

5-1-2005

# When Does a Party Prevail?: A Proposed "Third-Circuit-Plus" Test for Judicial Imprimatur

Matthew B. Tenney

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Civil Procedure Commons](#), [Civil Rights and Discrimination Commons](#), and the [Courts Commons](#)

---

## Recommended Citation

Matthew B. Tenney, *When Does a Party Prevail?: A Proposed "Third-Circuit-Plus" Test for Judicial Imprimatur*, 2005 BYU L. Rev. 429 (2005).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2005/iss2/3>

This Comment is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

## When Does a Party Prevail?: A Proposed “Third-Circuit-Plus” Test for Judicial Imprimatur

### I. INTRODUCTION

Congress has encouraged individual plaintiffs to bring civil rights lawsuits by providing that their attorney’s fees will be paid for if a judge deems them to be the “prevailing party.”<sup>1</sup> Congress utilizes these fee-shifting statutes to further important public policies by allowing private citizens to bring suits to protect their civil rights.<sup>2</sup> However, when parties resolve their suits via private settlement, the question of whether a party has “prevailed” is not always easily answered. Federal courts of appeals have split three ways on the questions of whether a party to a private settlement may be considered a prevailing party, and if so, what degree of judicial involvement is required for such a determination. This circuit split results in varying availability of attorney’s fees to civil rights plaintiffs throughout the country. This disagreement among circuits thus undermines Congress’s public policy of encouraging “private attorneys general” that underlies the fee-shifting statutory regimes.<sup>3</sup>

This split of authority stems from the Supreme Court’s lack of guidance in its most recent attorney’s fees case, *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*.<sup>4</sup> There the Court eliminated the “catalyst theory”—a widely

---

1. See, e.g., Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988 (b) (2000); Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (2000); Fair Housing Act, 42 U.S.C. § 3613(c)(2) (2000); Americans with Disabilities Act of 1990, 42 U.S.C. § 12205 (2000); Voting Rights Act Amendments of 1975, 42 U.S.C. § 1973l(e) (2000); see also *Marek v. Chesny*, 473 U.S. 1, 43–51 (1985) (appendix to opinion of Brennan, J., dissenting); Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 439–40; Robin Stanley, Note, *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources: To the Prevailing Party Goes the Spoils . . . and the Attorney’s Fees!*, 36 AKRON L. REV. 363, 368 (2003) (“Congress introduced fee-shifting statutes to encourage individuals to use private enforcement for the implementation of public policies.”).

2. See, e.g., Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186 (“The idea behind the ‘private attorney general’ can be stated relatively simply: Congress can vindicate important public policy goals by empowering private individuals to bring suit.”).

3. See *infra* Part II.A.

4. 532 U.S. 598 (2001).

used test<sup>5</sup> for determining prevailing party status—by adhering to a strict interpretation of the “plain language”<sup>6</sup> of the fee-shifting statutes. The Court reasoned that the catalyst theory permitted fee awards in the absence of any court-ordered or judicially sanctioned change in the parties’ legal relationship.<sup>7</sup> To illustrate, the Court explained that both a judgment on the merits and a consent decree involved the necessary judicial approval and oversight to provide prevailing party status.<sup>8</sup> However, it failed to adequately delineate the parameters of prevailing party status in the private settlement context. This failure has led to a divergence of views as to how much judicial imprimatur in the resolution of a lawsuit is required before a party can be said to have “prevailed.”<sup>9</sup> This question gains importance in light of the various ways in which a suit may end.

The level of judicial imprimatur in the resolution of a suit varies according to the manner in which a suit concludes. If a case actually culminates in a trial verdict, the prevailing party is readily ascertainable because the judgment on the merits bears full judicial sanction. However, not all cases are tried to conclusion, as parties often negotiate a settlement prior to litigation in order to save costs.<sup>10</sup> Parties wishing to resolve a dispute prior to litigation may enter their private agreement as an official judgment of the court, known as a consent decree.<sup>11</sup> This action bears the highest level of judicial involvement short of proceeding to trial. Alternatively, parties may enter a purely private settlement<sup>12</sup> and

---

5. *Buckhannon*, 532 U.S. at 600–02. Prior to *Buckhannon*, a party could “prevail” under the catalyst theory if it achieved a favorable result on any issue in its suit, even if the defendant’s change in behavior was voluntary and unconnected with any judicial decree. *See infra* Part III.A. In *Buckhannon*, the Court struck down the catalyst theory as a basis for prevailing party status and ruled that a party only prevails when it obtains actual judicial relief. *See infra* Parts III.B. The theory is so named because the prevailing party’s lawsuit, or threat thereof, has acted as a catalyst to achieve the desired result, even if that result occurred through a defendant’s voluntary cessation of allegedly offending activities. *See Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 429–30 (8th Cir. 1970) (“[The plaintiff]’s lawsuit acted as a catalyst which prompted the [defendant] to take action . . . seeking compliance with the requirements of Title VII.”).

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

7. *See infra* notes 88–97 and accompanying text.

8. *See infra* notes 93–94 and accompanying text.

9. *See infra* notes 152–154 and accompanying text.

10. *See infra* note 33.

11. *See infra* Part II.B.1.

12. As used in this Comment, the term “purely private settlement” denotes a private settlement that has been negotiated between the parties, who then stipulate to a dismissal of the action by the court. Purely private settlements are distinguished from those situations in which the terms of the settlement are incorporated into the court order dismissing a case. *See infra* note 113.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

petition the judge to enter a stipulated dismissal order.<sup>13</sup> Such an action generally bears the least judicial imprimatur. Parties may also opt for a resolution somewhere between private settlements and consent decrees on the spectrum of judicial involvement.<sup>14</sup>

The three-way split among the circuits revolves around whether a party to a private settlement that falls short of a consent decree can ever be termed a prevailing party. Contrary to the majority of circuits interpreting the issue, the Ninth Circuit has ruled that a party with nothing more than a private settlement may be awarded fees as a prevailing party.<sup>15</sup> At the other end of the spectrum, the Eighth Circuit has ruled that nothing short of a consent decree or a judgment on the merits may serve as the basis for prevailing party status.<sup>16</sup> Finding a middle ground, and representative of the majority of circuits to have considered the issue, the Third Circuit ruled that a party with a settlement agreement may be a prevailing party if the settlement bears sufficient judicial imprimatur.<sup>17</sup>

This Comment argues that of the various approaches taken by the circuits, the Third Circuit's comes closest to satisfying the Supreme Court's concerns regarding judicial approval and oversight. However, while the Third Circuit's test satisfies the Court's concern regarding oversight, it fails to satisfy the concern regarding approval. A good remedying test should clearly spell out the level of judicial oversight and approval that gives rise to prevailing party status.<sup>18</sup> Therefore, the Third Circuit's test should be augmented by adding an explicit merits-review requirement to create a "Third-Circuit-plus" test. Because *Buckhannon* was decided in the context of two civil rights laws, this Comment addresses the various policy concerns from the viewpoint of furthering Congress's civil rights public policy. The proposed test could also apply to other federal statutory regimes.<sup>19</sup>

Part II of this Comment examines the history of the Supreme Court's prevailing party jurisprudence prior to *Buckhannon*. Part III analyzes the

---

13. See *infra* Part II.B.2.

14. A court may incorporate the private settlement terms into the order of dismissal and/or explicitly retain jurisdiction over the settlement agreement. See *infra* Part II.B.3 and accompanying text.

15. See *infra* Part IV.A.

16. See *infra* Part IV.B.

17. See *infra* Part IV.C.

18. See *infra* note 107 and accompanying text.

19. See *infra* note 28 and accompanying text.

Supreme Court decision in *Buckhannon*, focusing on its concerns regarding “judicial imprimatur.” Part IV presents the ensuing disagreements among the circuit courts regarding how much judicial imprimatur in a private settlement is sufficient to bestow prevailing party status. Part V argues that the competing approaches taken by the Eighth and Ninth Circuits are overly restrictive and overly broad respectively and then proposes a judicial imprimatur test based on the Third Circuit’s approach in *Truesdell*. Part VI concludes this Comment.

## II. BACKGROUND

This Part first analyzes the “American Rule” of attorney’s fees and the purposes behind fee-shifting statutes. It next explores the characteristics of the various litigation conclusion mechanisms—purely private settlements, consent decrees, and those that fall somewhere between the two in terms of the level of judicial involvement. The approaches of the various circuits are founded upon a distinction in the level of judicial involvement in purely private settlements versus consent decrees. As a threshold matter, one must understand the distinguishing characteristics of these two dismissal mechanisms.

### A. The “American Rule” and Fee-Shifting Statutes

Undergirding the Court’s “prevailing party” jurisprudence is the default “American rule,” under which each side bears the burden of paying its own attorney’s fees—in other words, the “prevailing party is not entitled to collect from the loser.”<sup>20</sup> However, several federal courts created a “private attorney general exception to the traditional American rule,” which recognized that “[w]here the law relies on private suits to effectuate congressional policy in favor of broad public interests, attorney’s fees are often necessary to ensure that private litigants will initiate such suits.”<sup>21</sup> On the heels of the Supreme Court’s disapproval of this judicially created right to a fee award,<sup>22</sup> Congress passed the Civil

20. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 602 (2001) (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975)).

21. *Wilderness Soc’y v. Morton*, 495 F.2d 1026, 1029–30 (D.C. Cir. 1974), *overruled by Alyeska*, 421 U.S. at 263; *see also* Dobbs, *supra* note 1, at 439; Karlan, *supra* note 2, at 186–87; Daniel Steuer, *Another Brick in the Wall: Attorney’s Fees for the Civil Rights Litigant After Buckhannon*, 11 GEO. J. ON POVERTY L. & POL’Y 53, 53–54 (2004).

22. The Court in *Alyeska* ruled that courts did not have the authority to award fees to prevailing parties under any common-law theory, but could only do so under explicit statutory authority. 421 U.S. at 263.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

Rights Attorney's Fees Awards Act<sup>23</sup> to explicitly provide a prevailing party the right to a fee award when vindicating rights under federal civil rights law.<sup>24</sup>

In these statutes, Congress specifically encourages private citizens to act as "private attorneys general" by providing for fee shifting.<sup>25</sup> Indeed, one commentator has described "prevailing party" fee shifting as the "fuel that drives the private attorney general engine."<sup>26</sup> Absent fee shifting, few if any private parties would have the economic ability to see a civil rights action through to completion.<sup>27</sup> This Comment focuses on the policy behind the various civil rights statutes, although there are many other federal statutory regimes that allow for "prevailing party" fee shifting.<sup>28</sup> Given that *Buckhannon* has consistently been applied to

23. 42 U.S.C. § 1988(b) (2004).

24. See *supra* note 1. Less often, federal statutes allow a court to award attorney's fees "whenever the court determines such award is appropriate." Endangered Species Act, 16 U.S.C. § 1540(g)(4) (2000); see, e.g., Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(d) (2000); Clean Air Act, 42 U.S.C. §§ 7604(d), 7607(f), 7622(e)(2) (2000). The Supreme Court has recognized that Congress intended for these "whenever appropriate" fee-shifting statutes "to expand the class of parties eligible for fee awards from prevailing parties to *partially prevailing* parties—parties achieving *some success*, even if not major success." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 688 (1983). Hence, courts following *Buckhannon* have consistently maintained the catalyst theory as available for fee shifting in those statutes. See, e.g., *Loggerhead Turtle v. County Council*, 307 F.3d 1318, 1325 (11th Cir. 2002) ("[W]e agree that *Buckhannon* does not invalidate use of the catalyst test as a basis for awarding attorney's fees under the [Endangered Species Act] . . .").

25. The Court has recognized:

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law . . . . If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

*Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401–02 (1968). There are over one hundred federal statutes that award fees to the "prevailing party." See *Marek*, 473 U.S. at 43–51 (appendix to opinion of Brennan, J., dissenting).

26. *Karlan*, *supra* note 2, at 205.

27. *Id.* at 205–06 ("[M]ost civil rights plaintiffs are unable to afford counsel and without a fees statute, the available counsel would be limited to attorneys willing to represent them pro bono.").

28. Many of the arguments presented in this Comment could be imported into those contexts. The contexts of federal legislation other than civil rights in which *Buckhannon*'s construction of "prevailing party" applies include: special education, voting rights, freedom of information, fair credit reporting, endangered species protection, and employee retirement income. See, e.g., Lucia A. Silecchia, *The Catalyst Calamity: Post-Buckhannon Fee-Shifting in Environmental Litigation and a*

“prevailing party” fee-shifting statutes outside the civil rights context,<sup>29</sup> it is important that courts adopt a consistent approach to fee shifting that best serves Congress’s intent to encourage private citizen suits through the availability of fee shifting.<sup>30</sup>

*B. The Continuum of Litigation-Conclusion Mechanisms  
Short of Final Judgments*

The circuits split when deciding whether parties may be considered to have prevailed in situations falling between private settlements on the one hand and consent decrees on the other. Private settlements are contractual by nature—that is, they represent an agreement between two private parties. Consent decrees, on the other hand, are a hybrid of private contract and judicial decree.<sup>31</sup> Additionally, parties may enter into dismissals that ultimately entail a degree of judicial involvement more than private settlements but somewhat less than consent decrees.

---

*Proposal for Congressional Action*, 29 COLUM. J. ENVTL. L. 1, 3–4 n.9 (2004) (collecting articles) (“Because environmental law relies heavily on citizen suits, those in the environmental arena speculated on what the Court’s interpretation of ‘prevailing party’ in *Buckhannon* might mean in that context.”); Stanley, *supra* note 1, at 368 n.28 (citing various federal statutes containing “prevailing party” fee-shifting provisions); Mark C. Weber, *Special Education Attorneys’ Fees After Buckhannon Board & Care Home, Incorporated v. West Virginia Department of Health and Human Resources*, 2002 BYU EDUC. & L.J. 273.

29. The Court in *Buckhannon* recognized that it interprets all “fee-shifting provisions consistently.” *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 603 n.4 (2001). *See generally* Silecchia, *supra* note 28, at 41–42 (“[N]early every court that has required a prevailing party as a prerequisite to fee recovery has applied *Buckhannon*’s judicial imprimatur test to reject catalyst claims.”) (quoting Kyle A. Loring, Note, *Catalyst Theory Meets the Supreme Court—Common Sense Takes a Vacation*, 43 B.C. L. REV. 973, 993 (2002)).

