Id.
263. Id. at 1367.
265. Miller, supra note 30, at 1364.
266. Id. at 1365 nn.141-42.
267. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 620 (Scalia, J., concurring) (maintaining that "the catalyst theory also harms the 'less well-heeled defendants,' putting pressure on them to avoid the risk of massive fees by abandoning a solidly defensible case early in litigation").
269. Miller, supra note 30, at 1366.
270. The New York EAJA only allows recovery for plaintiffs who have a net worth of less than $50,000 (excluding the value of their primary residence), owners of businesses with fewer than 100 employees, and not-for-profit corporations. See 1989 N.Y. Legis. Ann. 336. In fact, New York's net worth cap is the lowest out of all the state EAJAs, ensuring that only the most underprivileged litigants may take advantage of fee-shifting. See Olson, supra note 40, at 562.
important check on government. These suits deter improper government actions, allow private citizens to protect their own interests, and achieve important public policy goals. Significantly, the drafters of the New York EAJA voiced their concern that the government could, with its greater resources, "coerce compliance with its position." Indeed, the New York State Bar Association ("NYSBA") has reported that the greatest problem plaguing indigents' assertion of their rights is "inadequate performance of local social services districts and the inadequate supervision of those districts" by the DSS. In 1988, the NYSBA found that "[m]ore than half of all fair hearings [were] conducted [against the DSS], ... [but the actions of the DSS were] affirmed in only 11% of the cases in 1986." This means that it is likely that some local agencies did not follow the law in almost 90% of the cases. More recent reports indicate that local agency compliance with laws remains a problem today: In 1998, the New York City Comptroller reported that local agencies failed to comply with fair order hearings in almost a quarter of all cases.

Permitting plaintiffs to recover attorney's fees under the New York EAJA via the catalyst theory is essential to check unfair governmental action. "[I]f state agencies become aware that citizens, no matter how poor, will have access to legal assistance in seeking ... redress, a closer adherence to statutory obligations may be expected." Without the catalyst theory, courts will "unintentionally sanction governmental misbehavior by removing any financial penalty for it."

4. Impact on Attorneys

Extending Buckhannon to the EAJAs would not only make filing suit against the government prohibitively expensive for most private litigants, but it would also complicate the task of finding a lawyer. It would discourage civil rights attorneys from taking up the more meritorious cases, because, as noted above, these are precisely the ones in which the government could voluntarily change its behavior, thereby mooting attorneys out of fees. Attorneys working on a contingency basis would be torn between advising settlement in order

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271. Miller, supra note 30, at 1366.
272. Id.
275. Id.
276. See id.
277. See id. at 12-13. The Comptroller declared that rates of non-timely compliance with fair order hearings ranged between 10-24%. Id. at 13.
278. Id. at 14.
279. Id. at 15.
280. See Tebo, supra note 133, at 57.
to ensure payment of fees, and going to trial, where fees would not be assured. 281

Furthermore, reports show that, for many attorneys working in small to mid-size law firms, it is not feasible to engage in poverty law unless there is some kind of remuneration. 282 The bulk of poverty lawyers' fees comes from stipulated settlements, entered into after the government has taken corrective action. 283 If Buckhannon is applied to the New York EAJA and the catalyst theory is disavowed, these attorneys will lose the greater share of their fees because the government will be able to take corrective action without paying for the expense of litigating its erroneous behavior. 284 This would discourage, and probably financially prohibit, many lawyers from making the large investments of time and resources necessary to become familiar with and litigate in most poverty law areas. 285

F. Private Settlements Bear the Necessary Judicial Imprimatur

In the alternative, if New York courts insist on applying Buckhannon to the New York EAJA, they should at least recognize private settlements as a basis for recovering attorney's fees. Recovery of fees is crucial for enabling poverty lawyers to take on low-income civil rights litigants' causes, and often determines the degree of access litigants will have to counsel. 286

The Buckhannon Court's concerns about the lack of federal jurisdiction to enforce private agreements, 287 as articulated in Kokkonen v. Guardian Life Insurance Co. of America, 288 are totally inapplicable in the state court context. Kokkonen explicitly acknowledged that state courts do not need special jurisdiction to enforce settlements. 289 New York's own court, in Wright v. New York State Office of Children & Family Services, 290 ventured as much by ruling that mere correspondence between parties could create a

281. Id.
284. See id. at 9.
285. See id. (describing how the Carole A. Burns & Assoc. firm's tentative efforts to create a poverty law practice group were frustrated by Buckhannon); Brief of Amicus Curiae NYSBA at 8, In re Wittlinger (No. 2003-0005) (observing that "a private attorney must decide whether the mammoth investment of time and effort carries with it a reasonable chance of fair compensation").
286. See Brief of Amicus Curiae Carole A. Burns & Assoc. at 7, Wittlinger (No. 2003-0005).
289. Id.
material alteration of their legal relationship under basic contract principles, satisfying Buckhannon's judicial *imprimatur* requirement.291

The federal and New York EAJAs' differing definitions of "final judgment" further support awarding fees to claimants under the state version without a consent decree attached to a settlement. The New York EAJA permits recovery after "a judgment that is final and not appealable, and settlement,"292 as opposed to an "order of settlement,"293 as the federal EAJA requires. The state version's exclusion of "order of" suggests that a party who obtains something less than a judicially-sanctioned agreement can still be considered a "prevailing party" under the New York EAJA, and New York courts need not construe the judicial *imprimatur* as narrowly as cases like *Smyth v. Rivero*.294 Ultimately, a more expansive construction of Buckhannon's judicial *imprimatur* requirement constitutes the correct compromise between achieving a consistent interpretation of "prevailing party" fee-shifting statutes, encouraging settlement, and permitting plaintiffs to recover fees.

**CONCLUSION**

New York courts must not apply the Supreme Court's rejection of the catalyst theory in *Buckhannon* to the New York EAJA. The drafters of the Act intended to expand the government's liability for attorney's fees in order to facilitate access to justice for disadvantaged litigants, and adequately addressed the competing concern of hampering legitimate governmental action by adding heightened restrictions on eligibility and recovery.295 These restrictions accommodate the catalyst theory's broader principle of recovery.296 In light of the significant burdens a disavowal of the catalyst theory will add to the problem of the underrepresentation of the poor, as well as the valuable check on illegal governmental activity society at large will lose, *Buckhannon* cannot pertain to the New York EAJA.297

In the alternative, if New York courts insist on applying *Buckhannon*, they must recognize private settlements as a valid enforceable judgment because the *Buckhannon* Court's rationale for disapproving of private settlement simply does not apply in a state court context, and there is statutory support for distinguishing the New York EAJA from the federal version.298 Permitting recovery

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291. *Id.*
292. N.Y. C.P.L.R. 8602(c) (McKinney 2003).
294. 282 F.3d 268 (4th Cir. 2002).
295. *See supra* Part I.C.
296. *See supra* Part III.D.
297. *See supra* Part III.E.
298. *See supra* Part III.F.
based on private settlement is the last door open to underprivileged litigants trying to assert their civil rights, and if courts close it, New York’s most vulnerable will be left out in the cold.