30. One commentator has noted that because some environmental protection statutes include “prevailing party” language while others include “whenever appropriate” language, “the availability of the catalyst theory is now automatically barred in one set of environmental statutes and yet still viable in another.” Silecchia, *supra* note 28, at 61. Silecchia later observes,

There seems to be no clear distinction between environmental statutes employing the two different standards. For example, the [Clean Air Act] and the [Clean Water Act] use different standards, although there is no compelling reason to do so. Moreover, having two standards can create confusion. Absent a true difference in the citizen enforcement regimes of the statutes that employ these standards, there seems to be no reason to continue to have two different standards.

*Id.* at 81; *see also* Stanley, *supra* note 1, at 396–97 (“Those particularly harmed are plaintiffs enforcing several environmental fee-shifting statutes where damages are not recoverable and only injunctive relief is available.”); Marisa Ugalde, *The Future of Environmental Citizen Suits After Buckhannon Board & Home, Inc. v. West Virginia Department of Health and Human Resources*, 8 ENVTL. LAW. 589, 608–09 (2002) (“[T]he *Buckhannon* decision inevitably results in an illogical and unjustifiable inconsistency in the enforcement of federal environmental laws.”).

31. *See infra* Part II.B.1–2.

---

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

---

This Part will first discuss consent decree characteristics and then will explore the contrasting elements of purely private settlements. It concludes with a look at the characteristics—in terms of judicial involvement—of those dismissals that fall between private settlements and consent decrees on the continuum of judicial involvement.

*1. Consent decrees*

A consent decree is “an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.”<sup>32</sup> Although the agreement underlying the consent decree is a private agreement, the parties submit that agreement to the court for incorporation into a formal decree.<sup>33</sup> A judge’s involvement is fairly extensive. A judge cannot merely rubber stamp a consent decree. On the contrary, a judge “must review a consent decree to ensure that it is ‘fair, adequate, and reasonable; that the proposed decree will not violate the Constitution, a statute or other authority; [and] that it is consistent with the objectives of Congress.’”<sup>34</sup> This fairness review is a key characteristic that distinguishes consent decrees from purely private settlements.

Additionally, courts have recognized that in deciding whether to approve a consent decree, the trial judge must “consider the nature of the litigation and the purposes to be served by the decree.”<sup>35</sup> Thus, for example, it is appropriate for a judge to consider the extent to which a consent decree furthers congressional purposes when the original suit was brought under federal civil rights laws. Accordingly, “the decree must be consistent with the public objectives sought to be attained by Congress.”<sup>36</sup> These factors illustrate a judge’s high level of involvement

---

32. *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 378 (1992); *see also* BLACK’S LAW DICTIONARY 419 (7th ed. 1999) (defining “consent decree” as “[a] court decree that all parties agree to”).

33. The Supreme Court has recognized that a consent decree is “primarily a means by which parties settle their disputes without having to bear the financial and other costs of litigating.” *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 528 (1986).

34. *Conservation Law Found. of New England, Inc. v. Franklin*, 989 F.2d 54, 58 (1st Cir. 1993) (quoting *Durrett v. Hous. Auth.*, 896 F.2d 600, 604 (1st Cir. 1990)); *see also* 46 AM. JUR. 2D *Judgments* § 216 (2004).

35. *United States v. City of Miami*, 664 F.2d. 435, 441 (5th Cir. 1981) (per curiam) (Rubin, J., concurring).

36. *Id.* (citing *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980)).



in the consent decree process. Specifically, before approving a consent decree, a judge should determine that the proposed settlement “represents a reasonable factual and legal determination based on the facts of record.”<sup>37</sup> Without being an actual review of the merits, this factual and legal determination that the settlement is reasonable reflects the judicial stamp of approval necessary for any official court decree.

Because of its unique nature, scholars have described the consent decree as “a kind of legal hermaphrodite, with characteristics both of a contract and of a court order.”<sup>38</sup> Courts have recognized that the “dual character . . . ‘result[s] in different treatment for different purposes.’”<sup>39</sup> Because it is a decree, a consent decree is enforceable “by judicial sanctions, including citation for contempt if it is violated.”<sup>40</sup> Accordingly, consent decrees are desirable to parties because they have “the force of *res judicata*, protecting the parties from future litigation,” while saving “the time, expense, and . . . psychological toll [as well as] the inevitable risk of litigation.”<sup>41</sup>

---

37. *Id.*

38. Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 894; see also *United States v. ITT Cont’l Baking Co.*, 420 U.S. 223, 237 n.10 (1975) (“Consent decrees and orders have attributes both of contracts and of judicial decrees.”); *Smyth v. Rivero*, 282 F.3d 268, 280 (4th Cir. 2002). The court in *Smyth* cites to Judge Rubin’s concurrence in *City of Miami*:

Because the consent decree does not merely validate a compromise but, by virtue of its injunctive provisions, reaches into the future and has continuing effect, its terms require more careful scrutiny. Even when it affects only the parties, the court should, therefore, examine it carefully to ascertain not only that it is a fair settlement but also that it does not put the court’s sanction on and power behind a decree that violates Constitution, statute, or jurisprudence.

664 F.2d at 441 (comparing level of judicial scrutiny in consent decree to that employed in review of a class action settlement).

39. *Smyth*, 282 F.3d at 280 (quoting *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986)).

40. *City of Miami*, 664 F.2d at 440. For a discussion of why the contempt power is important in the prevailing party analysis, see *infra* Part V.B.2. Parties may value this retained jurisdiction because it gives them an easier way to obtain subsequent enforcement of the settlement than if they had a purely private settlement. See 46 AM. JUR. 2D *Judgments* § 224 (2004).

41. *City of Miami*, 664 F.2d at 439. The court points out that if parties settle by way of purely private contract, “the only penalty for failure to abide by the agreement is another suit.” *Id.*; see *infra* note 47 and accompanying text.

---

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

---

*2. Purely private settlements*

Purely private settlements are distinct from consent decrees in the level of both judicial approval and judicial oversight.<sup>42</sup> First, private settlements “ordinarily do[] not receive the approval of the court.”<sup>43</sup> Typically, when two parties have reached a private settlement they will then stipulate to a dismissal of the suit.<sup>44</sup> A judge’s involvement is minimal<sup>45</sup> and is limited to ensuring that the defendant is not seriously prejudiced.<sup>46</sup>

Private settlements are also distinguished from consent decrees in terms of enforcement. Clear Supreme Court precedent establishes that a federal court’s inherent authority does not support “an assertion of jurisdiction to enforce a settlement agreement entered into by the parties and resulting in dismissal of the case pursuant to a stipulation by the parties.”<sup>47</sup> Therefore, any breach of the terms of a purely private settlement agreement gives rise to a claim for breach of contract but not for contempt of court as is available under a consent decree.

*3. Dismissal orders incorporating settlement terms*

As an alternative to either a purely private settlement or a consent decree, parties may opt for an intermediate level of judicial scrutiny. Often, after parties conclude settlement negotiations, they will want the court to retain jurisdiction over the enforcement of the agreement. If parties do not want the settlement memorialized in a consent decree, they may seek retained jurisdiction by requesting that the judge either incorporate the terms of the settlement agreement into the order of dismissal or include a separate provision in the dismissal order

---

42. *Smyth*, 282 F.3d at 280–81. *See infra* note 113.43. *Id.* at 280. Other circuit courts have also recognized that “[t]here are only certain designated types of suits, for instance consent decrees, class actions, shareholder derivative suits, and compromises of bankruptcy claims where settlement of the suit requires court approval.” *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 835 (3d Cir. 1995).44. FED. R. CIV. P. 41(a)(1) provides for a voluntary dismissal by stipulation of both parties. *See generally* 8 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* §§ 41.01–41.34 (3rd ed. 1998).45. *See infra* notes 190, 194 and accompanying text.46. 8 MOORE, *supra* note 44, § 41.01(2).47. *Smyth*, 282 F.3d at 282 (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379–81 (1994)).

acknowledging the settlement agreement and specifically retaining jurisdiction to enforce its terms.<sup>48</sup>

The primary distinction between an incorporated settlement agreement and a consent decree is the level of judicial approval. In consent decrees, the judge is required to sign off on the fairness of the settlement through a formal “fairness hearing.”<sup>49</sup> By contrast, nothing requires a judge to perform any kind of review of the terms of a settlement when those terms are simply incorporated into the dismissal order. Presumably, a judge would undertake a cursory review of the incorporated settlement terms pursuant to its general “responsibility to ensure that its orders are fair and lawful.”<sup>50</sup> Incorporated settlements can thus be viewed on the continuum as involving more judicial imprimatur than purely private settlements but somewhat less than consent decrees. The issue of whether incorporated settlements should be considered as the functional equivalent of consent decrees lies at the heart of the ensuing post-*Buckhannon* debate.

### III. SUPREME COURT PREVAILING PARTY JURISPRUDENCE

A review of the Supreme Court’s pronouncements prior to *Buckhannon* reveals some contours of the requirements for prevailing party status. Taken as a whole, the pre-*Buckhannon* fees cases present three general requirements for a determination of prevailing party status: (1) a judicial determination that a party has achieved success on the merits, (2) direct relief at the time of the judgment or settlement, and (3) a court-ordered sanctioning of a material alteration in the parties’ legal relationship. The Court has upheld a fee award only in situations where there is sufficient judicial imprimatur in the dismissal.<sup>51</sup> This Part first reviews the Court’s prevailing party decisions decided prior to *Buckhannon*. This Part then examines the *Buckhannon* decision and its implications for parties seeking to secure prevailing party status.

---

48. *Id.*

49. See *supra* notes 34–36 and accompanying text.

50. *Smyth*, 282 F.3d at 282.

51. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 606 (2001) (“Never have we awarded attorney’s fees for a nonjudicial alteration of actual circumstances.” (internal cross-reference omitted)); *infra* notes 90–97 and accompanying text.

---

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

---

*A. Decisions Prior to Buckhannon*

Through a series of early decisions, the Court provided guidelines regarding what constitutes a prevailing party for federal fee-shifting statutes. In *Hewitt v. Helms*,<sup>52</sup> the Court elaborated a merit requirement, which requires that a plaintiff achieve some judicial determination that he has “receive[d] at least some relief on the merits of his claim before he can be said to prevail,”<sup>53</sup> either at the conclusion of litigation or at any interlocutory stage.<sup>54</sup> This does not mean that a party must receive a formal adjudication in the form of a judgment on the merits. The Court recognized in *Maher v. Gagne*<sup>55</sup> that a litigant can receive a fee award when “prevail[ing] through a settlement rather than through litigation.”<sup>56</sup> The Court also recognized that a party to a consent decree may also be a prevailing party.<sup>57</sup> A judge reviewing a consent decree must examine the merits of the plaintiff’s claim, albeit to a lesser extent than in a judgment on the merits, to make sure that prevailing party status is not awarded to

---

52. 482 U.S. 755 (1987).

53. *Id.* at 760. *Hewitt* involved a former inmate who “brought suit under 42 U.S.C. § 1983 against a number of prison officials, alleging that the lack of a prompt hearing on his misconduct charges and his conviction for misconduct on the basis of uncorroborated hearsay testimony violated his rights to due process.” *Id.* at 757. The inmate was released on parole prior to the adjudication of his suit. *Id.* While his suit was pending, the state Bureau of Corrections amended its policies. *Id.* at 759. Upon motion for attorney’s fees as a prevailing party, the Third Circuit held that its prior ruling that the plaintiff’s constitutional due process rights had been violated while still incarcerated was a form of judicial relief sufficient to grant prevailing party status. *Id.* at 759.

The Court noted that “[t]he most that [the plaintiff] obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim. That is not the stuff of which legal victories are made.” *Id.* at 760. Although the Court did not precisely define the term “prevailing party,” it did state that “[w]hatever the outer boundaries of that term may be, *Helms* does not fit within them.” *Id.* at 759–60. The Court thus established that purely procedural victories, such as here surviving a motion to dismiss, did not have sufficient judicial determination of the merits to base an award of attorney’s fees.

54. *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (“Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims.”).

55. 448 U.S. 122 (1980).

56. *Id.* at 129. The Court cited to a Senate report for 42 U.S.C. § 1988, which stated that “for 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.” *Id.* (citing S. REP. NO. 94-1011).

57. *Id.* (“[T]he Senate Report expressly stated that ‘for 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.’”) (quoting S. REP. NO. 94-1011, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912).

one who brings a “nonfrivolous but nonetheless potentially meritless lawsuit.”<sup>58</sup>

In addition to the merit requirement, the Court has elaborated both a timing requirement and a material alteration requirement. The timing requirement simply requires that “[w]hatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement.”<sup>59</sup> The material alteration requirement mandates that a party prevails for fee-shifting purposes only when there has been a “material alteration of the legal relationship of the parties.”<sup>60</sup> In other words, a prevailing party must be able to point to “a resolution of the dispute which changes the legal relationship between itself and the defendant.”<sup>61</sup> This material alteration requirement is separate from the merit requirement in the sense that a settlement may alter the legal relationship between two parties even when the judge has not evaluated the merits of the plaintiff’s underlying claims.

Concurrent with these Supreme Court pronouncements, the federal courts of appeals developed the catalyst theory, under which courts consider a plaintiff the “‘prevailing party’ if [the party] achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.”<sup>62</sup> The catalyst theory served the purpose of the Civil Rights Attorney’s Fees Awards Act by encouraging impecunious clients to enforce their rights.<sup>63</sup> Most circuits adopted the catalyst theory for federal fee-shifting statutes on the theory that, defined in its “practical sense,”<sup>64</sup> the term “prevailing party” allows for fee shifting when a party’s “ends are accomplished as a result of the litigation.”<sup>65</sup>

---

58. *Id.* at 606.

59. *Farrar v. Hobby*, 506 U.S. 103, 111 (1992).

60. *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989) (describing the material alteration in the legal relationship as the “touchstone” of prevailing party status).

61. *Id.* at 792; *see also* *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (“[P]laintiffs 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.”) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278–79 (1st Cir. 1978)).

62. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 601 (2001). The Eighth Circuit was the first court of appeals to recognize the catalyst theory. *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 429–30 (8th Cir. 1970).

63. *See supra* notes 22–27 and accompanying text.

64. *Stewart v. Hannon*, 675 F.2d 846, 851 (7th Cir. 1982) (quoting *Dawson v. Patrick*, 600 F.2d 70, 78 (7th Cir. 1979)).

65. *Associated Builders & Contractors v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 378 (5th Cir. 1990) (quoting *Williams v. Leatherbury*, 672 F.2d 549, 550 (5th Cir. 1982)). Prior to *Farrar* all

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

The Supreme Court's 1992 decision in *Farrar v. Hobby*<sup>66</sup> provided "one of the clearest formulations of the prevailing party jurisprudence"<sup>67</sup> while at the same time casting doubt on the continued viability of the catalyst theory. The Court summarized its prior rulings<sup>68</sup> and enumerated the necessary components of "prevailing party" status: a party (1) "must obtain at least some relief on the merits of his claim";<sup>69</sup> (2) must be directly benefited by the relief "at the time of the judgment or settlement";<sup>70</sup> and (3) must have secured a "material alteration of the legal relationship of the parties."<sup>71</sup> Although the Fourth Circuit read *Farrar* as vitiating the catalyst theory,<sup>72</sup> the vast majority of circuit courts reaffirmed the continued viability of the catalyst theory after

---

circuit courts recognized the catalyst theory. See *Nadeau*, 581 F.2d at 279–81; *Gerena-Valentin v. Koch*, 739 F.2d 755, 758–59 (2d Cir. 1984); *Institutionalized Juveniles v. Sec'y of Pub. Welfare*, 758 F.2d 897, 910–17 (3d Cir. 1985); *Bonnes v. Long*, 599 F.2d 1316, 1319 (4th Cir. 1979); *Robinson v. Kimbrough*, 652 F.2d 458, 465–67 (5th Cir. 1981); *Citizens Against Tax Waste v. Westerville City Sch. Dist. Bd. of Educ.*, 985 F.2d 255, 257–58 (6th Cir. 1993); *Stewart*, 675 F.2d at 851; *Williams v. Miller*, 620 F.2d 199, 202 (8th Cir. 1980); *Am. Constitutional Party v. Munro*, 650 F.2d 184, 187–88 (9th Cir. 1981); *J & J Anderson, Inc. v. Erie*, 767 F.2d 1469, 1474–75 (10th Cir. 1985); *Doe v. Busbee*, 684 F.2d 1375, 1379–80 (11th Cir. 1982); *Grano v. Barry*, 783 F.2d 1104, 1108–10 (D.C. Cir. 1986).

66. 506 U.S. 103 (1992).

67. *Walker v. City of Mesquite*, 313 F.3d 246, 249 (5th Cir. 2002) (discussing *Farrar*).

68. *Farrar*, 506 U.S. at 108–12.

69. *Id.* at 111 (citing as examples "enforceable judgment against the defendant . . . or comparable relief through a consent decree or settlement" (internal citations omitted)).

70. *Id.* (citing *Hewitt v. Helms*, 482 U.S. 755, 764 (1987)).

71. *Id.* (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989)). The Court condensed these factors into a more succinct statement: "In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111–12.

72. *S-1 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir. 1994). The *Farrar* Court explained, "Of itself, 'the moral satisfaction [that] results from any favorable statement of law' cannot bestow prevailing party status. No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." 506 U.S. at 112–13 (citations omitted). The Fourth Circuit interpreted this language to stand for the proposition that "[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." *S-1*, 21 F.3d at 51. The court then cited to *Farrar* as justification for its holding that the catalyst theory was "no longer available." *Id.* The Supreme Court later recognized, however, that *Farrar* "involved no catalytic effect," *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 194 (2000), and that the fate of the catalyst theory was still "an open question." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 n.5 (2001).

*Farrar*.<sup>73</sup> The circuit courts based their decisions to reaffirm the catalyst theory on the grounds that Congressional intent in passing the Civil Rights Attorney's Fees Awards Act required a broad definition of prevailing party.<sup>74</sup>

Prior to *Buckhannon*, the Supreme Court had a fairly extensive history of interpreting fee-shifting statutes and deciding what constituted prevailing party status. This jurisprudence coexisted with a large body of circuit court precedent advocating the use of the catalyst theory. Indeed, at the time of *Buckhannon*, all but one of the circuit courts adhered to a broad interpretation of "prevailing party" and embraced the catalyst theory in order to satisfy the policy considerations of federal fee-shifting statutes.<sup>75</sup> However, those policy considerations would not save the catalyst theory from the buzz saw of *Buckhannon*'s literalist reading of the statutes.

### B. The Buckhannon Decision

In *Buckhannon*, the Supreme Court considered whether the catalyst theory was a proper basis for "prevailing party" status. *Buckhannon*'s lack of sufficient guidance regarding how to precisely delineate the bounds of the term "prevailing party" has led to confusion among the circuit courts.<sup>76</sup>

#### 1. The background of Buckhannon

In 1997, the state of West Virginia decided that the Buckhannon Board and Care Home had violated a state law that required "all residents of residential board and care homes be capable of 'self-preservation,' or capable of moving themselves 'from situations involving imminent

---

73. See *Stanton v. S. Berkshire Reg'l Sch. Dist.*, 197 F.3d 574, 577 n.2 (1st Cir. 1999); *Marble v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 546–50 (3d Cir. 1994); *Payne v. Bd. of Educ.*, 88 F.3d 392, 397–98 (6th Cir. 1996); *Zinn v. Shalala*, 35 F.3d 273, 276 (7th Cir. 1994); *Little Rock Sch. Dist. v. Pulaski City Sch. Dist.*, # 1, 17 F.3d 260, 263 n.2 (8th Cir. 1994); *Kilgour v. Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *Beard v. Teska*, 31 F.3d 942, 951–52 (10th Cir. 1994); *Morris v. W. Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999).

74. See, e.g., *Baumgartner*, 21 F.3d at 548 ("[F]rom a policy standpoint, if defendants could deprive plaintiffs of attorney's fees by unilaterally mooted the underlying case by conceding to plaintiffs' demands, attorneys might be more hesitant about bringing these civil rights suits, a result inconsistent with Congress' intent in enacting section 1988.").

75. See *supra* note 73 and accompanying text.

76. See *infra* Part IV.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

danger, such as fire.”<sup>77</sup> After the state ordered it to cease and desist its operations, Buckhannon filed suit<sup>78</sup> alleging that the state’s “self-preservation” requirement violated the Fair Housing Amendments Act of 1988 (FHAA)<sup>79</sup> and the Americans with Disabilities Act of 1990 (ADA).<sup>80</sup> Soon thereafter, the state legislature eliminated the “self-preservation” requirement,<sup>81</sup> and the district court subsequently granted the state’s motion to dismiss the case as moot.<sup>82</sup> Following dismissal, the plaintiffs sought attorney’s fees, arguing that their suit acted as a catalyst to the legislative change in the law.<sup>83</sup> The district court held that the plaintiffs were not prevailing parties based on the Fourth Circuit’s earlier precedent rejecting the catalyst theory,<sup>84</sup> a decision which the Fourth Circuit affirmed in an unpublished, per curiam opinion.<sup>85</sup>

## 2. The Supreme Court opinion

In *Buckhannon*, the Supreme Court affirmed the Fourth Circuit’s rejection of the catalyst theory.<sup>86</sup> The Court refused to rely on policy considerations to determine the meaning of “prevailing party”; rather, it turned to *Black’s Law Dictionary*, which defines “prevailing party” as “[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded.”<sup>87</sup> The Court reiterated its prior holding that a plain textual reading requires a party to receive “at least some relief on the merits of his claim before he can be said to prevail.”<sup>88</sup> This ran counter to the broad application of the catalyst theory, which

77. *Buckhannon*, 532 U.S. at 600 (quoting W. VA. CODE §§ 16-5H-1 to 16-5H-2 (1998)).

78. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 203 F.3d 819 (Table), 2000 WL 42250, at \*1 (4th Cir. Jan. 20, 2000).

79. 42 U.S.C. §§ 3601–19 (2000).

80. 42 U.S.C. §§ 12101–12213.

81. *Buckhannon*, 2000 WL 42250, at \*1.

82. *Id.*

83. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 609 (2001). Both statutes provide for an award of attorney’s fees to the “prevailing party.” 42 U.S.C. § 3613(c)(2); 42 U.S.C. § 12205.

84. *Buckhannon*, 532 U.S. at 601 (citing *S-1 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir. 1994)).

85. *Id.*

86. *Id.* In a five to four split, Chief Justice Rehnquist authored the majority opinion for himself and Justices Scalia, Thomas, O’Connor, and Kennedy. Justice Scalia, joined by Justice Thomas, wrote a concurring opinion. Justice Ginsburg wrote for the dissent, joined by Justices Stevens, Souter, and Breyer.

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

88. *Id.* (quoting *Hewitt v. Helms*, 482 U.S. 755, 760 (1987)).



permitted a fee award if the plaintiff could show “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.’”<sup>89</sup> The catalyst theory also permitted a party to recover attorney’s fees in situations “where there is no judicially sanctioned change in the parties’ legal relationship.”<sup>90</sup> The Court’s adherence to the plain meaning of the term “prevailing party” required a rejection of the catalyst theory.

The Court synthesized from its prior decisions a rule that a party only “prevails” when the change in the legal relationship between the two parties has sufficient “judicial imprimatur.”<sup>91</sup> As examples of situations entailing a sufficient level of judicial imprimatur to permit a fee award, the Court mentioned both a judgment on the merits<sup>92</sup> and a consent decree.<sup>93</sup> Both resolutions involve a sufficient “court-ordered ‘chang[e] [in] the legal relationship between [the plaintiff] and the defendant.’”<sup>94</sup> By contrast, the Court viewed the catalyst theory as falling “on the other side of the line from these examples.”<sup>95</sup> In footnote seven of the opinion, the Court rejected dicta from its earlier cases that “allow[ed] for an award of attorney’s fees for private settlements.”<sup>96</sup> The Court explicitly stated that private settlements “do not entail the judicial approval and oversight involved in consent decrees.”<sup>97</sup>

---

89. *Id.* at 605 (citation omitted).

90. *Id.* The Court further noted that the term “prevailing party” does not “authorize[] federal courts to award attorney’s fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the ‘sought-after destination’ without obtaining any judicial relief.” *Id.* (internal cross-reference omitted).

91. *Id.* The Court reasoned 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.” *Id.*

92. *Id.* at 604. The Court in *Hanrahan v. Hampton* declared that “Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims.” 446 U.S. 754, 758 (1980). The Court recognized that “even an award of nominal damages suffices under this test.” *Buckhannon*, 532 U.S. at 604 (citing to *Farrar v. Hobby*, 506 U.S. 103, 113 (1992)).

93. *Buckhannon*, 532 U.S. at 604 (citing to *Maher v. Gagne*, 448 U.S. 122 (1980)). A consent decree is “[a] court decree that all parties agree to.” BLACK’S LAW DICTIONARY 419 (7th ed. 1999); see *infra* Part II.B.1.

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

95. *Id.* at 605.

96. *Id.* at 604 n.7.

97. *Id.* (“And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal.”); see also *infra* note 108.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

Although *Buckhannon* recognized the legislative history of the Civil Rights Attorney's Fees Awards Act and various policy considerations for upholding the catalyst theory,<sup>98</sup> the Court found the "legislative history . . . clearly insufficient to alter the accepted meaning of the statutory term"<sup>99</sup> and eschewed any "roving [judicial] authority" to "disregard the clear legislative language . . . on the basis of . . . policy arguments."<sup>100</sup> The Court concluded by restating the principle that "[a] request for attorney's fees should not result in a second major litigation."<sup>101</sup> The Court also expressed concern that the case-by-case "analysis of the defendant's subjective motivations in changing its conduct," required by the catalyst theory, was "clearly not a formula for 'ready administrability.'"<sup>102</sup>

### 3. What *Buckhannon* adds to the prevailing party jurisprudence

In order to "prevail" prior to *Buckhannon*, a party must have received "actual relief on the merits of his claim [that] materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."<sup>103</sup> *Buckhannon* clarified the existing rule by requiring that the "chang[e] [in] the legal

98. See *infra* note 100; *supra* Part II.A.

99. *Buckhannon*, 532 U.S. at 608.

100. *Id.* at 610. The petitioners asserted that "the 'catalyst theory' [was] necessary to prevent defendants from unilaterally mooting an action before judgment in an effort to avoid an award of attorney's fees." *Id.* at 608. Furthermore, petitioners argued that abandoning "the 'catalyst theory' [would] deter plaintiffs with meritorious but expensive cases from bringing suit." *Id.* The Court rejected this argument, pointing out that the catalyst theory could also act as a disincentive for a defendant to voluntarily change conduct, whether legal or not, because of "the possibility of being assessed attorney's fees." *Id.*

In his concurrence, Justice Scalia refuted the dissent's policy concerns:

The dissent's ultimate worry is that today's opinion will "impede access to court for the less well-heeled[.]" But, of course, 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. Since the fee-shifting statutes at issue here allow defendants as well as plaintiffs to receive a fee award, we know that Congress did not intend to *maximize* the quantity of "the enforcement of federal law by private attorneys general[.]" Rather, Congress desired an *appropriate* level of enforcement—which is more likely to be produced by limiting fee awards to plaintiffs who prevail "on the merits," or at least to those who achieve an enforceable "alteration of the legal relationship of the parties," than by permitting the open-ended inquiry approved by the dissent.

*Id.* at 620 (Scalia, J., concurring) (internal cross-references omitted).

101. *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)).

102. *Id.* at 610 (quoting *Burlington v. Dague*, 505 U.S. 557, 566 (1992)).

103. *Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992); see *supra* note 71.

relationship”<sup>104</sup> must have sufficient “judicial *imprimatur*”<sup>105</sup> to qualify a party as prevailing in the suit.<sup>106</sup> To clarify the concept of *imprimatur*, the Court explained in a footnote that any resolution of a suit that lacks sufficient judicial approval and oversight<sup>107</sup> would not suffice for prevailing party status.<sup>108</sup> By referring to both approval and oversight in its endorsement of consent decrees, the Court implied that to sustain prevailing party status a private agreement must contain both an element of enforceability and some level of judicial approval of the terms of the settlement.<sup>109</sup> The issue of judicial approval closely tracks the Court’s concern regarding the “merit requirement”—in other words, a party

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

105. *Id.* at 605 (emphasis added). Courts following *Buckhannon* have recognized that “the core of the Court’s reasoning was the concept of ‘judicial *imprimatur*.’” *Doe v. Boston Pub. Sch.*, 358 F.3d 20, 24 (1st Cir. 2004).

106. The dissent emphasized that, “in determining whether fee-shifting is in order, the Court in the past has placed greatest weight not on any ‘judicial *imprimatur*,’ but on the practical impact of the lawsuit.” *Buckhannon*, 532 U.S. at 641 (Ginsburg, J., dissenting). Thus, a plaintiff prevails when he has achieved what he sought in bringing the suit in the first place, whether or not the success is court-ordered. *Id.* at 642–43 (Ginsburg, J., dissenting). To this, Justice Scalia in his concurrence responded,

[M]any statutes . . . use the phrase [“prevailing party”] in a context that *presumes* the existence of a judicial ruling. . . . When “prevailing party” is used by courts or legislatures in the context of a lawsuit, it is a term of art. It has traditionally—and to my knowledge, prior to enactment of the first of the statutes at issue here, *invariably*—meant the party that wins the suit or obtains a finding (or an admission) of liability.

*Id.* at 614–15 (Scalia, J., concurring). Therefore, a party does *not* prevail if the success achieved does not bear some judicial *imprimatur*.

107. *Id.* at 604 n.7.

108. The Court also notes in footnote seven that “federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal.” *Id.* (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994)). *Kokkonen* stands for the proposition that federal district courts do not possess inherent ancillary jurisdiction to enforce breach of contract claims when one party has violated a private settlement agreement. *See Kokkonen*, 511 U.S. at 380 (“No case of ours asserts, nor do we think the concept of limited federal jurisdiction permits us to assert, ancillary jurisdiction over any agreement that has as part of its consideration the dismissal of a case before a federal court.”). The Court in *Kokkonen* did recognize, however, that federal district courts may retain jurisdiction to enforce a settlement agreement when “the settlement agreement [has] been made part of the order of dismissal—either by separate provision (such as a provision ‘retaining jurisdiction’ over the settlement agreement) or by incorporating the terms of the settlement agreement in the order.” *Id.* at 381.

109. Inclusion of these two elements satisfies the *Garland* requirement that a prevailing party obtain a change in the legal relationship. *See supra* notes 60–61 and accompanying text.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

prevails only if he receives judicial relief on some merit of his claim.<sup>110</sup> Judicial approval of a settlement necessarily implicates a review of the suit's underlying merits. Hence, a judge's fairness review in the consent decree context includes some degree of inquiry into the strength of the plaintiff's claims.<sup>111</sup> This inquiry into the merits suggests that the Court's reference to approval is merely a gloss on the previously elaborated merit requirement.

But this endorsement of imprimatur begs the question as to exactly how much judicial approval and oversight are needed before a settlement agreement can serve as a proper basis for prevailing party status. Can a settlement agreement with sufficient judicial imprimatur be the functional equivalent of a consent decree and hence serve as the basis for prevailing party status?<sup>112</sup> On the continuum between consent decrees and purely private settlements,<sup>113</sup> there is a line representing the point at which a party obtains a "judicially sanctioned change in the legal relationship of the parties"<sup>114</sup> and "crosse[s] the 'statutory threshold' of

110. *Buckhannon*, 532 U.S. at 606. The Fourth Circuit recognized that "[g]enerally, the Supreme Court has stated, 'a determination of 'legal merit' is necessary for an award of attorney's fees.'" *Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002) (citing *Buckhannon*, 532 U.S. at 606).

111. *See United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (recognizing that a valid consent decree "requires a determination that the proposal represents a reasonable factual and legal determination based on the facts of record, whether established by evidence, affidavit, or stipulation").

112. Many circuit courts considering this question have answered it in the affirmative. *See, e.g., Smyth*, 282 F.3d at 281 ("[A]n 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."); *infra* notes 152–154 and accompanying text.

*Smyth* recognized, however, that "approval and oversight of an agreement alone will not suffice to make a party a prevailing party. The party must likewise demonstrate that it has received some of the relief it sought in bringing the lawsuit in the first place." *Id.* at 282 n.11. In *Smyth*, the settlement achieved by the plaintiffs was "insufficient to support prevailing party status" because "[a]n agreement that the plaintiff will join a motion to dismiss a lawsuit in return for the defendant's promise not to seek sanctions against the plaintiff . . . [did] not render the plaintiff a prevailing party even if incorporated into an enforceable court order." *Id.* (emphasis added).

113. The term "purely private settlements" does not appear in the text of *Buckhannon*. It is used, however, by Judge Melloy in his dissenting opinion to *Christina A. v. Bloomberg*, 315 F.3d 990 (8th Cir. 2003), as distinguishable from "a settlement agreement with retained enforcement jurisdiction, or a consent decree." *Id.* at 996 (Melloy, J., dissenting). As used in this Comment, the term "purely private settlement" will denote a private settlement that is not incorporated into a court order dismissing a case.

114. *Buckhannon*, 532 U.S. at 605; *see also* *Oil, Chemical & Atomic Workers Int'l Union v. Dep't of Energy*, 288 F.3d 452, 460 (D.C. Cir. 2002) (Rogers, J., dissenting) ("Finding a common thread in its precedent, the Court in effect established a line: a party prevails only upon obtaining a 'judicially sanctioned change in the legal relationship of the parties.'" (citation omitted)).

prevailing party status.”<sup>115</sup> Indeed, the Supreme Court recognized this continuum when it declared, “the ‘catalyst theory’ falls on the other side of the line from [judgments on the merits and consent decrees].”<sup>116</sup>

Consent decrees fall on the “sufficient-judicial-imprimatur” side of the line because they “involve[] judicial approval and oversight that may suffice to demonstrate the requisite ‘court-ordered chang[e] [in] the legal relationship between [the plaintiff] and the defendant.’”<sup>117</sup> On the contrary, “[p]rivate settlements do not entail the judicial approval and oversight”<sup>118</sup> necessary for a determination that a party has prevailed on the merits. Thus, purely private settlements fall on the other side of the line from consent decrees when courts determine prevailing party status. Unfortunately, the Court in *Buckhannon* did not answer the question of how much judicial imprimatur of the change is needed before a private settlement crosses over to the “prevailing party” side of the line. This unanswered question has subsequently spawned disagreement among the various circuit courts as to where to draw the line.<sup>119</sup>

#### IV. THE AFTERMATH: CIRCUIT COURT INTERPRETATIONS OF *BUCKHANNON*

In the absence of clear policy guidelines from the Supreme Court, the circuit courts looked to the examples enumerated by the Court as guideposts to determine what is sufficient judicial imprimatur.<sup>120</sup> Circuit courts have split on the question of how much judicial approval and oversight is sufficient, or even whether judicial approval and oversight can ever make a private agreement sufficiently equivalent to a consent decree such that it supports prevailing party status.<sup>121</sup> This Part explores

---

115. *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789 (1989).

116. *Id.* at 605.

117. *Smyth*, 282 F.3d at 281 (quoting *Buckhannon*, 532 U.S. at 606).

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

119. *See infra* Part IV.A–C.

120. According to the Court in footnote seven, consent decrees have enough judicial imprimatur while private settlements do not. *See supra* note 108.

121. *See infra* Parts IV.C and V.B. One commentator has stated:

While courts have been surprisingly uniform in finding that *Buckhannon* invalidates the catalyst theory in “prevailing party” statutes, they have been far less unanimous in defining these very fact-specific cases that circumvent *Buckhannon*. Unfortunately, the wide variety of judicial actions involved in these cases suggests that a second generation of post-*Buckhannon* litigation may be arising to ascertain the precise types of judicial action needed to constitute a true change in legal relationship as required by *Buckhannon*.

Silecchia, *supra* note 28, at 51.

---

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

---

decisions issued by the Ninth, Eighth, and Third Circuits to illustrate these differing approaches.

*A. The Ninth Circuit's Approach in Barrios*

The Ninth Circuit first considered *Buckhannon* in *Barrios v. California Interscholastic Federation*.<sup>122</sup> In *Barrios*, the plaintiff, a paraplegic high school baseball coach, filed a complaint and application for a temporary restraining order to allow him to remain on the field to coach his team during games.<sup>123</sup> The parties subsequently reached a settlement agreement, but Barrios's petition for attorney's fees was denied by the district court.<sup>124</sup> The parties then "stipulated to a dismissal with prejudice," which made "no mention of the issue of attorneys' fees."<sup>125</sup> Subsequent to the district court's decision but prior to the Ninth Circuit hearing the case on appeal, the Supreme Court issued the *Buckhannon* ruling.

On appeal, the Ninth Circuit held that Barrios was a prevailing party and that *Buckhannon* did not control the outcome of the case.<sup>126</sup> The court read *Buckhannon* narrowly as applying only to parties acting as a catalyst of policy change.<sup>127</sup> The Ninth Circuit reasoned that even though the catalyst theory was no longer valid for conferring prevailing party status following *Buckhannon*,<sup>128</sup> Barrios was a prevailing party because he obtained a legally enforceable settlement agreement.<sup>129</sup> The

---

122. 277 F.3d 1128 (9th Cir. 2002).

123. *Id.* at 1130–32.

124. On the issue of attorney's fees, the district court held that Barrios was indeed a "prevailing party" under the ADA. *Id.* at 1134. However, the district court ruled that "Barrios' victory was at best *de minimis* and thus undeserving of attorneys' fees and costs." *Id.*

125. *Id.* at 1133. The settlement agreement provided, among other things, that "the issue of whether any [party] is the prevailing party and whether any [party] is entitled to attorneys' fees, and if so, the amount thereof, is expressly reserved for the Court to decide upon motion by any [party]." *Id.*

The district court initially "entered a judgment and order according to the terms of the settlement agreement," but that order was subsequently vacated upon motion by the defendant California Interscholastic Federation, because, as Barrios conceded, "the settlement did not address whether a judgment or stipulation for dismissal would be filed." *Id.*

126. *Id.* at 1134 n.5.

127. *Id.* Specifically, the court declared: "Barrios, however, does not claim to be a 'prevailing party' simply by virtue of his being a catalyst of policy change; rather, his settlement agreement affords him a legally enforceable instrument, which under *Fischer*, makes him a 'prevailing party.'" *Id.* (citing *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1118 (9th Cir. 2000)).

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

129. *Id.*; see *supra* note 127.

Ninth Circuit avoided dealing with the Supreme Court's language regarding the insufficiency of private settlements by characterizing *Buckhannon's* footnote seven as "dictum [which merely] suggests that a plaintiff 'prevails' only when he or she receives a favorable judgment on the merits or enters into a court-supervised consent decree."<sup>130</sup>

*B. The Eighth Circuit's Approach in Bloomberg*

The Eighth Circuit considered the question of judicial imprimatur for "prevailing party" status in *Christina A. v. Bloomberg*.<sup>131</sup> In the context of a proposed class action settlement agreement,<sup>132</sup> the district court in *Bloomberg* conducted a "'fairness hearing' pursuant to Federal Rule of Civil Procedure 23(e)," approved the agreement,<sup>133</sup> and specifically "retain[ed] jurisdiction for the 'purpose of enforcing the Settlement Agreement.'"<sup>134</sup> The district court then awarded attorney's fees to the plaintiff class as prevailing parties.<sup>135</sup>

On appeal, the Eighth Circuit reversed the award of attorney's fees by focusing its inquiry on the settlement agreement's form rather than the level of judicial imprimatur:

---

130. *Id.* (emphasis added).

131. 315 F.3d 990 (8th Cir. 2003).

132. *Id.* at 991. The *Bloomberg* plaintiffs, juvenile inmates at the South Dakota State Training School, sued as a class to effectuate changes in school policies and treatment of them as inmates:

At issue, among other things, were (1) the restraint methods used by the institution's employees, (2) the lengthy confinements to which inmates were subjected, (3) the provision (or lack thereof) of mental health services, (4) the training of staff, (5) the "arbitrary" method of discipline and punishment, (6) the presence of male staff members in the female shower area, (7) the monitoring of telephone calls and visits, and (8) the lack of special education courses for inmates who need additional educational assistance.

*Id.*

133. While the district court did conduct a fairness review pursuant to FED. R. CIV. P. 23(e), it did not incorporate any of the "specific terms and conditions agreed upon by the parties in its opinion and order." *Id.*

134. *Id.* Class action settlements must receive the "approval of the court." FED. R. CIV. P. 23(e). The "universally applied standard" for a court's approval "is whether the settlement is fundamentally fair, adequate, and reasonable. Some courts also require that settlements be consistent with the public interest. Finally, the court must determine that the terms of the settlement do not violate any applicable federal law." 5 MOORE, *supra* note 44, § 23.85[1] (compiling cases and listing various multi-factor tests that various courts apply). A court's involvement in a class action settlement may include granting preliminary approval of the settlement, conducting a fairness hearing prior to final approval, considering class members' objections, and making specific findings and conclusions regarding the fairness of an approved settlement. *See id.* §§ 23.85[3]–[8].

135. *Bloomberg*, 315 F.3d at 991.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

The Supreme Court specified that a judgment on the merits or a “settlement agreement[] enforced through a consent decree” is sufficient to meet this standard. . . . If the agreement between the inmate class and the institution is a private settlement, then it is clear from *Buckhannon* that the inmate class is not a “prevailing party” entitled to attorney’s fees under 42 U.S.C. § 1988.<sup>136</sup>

The Eighth Circuit thus viewed the question as a matter of classification—in other words, if the settlement is a private settlement then there is not sufficient judicial imprimatur, and if the settlement is a consent decree then there is sufficient imprimatur. The court stated the *Buckhannon* rule as such: “a party prevails only if it receives either an enforceable judgment on the merits or a consent decree.”<sup>137</sup> The court apparently viewed those two options as comprising the exhaustive list of judicial relief that may convey prevailing party status. The line is simply drawn right behind consent decrees, and no amount of judicial imprimatur on a private settlement will suffice to convey prevailing party status.<sup>138</sup> In reaching this conclusion, the *Bloomberg* court reasoned that a settlement, even in the class action context, was not the functional equivalent of a consent decree because it is not directly enforceable through the court’s contempt power.<sup>139</sup>

---

136. *Id.* at 992 (citations omitted).

137. *Id.* at 993 (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 604 (2001)).

138. The circuit court in *Bloomberg* explicitly rejected the district court’s pronouncement that the class action settlement at issue was the functional equivalent of a consent decree and hence a fee award was justified:

The district court indicated that, although the settlement agreement was not a formal consent decree, “to read *Buckhannon* to require one particular form for resolving a dispute in order to become a prevailing party is to read the opinion too narrowly.” *Christina A. v. Bloomberg*, 167 F. Supp. 2d 1094, 1098 (D.S.D. 2001). The court went on to say that the settlement agreement served essentially the same purpose as a formal consent decree since it changed the legal relationship between the parties by requiring the appellants to make specific improvements to the training school and by allowing the appellees to enforce the agreement in court. *Id.* at 1099. We disagree with this conclusion.

*Bloomberg*, 315 F.3d at 993. In fact, in a footnote, the circuit court recast the district court’s holding to conform to its conception of the proper analytical framework. *Id.* at 993 n.3 (“We do not read the district court’s opinion as holding that an agreement that falls short of the essential requirements of a consent decree is sufficient. We believe that the court finds that the approved agreement is, indeed, *some form of consent decree.*”) (emphasis added).

139. *Id.* at 994 (“[T]he availability of . . . non-contempt remedies fails to support the conclusion that the settlement agreement serves essentially as a consent decree.”).



*C. The Third Circuit's Approach to Judicial Imprimatur*

Subsequent to *Buckhannon*, the Third Circuit considered what extent of judicial imprimatur was needed for a litigant to be a prevailing party under a private settlement in *Truesdell v. Philadelphia Housing Authority*.<sup>140</sup> In *Truesdell*, the plaintiff, participating in a Section 8 Federal Housing Assistance Program administered by the Philadelphia Housing Authority ("PHA"), brought a § 1983 action to enforce his rights under the U.S. Housing Act of 1937.<sup>141</sup> The terms of the subsequent settlement requiring the PHA to undertake certain actions were included in the district court's order. These actions included a retroactive rent adjustment that the PHA had previously refused to grant to the plaintiff.<sup>142</sup> However, the district court denied Truesdell's motions for attorney's fees.<sup>143</sup>

On appeal, the PHA argued that "because it never admitted liability nor consented to what counsel termed in oral argument a 'gratuitous resolution,' the [dismissal order] was a stipulated settlement—not a court approved consent decree—and therefore no attorney's fees should be awarded."<sup>144</sup> To resolve the issue, the *Truesdell* court discussed whether the judicial order, "in form, may support an award of attorney's fees."<sup>145</sup>

The Third Circuit recognized that since "attorney's fees may be awarded based on a settlement when it is enforced through a consent decree,"<sup>146</sup> a judicial order that was enough like a consent decree may be sufficient to warrant a fee award.<sup>147</sup> The court reasoned that if the private settlement is enforceable against the opposing party through a court order, even though not titled "Consent Decree," then the party in whose favor that order is entered may be termed the prevailing party.<sup>148</sup> The *Truesdell* court found the judicial order enforcing the private settlement sufficient to confer prevailing party status based on the following

---

140. 290 F.3d 159 (3d Cir. 2002).

141. *Id.* at 161.

142. *Id.*

143. *Id.* at 163.

144. *Id.* at 164–65.

145. *Id.* at 165.

146. *Id.* (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001)).

147. *Cf. Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002) ("[A]n 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.").

148. *Truesdell*, 290 F.3d at 165.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

characteristics: (1) the order contained “mandatory language” requiring the PHA to take certain actions inuring to the benefit of the plaintiff,<sup>149</sup> (2) the document was entitled “Order,” (3) the document bore “the signature of the district court judge, not the parties’ counsel,” and (4) the document “gave Truesdell the right to request judicial enforcement of the settlement against PHA.”<sup>150</sup> In a subsequent case, the court explained that compliance with these four factors is enough for a stipulated settlement to be sufficiently “judicially sanctioned”<sup>151</sup> for prevailing party purposes.

The Third Circuit’s approach falls between the Ninth and Eighth Circuits in terms of the level of judicial imprimatur required for prevailing party status. The approaches of these three circuits illustrate how circuit courts following *Buckhannon* have diverged on the question of who can be a prevailing party. A majority of circuits have agreed with the Third Circuit in holding that a party may be deemed “prevailing” after having obtained a private settlement with sufficient judicial imprimatur,<sup>152</sup> but other circuits have disagreed, either adopting a

---

149. At least one other circuit court has found the presence of mandatory language in a district court’s dismissal order determinative. See *New England Reg’l Council of Carpenters v. Kinton*, 284 F.3d 9, 30 (1st Cir. 2002) (“The district court did not compel [the defendant] to adopt the regulations. Under the *Buckhannon* rule, that ends the matter.”).

150. *Truesdell*, 290 F.3d at 165. Regarding the importance of the enforceability, the court cites *Farrar* for its holding 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.” *Id.* (citing *Farrar v. Hobby*, 506 U.S. 103, 113 (1992)).

151. *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 558 (3d Cir. 2003).

152. *E.g.*, *Roberson v. Giuliani*, 346 F.3d 75, 81 (2d Cir. 2003) (“We therefore join the majority of courts to have considered the issue since *Buckhannon* in concluding that judicial action other than a judgment on the merits or a consent decree can support an award of attorney’s fees, so long as such action carries with it sufficient judicial imprimatur.”); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 478–79 (7th Cir. 2003) (recognizing that some private settlements entail sufficient judicial approval and oversight to serve as the basis of an award for attorney’s fees); *Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002) (“We will assume, then, 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.”); *Am. Disability Ass’n v. Chmielarz*, 289 F.3d 1315, 1319 (11th Cir. 2002) (same); see also *Doe v. Boston Pub. Sch.*, 358 F.3d 20, 24 n.4, 30 (1st Cir. 2004) (taking “no position on whether forms of judicial imprimatur other than a judgment on the merits or a court-ordered consent decree may suffice to ground an award of attorneys’ fees,” but recognizing that other circuits have considered the question and implying that “plaintiffs who achieve their desired result via private settlement may . . . be considered ‘prevailing parties’” with sufficient judicial imprimatur).

narrow view of what constitutes a prevailing party<sup>153</sup> or an overly permissive view of prevailing party.<sup>154</sup>

#### V. ANALYSIS

A court should award prevailing party status only when a party's settlement has sufficient judicial imprimatur under the *Buckhannon* requirements of approval and oversight. In this regard, the Ninth Circuit's approach is overly broad and fails to follow the rule set forth in *Buckhannon*. On the other hand, courts should respect Congress's intent to encourage private suits to enforce important public policies. Accordingly, courts should allow fee shifting to prevailing parties with less than a judgment on the merits or a consent decree, provided the

---

153. *Christina A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003) ("*Buckhannon*, as indicated, makes it clear that a party prevails only if it receives either an enforceable judgment on the merits or a consent decree."); *see also* *Toms v. Taft*, 338 F.3d 519, 528 (6th Cir. 2003) ("The Supreme Court has limited the term 'prevailing party' to a party who obtains either a judgment on the merits or a court-ordered consent decree.") (citation omitted); *Oil, Chemical & Atomic Workers Int'l Union v. Dep't of Energy*, 288 F.3d 452, 456–57 (D.C. Cir. 2002) ("We therefore hold that in order for plaintiffs in FOIA actions to become eligible for an award of attorneys' fees, they must have 'been awarded some relief by [a] court,' either in a judgment on the merits or in a court-ordered consent decree."); *infra* Part IV.C.

There is some question as to whether the D.C. Circuit in *Atomic Workers* actually held that nothing outside of a judgment on the merits or a consent decree suffices for prevailing party status. The dissent in *Atomic Workers* characterizes the majority holding in that regard as merely a "suggestion." 288 F.3d at 459 (Rogers, J., dissenting). And the Second Circuit in *Roberson* includes the D.C. Circuit as among the circuits that have concluded that "judicial action other than a judgment on the merits or a consent decree can support an award of attorney's fees, so long as such action carries with it sufficient judicial imprimatur." 346 F.3d at 81. The *Roberson* court characterizes *Atomic Workers* as "implying that had there been [an alteration in the legal relationship of the parties], *Buckhannon* would not preclude an award of fees." *Id.* (citing *Atomic Workers*, 288 F.3d 452, 458–59). The inquiry in *Atomic Workers* concerned whether the stipulation and orders in the case were in fact consent decrees and was not to determine whether there was sufficient judicial imprimatur. *Atomic Workers*, 288 F.3d at 458–59. There is a noted lack of recognition by the majority in *Atomic Workers* that something other than a consent decree may be the functional equivalent of a consent decree.

Additionally, the dissent in *Atomic Workers* based its argument on the assumption that the majority was focusing solely on "whether the relief obtained was either a judgment on the merits or a consent decree" when it should have instead "looked for action compelled by the court, focusing on the underlying concern of the Supreme Court in *Buckhannon* that there be some 'judicial imprimatur on the change' in the parties' legal status." *Id.* at 462 (Rogers, J., dissenting) (citation omitted). This Comment, therefore, includes the D.C. Circuit, together with the Eighth and Sixth Circuits, as adopting a narrow reading of *Buckhannon*. *See infra* Part IV.B.

154. *See Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134 n.5 (9th Cir. 2002) (distinguishing *Buckhannon* based on the fact that the plaintiffs in *Buckhannon* were "a catalyst of policy change" whereas the *Barrios* plaintiff had a "legally enforceable instrument" in his settlement agreement); *infra* Part IV.A.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

parties' settlement contains sufficient imprimatur. In this regard, the Eighth Circuit's approach is overly restrictive. The Third Circuit's approach comes closest to satisfying the Court's imprimatur concerns; however, it should be augmented to include an explicit merit-review requirement.

*A. The Ninth Circuit's Approach Is Overly Broad*

The Ninth Circuit's approach to determining "prevailing party" status runs counter to Supreme Court precedent. Because a judge does not inquire into whether a party has succeeded on any merits in the typical stipulated dismissal context,<sup>155</sup> such a resolution does not warrant an award of attorney's fees. Had the Ninth Circuit appropriately followed the reasoning of *Buckhannon*, it would have concluded that Barrios was not a prevailing party because he secured a private settlement agreement and nothing more. The judicial order dismissing the case did not require the parties to comply with the terms of the settlement agreement, nor did it retain jurisdiction to enforce the terms of the settlement agreement.<sup>156</sup>

In *Barrios*, the Ninth Circuit improperly expanded the class of "prevailing party" further than any circuit court interpreting *Buckhannon*. The court reasoned that because Barrios could "enforce the terms of the settlement agreement against the [defendant]... Barrios was the 'prevailing party' in his civil rights litigation."<sup>157</sup> In so holding, the Ninth Circuit felt it proper to follow its own prevailing party precedent<sup>158</sup> rather than clear Supreme Court language in *Buckhannon*. Thus, the Ninth Circuit has a rule that "a plaintiff 'prevails' when he or

155. See *supra* notes 45–46 and accompanying text.

156. The Ninth Circuit's characterization of the court's order is a stipulated dismissal with prejudice. *Barrios*, 277 F.3d at 1133.

157. *Id.* at 1134.

158. The Ninth Circuit had previously held:

"[A] plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." The Court explained that "a material alteration of the legal relationship occurs [when] the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." In these situations, the legal relationship is altered because the plaintiff can force the defendant to do something he otherwise would not have to do.

*Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1118 (9th Cir. 2000) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992)).

she enters into a legally enforceable settlement agreement against the defendant.”<sup>159</sup>

The Ninth Circuit in *Barrios* ignored the clear implications of the entire *Buckhannon* decision. It did this by characterizing the footnote seven “approval and oversight” language in *Buckhannon* as dictum—technically correct in that *Buckhannon* did not involve a settlement agreement—which it was not bound to follow. However, this construction of footnote seven’s language ignores the context in which it is found.<sup>160</sup> Footnote seven’s reference to “approval and oversight” appears in the midst of the Court’s explication of the requirements for prevailing party status.

The Court in *Buckhannon* clearly held that a “‘prevailing party’ is one who has been awarded some relief by the court.”<sup>161</sup> It also stated that a party only prevails when there is sufficient “judicial *imprimatur*” and “judicial[] sanction[]” in the “change in the legal relationship of the parties.”<sup>162</sup> The Court distilled its “merit requirement” from prior precedent—a requirement that is clearly not met in *Barrios* as the only judicial involvement in the suit was through a stipulated dismissal order without any approval or retained jurisdiction over the settlement terms. By awarding prevailing party status to the plaintiff in *Barrios*, the Ninth Circuit ignored the *Buckhannon* requirements that the change in the parties’ relationship be court-ordered and that the prevailing party have “established his entitlement to some relief on the merits of his claims.”<sup>163</sup>

In *Barrios*, the parties’ settlement expressly reserved the question of prevailing party status and attorney’s fees for the court to determine.<sup>164</sup> The court in *Barrios* held that the private settlement agreement’s deferral to the court to determine the question of attorney’s fees provided

---

159. *Barrios*, 277 F.3d at 1134. The Ninth Circuit subsequently reaffirmed its *Barrios* holding. See *Richard S. v. Dep’t of Developmental Servs.*, 317 F.3d 1080, 1086 (9th Cir. 2003).

160. See *infra* notes 170–171 and accompanying text; see also Mark C. Weber, *Litigation Under the Individuals with Disabilities Education Act After Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 65 OHIO ST. L.J. 357, 389–90 (2004) (“By ignoring the requirement for a judicial sanction in the settlement it said would support fees, the Ninth Circuit refused to apply the Supreme Court’s reasoning, and its distinction of the case is not fully persuasive.”).

161. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 603 (2001).

162. *Id.* at 605.

163. *Id.* at 604 (quoting *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980)).

164. See *supra* note 125.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

“sufficient judicial oversight to justify an award of attorneys’ fees and costs.”<sup>165</sup> This reasoning runs counter to *Buckhannon*’s holding that a party only prevails when the change in the legal relationship is “court-ordered.”<sup>166</sup> Also, the merit requirement is not met because the trial judge in *Barrios* undertook no review of the underlying claim’s merits.<sup>167</sup> Nothing in the private settlement agreement conferred continuing “federal jurisdiction to enforce a private contractual settlement.”<sup>168</sup> It is safe to say that the dismissal order at issue in *Barrios* did not convey the necessary judicial sanction to change the parties’ relationship. Such “is not the stuff of which legal victories are made.”<sup>169</sup>

Circuit courts that have considered the *Barrios* reasoning have rejected its take on *Buckhannon*. For example, the Third Circuit characterized *Barrios* as “distinguish[ing] *Buckhannon* on very narrow grounds.”<sup>170</sup> Similarly, the First Circuit viewed “[t]he *Barrios* court’s reading of *Buckhannon* [as] contraven[ing] the Supreme Court’s unambiguous rejection of private settlement as sufficient grounds for ‘prevailing party’ status.”<sup>171</sup> The Ninth Circuit improperly held in *Barrios* that a plaintiff could be a prevailing party with nothing more than a private settlement.

*B. The Eighth Circuit’s Approach Is Overly Narrow and Restrictive**1. Form over substance*

In contrast to the Ninth Circuit’s decision, the Eighth Circuit’s reasoning in *Bloomberg* adopts a narrow and overly restrictive approach, focusing too much on the form of the judicial order as determinative of whether a party has prevailed. The Eighth Circuit viewed *Buckhannon* as “mak[ing] it clear that a party prevails *only* if it receives either an enforceable judgment on the merits or a consent decree.”<sup>172</sup> On appeal, the Eighth Circuit’s elevation of form over substance resulted from its

165. *Barrios v. Cal. Interscholastic Fed’n*, 277 F.3d 1128, at 1134 n.5 (9th Cir. 2002).

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

167. *See Barrios*, 277 F.3d at 1133.

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

169. *Hewitt v. Helms*, 482 U.S. 755, 760 (1987).

170. *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 560 (3d Cir. 2003).

171. *Doe v. Boston Pub. Sch.*, 358 F.3d 20, 25 (1st Cir. 2004); *see also* *N.Y. State Fed’n of Taxi Drivers, Inc. v. Westchester County Taxi & Limousine Comm’n*, 272 F.3d 154, 158–59 (2d Cir. 2001).

172. *Christina A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003).

disregard of the judicial approval and oversight<sup>173</sup> involved in the case. In *Bloomberg*, the district court in a class action settlement context had approved the terms of the proposed settlement for fairness.<sup>174</sup> The court disregarded the approval element and improperly reasoned away the oversight element.

On the question of the district court's approval of the settlement terms, the Eighth Circuit was unpersuaded as to its effect for prevailing party determination: "Although Rule 23(e) requires the district court to approve the class action agreement, it does not require the court to establish the *terms* of the agreement. Therefore, the district court's approval of the settlement agreement does not, by itself, create a consent decree . . . ."<sup>175</sup> In making this assertion, the court impliedly presupposed that in consent decree situations the court, rather than the parties, "establish[es] the terms" of the agreement.<sup>176</sup> This supposition has no basis in reality, as the parties themselves are the ones that establish the terms of a consent decree and then submit those terms for judicial approval.<sup>177</sup>

For *Buckhannon* prevailing party purposes, class action settlement agreements entail the same level of judicial approval as consent decrees.<sup>178</sup> Misunderstanding the sufficiency of a court's approval in the class action settlement, the Eighth Circuit failed to address the fact that the district court's "fairness review" for the purposes of Rule 23(e) should have entailed sufficient judicial approval for "prevailing party" status.

The Eighth Circuit also misunderstood the sufficiency of the district court's oversight in retaining jurisdiction over the settlement. In a footnote the court stated, "the district court *purported* to retain jurisdiction over the agreement in order to enforce its provisions against appellants."<sup>179</sup> The court apparently believed that the district court did

---

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

174. See *supra* text accompanying note 134.

175. *Bloomberg*, 315 F.3d at 992–93.

176. *Id.*

177. See *supra* Part II.B.1.

178. Compare *supra* note 34 and accompanying text (noting that judges review consent decrees to determine whether they are "fair, adequate, and reasonable") with 5 MOORE, *supra* note 44, § 23.85[1].

179. *Bloomberg*, 315 F.3d at 994 n.5 (emphasis added). The distinction between the class action settlement and the consent decree settlement is negligible when determining prevailing party status. While it is true that the parties to a consent decree specifically intend their agreement to be memorialized in a judicial decree and that class action parties may not wish for such incorporation,

---

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*


---

not have jurisdiction to enforce the terms of the settlement agreement, either through its inherent jurisdiction to enforce its own orders or through incorporating the terms of the agreement into the dismissal order. But the court failed to explain why the explicit retention of jurisdiction was not sufficient. The court reasoned that because the plaintiffs could only enforce the class action settlement through a breach of contract action, they were not prevailing parties under a *Buckhannon* analysis.<sup>180</sup> The court ignored the reality that the district court's retained jurisdiction allowed for enforcement of the settlement terms.<sup>181</sup>

In fact, both Supreme Court and Eighth Circuit precedent call for the opposite result on the enforcement issue. The Court in *Kokkonen* explicitly recognized that a district court may retain jurisdiction over a dismissed settlement agreement through either incorporation of the terms in a dismissal order or through a specific "retaining jurisdiction" provision in the dismissal order.<sup>182</sup> Commentators have reached similar conclusions.<sup>183</sup> Even the Eighth Circuit "has repeatedly recognized the possibility of federal enforcement jurisdiction over a settlement

---

in both contexts the court must examine the terms for fairness and retain jurisdiction to enforce the terms of the settlement. The judge is also required in both contexts to ensure fairness of the agreement before signing off on it. However, at least one court has described the level of scrutiny in the consent decree context as "more careful" than that in the class action settlement context. *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981). See *supra* notes 34–36 and accompanying text.

180. *Bloomberg*, 315 F.3d at 993 ("[C]onsent decrees . . . are enforceable through the supervising court's exercise of its contempt powers, and private settlements [are] enforceable only through a new action for breach of contract.") (quoting *Hazen ex rel. LeGear v. Reagen*, 208 F.3d 697, 699 (8th Cir. 2000)).

181. A court may enforce a consent decree directly through contempt power. With an incorporated settlement, a court may also enforce the terms through the contempt power, albeit through a circuitous route. See *infra* note 200.

182. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994) (recognizing that a settlement agreement may be "made part of the order of dismissal—either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order").

183. Although "district courts have no inherent power to enforce settlement agreements" in the class action context, "[i]t is common in class actions for courts to explicitly retain jurisdiction over settlement agreements and to incorporate the terms of such agreements in dismissal orders." 5 MOORE, *supra* note 44, § 23.87. Moore further recognizes that class action settlements are akin to consent decrees:

A class action settlement, like an agreement resolving any other legal claim, is a private contract negotiated between the parties. Nevertheless, Rule 23(e) requires the court to intrude on that private consensual agreement to ensure that the agreement is not the product of fraud or collusion and that, taken as a whole, it is fair, adequate, and reasonable to all concerned.

*Id.* § 23.82[1].



agreement where the district court approves, and expressly retains jurisdiction to enforce, the agreement.”<sup>184</sup>

Instead of explaining why the district court’s retention of jurisdiction was not sufficient, the *Bloomberg* majority focused on general principles of dismissal that had no apparent connection to the facts of the case. The court cited to *Moore’s Federal Practice* for the proposition that “a voluntary dismissal without prejudice under Rule 41(a)(2) [as here] renders the proceedings a nullity and leaves the parties as if the action had never been brought.”<sup>185</sup> But in this particular case, the parties have something more than they had before the action was brought—a settlement reviewed by the judge and enforceable through the court’s retained jurisdiction. The *Bloomberg* plaintiffs presented a strong case for prevailing party status—the party obtained a dismissal short of a consent decree, which nevertheless contained sufficient judicial approval and oversight to justify prevailing party status.<sup>186</sup>

## 2. The Roberson reasoning undermines the logic of Bloomberg

The Second Circuit in *Roberson* adopted a view opposite that of the Eighth Circuit regarding the importance of the enforcement remedy in determining prevailing party status.<sup>187</sup> The *Roberson* district court adopted the same reasoning regarding the distinction between settlements and consent decrees as did the Eighth Circuit in *Bloomberg*.<sup>188</sup> In rejecting the district court’s arguments, the Second Circuit presented reasoning that effectively refutes the Eighth Circuit’s rationale in *Bloomberg*.

In *Roberson*, although the district court had incorporated the settlement terms into the dismissal order and specifically retained

---

184. *Bloomberg*, 315 F.3d at 997 (Melloy, J., dissenting); see, e.g., *Hayden Ass’n, v. ATY Bldg. Sys., Inc.*, 289 F.3d 530, 532–33 (8th Cir. 2002) (citing *Kokkonen* for the proposition that a settlement agreement may be made part of a district court’s order of dismissal by a provision retaining jurisdiction over a settlement agreement); *Gilbert v. Monsanto*, 216 F.3d 695, 699–700 (8th Cir. 2000) (same)).

185. *Bloomberg*, 315 F.3d at 993–94 (citing 8 MOORE, *supra* note 44, § 41.40[9][b]).

186. See *infra* Part V.D.1.

187. *Roberson v. Giuliani*, 346 F.3d 75, 83 (2d Cir. 2003).

188. *Roberson v. Giuliani*, No. 99 Civ. 10900 (DLC), 2002 U.S. Dist. LEXIS 2750, at \*8–9 (S.D.N.Y. Feb. 21, 2002) (“Here, there is neither an enforceable judgment on the merits nor a court-ordered consent decree. . . . The Court’s continuing jurisdiction in order to enforce the terms of the Agreement does not, however, constitute a ‘judicial sanctioning’ of the alteration of their legal relationship such that the plaintiffs can be considered prevailing parties under the *Buckhammon* standard.”).

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

jurisdiction to enforce the terms of the settlement agreement, it ruled that “[t]he [c]ourt’s continuing jurisdiction in order to enforce the terms of the Agreement does not . . . constitute a ‘judicial sanctioning’ of the alteration of their legal relationship such that the plaintiffs can be considered prevailing parties under the *Buckhannon* standard.”<sup>189</sup> The district court distinguished the settlement at issue from consent decrees on three grounds: first, the level of judicial scrutiny involved;<sup>190</sup> second, the court’s inherent power to enforce a consent decree;<sup>191</sup> and third, the fact that consent decrees are “directly enforceable through the contempt power of the court.”<sup>192</sup> The first element corresponds to *Buckhannon*’s approval element while the second and third correspond to the oversight element.

On appeal, the Second Circuit found the district court’s enumerated distinctions to be insignificant for purposes of a prevailing party inquiry.<sup>193</sup> On the first point, the circuit court reasoned that “because the court has the general responsibility to ensure that its orders are fair and lawful, it retains some responsibility over the terms of a settlement

---

189. *Id.* at \*3.

190. *Id.* (“Although it may be minimal, there is a level of judicial scrutiny of the terms of a consent decree that is entirely absent when a lawsuit is dismissed based on the parties’ agreement to settle it.”).

191. *Id.* On this point, the district court correctly cites the *Kokkonen* principle, but seems to either misconstrue its applicability to the agreement at hand or to ignore it entirely. Specifically, the district court declared that

[w]here . . . “the parties’ obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal—either by separate provision (such as a provision ‘retaining jurisdiction’ over the settlement agreement) or by incorporating the terms of the settlement agreement in the order”—a federal court retains jurisdiction to enforce the settlement agreement.

*Id.* at \*13 (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 382 (1994)). The district court’s opinion is silent as to why the “retaining jurisdiction” provision in the instant case was not sufficient judicial oversight for prevailing party status.

192. *Roberson*, 346 F.3d at 80. The district court relied on the Second Circuit’s decision in *Hester Indus., Inc. v. Tyson Foods, Inc.*, 160 F.3d 911, 916–17 (2d Cir. 1998), for the proposition that “because the district court lacked authority to condition the dismissal on compliance with the settlement agreement, it lacked a basis for finding contempt.” *Roberson*, No. 99 Civ. (DLC), 2002 U.S. Dist. LEXIS 2750, at \*15–16. The Second Circuit responded that its *Hester* decision

did not offer an opinion on how an explicit retention of jurisdiction would have changed the outcome of the case, if at all. It is therefore an open question in this circuit whether a district court could enforce an agreement through its contempt power in circumstances like those facing us in this appeal.

*Roberson*, 346 F.3d at 83 n.9.

193. *Roberson*, 346 F.3d at 83.

agreement.”<sup>194</sup> Accordingly, when the court incorporates or references the terms of the settlement into its dismissal order, there will be at least the same “minimal . . . level of judicial scrutiny”<sup>195</sup> that the district court reasoned was sufficient in the consent decree context.<sup>196</sup>

The next two points raised dealt with the difference between incorporated settlements and consent decrees in terms of the enforcement remedy. The Eighth Circuit in *Bloomberg* had used this distinction as the principal reason for holding that a settlement could not serve as the basis for prevailing party status.<sup>197</sup> On the second point, the Second Circuit found it insignificant that the district court’s jurisdiction over a consent decree is inherent while its jurisdiction over an incorporated settlement only stems from its inclusion in a court order.<sup>198</sup> Regarding the third point, the court explained that the fact that the contempt power is inherent in a consent decree and not in a stipulated settlement is not “significant enough to deprive plaintiffs of prevailing party status.”<sup>199</sup> The court reasoned that “[i]n the case of both consent decrees and private settlement agreements over which a district court retains enforcement jurisdiction, the district court has the authority to force compliance with the terms agreed upon by the parties.”<sup>200</sup> Where *Bloomberg* found the lack of a direct contempt remedy in the incorporated settlement context dispositive, the Second Circuit correctly recognized that this argument was unsound.

---

194. *Id.* at 82.

195. *Roberson*, 2002 U.S. Dist. LEXIS 2750, at \*9.

196. However, this minimal level of judicial scrutiny may not be enough to satisfy the Supreme Court’s concern’s regarding the level of judicial imprimatur required for prevailing party status. This Comment suggests that more is required. *See infra* Part V.C.2.

197. *See supra* notes 179–181 and accompanying text.

198. The court stated:

Consent decrees are enforceable in federal court because they are orders of the court; the Agreement is enforceable in federal court because a violation of the Agreement is a violation of the court’s dismissal Order. Both are, in the terms used by the *Buckhannon* Court, “court-ordered change[s] in the legal relationship between the plaintiff and the defendant.”

*Roberson*, 346 F.3d at 83 (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 604 (2001)).

199. *Id.*

200. *Id.* The court recognized that in the context of enforcing a private settlement, “the court at most would need to take an extra step by first ordering specific performance and then, if a party does not comply, finding that party in contempt. We doubt that the definition of ‘prevailing party’ should turn on such a difference.” *Id.*

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

The *Roberson* logic effectively undermines the reasoning of *Bloomberg*.<sup>201</sup> While there are distinctions between consent decrees and stipulated settlement agreements incorporated into the record, the *Bloomberg* court failed to adequately explain how those distinctions affect the prevailing party analysis. The Supreme Court's focus and concern in *Buckhannon* was the level of judicial imprimatur on the parties' agreement. The Eighth Circuit's approach bears a disconnect from the Supreme Court's approval and oversight concerns. The Eighth Circuit in *Bloomberg* wrongly decided that the universe of prevailing parties was limited only to those receiving either judgments on the merits or consent decrees.<sup>202</sup>

*C. An Endorsement of a "Third-Circuit-Plus" Test*

While the approach of the Third Circuit comes closer to satisfying the *Buckhannon* imprimatur concerns than the approaches of the other circuits, it still lacks a sufficient test for judicial approval. An ideal test can be created by modifying the Third Circuit's test from *Truesdell* to include a judicial approval element. Specifically, a judge should be required to conduct some level of review of the suit's merits in order to satisfy the approval requirement. Such a test can be crafted such that it would simultaneously satisfy the Supreme Court's *Buckhannon* concerns while allowing courts to expand the class of prevailing parties consistent with congressional intent.<sup>203</sup>

A close reading of *Buckhannon* reveals that a satisfactory judicial imprimatur test needs approval as well as oversight. The Court in *Buckhannon* was concerned that the catalyst theory "allow[ed] an award where there is no judicially sanctioned change in the legal relationship of the parties."<sup>204</sup> The Court reasoned that prevailing party status required that there be at least some participation by a judge—a judicial finger in

---

201. The Second Circuit approved of the "vigorous and persuasive dissent by Judge Melloy" in *Bloomberg*. *Id.* at 82 n.7. The court specifically referred to Judge Melloy's pronouncement that "[t]he Court in *Buckhannon* did not limit the availability of prevailing party status to only those cases resolved through a consent decree or final judgment on the merits. Rather, the Court set forth criteria to guide the analysis of whether there is a judicially sanctioned, material change in the legal relationship of the parties." *Id.* (quoting *Bloomberg*, 315 F.3d at 996 (Melloy, J., dissenting)).

202. Although joined by two other circuit courts in so holding, the Eighth Circuit is in the minority. See *supra* note 153.

203. See *infra* Part V.C.4.

204. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001).

the pot—so as to justify the notion that the party has “prevailed” in the actual suit in some way.<sup>205</sup> The Court’s reasoning suggests that the form of the resolution is important, but that it is not the only requirement. Significantly, the Court declined to “abrogate the ‘merit’ requirement of [its] prior cases”<sup>206</sup> by reaffirming its declaration in *Hewitt* that “[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail.”<sup>207</sup> Respect for the Court’s “merit requirement” urges that a judge may not simply incorporate the terms of the settlement and add his signature without any review of the merits of the original complaint. Furthermore, in *Buckhannon*, the Court referred to “judicial approval and oversight” as the distinguishing factors between consent decrees and private settlements.<sup>208</sup> It follows that a party may only “prevail” when a judge has been sufficiently involved in the resolution of the case in both the areas of oversight and approval.

*1. The Third Circuit’s judicial imprimatur test satisfies judicial oversight*

The Third Circuit’s *Truesdell* formula adequately satisfies the *Buckhannon* concern requiring sufficient judicial oversight in a private settlement context.<sup>209</sup> Specifically, the test allows a party to prevail when the dismissal order contains mandatory language, is entitled “Order,” is signed by the judge, and provides for retained jurisdiction to enforce the terms of the settlement agreement.<sup>210</sup> The Supreme Court in *Buckhannon* specifically approved of consent decrees as having the requisite oversight for prevailing party status. This is so because courts have inherent jurisdiction to enforce consent decrees.<sup>211</sup> As noted above, courts may retain jurisdiction over private settlements either through incorporating the settlement terms or through a specific provision.<sup>212</sup> Such jurisdiction

---

205. In his concurrence, Justice Scalia points out:

[I]n the case of court-approved settlements and consent decrees, even if there has been no judicial determination of the merits, the outcome is at least the product of, and bears the sanction of, judicial action in the lawsuit. There is at least some basis for saying that the party favored by the settlement or decree prevailed in the *suit*.

*Id.* at 618 (Scalia, J., concurring).

206. *Id.* at 606.

207. *Id.* at 603 (citing *Hewitt v. Helms*, 482 U.S. 755, 760 (1987)).

208. *Id.* at 604 n.7.

209. See *supra* notes 150–151 and accompanying text.

210. *Truesdell v. Phila. Hous. Auth.*, 290 F.3d. 159, 165 (3d Cir. 2002).

211. See *supra* note 40 and accompanying text.

212. See *supra* note 108.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

over a settlement means that the court may enforce the terms of the settlement through its contempt power.<sup>213</sup> By requiring that a party prevails only when its dismissal order contains mandatory language and provides for retained jurisdiction, the Third Circuit's test provides for sufficient judicial oversight under *Buckhannon*.

The Third Circuit's judicial imprimatur test satisfies the oversight concern, while maintaining judicial flexibility to allow for an award of attorney's fees even though the court-approved settlement may not be in the specific form of a consent decree. The Third Circuit correctly recognized that an agreement need not be titled "Consent Decree" to have sufficient judicial imprimatur. Given the many ways in which the parties may negotiate for a settlement and the many contexts under which they labor, it is not surprising that some private settlements, although not classified as consent decrees, will nonetheless involve a great deal of judicial oversight and approval.

This test also avoids an overly restrictive formulation that inequitably narrows the class of parties that can recover attorney's fees as prevailing parties,<sup>214</sup> while at the same time avoiding a definition of "prevailing party" that is too permissive of plaintiffs who have not received sufficient judicial imprimatur.<sup>215</sup> The test recognizes that there is a category of settlement, falling between consent decrees and purely private settlements on the continuum, that contains sufficient imprimatur to confer prevailing party status under federal fee-shifting statutes. The *Truesdell* elements satisfy the Court's concerns regarding judicial oversight because they provide for continuing jurisdiction to enforce the settlement terms.

*2. The need for an additional merit-review element to the Third Circuit's test*

While the Third Circuit's judicial imprimatur test addresses the *Buckhannon* concern regarding oversight—in the sense of retaining jurisdiction—it fails to sufficiently address the judicial approval concern. On their face, the elements cited by the Third Circuit in *Truesdell* address a district court's formal procedures for approving a private settlement. However, *Buckhannon* requires that a court must also review the terms of the settlement to determine whether a party has prevailed on

---

213. See *supra* notes 198–200 and accompanying text.

214. See *supra* discussion regarding *Bloomberg*, Part V.B.

215. See *supra* discussion of *Barrios*, Part V.A.

the merits of the suit.<sup>216</sup> This merit requirement also finds ample support in pre-*Buckhannon* Supreme Court precedent.<sup>217</sup> Hence, the Third Circuit's test needs a specific merit-review element in order to ensure sufficient judicial imprimatur for prevailing party status.

The *Truesdell* elements do not require a judge to review either the terms of the settlement or the underlying merits of the plaintiff's claim. Under the Court's *Buckhannon* reasoning, this is insufficient judicial imprimatur. The Court rejected the catalyst theory in part because it potentially classified a party as prevailing even when there has been no judicial determination of the claim's merits.<sup>218</sup> The Court could not countenance a definition of "prevailing party" that awarded "attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the 'sought-after destination' without obtaining any judicial relief."<sup>219</sup> The *Truesdell* test, without an approval element, could likewise countenance an award of attorney's fees to a party without a judge's approbation of the underlying claim's merits. Nothing in the *Truesdell* test specifically requires the judge to review and approve the specific terms of the settlement or determine that the party is entitled to some relief on the claim's merits.

Courts have argued that the trial judge's "responsibility to ensure that its orders are fair and lawful stamps an agreement that is made part of an order with judicial imprimatur."<sup>220</sup> Under this conception, a judge need not undertake any specific review of the settlement terms or underlying merits; the court's general mandate to ensure that its orders are fair suffices for judicial imprimatur.<sup>221</sup> In *Roberson*, for example, the

---

216. The Supreme Court in *Buckhannon* stated that "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." 532 U.S. at 603 (quoting *Hewitt v. Helms*, 482 U.S. 755, 760 (1987)); see *supra* notes 52–58 and accompanying text.

217. See *Hewitt*, 482 U.S. at 760 ("Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail."); *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) ("Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims."); *supra* notes 52–58 and accompanying text.

218. *Buckhannon*, 532 U.S. at 606.

219. *Id.*; see *supra* note 90.

220. *Smyth v. Rivero*, 282 F.3d 268, 282 (4th Cir. 2002); see also *Roberson v. Giuliani*, 346 F.3d 75, 82–83 (2nd Cir. 2003) ("[W]hen the district court retained jurisdiction . . . it gave judicial sanction to a change in the legal relationship of the parties, regardless of the actual scrutiny applied.").

221. *Smyth*, 282 F.3d at 282.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

Second Circuit found sufficient judicial imprimatur for prevailing party purposes even though the district court “had not specifically reviewed or approved the terms of the settlement agreement.”<sup>222</sup> The cases following this line of reasoning equate the enforcement remedy, when combined with the court’s general mandate to ensure that its orders are fair, as sufficing for judicial imprimatur.

This logic does not hold up because it lacks sufficient specific judicial approval of the underlying merits of the suit. In order to satisfy *Buckhannon*, the settlement should have enough judicial imprimatur to make it the functional equivalent of a consent decree.<sup>223</sup> The level of judicial review when simply ensuring that the court’s orders are fair does not rise to the level of fairness review when approving of a consent decree.<sup>224</sup> Settlements such as those in *Roberson* cannot logically be deemed the functional equivalent of consent decrees.<sup>225</sup> In a consent decree, the judge must not only ensure that the terms of the settlement are fair and reasonable, but must make sure that “the proposal represents a reasonable factual and legal determination based on the facts of record, whether established by evidence, affidavit, or stipulation.”<sup>226</sup>

### 3. Proposed “Third-Circuit-plus” test

This comment proposes that courts adopt a judicial imprimatur test for determining prevailing party status that is a combination of the Third Circuit’s *Truesdell* elements plus an explicit approval element, as discussed above.<sup>227</sup> Specifically, the “Third-Circuit-plus” test consists of two prongs: (1) judicial oversight, and (2) judicial approval. The oversight prong is satisfied when the four *Truesdell* elements are met.<sup>228</sup> That is, this prong is satisfied if an order: (a) contains mandatory language, (b) is entitled “Order,” (c) is signed by the judge, and (d) provides for retained jurisdiction, either through incorporating the terms of the settlement or through including a separate “provision ‘retaining jurisdiction’ over the settlement agreement.”<sup>229</sup>

---

222. *Roberson*, 346 F.3d at 82.

223. See *supra* note 112 and accompanying text.

224. See *supra* notes 34–37 and accompanying text.

225. See *supra* notes 34–36 and accompanying text.

226. *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981).

227. See *supra* Part V.C.1–2.

228. See *supra* notes 149–151 and accompanying text.

229. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994).



The approval element is satisfied if the trial judge undertakes a review of the underlying merits of the claim to determine that the corresponding settlement represents a fair conclusion to the dispute.<sup>230</sup> The approval element of this proposed test contemplates that, after undertaking such a review, a judge will memorialize the finding, either on the record or in writing, that the terms of the settlement are fair to both sides based on a review of the merits of the claim. This element prevents a party from achieving prevailing party status when its claim was merely colorable but potentially meritless.<sup>231</sup> This element thus satisfies the “merit requirement,” which is a necessary precursor to prevailing party status.<sup>232</sup>

The added merit-review element requires that a judge determine that a plaintiff has achieved success on some of the merits of his claim. In other words, the judge should review both the terms of the settlement and the plaintiff’s underlying claim to ensure that the resolution is meritorious.<sup>233</sup> This is not an equation of liability to the defendant.<sup>234</sup> Indeed, one reason consent decrees are attractive to defendants is that

---

230. By requiring the judge to make a determination at the time of dismissal, the “Third-Circuit-plus” test satisfies the Supreme Court’s concern in *Farrar* that the prevailing party must benefit directly from the relief at the time of settlement. See *supra* note 69 and accompanying text.

A similar version of this test has been proposed. See Laura Kendall, Note, *The Losing Argument Continues for Prevailing Without Winning: A Critical Summary of the Impact of Buckhannon on the Catalyst Theory*, 54 CASE W. RES. L. REV. 573, 595 (2003) (“[I]n order for a ‘functional equivalent’ of a consent decree to preserve the stamp of *imprimatur* required by *Buckhannon*, the court should be required to both endorse the terms of the settlement and explicitly retain jurisdiction over the case.”) (citing *Reed v. Shenandoah Mem. Hosp.*, 2002 WL 1964826, at \*10 (D. Neb. Aug. 12, 2002) (“A district court approval of a private settlement along with explicit retention of jurisdiction to enforce the settlement terms makes a settlement the functional equivalent of a consent decree, providing the necessary judicial *imprimatur* on the change of conduct.”)). The “Third-Circuit-plus” test provides more detailed guidelines regarding the proposed levels of approval and oversight than does Kendall’s proposal. Furthermore, the *imprimatur* test as envisioned by Kendall would allow for prevailing party status when a judge has merely incorporated the terms of the settlement into the dismissal order; Kendall’s test does not require a judge to specifically review the settlement terms for fairness or to specifically enquire as to the merits of the underlying suit. “Third-Circuit-plus” contemplates a more focused review into the merits in order to satisfy the Court’s concerns regarding the merit requirement.

231. See *supra* note 219 and accompanying text.

232. See *supra* note 218.

233. Such a review would satisfy the demands of Supreme Court precedent; namely, a party prevails, according to the Court in both *Garland* and *Buckhannon*, when it secures: (1) “material alteration of the legal relationship of the parties,” *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989), and (2) “at least some relief on the merits of his claim before he can be said to prevail,” *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 603 (2001).

234. See *supra* notes 57–58 and accompanying text.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

they do not always entail a declaration of liability or wrongdoing.<sup>235</sup> If a consent decree entails sufficient judicial imprimatur, then it follows that a party's settlement does not have to include an admission of liability in order to be considered a prevailing party. This lack of liability admission is distinguishable from a judicial finding that a party's underlying claim was meritorious enough to base prevailing party classification on. It is one thing to say that a party's claims have merit in the settlement context and another to say that the defendant bears liability—the latter requiring a full adjudication of possible defenses and immunities.

This judicial finding of merit must be more than that the plaintiff stated a colorable claim and that the lawsuit was nonfrivolous.<sup>236</sup> The level of merit review should be more than that typically undertaken in a stipulated dismissal order following a purely private settlement.<sup>237</sup> Even in situations where the dismissal order incorporates the terms of the private settlement into the dismissal order, the judge should undertake a significant merit review in order to satisfy the *Buckhannon* approval concern. This judicial inquiry need not be searching or overly exact, but it should include sufficient judicial imprimatur on the parties' resolution as called for by the "Third-Circuit-plus" test.

#### 4. Reasons to adopt "Third-Circuit-plus": a return to policy

The circuit split exists in part because the Supreme Court failed to provide guidance regarding how much judicial involvement is necessary for prevailing party status and also in part because the Court explicitly eschewed policy as a basis for striking down the catalyst theory.<sup>238</sup> The split arose when lower courts attempted to decide what level of judicial imprimatur is sufficient for "prevailing party" status in a policy void. However, the decision as to how much judicial imprimatur suffices for prevailing party status necessarily rests on some form of policy determination. If a court believes that plain meaning interpretation,

---

235. See *Buckhannon*, 532 U.S. at 604.

236. See *id.* at 605. The Court noted:

Even under a limited form of the "catalyst theory," 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. This is not the type of legal merit that our prior decisions, based upon plain language and congressional intent, have found necessary.

*Id.*

237. See *supra* notes 42–46 and accompanying text.

238. See *supra* note 100 and accompanying text.

regardless of congressional intent, should win the day, then that court will likely follow the lead of the Eighth Circuit in restricting the class of prevailing parties. On the other hand, if a court believes that congressional intent should always trump an overly literalist reading of statutory text, then that court will likely follow the Ninth Circuit in expanding the prevailing party class as much as possible. The proposed “Third-Circuit-plus” test attempts to find a balance between these competing views.

The purpose of the civil rights statutes was to “encourage individuals injured by racial discrimination to seek judicial relief.”<sup>239</sup> Congress designed the fee-shifting statutes to empower impecunious litigants in their dealings with civil rights violators. An overly strict reading of *Buckhannon*, such as that taken by the Eighth Circuit, improperly shifts power back to the defendants in civil rights litigation.<sup>240</sup> If a plaintiff can only receive a fee award from the court by obtaining a judgment on the merits or a consent decree, the defendant has leverage in negotiating the settlement. The defendant in such situations can, in effect, unduly pressure the plaintiff who desires to settle to do so with little or no consideration of attorney’s fees.<sup>241</sup> Additionally, an overly strict reading of *Buckhannon* “likely would discourage informal settlement and increase litigation, which is inefficient.”<sup>242</sup> However, the “Third-Circuit-plus” test shifts the balance of power back to the plaintiffs. If a plaintiff can receive a fee award based on a settlement with sufficient judicial

---

239. *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968); *see supra* note 63.

240. *See, e.g., Weber, supra* note 28, at n.8 (“[A]ttorneys’ fees are simply another item of relief, and if the plaintiff’s right to obtain them is limited, settlements will be biased downward.”).

241. In such situations, the defendant knows that the plaintiff can only get court-awarded attorney’s fees if it reaches at least a consent decree. Therefore, the defendant has an incentive not to include attorney’s fees in any potential settlement that is not stylized as a consent decree. The defendant may simply refuse to agree to submit the settlement to the court as a consent decree. A similar line of reasoning was recognized in the special education context following *Buckhannon*. *See Weber, supra* note 160, at 398–99 (concluding that the plaintiff’s “natural response [in such a situation] is to split some of the difference between the fees and the offered services, accepting less of either or both”).

242. Macon Dandridge Miller, Comment, *Catalysts as Prevailing Parties Under the Equal Access to Justice Act*, 69 U. CHI. L. REV. 1347, 1370 (2002) (“[Strict application of] *Buckhannon*’s rule likely would discourage informal settlement and increase litigation, which is inefficient. Instead of settling a case out of court with its opponent, a party may be compelled to continue with litigation—consuming judicial resources and increasing costs—in order to recover attorney’s fees.”); *see also Steuer, supra* note 21, at 82–83 (“A looser interpretation of *Buckhannon* could mitigate its pernicious effects by allowing more private settlements to qualify as the functional equivalent of a consent decree.”).

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

imprimatur, attorney's fees reenter the equation during settlement negotiations.<sup>243</sup>

At the same time, courts also do not have the leeway after *Buckhannon* to stretch the term "prevailing party" beyond its plain meaning.<sup>244</sup> There is a competing tension between expanding the class of prevailing parties in order to satisfy congressional policy and the Supreme Court's adherence to plain meaning of the term "prevailing party."<sup>245</sup> While civil rights legislative policy urges an expansive reading of prevailing parties beyond those that secure a judgment on the merits or a consent decree, the Court's rule in *Buckhannon* urges that courts not expand the class too far. Specifically, a party to a private settlement can only be termed a prevailing party when the settlement bears sufficient judicial imprimatur, which only occurs when a court has both approved of the settlement terms against the backdrop of the underlying merits of the claim and retained jurisdiction to enforce those terms. The "Third-Circuit-plus" test is designed to expand the class of prevailing parties while adhering faithfully to the Supreme Court's guidance in *Buckhannon*. Accommodating both of these competing interests requires allowing prevailing party status when a party has something less than a consent decree but more than a purely private settlement.<sup>246</sup>

---

243. The reasoning of this situation is the reverse of the discussion in note 241, *supra*. If the plaintiff does not depend so much on the cooperation of the defendant to receive attorney's fees, the defendant must now consider the amount of fees in the settlement negotiation or else will be forced to litigate to conclusion.

244. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 at 610 (2001) ("Given the clear meaning of 'prevailing party' in the fee-shifting statutes, we need not determine which way these various policy arguments cut. . . . To disregard the clear legislative language and the holdings of our prior cases on the basis of such policy arguments would be [an impermissible] assumption of a roving [judicial] authority." (citation omitted)).

245. Commentators have derided the Court's decision in *Buckhannon* and in other cases as a general assault on the private attorney general regime. See, e.g., Karlan, *supra* note 2, at 186 ("[T]he Court has launched a wholesale assault on one of the primary mechanisms Congress has used for enforcing civil rights: the private attorney general."); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 372 (2002) ("[T]he narrow majority of the Court has rejected settled interpretations of federal civil rights laws to limit the protection that Congress has sought to give to the civil and economic rights of many vulnerable people, including older people, people with disabilities, women, and working people.").

246. See *supra* Part V.C.1–3.

*D. Applying “Third-Circuit-Plus” to Bloomberg and Barrios**1. The Bloomberg plaintiffs would prevail under “Third-Circuit-plus”*

Applying the “Third-Circuit-plus” formulation to the facts of *Bloomberg* demonstrates that the settlement agreement was sufficient to confer prevailing party status. The district court’s dismissal met the *Truesdell* elements for sufficient judicial “oversight”: it was entitled “Order”<sup>247</sup> and specifically retained jurisdiction over the parties to enforce the settlement agreement.<sup>248</sup> While the record does not so indicate, this Comment assumes that the district court’s dismissal order contained mandatory language and was signed by the district court judge, not the parties’ attorneys.

To pass muster under the “Third-Circuit-plus” test, the *Bloomberg* settlement would also need to have sufficient judicial merit review. Settlements in class action suits require the judge to undertake a “fairness review.”<sup>249</sup> Various circuits have different multifactor tests for determining if a proposed class action settlement is fair.<sup>250</sup> Some circuits include factors that implicitly require a judge to look at the merits of the underlying claims.<sup>251</sup> For example, in the Eighth Circuit district courts determining the fairness of a class action settlement must consider a variety of factors, including “the probability of success in the litigation.”<sup>252</sup> Assuming the trial judge in *Bloomberg* followed proper procedure and undertook such a review, the settlement would qualify the *Bloomberg* plaintiffs as prevailing parties under the approval prong of the “Third-Circuit-plus” test.<sup>253</sup> While the district court’s opinion granting attorney’s fees<sup>254</sup> did not mention a specific inquiry into the

---

247. *Christina A. v. Bloomberg*, 167 F. Supp. 2d 1094, 1099 (D.S.D. 2001), *rev’d*, 315 F.3d 990 (8th Cir. 2003).

248. *Id.*

249. *See supra* notes 134–135 and accompanying text.

250. *See* 8 MOORE, *supra* note 44, § 23.85[1] (compiling cases and listing various multifactor tests that various courts apply).

251. *Id.*

252. *Lambert v. Flight Transp. Corp. (In re Flight Transp. Corp. Sec. Litig.)*, 730 F.2d 1128, 1135 (8th Cir. 1984).

253. *See also* Weber, *supra* note 160, at 406 (“[C]ase law supports the proposition that judicial approval of a class settlement suffices for a judicial imprimatur on the alteration of the legal relation of the parties.”) (citing *Nat’l Coalition for Students with Disabilities v. Bush*, 173 F. Supp. 2d 1272 (N.D. Fla. 2001)).

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

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

merits, it did indicate that “the Settlement Agreement appears adequately to deal with many of the due process and confinement issues discussed in the Complaint.”<sup>255</sup> Because *Bloomberg* would be a case in which both approval and oversight elements were satisfied, the Eighth Circuit incorrectly focused only on the form of the judicial order, and not on the material alteration of the parties’ relationship, to determine that prevailing party status was not satisfied.

2. *The Barrios plaintiff would not prevail under “Third-Circuit-plus”*

While the Eighth Circuit interpreted the class of prevailing parties too narrowly, the Ninth Circuit in its decisions following *Buckhannon* interpreted the class too broadly. Under the proposed “Third-Circuit-plus” test, *Barrios* is a case in which there would not be enough judicial imprimatur on that change in the legal relationship to satisfy prevailing party status.

Specifically, *Barrios* fails to satisfy the oversight prong of “Third-Circuit-plus” test. The order dismissing the lawsuit did not contain mandatory language and did not retain jurisdiction to enforce the settlement terms.<sup>256</sup> The Ninth Circuit found dispositive the fact that the settlement agreement provided “that the district court would retain jurisdiction over the issue of attorneys’ fees, thus providing sufficient judicial oversight to justify an award of attorneys’ fees and costs.”<sup>257</sup> However, an agreement between the parties that a court will subsequently decide the issue of attorney’s fees does not equate to actual judicial oversight as contemplated by *Buckhannon*. Nothing in the *Barrios* settlement or dismissal provided for continued jurisdiction over the settlement terms. *Barrios* also fails the “Third-Circuit-plus” approval prong. Nothing in the record indicates that the trial judge reviewed the settlement terms to determine whether the plaintiff was succeeding on any meritorious claims.<sup>258</sup>

Applying the “Third-Circuit-plus” test to both *Bloomberg* and *Barrios* reveals that neither of these cases was properly resolved under a faithful reading of *Buckhannon*. Application of the proposed test reveals that the Eighth Circuit improperly denied attorney’s fees whereas the Ninth Circuit improperly awarded attorney’s fees. *Buckhannon* was

---

255. *Id.* at 1097.

256. *Barrios v. Cal. Interscholastic Fed’n*, 277 F.3d 1128, 1133 (9th Cir. 2002).

257. *Id.* at 1134 n.5.

258. *Id.* at 1133.

concerned that a party be classified as prevailing only when the resolution to its suit contained sufficient judicial imprimatur, or approval and oversight. Adoption of the “Third-Circuit-plus” test throughout the circuits would properly balance congressional fee-shifting goals with the Court’s adherence to plain meaning.

## VI. CONCLUSION

Circuit courts have split three ways in determining just how much judicial sanctioning a party must secure to become a prevailing party. By conferring prevailing party status on private settlement participants when the court order contains 1) mandatory language, 2) the title “Order,” 3) the signature of the judge, and 4) retention of jurisdiction to enforce the terms of the settlement agreement, the Third Circuit comes closest to satisfying the Supreme Court’s concerns about judicial imprimatur, while avoiding the overly harsh or overly broad constructions adopted by the Eighth and Ninth Circuits. However, this test should be augmented by a merits-review element requiring courts to examine the degree of alteration in the parties’ legal relationship in order to fully comply with the proposed “Third-Circuit-plus” judicial imprimatur test.

In order to bring clarity to the issue, courts should adopt a “prevailing party” test that implicates both judicial approval and oversight by focusing on whether a dismissing court conducted a “merit” review of the settlement and retained jurisdiction of the settlement’s enforcement. Until uniformity is achieved, practitioners should inform themselves of and comply with the requirements for “prevailing party” status in their respective jurisdictions prior to finalizing the judicial involvement in a potential settlement. By adopting a clear rule for when a party “prevails,” courts may still promote the policy concerns of the Civil Rights Attorney’s Fees Awards Act while adhering to the plain meaning of the term “prevailing party” in federal fee-shifting statutes.

*Matthew B. Tenney*\*

---

\* I would like to thank Professor C. Douglas Floyd and the entire *BYU Law Review* staff for their invaluable assistance in editing and critiquing this Comment. I especially thank my wife, Robin, and my children, Katelyn, Rachel, Ethan and Parker, for their love, support, and encouragement.